

# VALUING ALL IDENTITIES BEYOND THE SCHOOLHOUSE GATE: The Case for Inclusivity as a Civic Virtue in K-12

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*“Education is the most powerful weapon we can use to change the world.”*

–Nelson Mandela<sup>1</sup>

## ABSTRACT

Increasing social and political polarization in our society continues to exact a heavy toll marked by, among other social ills, a rise in uncivility, an increase in reported hate crimes, and a more pronounced overall climate of intolerance—for viewpoints, causes, and identities alike. Intolerance, either a cause or a consequence of our fraying networks of social engagement, is rampant, hindering our ability to live up to our de facto national motto, “E Pluribus Unum,” or “Out of Many, One” and prompting calls for how best to build a cohesive civil society. Within the public school—an institution conceived primarily for the purpose of inculcating civic virtues thought necessary to foster solidarity in a pluralistic society—the intolerance has contributed to increased bias-based bullying, particularly toward transgender and gender diverse students. The devastating impacts of intolerance and exclusion on transgender and gender-diverse students include disproportionate rates of psychological distress, physical ailments, increased risk of homelessness, and other negative outcomes. As schools ponder how best to meet their needs and create safe and supportive learning environments, some parents have attempted to assert exclusive authority in this domain, challenging practices such as the adoption of gender-complex and LGBTQ-inclusive curricula as well as gender-affirming policies and practices. Parents allege that attempts by schools to accommodate transgender and gender diverse students infringe on their parental rights and the privacy rights

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1. Nelson Mandela, Address at Launch of Mindset Network: Lighting Your Way to a Better Future (July 16, 2003), [http://db.nelsonmandela.org/speeches/pub\\_view.asp?pg=item&ItemID=NMS909](http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS909).

of their cisgender children. While some schools have yielded to parental objections, others have resisted.

This Article presents a compelling approach for schools both to address the challenges posed by objecting parents and to carry out their original mission of inculcating an appreciation for democratic norms—namely, civility, tolerance, and equality—through the adoption of gender complex and LGBTQ-inclusive curricula. Relying on both long-standing limitations on parents' ability to exercise curricular control and research on the benefits of inclusive and comprehensive curricula, this Article makes the case that the educational purposes served by gender complex and LGBTQ-inclusive curricula more than justify any alleged burden on parents' free exercise of religion as protected by the First Amendment or any alleged infringement upon parents' substantive due process rights as protected by the Fourteenth Amendment. It posits that although both parents and the state share responsibility for shaping our youngest citizens, parental interests should be subordinate to the interests of the state in promoting proteophilic competence—an appreciation for diversity—through public education. This critical educational mission holds the promise of reaching beyond the scope of gender to include the inculcation of civic virtues essential to the health of an increasingly demographically diverse nation: Respect for “other-ness” and the development of skills needed for effective democratic self-governance.

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## INTRODUCTION

In the United States, as well as across the globe, there has been a rising chorus of disapproval from social and political conservatives who denounce “gender ideology”<sup>2</sup> as a diabolical “assault on the sexes.”<sup>3</sup> The growing visibility of transgender and gender-expansive children in schools, media, and as subjects of litigation is regarded as prime evidence of this particular threat. Most recently, as formidable an authority as the Vatican has decried the “educational crisis”<sup>4</sup> created by “efforts to

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2. I use the term “gender ideology” as it has been coined by political, social, and religious conservative figures who base the concept on the assumption “[f]irst, that reforms benefitting LGBT[Q] people encourage homosexuality, threaten the traditional concept of the family, and pose a threat to Christian values . . . [s]econd, that men and women should abide by antiquated gender roles and that women’s engagement outside of the family should be limited.” Michelle Gallo, “*Gender Ideology*” *Is a Fiction That Could Do Real Harm*, OPEN SOC’Y FOUND. (Aug. 29, 2017), <https://www.opensocietyfoundations.org/voices/gender-ideology-fiction-could-do-real-harm>. While it has never been formally defined, the term has been used as a rhetorical strategy to refer broadly to the academic discipline of (1) “gender studies;” (2) “gender theory,” which is the idea that while people may be biologically defined as male or female in terms of natal sex, they may identify as male or female—or both or neither; and/or (3) “gender mainstreaming,” which is the inclusion of a gender perspective in all policy, regulation, and spending programs. Pope Francis castigated the concept in a 2016 dialogue with Polish Bishops, including it among other forms of:

exploitation of creation, exploitation of persons [and] the annihilation of man as image of God . . . In Europe, in America, in Latin America, in Africa, in some countries of Asia, there are ideological colonizations. And one of these—I say it clearly with name and surname is *gender!* Today children, children are taught this in school that one can choose one’s sex!

Francis, Bishop of Rome, Dialogue with Polish Bishops (Aug. 4, 2016), <https://zenit.org/articles/transcript-of-popes-dialogue-with-polish-bishops>.

3. Dale O’Leary & Peter Sprigg, *Understanding and Responding to the Transgender Movement*, FAM. RES. COUNCIL (Feb. 17, 2020), <https://downloads.frc.org/EF/EF15F45.pdf>; see Letter from John Paul II, Pope, Roman Catholic Church, to Bishops, Roman Catholic Church on the Collaboration of Men and Women in the Church and in the World (May 31, 2004), [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20040731\\_collaboration\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html); see also Francis DeBernardo, *The Many—and Wrong—Definitions of ‘Gender Ideology,’* NEW WAYS MINISTRY (June 25, 2017), <https://www.newwaysministry.org/2017/06/25/the-many-and-wrong-definitions-of-gender-ideology/> (quoting Jose Ulloa Mendieta, Archbishop of Panama City, who said that “gender theory, which argues that male and female characteristics are largely malleable social constructs, is ‘diabolical’ in that ‘it wants to break a bit with the reality of the family.’”). Opponents contend that “gender ideology is a construct that depicts efforts to expand rights for women, LGBTQI people, and people of color, as radical, dangerous, and elitist, arguing that we are a threat to traditional family values.” J. Bob Alotta, *The Right-Wing is Weaponizing Gender Panic*, ADVOC. (June 23, 2019), <https://www.advocate.com/commentary/2019/6/23/right-wing-weaponizing-gender-panic>.

4. CONGREGATION FOR CATHOLIC EDUCATION, “MALE AND FEMALE HE CREATED THEM”: TOWARDS A PATH OF DIALOGUE ON THE QUESTION OF GENDER THEORY IN EDUCATION 3 (2019), [http://www.vatican.va/roman\\_curia/congregations/ccatheduc/documents/rc\\_con\\_ccatheduc\\_doc\\_20190202\\_maschio-e-femmina\\_en.pdf](http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_20190202_maschio-e-femmina_en.pdf).

impose transgender ideology on American school children” as opposed to both “faith and right reason.”<sup>5</sup> Indeed, debates over how schools should approach gender theory and gender identity, particularly in response to the increasing prevalence of children publicly disclosing transgender and gender diverse identities, have become “the single most polarizing education”<sup>6</sup> issue to surface in the past decade. Largely because our understanding of gender tugs so heavily on issues of morality and religion, it has been described as “the biggest issue facing families and schools in America since prayer was taken out of the public schools.”<sup>7</sup>

The gender theory battle in this domain of the culture wars is playing out with noteworthy tension in the classrooms, locker rooms, and bathrooms of our nation’s K-12 public schools, a fact that might reasonably have been expected in the wake of the 2015 Supreme Court decision in *Obergefell* that legalized marriage between persons of the same sex and the ensuing anti-LGBTQ backlash.<sup>8</sup> Public schools were 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. Thus, it should come as no surprise that the most contentious political and social controversies, which reflect competing visions of who we are as an American society, should make their way beyond the schoolhouse gate.

The close connection between debates in the public square and debates in the public school illuminates the critical role public schools play in our nation, particularly in their capacity as institutions designed to inculcate those virtues essential for the maintenance and health of our democratic society. For most Americans, public education is where our approach to citizenship is first meaningfully cultivated and where we learn—or, as current trends suggest, *fail* to learn—the essential civic virtues needed to weave together the social fabric of our nation, to contribute to the flourishing of our collective community, and to preserve life, liberty, and the pursuit of happiness for all. Since the time of our nation’s founding, we have charged schools with the vital task of inculcating civic virtue and preparing young people for responsible citizenship in a free

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5. *Transgender Ideology in Public Schools: Parents Fight Back*, FAM. RES. COUNCIL (May 5, 2017), <https://www.frc.org/university/transgender-ideology-in-public-schools-parents-fight-back>.

6. JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT AND THE BATTLE FOR THE AMERICAN MIND* 343 (2018).

7. *Id.*

8. The most recent iteration of this tension is reflected in the August 2019 declaration by the mayor of Barnegat, New Jersey, in response to the New Jersey governor signing an LGBTQ-inclusive curriculum into law, that “[t]he government has no right to teach our kids morality.” Eli Rosenberg, *‘An Affront to Almighty God’: Mayor Rails Against New LGBT Education Law*, WASH. POST (Aug. 7, 2019), <https://www.washingtonpost.com/politics/2019/08/07/an-affront-almighty-god-mayor-rails-against-new-lgbt-education-law/>.

society, all of which, ideally, contributes to the common good.<sup>9</sup> “Our public education system is about much more than personal achievement; it is about preparing people to work together to advance not just themselves but society.”<sup>10</sup>

Public schools, however, are not the only entities tasked with carrying out the rather broad instructional mission of citizenship development. So too, quite naturally, are parents, who can rightly be regarded as their children’s very first civics teachers. Both parents and schools carry out their shared, but unique, roles in shaping children within the politically charged context of our pluralistic society’s varied social and religious values, diverse moral principles, and changing mores. Tensions are likely to erupt when the school’s socialization efforts are alleged to conflict with parental prerogatives or assertions of parental authority, as is frequently the case in all matters concerning sex and sexuality.

As microcosms of society, schools have been wrestling with how to address the issue of gender identity and gender expression, even among the youngest of pupils. Kids are coming out and transitioning at younger and younger ages and school administrators have had to develop policies to address the myriad of interactions that students will experience with peers and their environment in a typical school day.<sup>11</sup> Schools have developed policies pertaining to social transitioning and access to sex-segregated locker rooms and bathrooms, sometimes voluntarily upon request and, at times, only after legal action brought on behalf of transgender and gender diverse students.<sup>12</sup> Parents opposed to affirming

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9. Nancy Kober, *Why We Still Need Public Schools: Public Education for the Common Good*, CTR. ON EDUC. POLICY 1 (2007), <https://files.eric.ed.gov/fulltext/ED503799.pdf> (observing that “in addition to preparing young people for productive work and fulfilling lives, public education has also been expected to accomplish certain collective missions aimed at promoting the common good, [including] preparing youth to become responsible citizens, forging a common culture from a nation of immigrants, and reducing inequalities in American society”); CHARLES L. GLENN, *THE AMERICAN MODEL OF STATE AND SCHOOL* 34–35 (2012).

10. Erika Christakis, *Americans Have Given Up on Public Schools. That’s a Mistake.*, ATLANTIC (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/the-war-on-public-schools/537903>.

11. See, e.g., Josh Goodman, *Preparing for a Generation That Comes Out Younger*, HUFF POST (Jan. 31, 2013), [HTTPS://WWW.HUFFPOST.COM/ENTRY/PREPARING-FOR-A-GENERATION-THAT-COMES-OUT-YOUNGER\\_B\\_2556346](https://www.huffpost.com/entry/preparing-for-a-generation-that-comes-out-younger_b_2556346); Benoit Denizet-Lewis, *Coming Out in Middle School*, N.Y. TIMES MAG. (Sept. 23, 2009), <https://www.nytimes.com/2009/09/27/magazine/27out-t.html>; Sacha M. Coupet, *Policing Gender on the Playground: Interests, Needs, and Rights of Transgender and Gender Non-Conforming Youth*, in CHILDREN, SEXUALITY, AND THE LAW (Sacha M. Coupet & Ellen Marrus eds., 2015).

12. *Coy Mathis v. Fountain-Fort Carson Sch. Dist. 8*, Charge No. P20130034X Dep’t. of Regulatory Agencies, Div. of Civil Rights (2013), [http://www.transgenderlegal.org/media/uploads/doc\\_529.pdf](http://www.transgenderlegal.org/media/uploads/doc_529.pdf); *Doe v. Reg’l Sch. Unit 26*, 2014 ME 11, 86 A.3d 600; *Gavin Grimm v. Gloucester Cty. Sch. Bd.*, 400 F. Supp. 3d 444 (E.D. Va. 2019); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017); *Jane Doe v. Bd. of Educ.*

school policies have sometimes filed their own suits against school districts on the basis of alleged violations of parental rights and student privacy.<sup>13</sup>

The Department of Education, the federal agency whose mission includes prohibiting discrimination and ensuring equal access to education, has not provided formal guidance on the matter of accommodating transgender and gender-diverse students since 2017.<sup>14</sup> In the absence of administrative guidance, schools are ostensibly free to develop policies based on a balancing of a range of sometimes competing interests, including parental preferences.<sup>15</sup> This Article posits that, consistent with the original mission of the public school to inculcate civic virtue and on the basis of increasing social science research supporting gender affirmative approaches, schools should develop inclusive policies based on the best interests of children—long hailed as the quintessential touchstone

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of the Highland Local Sch. Dist., 208 F. Supp. 3d 850 (S.D. Ohio 2016); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704 (D. Md. 2018); *R.M.A. by Appleberry v. Blue Springs R-IV School Dist.*, 568 S.W.3d 420 (Mo. 2019); *Doe v. Volusia Cty. Sch. Bd.* (M.D. Fl. 2018). To access these cases, see [https://www.aclu.org/search/%20?f%5B0%5D=field\\_issues%3A213&f%5B1%5D=type%3Acase](https://www.aclu.org/search/%20?f%5B0%5D=field_issues%3A213&f%5B1%5D=type%3Acase).

13. For a catalog of cases brought by parents against school districts, see *Search Results*, ACLU, [https://www.aclu.org/search/%20?f%5B0%5D=field\\_issues%3A213&f%5B1%5D=type%3Acase](https://www.aclu.org/search/%20?f%5B0%5D=field_issues%3A213&f%5B1%5D=type%3Acase) (last visited Feb. 17, 2020).

14. In 2017, the Trump administration withdrew the Department of Education, Office of Civil Rights guidelines that had previously protected transgender and gender diverse students by declaring that Title IX of the Education Amendments of 1972 applied to discrimination based on gender identity, not just gender. See Sandhya Somashekhar et al, *Trump Administration Rolls Back Protections for Transgender Students*, WASH. POST (Feb. 22, 2017), [https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643\\_story.html](https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643_story.html).

15. Even without guidance from the Department of Education, schools are likely to be influenced by a growing number of federal court cases pertaining to the interpretation of Title IX with respect to transgender students and access to sex-segregated spaces. Since Title IX claims typically take guidance from Title VII, the way in which “on the basis of sex” is interpreted in a case currently before the Supreme Court, *R.G. & G.R. Harris Funeral Homes v. EEOC* will significantly impact claims of transgender students. *R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2018) (*cert. granted*, 139 S. Ct. 1599 (2019) (mem.)). While interpretation of Title IX as it relates to gender identity is beyond the scope of this article, the instant proposal to incorporate gender complex and LGBTQ-inclusive curricula presumes policies and practices that would likewise be protected under an interpretation of Title IX that takes “on the basis of sex” to include “gender identity.” Parental objections typically arise in the context of school board decisions to grant or deny access to sex-segregated spaces and if such conduct is required under Title IX, schools will be prohibited from acquiescing to the demands of protesting parents. Title IX provides that no person “shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (Westlaw through P.L. 116–91); see also 34 C.F.R. § 106.31 (2020).



for all decision-making pertaining to children.<sup>16</sup> Indeed, the core civic virtues taught in schools—such as tolerance, inclusion, and equality—should themselves compel schools to adopt affirming models of care for transgender and gender-expansive students, including adoption of gender-complex and LGBT-inclusive curricula.<sup>17</sup> Not only would transgender and gender-diverse students benefit from reductions in risk that would result from the implementation of inclusive and affirming policies and practices, but so too would *all* students. This is because gender—defined in the broadest way to include gender diversity, gender identity, gender expression, and gender roles—is ubiquitous and inescapable.

The backlash against transgender and gender diverse youth appears rooted in society’s resistance to any attempt to shift so fundamental a precept as gender.<sup>18</sup> Gender variance, to some, is simply too upending, and the challenges to deeply ingrained attitudes, systems, and practices too overwhelming to embrace. Indeed, “accepted social gender roles and expectations are so entrenched in our culture that most people cannot imagine any other way.”<sup>19</sup> All of this makes how we support transgender and gender diverse children in the school environments in which they spend their formative years—the almost sacred space in which we entrust the State with the inculcation of critical civic virtues—highly revealing of our capacity to extend empathy, compassion, tolerance, and respect in the face of the fear that profound conceptual shifts like this tend to generate. My modest proposal for more inclusive curricula in K-12 is that through exposure would come understanding, and from understanding, a capacity to engage in the kind of respectful discourse and deliberation in which citizens in a modern liberal democracy must partake. These skills

16. See, e.g., JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 5* (1996).

17. According to the National Education Association, civics education includes those attributes aimed at creating a positive school climate—“one that promotes norms, values, and expectations that bolster students’ social, emotional, and physical safety; supports a sense of unity and cohesion in the school as a community; [and] promotes a culture of respect.” Amanda Litvinov, *Forgotten Purpose: Civics Education in Public Schools*, NEAT TODAY (Mar. 16, 2017, 10:21 AM), <http://neatoday.org/2017/03/16/civics-education-public-schools/>.

18. See Judith Butler, *The Backlash Against “Gender Ideology” Must Stop*, NEWSTATESMAN (Jan. 21, 2019), <https://www.newstatesman.com/2019/01/judith-butler-backlash-against-gender-ideology-must-stop> (arguing that “[t]o affirm gender diversity is . . . not destructive: [I]t affirms human complexity and creates a space for people to find their own way within this complexity”); Scott Jaschik, *Judith Butler on Being Attacked in Brazil*, INSIDE HIGHER ED (Nov. 13, 2017), <https://www.insidehighered.com/news/2017/11/13/judith-butler-discusses-being-burned-effigy-and-protested-brazil> (explaining the possible motive of the protesters as wanting “boys to be boys, and girls to be girls, and for there to be no complexity in questions such as these”); see generally JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

19. *Understanding Gender*, GENDER SPECTRUM (2012), [http://www.pflagsf.org/wp-content/uploads/2012/12/Understanding\\_Gender.pdf](http://www.pflagsf.org/wp-content/uploads/2012/12/Understanding_Gender.pdf).



are what we are desperately lacking in today's politically, culturally and socially polarized climate and what is most needed for a healthy pluralistic and diverse society to advance the common good.

Exploring how transgender and gender expansive youth are supported in the public schools, this Article posits that based on its long history of inculcating civic virtue, the public school is best suited to function as a primary agent of socialization, often over the objections of parents who seek to exercise exclusive parental authority when child rearing touches upon gender identity. It aims to support the state's effort to develop policies that are most reflective of both children's best interests and the broader interests of our common community. In so doing, it provides support for the development of state legislation supporting affirmative approaches regarding transgender and gender expansive youth, including gender complex and LGBTQ-inclusive curriculum mandates, not only for the well-being of individual transgender and gender expansive youth, but for all of us.

Part I of this Article introduces the history of the public school and its role in inculcating civic virtue in the context of citizenship development. Part II examines the ways in which the state and parents often compete in their efforts to socialize children, an unsurprising dynamic given the ways in which the articulation of parental "rights" came to be grounded in the tension between the state and families over whose interests were paramount in shaping the next generation of citizens. This Part also explores the ways in which courts have attempted to resolve disputes between parents and the state over curriculum content—ostensibly the vehicle for values inculcation—especially in the context of a multicultural, religiously diverse and pluralistic society such as ours. Further, Part II analogizes race and gender to highlight how challenging it can be to inculcate diversity as a norm. Part III champions best interests of the child as the standard that the state should apply in setting school policy around gender diversity, reflecting the currency of the concept of best interests in all legal decisions pertaining to children, and echoing the ethos expressed in *Brown* pertaining to the "hearts and minds" of children in whom a feeling of inferiority had been generated. Part IV provides support for the subordination of parental prerogatives when the exercise of such privileges is antagonistic to the best interests of all children—transgender, gender diverse, and *all* others. Finally, Part V articulates the ways in which public schools, through the inculcation of civic virtues such as proteophilic competence, can foster connections that inspire citizens to nurture a concern for and a meaningful commitment to the common good.

## I. THE ROLE OF PUBLIC SCHOOLS IN INCULCATING CIVIC VIRTUE

In quite simple terms, *uncivility* is social behavior lacking in civic virtue.<sup>20</sup> Recent poll data suggests that we are experiencing a worrisome “severe civility deficit” in our country—a phenomenon that has captured the attention of the public especially since the election of Donald Trump in 2016.<sup>21</sup> While our de facto national motto remains “*E Pluribus Unum*,” or “Out of Many, One,” in the wake of the 2016 presidential election, we find ourselves perennially challenged in attending to the common good, a normative concept used in this Article to refer to our shared bonds of social solidarity.<sup>22</sup> This seemingly intractable social problem has permeated both our politics and our personal interactions. Most troubling is the corrosive effect that this “tsunami of uncivility” has had on our public discourse, even among our nation’s youngest citizens.<sup>23</sup> An online survey conducted by Teaching Tolerance found that the 2016 campaign had a profoundly negative impact on students and classrooms across the country, with “[t]he gains made by years of anti-bullying work in schools . . . rolled back in a few short months.”<sup>24</sup> Teachers who participated in the survey reported that students were “emboldened” to use slurs, engage in bigoted name-calling and make inflammatory statements toward each other.<sup>25</sup> When confronted, students claimed that they were “just saying what everyone is thinking.”<sup>26</sup> Not surprisingly, the “inflam[ed] racial and ethnic tensions in the classroom” resulted in “increased bullying, harassment and intimidation of students” from groups targeted by candidates on the campaign trail.<sup>27</sup> A UCLA survey similarly found that the vast majority of principals reported “that uncivility and

20. Oxford English Dictionary defines incivility as “from Latin *incivilis*, from in- ‘not’ + *civilis* ‘of a citizen’ (see *civil*).” *Incivility*, OXFORD ENGLISH DICTIONARY. “Not of a citizen” in the context of this Article means lacking in those virtues attached to being civil or behaving civilly—namely, courteous, and polite. I would accept that uncivility refers to lack of civility; civility itself is a dimension of civic virtue or the disposition or character of a good citizen.

21. WEBER SHANDWICK ET AL., *CIVILITY IN AMERICA 2018: CIVILITY AT WORK AND IN OUR PUBLIC SQUARES 2*, <https://www.webershandwick.com/wp-content/uploads/2018/06/Civility-in-America-VII-FINAL.pdf>.

22. The common good has been generally defined across various schools of thought as an orientation toward the good of the community. See Amitai Etzioni, *The Common Good*, in *THE ENCYCLOPEDIA OF POLITICAL THOUGHT* (Michael T. Gibbons ed., 2015). This article refers to the common good in its broadest terms to mean “for the benefit of all” or “that which benefits society as a whole.”

23. Richard North Patterson, *America’s Epidemic of Incivility*, HUFF POST (Oct. 24, 2017, 8:41 AM), [https://www.huffpost.com/entry/americas-epidemic-of-incivility\\_b\\_59ef342be4b0b8a51417bd1f](https://www.huffpost.com/entry/americas-epidemic-of-incivility_b_59ef342be4b0b8a51417bd1f).

24. Maureen Costello, *The Trump Effect: The Impact of the Presidential Campaign on our Nation’s Schools*, S. POVERTY LAW CTR. 10 (2017), <https://www.tolerance.org/sites/default/files/2017-06/SPLC%20The%20Trump%20Effect.pdf>.

25. *Id.*

26. *Id.*

27. *Id.* at 4.

contentiousness in the broader political environment has considerably affected their school community.”<sup>28</sup> Since the 2016 campaign, the civility deficit has only grown wider.

These survey results require us to ask what role schools should play in combatting uncivility by inculcating those qualities regarded as necessary to becoming “a good citizen.”<sup>29</sup> Where we presently stand on the role that schools should play is decidedly mixed, with parents tending to favor greater involvement of schools than the general population. Both Millennial and Generation X parents “agree that there should be civility training in school,” at a rate of seventy-eight percent while the general population endorsed the statement forty-nine percent. In 2017, the same year that barely half of survey respondents recommended civility training in schools to combat uncivility, nearly a quarter of parent respondents (twenty-two percent) reported that they had transferred their children to different schools because of acts of uncivility—the highest rate reported since Weber Shandwick began asking this survey question.<sup>30</sup> The decline in civility is an oft-heard lament made about every upcoming generation whose social mores challenge the status quo, but what is particularly noteworthy at this point in our history is that the reported recent decline is occurring at a time when we are seeing radical demographic changes in our population and an increasing embrace of the values of diversity, equity, and inclusion across a number of institutions and organizations in the U.S.<sup>31</sup> The demographic trends present challenges that touch on matters of civility, as a recent Pew Research Center survey on the future of America revealed. In reference to the U.S. Census Bureau prediction that a majority of the U.S. population will be nonwhite by the year 2050, about

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28. John Rogers, *Schools and Society in the Age of Trump*, UCLA INST. FOR DEMOCRACY, EDUC. & ACCESS iv (2019), <https://idea.gseis.ucla.edu/publications/school-and-society-in-age-of-trump/publications/files/school-and-society-in-the-age-of-trump-report>.

29. Frank Lovett, *Civic Virtue*, in THE ENCYCLOPEDIA OF POLITICAL THOUGHT 1 (Michael T. Gibbons ed., 2015) (“Civic virtues are a species of human virtue—specifically, they are those settled dispositions in human beings that exhibit the excellences relevant to membership in a political community. Put another way, civic virtue is simply the character of a good citizen.”).

30. WEBER SHANDWICK ET AL., CIVILITY IN AMERICA 7 (2014), <https://www.webershandwick.com/uploads/news/files/civility-in-america-2014.pdf>. (“Parents of both generations [Millennial and Gen X] agree that there should be civility training in schools (78% and 77%).”) WEBER SHANDWICK ET AL., CIVILITY IN AMERICA VII: THE STATE OF CIVILITY 14, [https://www.webershandwick.com/uploads/news/files/Civility\\_in\\_America\\_the\\_State\\_of\\_Civility.pdf](https://www.webershandwick.com/uploads/news/files/Civility_in_America_the_State_of_Civility.pdf) (reporting 49 percent of survey respondents recommending civility training in schools and colleges). *Id.* at 12 (“Worth special mention is the rate of parents who report transferring children to different schools because of acts of incivility, which is at the highest level (22%) since we began tracking this behavior in 2012 (14%).”).

31. PAUL TAYLOR, THE NEXT AMERICA: BOOMERS, MILLENNIALS, AND THE LOOMING GENERATIONAL SHOWDOWN (2014).

half (forty-nine percent) of Americans in the survey reported that this shift will lead to more conflicts between racial and ethnic groups, with a sizeable majority (thirty-eight percent) also reporting that a nonwhite majority “will weaken American customs and values.”<sup>32</sup>

These grim predictions shed light on the possibility that the caliber of our civility skills and our commitment to the common good may be insufficient to keep up with shifting demographics that require now, perhaps more than ever, those civic virtues useful for effective community building and deliberative discourse—fairness, open-mindedness, and empathy, among others. The focus on the role of schools in civility training was brought home by 2016 poll data looking at uncivility through a generational lens in order to better understand how different segments of our society perceive and experience the actions of others. The poll found that a segment (15 to 18 year olds) of “Generation Z”—those born between 1997 and 2010—reported “the highest rate of encounters with uncivility” among all other respondents.<sup>33</sup> “No surprise given their age, school is the primary place where uncivility breeds for Gen Z, with 61% having experienced uncivility at school,” which perhaps explains why nearly as many of them at fifty-nine percent—which is more than the reported rate for their parents—believe that schools should have civility training.<sup>34</sup> Survey data consistently reveals that the student population most at risk from severe harassment within schools is the students who identify as LGBTQ.<sup>35</sup> LGBTQ youth also suffer the most pernicious consequences of uncivility and have the highest reported rates of seriously considering suicide, making a suicide plan, and attempting suicide, among any other student subgroup in the U.S.<sup>36</sup> The fact that schools are the forum where uncivility is both bred and encountered supports the argument that schools may present the best opportunity to proactively engage the next generation of good citizens through learning, dialogue, and engagement *before* matters worsen.

#### A. *The Early History of Civic Virtue Inculcation via Public Education*

The faith in schools as incubators of citizenship and those civic virtues intrinsically attached to it is rooted in both the origins of our nation

32. KIM PARKER ET AL., LOOKING TO THE FUTURE, PUBLIC SEES AN AMERICA IN DECLINE ON MANY FRONTS 37 (2019), [https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2019/03/US-2050\\_full\\_report-FINAL.pdf](https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2019/03/US-2050_full_report-FINAL.pdf).

33. WEBER SHANDWICK ET AL., CIVILITY IN AMERICA 2016: THROUGH THE GEN Z LENSES (2016), <https://www.webershandwick.com/news/generation-z-points-to-internet-and-social-media-as-main-sources-incivility> (“This year’s study explores 15 to 18 year olds, a segment of a larger cohort commonly known as Generation Z, and found that this group reports the highest rate of encounters with incivility.”).

34. *Id.*

35. Laura Kann et al., *Youth Risk Behavior Surveillance—United States, 2017*, MORBIDITY AND MORTALITY WKLY. REP., June 15, 2018, at 1, 19.

36. *Id.* at 24–27.

and the founding of “the common school”—our earliest system of free, public, non-sectarian education.<sup>37</sup> Americans have long championed the notion that education is essential in preparing the next generation of citizens for self-governance, especially in our democratic constitutional republic. Inherent in “the peculiar form of our government,”<sup>38</sup> and required for its long term sustainability, is a system of education that inculcates civic virtues—an understanding of one’s connection to the broader community and responsibility towards fellow citizens along with a disposition that directs “citizens to subordinate their personal interests when necessary to contribute to the common good.”<sup>39</sup> Under the assumption that the “quality of constitutionalism can be no better than the character of the people,” political thinkers continue to emphasize the importance of cultivating in all citizens those virtues that are fundamental to our American democracy,<sup>40</sup> among which are tolerance, civility, solidarity, and justice. While experiences within the home and family naturally plant the seeds of civic virtue, forces outside of the home, especially education, are also called upon “to prepare informed, rational, humane, and participating citizens committed to the values and principles of American constitutional democracy.”<sup>41</sup> Imparting both basic intellectual skills and those virtues fundamental to the flourishing of our free society, schools serve the role of “develop[ing] competent and responsible citizens who possess a reasoned commitment to the fundamental values and principles that are essential to the preservation and improvement of American constitutional democracy.”<sup>42</sup>

However, the late 18th and early 19th century reformulation of education principles in Europe successfully motivated education reformers

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37. HORACE MANN, REPORT NO. 12 OF THE MASSACHUSETTS SCHOOL BOARD, *in* BASIC READINGS IN U.S. DEMOCRACY 102 (Melvin Urofsky ed., 1848); *see also* GLENN, *supra* note 9, at 34–35.

38. Benjamin Rush, *Of the Mode of Education Proper in a Republic*, *in* THE FOUNDERS’ CONSTITUTION 87 (2000). Observing the role that education might play in attending to both the head and heart, Benjamin Rush noted that “[young people] who have trodden the paths of science together, or have joined in the same sports, whether of swimming, skating, fishing, or hunting, generally feel, thro’ life, such ties to each other, as add greatly to the obligations of mutual benevolence.” *Id.*

39. JOHN J. PATRICK, UNDERSTANDING DEMOCRACY: A HIP POCKET GUIDE 98 (2006).

40. In remarking on Professor Robert Putnam’s description of the role of civic virtue in fostering a sense of community, Sara Bosin writes: “Putnam defines three civic virtues: active participation in public life, trustworthiness, and reciprocity that is acquired through social connectedness. Only through an understanding of civic virtue will Americans be able to flourish in their communities and play an active role in American democracy.” Sara Bosin, *Civic Virtue*, LEARNING TO GIVE (Feb. 12, 2020), <https://www.learningtogive.org/resources/civic-virtue>.

41. Center for Civic Education, *Preface* to NATIONAL STANDARDS FOR CIVICS AND GOVERNMENT (2014), [https://www.civiced.org/standards?page=stds\\_toc\\_preface](https://www.civiced.org/standards?page=stds_toc_preface).

42. *Id.*

in the United States to revive public education on a broad scale.<sup>43</sup> That effort was led principally by Horace Mann, often referred to as the “father of the common school.”<sup>44</sup> An emphasis on citizenship formation, particularly sociological and national unity, animated Mann’s vision for public education, just as it did for the Founders. He conceived of “the common school” as a free, universal, non-sectarian public institution that, by being “common to all the people,” would provide a common and unifying experience that would foster a sense of national unity.<sup>45</sup> When mapping out what would become the blueprint for our entire modern system of public education, Mann espoused the same reverence for education as a means of creating the virtuous republican citizenry needed to sustain our democratic institutions that his predecessors had expressed decades earlier.<sup>46</sup> Unlike the Puritans who first introduced education outside of the home, or the Founders who advocated for its use in citizenship development, Mann’s social reform aims were taking place during a time of vast diversity in social and economic status in the United States. Mann imagined the common school as “the single most important institution in American life, an institution that would dignify the great diversity of American society and engender feelings of respect and goodwill that would sustain and connect those children when they grew up and became citizens.”<sup>47</sup> Indeed, the ethnic and religious diversity that was increasingly

43. Yasemin N. Soysal & David Strang, *Construction of the First Mass Education Systems in Nineteenth-Century Europe*, 62 SOC. OF EDUC. 277 (1989).

44. Graham Warder, *Horace Mann and the Creation of the Common School*, DISABILITY HISTORY MUSEUM, <https://www.disabilitymuseum.org/dhm/edu/essay.html?id=42> (last visited Feb. 12, 2020).

45. CHARLES L. GLENN, JR., THE MYTH OF THE COMMON SCHOOL 3 (1988). Critics of Mann rightly observe that his interest in uniformity was largely born from (anti-immigrant and anti-Catholic) backlash against the increasing diversity of the population:

One of those social reforms, championed by Mann and others, was an effort to ensure that all of America’s children were educated in good ‘American’ (read mainstream Protestant) values. This had become a hot issue of the day, due to the burgeoning immigration from Ireland and other more Catholic countries of southern Europe. The religion of these new immigrants from Ireland and southern Europe had become the focal point of xenophobic nativist concern, and anti-Catholic sentiment was rampant across the spectrum of the more established Protestant community. The perception was that these new immigrants were ignorant, and worse, swore allegiance to the Pope and not to the principles and values of their adopted country, and thus were a growing threat to those principles and values. Since the immigrant labor was needed to fuel the economic engine of the industrializing state, there was a major ongoing campaign to assimilate these immigrants (and particularly their children) into the majority culture.

Cooper Zale, *The Myth of the Common School*, LEFTY PARENT (July 22, 2011), <http://www.leftyparent.com/blog/2011/07/22/the-myth-of-the-common-school/>.

46. MANN, *supra* note 37.

47. HORACE MANN, LECTURES ON EDUCATION 226 (1855). Lauded as an education activist, Mann is not without his critics who regard him as having created a “rationale

characterizing American cities in the second quarter of the 19th century “contributed powerfully to calls for an institution that could inculcate a common culture, the English language, and republican sensibilities by educating children of different faiths and classes in one institution dedicated to forging a shared citizenship.”<sup>48</sup> For Mann, the common schools were instrumental to the functioning of free society and the exercise of self-governance, not necessarily for the intellectual skills they would impart to young minds, but for the “social integration [that could be achieved] through the inculcation of certain common beliefs selected for their ‘uplifting’ character.”<sup>49</sup> He believed strongly that only through education could young citizens “wield [their] mighty energies for the protection of society against the giant vices which [may] invade and torment it;—against intemperance, avarice, war, slavery, bigotry, the woes of want and the wickedness of waste.”<sup>50</sup>

for common schools that understood them as bulwarks against fragmentation.” Mann asserted that these institutions “could safeguard the republic by creating virtuous, informed, and engaged citizens,” but in so doing, “created a conception of public education that elevated the political at the expense of the intellectual” and one that “threatens to undermine ‘the philosophical or intellectual purposes’ of public education.” Hillary Moss, *Horace Mann’s Troubling Legacy: The Education of Democratic Citizens*, THE J. OF THE CIV. WAR ERA 414, 413–15 (2011). Mann is also justifiably critiqued for failing to include or consider those existing outside of the body politic, for example, women, African-Americans, or Native Americans.

48. STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 63 (2000).

49. MATTHEW J. BROUILLETTE, SCHOOL CHOICE IN MICHIGAN: A PRIMER FOR FREEDOM IN EDUCATION 8–9 (1999). The aims and effects of the Common School Movement have been debated by contemporary historians of American education. As Barbara Woodhouse notes,

[u]ntil recently, historians depicted the story of American education as a steady march, led by benevolent and disinterested reformers, from the darkness of ignorance to the light of equal opportunity through free public education. Beginning in the 1960’s, however, revisionist historians sought to debunk this view as myth. Their studies of class conflict portray the common school movement and ‘progressive’ school reformers as agents of a ruling business elite that effectively subjugated working-class and especially immigrant children through a form of cultural imperialism.

Barbara Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1005 (1992). While acknowledging the legitimate critique of Mann and his ignoble efforts to force assimilation via public education, I focus solely on the aims of the common school to inculcate civic virtue. The present Article endorses the aims of the common school in so far as they reflect an imperative to inculcate in children a shared set of values needed to foster social harmony—including tolerance, openness to social diversity, equality of concern, mutual understanding and respect, and civility—those virtues that, as Stephen Macedo notes, will “help us negotiate our differences in the name of forging a public life.” MACEDO, *supra* note 48, at 6.

50. MANN, *supra* note 37. In his final letter as Superintendent, Mann extolled the virtues of the common school as a forum for developing tools of deliberative discourse:



With an emphasis on cultural assimilation and a state-controlled centralized authority, Mann's common school system explicitly made no room for the input or involvement of parents. His vision of a universal system of education, "implicitly religious" though it was, made the state the primary agent in "shaping the character of the American people."<sup>51</sup> Rather than partner with parents, Mann vested complete authority in the state to define what would be taught in schools and how those who would teach in them should be trained.<sup>52</sup> Not surprisingly, Mann's efforts to inculcate moral values via education did not escape forceful opposition from those who saw the common schools as Mann's attempt to impose his own sectarianism—a thinly veiled New England thread of Protestantism—in the schools.<sup>53</sup> Even more substantively, many disagreed with Mann about the primary role of government in the education of the young, as they regarded "centralized control of schooling . . . as antithetical to republican traditions; in particular, the freedom of parents to pass on their own beliefs and traditions to their children."<sup>54</sup> The issue of whether parents may exercise some control in the realm of schooling and the nature of this control as guaranteed by the Constitution did not make its way to the Supreme Court until nearly 75 years later.<sup>55</sup>

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may all the children of the Commonwealth receive instruction in the great essentials of political knowledge,—in those elementary ideas without which they will never be able to investigate more recondite and debatable questions;—thus, will the only practicable method be adopted for discovering new truths, and for discarding,—instead of perpetuating,—old errors; and thus, too, will that pernicious race of intolerant zealots, whose whole faith may be summed up in two articles,—that they, themselves, are always infallibly right, and that all dissenters are certainly wrong,—be extinguished,—extinguished, not by violence, nor by proscription, but by the more copious inflowing of the light of truth.

*Id.*

51. BROUILLETTE, *supra* note 49, at 8.

52. *Id.* at 9.

53. HORACE MANN, LIFE AND WORKS: ANNUAL REPORTS OF THE SECRETARY OF THE BOARD OF EDUCATION OF MASSACHUSETTS FOR THE YEARS 1845–1848 292 (1891) ("But it will be said that this grand result in practical morals is a consummation of blessedness that can never be attained without religion, and that no community will ever be religious without a religious education.").

54. MATTHEW J. BROUILLETTE, THE MACKINAC CENTER FOR PUBLIC POLICY, THE 1830S AND 40S: HORACE MANN, THE END OF FREE-MARKET EDUCATION, AND THE RISE OF GOVERNMENT SCHOOLS (1999). *See also* Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POLICY REV. 169, 184 (1996) (noting as to the inculcative nature of schooling that "[a] broad state indoctrinative interest in using schools as a vehicle for inculcating values . . . is inconsistent with the 'constitutional ideal of citizen self-government.'").

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

### B. *Civic Virtues for a Modern Democratic Republic*

The common school's aim of molding character raised reasonable concerns about the state's usurpation of this fundamental aspect of child rearing. Indeed, the inherent tension created by the ambiguous boundary between *child rearing* controlled by parents and *citizen formation* controlled by the state was, and remains, an inescapably vexing problem. While it is safe to assume in most instances that the interests of parents align with those of the state with respect to the inculcation of virtue, there are certainly occasions where these interests might be regarded as antagonistic. Moreover, there may also be instances where parents, in exercising their parental authority to impart values and beliefs to their offspring, may actually be thwarting the inculcation of those civic virtues regarded as essential to the common good. Such instances call into question how authority to shape children's educational lives should be allocated between parents and the state. The core of this tension as it relates to education is captured by two provocative questions posed by political philosopher Amy Gutmann in her exploration of the role of education in setting the stage for democratic politics: "[W]hat *kind* of people should human education seek to create?"<sup>56</sup> and relatedly, "*Who* should share the authority to influence the way democratic citizens are educated?"<sup>57</sup>

The answers to these questions both depend on the kind of government within which children are being reared and the system of government they are being prepared to inherit. In our particular constitutional republic and the democratic system of government to which it gave rise, parents *and* the state share authority in "fostering capacities for democratic and personal self-government"<sup>58</sup>:

Concomitant with the state's most significant formative responsibility of providing compulsory education for children is to prepare them for responsible citizenship—to protect them as 'immature citizens,' and facilitate their healthy development as well as longer-term interest in preparing children to be fully participating and cooperating members of their communities and the polity.<sup>59</sup>

These ideals were expressed by the Supreme Court in the arguably most well-known education case of *Brown v. Board of Education*:

[Education] is required in the performance of our most basic public responsibilities [and . . .] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural

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56. AMY GUTMANN, *DEMOCRATIC EDUCATION* 19 (1987) (emphasis added).

57. *Id.* at 3 (emphasis added).

58. JAMES E. FLEMING & LINDA C. McCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* 112 (2013).

59. *Id.* at 118.

values, in preparing him for later professional training, and in helping him to adjust normally to his environment.<sup>60</sup>

The Court's framing of the critical role played by education is no less true today in the context of *gender* norms than it was in 1954 in relation to *racial* ones.

Threads of Mann's earlier vision for the common school—inculcation of virtues and values necessary for the flourishing of our democracy—seem to animate Gutmann's framing of the role of public education, especially as it relates to the problem of defining the boundaries of legitimate democratic authority in the realm of education. According to Gutmann, the primary aim of a democratic education is to impart the 'ability to deliberate' by teaching problem solving skills "that are compatible with a commitment to democratic values."<sup>61</sup> As respectful deliberation becomes even more challenging in an increasingly ideologically and demographically diverse society, such as the one that demographers in the United States have been predicting,<sup>62</sup> "the ideal of democratic education [must] also insist[] upon instituting a common standard compatible with diversity: Children must be taught enough to participate intelligently as adults in the political processes that shape their [whole] society."<sup>63</sup> The capacity for collective self-governance that we expect children to develop over time rests on the development of a set of skills that facilitate participation in our constitutional democracy.<sup>64</sup> Indeed, for this reason, education is regarded as more than merely

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60. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954).

61. GUTMANN, *supra* note 56, at 11.

62. According to the U.S. Census Bureau projections, "[t]he United States is expected to experience significant increases in racial and ethnic diversity over the next four decades" with "the minority groups [Black, American Indian and Alaskan Native, Asian, Native Hawaiian and Other Pacific Islander, and Two or More races] projected to maintain or increase their shares of the population," and "the proportion of the population that is non-Hispanic White alone is projected to decrease." JENNIFER M. ORTMAN & CHRISTINE E. GUARNERI, U.S. CENSUS BUREAU, UNITED STATES POPULATION PROJECTIONS: 2000 TO 2050 3–4 (2009).

63. GUTMANN, *supra* note 56, at xi.

64. Martin Samuelsson presents a range of definitions that are useful to illustrate what is meant by deliberative democracy, citing scholars including Habermas (good deliberative process is based upon "a communicative situation where everybody can contribute, where they have an equal voice, and where they can speak freely and honestly without internal or external deception or constraint"), Gutmann and Thompson ("a reason-giving process in which participants use arguments accessible to all citizens and appeal to principles that all reasonable citizens could accept"), and Fishkin ("a process where arguments offered by one perspective are answered by considerations from other perspectives and where the arguments offered are considered on their merits regardless of which participant offers them"). Samuelsson concludes that deliberative democracy is a "discussion in which different points of view are presented and underpinned with reasons, and participants listen respectfully to each other and reflect on other participants' claims and arguments." Martin Samuelsson, *Education for Deliberative Democracy: A Typology of Classroom Discussions*, 24 DEMOCRACY

knowledge and skill acquisition, but the development of democratic virtue. Ideally, a broadly conceived democratic education—one that fosters effective and responsible participation in democracy—assists children in developing “certain dispositions or traits of character that enhance the individual’s capacity to participate in the political process and contribute to the healthy functioning of the political system and improvement of society.”<sup>65</sup> Gutmann’s theory of democratic education places a particular emphasis on the skill of civil discourse through thoughtful deliberation, since political disagreement is a natural consequence of a functional democracy, particularly in a heterogenous population such as ours.

This sentiment is echoed by the Center for Civic Engagement in highlighting the “special and historic responsibility” played by schools in the development of civic competence and civic responsibility.<sup>66</sup> Critical of the tendency to view civic education as “incidental” to the schooling of American youth, the Center cautions that “[g]overnment of the people, by the people, and for the people,” in Lincoln’s phrase, means that the people have the right to control their government . . . [a] right [that] is meaningless [however] unless they have the knowledge and skills to exercise that control and possess the traits of character required to do so responsibly.”<sup>67</sup> Although education of our youngest citizens was intended to achieve both, we are witnessing a “civics education crisis” that threatens young people’s ability to become informed and engaged citizens.<sup>68</sup>

## II. PARENTAL RIGHTS ENTWINED WITH PUBLIC EDUCATION

### A. *Parental Education Authority*

Understanding that historically, neither parents nor the state have ever *solely* controlled the education of children, the debate continues over just how much parents should exercise authority over the inculcation of civic virtues via public education.<sup>69</sup> Relatedly, how would vesting

& Educ., no. 1, 2016, at 2, <https://democracyeducationjournal.org/cgi/viewcontent.cgi?article=1227&context=home>.

65. Center for Civic Education, *Introduction to NATIONAL STANDARDS FOR CIVICS AND GOVERNMENT* (2014), [http://www.civiced.org/standards?page=stds\\_toc\\_intro](http://www.civiced.org/standards?page=stds_toc_intro) (last visited Feb. 16, 2020).

66. *Id.*

67. *Id.*

68. Megan McClure, *Tackling the American Civics Education Crisis*, 25 LEGISBRIEF, no. 9, Mar. 2017, [https://www.ncsl.org/LinkClick.aspx?fileticket=kBr\\_Ti5RdHE%3d&tabid=31155&portalid=1](https://www.ncsl.org/LinkClick.aspx?fileticket=kBr_Ti5RdHE%3d&tabid=31155&portalid=1) (reporting numerous polls that reveal lack of knowledge about civics among American youth).

69. Mary-Michelle Upson Hirschhoff, *Parents and the Public School Curriculum: Is There a Right to Have One’s Child Excused from Objectionable Instruction?*, 50 S. CAL. L. REV. 871, 899 (1977) (observing of the parent-state debate even several decades ago: “Although one may confidently state that the Constitution protects parental liberty to direct the education of one’s child, the extent of the protection

parents with exclusive authority in this domain serve the common good? While we might instinctively comprehend the danger of centralized state monopolization of education and reasonably denounce such unequivocal authoritarianism within a society whose civic virtues celebrate liberty as well as pluralism, we may have an underappreciation of the danger of placing inordinate or exclusive authority in the hands of parents. As Gutmann cautions, parental instincts and intimacy alone may be an insufficient reason for resting educational authority exclusively in the family.<sup>70</sup> Certainly, there is an attraction to a system that prioritizes parental authority by letting parents educate their own children as they see fit. First, in so doing, the state avoids all the political battles that rage over the content of public education. Second, this model would also seem to foster the value of pluralism “by permitting many ways of life to be perpetuated in its midst.”<sup>71</sup> But, as Gutman asserts, both 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.<sup>72</sup> The greatest cost to the state if it were to abdicate exclusive educational authority to parents is the sacrifice of its “most effective and justifiable instrument for securing mutual respect among their citizens” and inculcating an appreciation for democratic values.<sup>73</sup> Our increasingly diverse society rests on finding a sustainable balance between those entities most intimately involved in the formation of future citizens—what political philosopher Stephen Macedo calls “the positive constitutional project of shaping diversity toward the demands of a shared public life.”<sup>74</sup>

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against state regulation is unclear”). The same tension over balancing the interests of the state against parents continues to today. Jill Underwood, *The Balancing Act Over Public School Curriculum*, PHI DELTA KAPPAN (Feb. 25, 2019), <https://kappanonline.org/legal-balancing-act-public-school-curriculum-underwood/>.

70. Says Gutmann of the need for state provision and regulation of education:

The same principle that requires a state to grant adults personal and political freedom also commits it to assuring children an education that makes those freedoms both possible and meaningful in the future. A state makes choice possible by teaching future citizens respect for opposing points of view and ways of life. It makes choice meaningful by equipping children with the intellectual skills necessary to evaluate ways of life different from that of their parents.

GUTMANN, *supra* note 56, at 30.

71. *Id.* at 32.

72. *Id.* at 32; see also Richard Kahlenberg, *Public Schools Have a Public Purpose*, N.Y. TIMES (Jan. 24, 2012), <https://www.nytimes.com/roomfordebate/2012/01/24/should-parents-control-what-kids-learn-at-school/public-schools-have-a-public-purpose> (“Adherence to democratic values is not automatic; it needs to be taught to each generation. Should parents who are members of the Ku Klux Klan be allowed to create a special public school curriculum for their child that suggests that extension of voting rights to black Americans was a mistake?”).

73. GUTMANN, *supra* note 56, at 32–33.

74. MACEDO, *supra* note 48, at 14.

While we might like to think that the state and parents share a common vision of how to accomplish this task, or at least are in alignment around goals, this is not always the case. As Fleming and McClain observe, tension may arise in the context of conflicting goals—on the one hand, the state’s interest in “preparing children to live in a diverse, morally pluralistic society, in which toleration is a virtue” and on the other, parents’ rights to “instruct their children in a particular way of life that *rejects* such ‘modern’ virtues as toleration.”<sup>75</sup> Our pluralistic society that celebrates social diversity as enriching “our understandings of differing ways of life” is, however, profoundly threatened if too many young citizens are placed beyond the state’s reach.<sup>76</sup> Indeed, for all of us “[t]o reap the benefits of social diversity, children must be exposed to ways of life *different* from their parents and—in the course of their exposure—must embrace certain values, such as mutual respect among persons, that make social diversity both possible and desirable.”<sup>77</sup> This is one example of the state’s interests trumping parental authority in pursuit of the common good—preparing young citizens for participation in, discussion concerning, and decision-making about their common destiny. Gutmann warns against an assumption that exclusive parental authority over education would help us to achieve aims related to the common good. Rather, she finds “good reason to reject the claim that, regardless of the consequences for individual citizens or for society as a whole, parents have a natural right to exclusive educational authority over their children.”<sup>78</sup> Echoing a sentiment at the core of Supreme Court jurisprudence in relation to parental rights, Gutmann supports consideration of a superior state interest in noting that “[c]hildren are no more the property of their parents than they are property of the state.”<sup>79</sup>

Gutmann demonstrates, however, a finer appreciation for the tension between parents and the state with respect to allocation of authority over education than early common school theorists, such as Mann, when she suggests that “the educational authority of parents and politics has to be *partial* to be justified.”<sup>80</sup> Like Fleming and McClain, she posits that precisely because children are members of both families *and* the state, neither entity *alone* should be vested with absolute authority to control the education of future citizens.<sup>81</sup> Gutmann’s theory of democratic education itself rests on an appreciation of the balance of control between

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75. FLEMING & McCLAIN, *supra* note 58, at 118 (emphasis added).

76. GUTMANN, *supra* note 56, at 33.

77. *Id.*

78. *Id.*

79. *Id.* (echoing the observation in *Pierce v. Society of Sisters* that “the child is not the mere creature of the state.”). *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 535 (1925).

80. GUTMANN, *supra* note 56, at 30.

81. *Id.* at 27.

parents and the state and the likely conflicting roles of both.<sup>82</sup> It is captured in what she refers to as conscious social reproduction—the process by which citizens are “empowered to influence education that in turn shapes . . . future citizens.”<sup>83</sup> This core aspect of Gutmann’s theory aims to distinguish *socialization* as unconscious social reproduction, within the realm of parenting, from *education* as conscious social reproduction within the realm of schooling.<sup>84</sup> A society that is committed to the latter would have a compelling response to adults whose primary objection to either the form or content of education “is that it indirectly subverts or directly conflicts with their moral values” which is that “[t]he virtues and moral character we are cultivating, are necessary to give children the change collectively to shape their society.”<sup>85</sup> By subordinating the state’s interest in shaping education to meet citizenship demands, children would be deprived of “the very chance that legitimates [parents’] own claim[s] to educational authority.”<sup>86</sup>

A parentalist perspective, such as that advanced by Stephen Gilles, supports recalibrating the balance between state and parents to empower parents to exercise greater control over curricular matters and, in particular, to “reject schooling that promotes values contrary to their own.”<sup>87</sup> To whom might this appeal? It would tend to resound with “the perspective of religious parents and students who challenge curricula or programs designed to teach tolerance, enduring lessons or assemblies they perceive as offensive indoctrination infring[ing] deeply upon their freedom of speech and exercise of religion, as well as upon parental liberty.”<sup>88</sup> Gilles’ parentalist manifesto rests on two premises—first, that parents are more likely than the state to faithfully act in *accord* with their definition of the child’s best interests, and second, that parents’ interests in nurturing their children and children’s corresponding interest in being nurtured by their parents is *more* fundamental than the state’s interest in controlling the education of its future citizens.<sup>89</sup> Gilles’ parentalist approach is limited, however, on the basis of a presumed dichotomy—an “educational dualism,” as he frames it—that does not necessarily exist.<sup>90</sup> In no regime, including that presently endorsed in this Article, are parents *prevented* from inculcating values in their children that are distinct

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82. *Id.*

83. *Id.* at 14.

84. *Id.* at 15.

85. *Id.* at 39.

86. *Id.*

87. Stephen Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 938 (1996) (basing author’s parentalist theory on an assumption that parents will demonstrate greater fidelity to their vision of what is in the best interests of the child than will the state).

88. FLEMING & McCLAIN, *supra* note 58, at 129.

89. Gilles, *supra* note 87, at 940.

90. *Id.* at 969.



from or in opposition to those that shape public education. Parents can still enjoy the range of privileges established under law to care, custody, and control of their children, but are limited to doing so within the privacy of the home, a point Gutmann makes clear in her promotion of democratic education and conscious social reproduction.

Given the increasing incidents of uncivility reported to be taking place in schools, on full display in the public at large, and all over social media, we should be pondering whether parents are doing an adequate job of planting the seeds of virtue that the next generation will need to live harmoniously in an increasingly diverse nation. At the very least, there is support for the belief that the adults who are presently inculcating values are failing to set a good example of what civil discourse in a functioning democracy should look like.<sup>91</sup> Examples of the rising climate of uncivility and intolerance abound, most disturbingly within K-12 schools where incidents of bias-based bullying have recently increased.<sup>92</sup> Such bullying and harassment is believed to “undermine democratic norms, most likely for the effect such conduct has on marginalizing the voices of those being targeted.”<sup>93</sup> It seems pretty clear that adults are failing to model the kind of behavior that is essential for a healthy democracy to flourish, replacing civil and deliberative discourse with reactionary, coarse, and divisive rants.<sup>94</sup> As pundits remark on the ways in which uncivility is channeled on social media, “[c]ivility is *out*; crude and rude are *in*. Twitter is toxic—it is a public forum, no different than if you were on a street corner shouting foul language, yet everyone keeps hollering vile thoughts online.”<sup>95</sup> Take, for example, the young school aged boy

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91. Speaking to the poor example being set from the highest levels of government, Arizona Senator Jeff Flake said from the Senate floor while announcing his decision to retire at the end of his term: “It must also be said that I rise today with no small measure of regret. Regret because of the state of our disunion. Regret because of the disrepair and destructiveness of our politics. Regret because of the indecency of our discourse. Regret because of the coarseness of our leadership.” Senator Jeff Flake, Speech on the Senate Floor (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/us/politics/jeff-flake-transcript-senate-speech.html>.

92. The Anti-Defamation League reported, for example, that “anti-semitic incidents in K-12 schools and college campuses in 2017 nearly doubled over 2016.” *Anti-Semitic Incidents Surged Nearly 60% in 2017*, ANTI-DEFAMATION LEAGUE (Feb. 27, 2018), <https://www.adl.org/news/press-releases/anti-semitic-incidents-surged-nearly-60-in-2017-according-to-new-adl-report>.

93. FLEMING & McCLAIN, *supra* note 58, at 129.

94. Gerald F. Seib, *Civil Discourse in Decline: Where Does it End?*, WALL ST. J. (May 29, 2017), <https://www.wsj.com/articles/civil-discourse-in-decline-where-does-it-end-1496071276> (observing “the state of (un)civil discourse in America today [where] [p]oliteness, decorum, respect—all seem to be endangered ideas” and querying “[w] hat kind of behavior is society modeling for its youngest members?”).

95. Norman Chad, *Rise of Public Dis Coarse: Anti-Social Media, Boorish Behavior Go Hand in Hand*, CHI. SUN TIMES (Mar. 31, 2019), <https://chicago.suntimes.com/2019/3/31/18313379/rise-of-public-dis-coarse-anti-social-media-boorish-behavior-go-hand-in-hand>.

who made headlines during the 2016 presidential campaign for his use of a misogynistic expletive—“Take that bitch down!”—while attending a Trump rally with his mother.<sup>96</sup> When asked by reporters about her son’s remarks, his mother appeared to embrace a “parentalist” perspective that seemed dangerously blind to the consequences of engendering hateful partisan rhetoric in her young child: “I think he has a right to speak what he wants to.”<sup>97</sup> And where did he learn to use such coarse language? In “Democratic schools,” [the mother] told reporters.<sup>98</sup> More recently in the run up to the 2020 national election, some have expressed concern about the presence of children at political rallies at which racist chants of “Send her back!” have been heard: “Children must have heard it, too, and felt uncomfortable, knowing in their gut that the chant is wrong. Some kids are surely being malignly influenced by its repudiation of the American creed.”<sup>99</sup> Although it may be unfair to hold parents *entirely* responsible for the currently divisive state of our union, empowering parents to serve as the *sole* force for inculcation of civic virtues invites precisely the dangerous possibility that far too many parents may fail to inculcate the values and virtues that our pluralistic society most needs.

#### B. *Significance of Schools in the Origins of the Parental Rights Doctrine*

Because public schools and school personnel are so centrally involved in the inculcation of social values and norms, they have long been the subject of intense parent and state conflicts. It is no accident that our seminal parental rights cases arose in school settings where the boundaries between state and family abut one another with the greatest degree of friction and where we witness “the long-playing drama of who would control the country’s education policies and what ends they should serve.”<sup>100</sup> Although lauded by most as *the* seminal parents’ rights cases—the ones that established for parents a constitutionally protected

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96. *Foul Mouthed Child at Trump Rally Uses Misogynistic Profanity to Assail Clinton*, WOMEN IN THE WORLD (Aug. 2, 2016), <https://womenintheworld.com/2016/08/02/foul-mouthed-child-at-trump-rally-uses-misogynistic-profanity-to-assail-clinton/>.

97. *Id.*

98. *Id.*

99. Conor Friedersdorf, ‘Send Her Back’: The Bigoted Rallying Cry of Trump 2020, ATLANTIC (July 18, 2019), <https://www.theatlantic.com/ideas/archive/2019/07/send-her-back/594253/> (commenting on children’s exposure to the “civic poison” of the racist chants); See also Joseph Bernstein, *YouTube’s Newest Far-Right, Foul-Mouthed, Red-Pilling Star Is A 14-Year-Old Girl*, BUZZFEED NEWS (May 13, 2019), <https://www.buzzfeednews.com/article/josephbernstein/youtubes-newest-far-right-foul-mouthed-red-pilling-star-is>; Christine Hauser & Katharine Q. Seelye, *New Hampshire Investigates Wounding of 8-Year-Old as Possible Hate Crime*, N.Y. TIMES (Sept. 13, 2017), <https://www.nytimes.com/2017/09/13/us/biracial-boy-lynched-new-hampshire.html?mcubz=0>.

100. Woodhouse, *supra* note 49, at 1003.

fundamental liberty interest in the care, custody, and control of children—the Court made clear in *Meyer v. Nebraska*<sup>101</sup> and *Pierce v. Society of Sisters*<sup>102</sup> that the shaping of children through education, especially their formation as citizens, was a *shared* endeavor.<sup>103</sup> While the state entrusts parents to exercise discretionary decision-making in carrying out the mission of providing “an education that will prepare the child for eventual enfranchisement from parental authority,”<sup>104</sup> it is the state that defines and enforces the parental duty to educate.

A review of the seminal parental rights cases will assist in providing context for the above assertions as well as the instant claim that the state enjoys a superior right to parents in tailoring public education to serve the common good. The first of these seminal cases, *Meyer v. Nebraska*, unfolded against a growing and insistent nationalist movement taking place in the 1920s—post-WWI and in response to the greatest influx of immigrants in the country’s history.<sup>105</sup> *Meyer* concerned the constitutionality of a Nebraska statute that prohibited the teaching in any private or public school of any modern languages other than English to any child who had not passed the eighth grade.<sup>106</sup> The statute under review was not an aberration at this particular time, and laws like this one were widespread in the early 1920s.<sup>107</sup> Echoing—for better or worse—the impetus behind Mann’s common school movement, the effort to mandate the teaching of only English

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

102. *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 534 (1925).

103. “That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected.” *Meyer*, 262 U.S. at 401. “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Pierce*, 268 U.S. at 535.

104. JEFFREY SHULMAN, *THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND THE ENFRANCHISEMENT OF THE CHILD* 5 (2014).

105. Part of this backdrop includes the demographic and cultural changes that resulted from a giant wave of immigration that began in the late 1800s. This influx of European immigrants raised the nation’s population of foreign-born residents to a then-record high of 13.9 million in 1920, making up a near-record thirteen percent of the entire U.S. population. While earlier waves of immigrants hailed mostly from Northern and Western Europe, Southern and Eastern Europeans comprised the majority of the newer immigrant population. Reacting to the change in immigrant origins, laws enacted in the 1920s sought to return U.S. immigration patterns to those that prevailed decades earlier. In addition to laws that directly impacted immigration, such as the federal 1924 Immigration Act, whose purpose was to preserve the ideal of U.S. homogeneity, there were a number of measures such as the one under review in *Meyer v. Nebraska*, that attempted to remake immigrants by aggressive “Americanization” efforts. *Meyer*, 262 U.S. at 390.

106. *Meyer*, 262 U.S. at 397.

107. MACEDO, *supra* note 48, at 96. “The law at issue in *Meyer* was passed by the Nebraska state legislature in 1919. Sixteen states enacted similar laws in that year, and by 1923, thirty-one states had laws mandating English as the sole language of instruction, either in public or private schools.” *Id.*

in the schools was part of a drive to create national unity and to combat growing ethnic isolation within immigrant communities that some feared might hinder the opportunities presented to immigrant children.<sup>108</sup> As Macedo notes, “for progressives, the public schools represented common republican ideals, opportunities to all, and the hope that all the children of a community would meet and learn from each other.”<sup>109</sup> Since English was the language of political deliberation, there was good reason to believe that failure to learn English could “stymie such core political values as mutual understanding and cooperative relations, the capacity to comprehend and negotiate differences, and reasoned public deliberation.”<sup>110</sup> This concern was evident in the opinion in *Meyer* in which Justice McReynolds spoke favorably about the state’s interest in fostering a “homogenous people with American ideals prepared readily to understand current discussions of civic matters” and the state’s authority “to compel attendance at some schools and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English.”<sup>111</sup> That said, the Court determined that the statute unreasonably interfered with the liberty of parents by prohibiting foreign language instruction, an endeavor the Court regarded as relatively benign.<sup>112</sup>

Although the subject of the fine under the statute was the teacher-plaintiff, Robert Meyer, the challenge to the statute was reframed, as it made its way to the Supreme Court, first to highlight religious concerns and then to reflect underlying parental interests in controlling the kind of education their children received.<sup>113</sup> Parents had reason to feel emboldened following *Meyer*, for the case represented the first time that the Court pronounced a right for parents protected within the term “liberty” in the Fourteenth Amendment’s Due Process Clause.<sup>114</sup> Said the Court:

Without doubt, [liberty] 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 common law as essential to the orderly pursuit of happiness by free men.<sup>115</sup>

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108. Woodhouse, *supra* note 49, at 1004.

109. MACEDO, *supra* note 48, at 96.

110. *Id.* at 97.

111. *Meyer*, 262 U.S. at 402.

112. *Meyer*, 262 U.S. at 402 (“The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate.”).

113. See generally *Meyer*, 262 U.S.

114. *Meyer*, 262 U.S. at 399 (“While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated.”).

115. *Meyer*, 262 U.S. at 399.

While the precise metes and bounds of this liberty interest were not made clear in *Meyer*, the opinion marked the first time that parents were empowered to temper the state's zeal in its efforts to "improve the [physical, mental, and moral] quality of its citizens."<sup>116</sup> As bold as this pronouncement was, however, *Meyer* should not be read "as standing for the proposition that parental rights to direct children's education routinely trump the public interest in providing for all children the prerequisites of a common civic life and the equal opportunity to lead an independent existence."<sup>117</sup> Indeed, as will be explored later in this Article, our more modern education curriculum cases make that point precisely clear.

A more radical educational policy reform statute was the subject of dispute in *Pierce v. Society of Sisters*,<sup>118</sup> which made its way to the Supreme Court only two years after *Meyer*. In *Pierce*, the Oregon voters approved an initiative mandating public school for all children between the ages of eight and sixteen, thereby criminalizing participation in private and parochial education.<sup>119</sup> Parents who violated the law faced substantial fines and even the possibility of imprisonment, while the named plaintiffs faced the very real prospect of having to cease operations.<sup>120</sup> The political, cultural, and social forces that seemed to drive the Oregon Compulsory Education Act were, as Woodhouse observes, "an odd commingling of patriotic fervor, blind faith in the cure-all powers of common schooling, anti-Catholic and anti-foreign prejudice, and the conviction that private and parochial schools were breeding grounds of Bolshevism."<sup>121</sup> The ultimate fate of the Oregon law was similar to the Nebraska language statute, however, this time by a unanimous Court who found the act to be an unconstitutional infringement on the property rights of those conducting private educational institutions, as well as an unreasonable interference with the liberty of parents to "direct the upbringing and education of children under their control."<sup>122</sup> Once again extracting from the liberty claims made by the appellee schools the right of *parents* to raise their children, the Court reiterated its position from two years prior in *Meyer*, holding that:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>123</sup>

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116. *Meyer*, 262 U.S. at 401.

117. MACEDO, *supra* note 48, at 98.

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

119. *Pierce*, 268 U.S. at 530.

120. *Pierce*, 268 U.S. at 531.

121. Woodhouse, *supra* note 49, at 1018.

122. *Pierce*, 268 U.S. at 534.

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

While both *Meyer* and *Pierce* were profoundly reflective of anti-Catholic, anti-immigrant sentiment taken to the extreme, the cases can be read outside of that context as strong support for the state's role in inculcating civic virtue, however, with restraint<sup>124</sup> Piercing through the nativist rhetoric of both efforts—including the overtly racist support for the Oregon measure provided by the Ku Klux Klan—one can discern some underlying admirable aims worth salvaging, perhaps even celebrating. They are what Woodhouse refers to as “the cure-all powers” noted above—the promise of public schools to fulfill their mission of fostering a cohesive society.<sup>125</sup> Quoting supporters of the initiative with respect to the curative power of the public school to inculcate tolerance, Macedo notes the call to:

[m]ix the children of the foreign born with the native born, and the rich with the poor. Mix those with prejudices in the public school melting pot for a few years while their minds are plastic, and finally bring out the finished product—a true American. The permanency of this nation rests in the education of its youth in the public schools . . . where all shall stand upon one common level.<sup>126</sup>

Supporters of the initiative placed on the back of the ballot a cautionary note that rings particularly prescient for those reading these words nearly one hundred years later:

Our children must not . . . be divided into antagonistic groups, there to absorb the narrow views of life, as they are taught [lest] we will find our citizenship composed and made up of . . . factions, each striving not for the good of the whole, but for the supremacy of themselves.<sup>127</sup>

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124. These cases recognize a limitation on the state's power to educate children, giving parents authority to determine how, but not whether, to educate children. The Supreme Court decisions established for the first time that parents actually have such a right, but did so by articulating a limit on the state's authority to control education. In so doing, the state reserves for itself the important role of educating children, largely driven by its need to raise citizens capable of participating in and sustaining our democratic institutions. This idea is articulated more unambiguously in the later case of *Yoder*, which relies entirely on *Meyer* and *Pierce*: “There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.” *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

[W]here nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts “reasonably” and constitutionally in requiring education to age 16 in some public or private school meeting the standards prescribed by the State.

*Yoder*, 406 U.S. at 233. Essentially, it is well within the inherent authority of the state to require children to be educated and to establish the standards for such education.

125. Woodhouse, *supra* note 49, at 1018.

126. MACEDO, *supra* note 48, at 98.

127. *Id.* at 100.

The last case sometimes cited in the context of resolving turf battles between state and parents over control of public education, *Wisconsin v. Yoder*, arose many years after *Meyer* and *Pierce*, and introduced an overtly religious dimension to this debate.<sup>128</sup> *Yoder* concerned the constitutionality of a Wisconsin compulsory school attendance statute and the right of Amish parents to remove their children from public schools after the eighth grade as an exercise of their right to religious freedom.<sup>129</sup> The Amish parents successfully argued that exposing their children to the mainstream, “worldly” values taught in the public high school, such as competition and materialism, would undermine the religious teachings central to their alternative lifestyle and world view.<sup>130</sup> They preferred instead to prepare their children at home or in Amish “schools” for the agricultural and domestic pursuits that awaited them as adults in the Amish community.<sup>131</sup> The Court held that the educational purposes served by the two additional years of schooling from which exemption was sought did not justify the burden on the Amish parents’ free exercise of religion under the First Amendment.<sup>132</sup>

While *Yoder* might seem to be a seminal case for parents seeking to exercise curricular control over public schools on the basis of religious liberty, reliance on the case is tempered by the attributes associated with the Amish themselves—a religious community so self-sufficient and set apart from the rest of democratic society as to suggest only “*partial citizenship*.”<sup>133</sup> Indeed, the majority opinion is grounded on the unique and pervasive nature of the Amish religion and an assumption that in an Amish community, religion, culture, and daily life are inseparable.<sup>134</sup> The needs and interests of Amish children as future citizens were, therefore, not even meaningfully contemplated by the Court, which only served to strengthen the claims of parents that their religious liberty interests were paramount to the state’s interest in educating Amish children.<sup>135</sup>

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128. Since the plaintiffs in *Meyer* and in the companion cases in Ohio and Iowa contended that their children needed to learn the German language in order to participate in German-language worship at home and in churches, one could point to inchoate religious interests at stake. However, the Court in *Meyer* did not rely upon the First Amendment’s freedom of religion clause or any other specific provision of the Bill of Rights, which the Court had not yet begun to incorporate into state law.

129. *Yoder*, 406 U.S. at 205.

130. *Wisconsin v. Yoder*, 406 U.S. 205, 209 (1972).

131. *Yoder*, 406 U.S. at 223.

132. *Yoder*, 406 U.S. at 223.

133. Amy Gutmann, *Civic Education and Social Diversity*, 105 *ETHICS* 557, 569 (1995).

134. *See, e.g., Yoder*, 406 U.S. at 216 (“[T]he Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.”).

135. *See Yoder*, 406 U.S. at 230 (“[O]ur holding today in no degree depends on the assertion of the religious interest of the *child*, as contrasted with that of the parents.”) (emphasis added).



Gutmann's observation about the case explains, in part, why *Yoder* has limited precedential value in future cases concerning parental educational authority. The "exception to the rule of equipping all children to exercise the full rights and responsibilities of liberal democratic citizenship" expressed in the holding of *Yoder* should be as troubling to adherents of political liberalism "committed to educating children for citizenship" as it is for those who value traditional liberalism "committed to educating for individuality or autonomy."<sup>136</sup> Neither of these aims are supported by *Yoder*.

C. *Civic Values and Diversity Aims in the Public School: "Live and Let Live" Plus*

Just how robust are parental rights in the realm of schooling, and more specifically, how much control may parents assert over school curricula? Are schools compelled to tailor lessons to accommodate parental prerogatives or religious beliefs, particularly when those beliefs may not reflect the civic virtues schools aim to inculcate? The answer to this question was at the heart of *Mozert v. Hawkins County Board of Education*, a case that departs from *Yoder* in ruling against parental assertion of First Amendment protections within the public school.<sup>137</sup> Plaintiff parents in *Mozert* sought injunctive relief and money damages for the school's alleged violation of their First Amendment right to free exercise of religion.<sup>138</sup> The basis of their claim was the school's reading requirement, which they alleged "forc[ed] the student-plaintiffs to read school books which teach or inculcate values in violation of their religious beliefs and convictions."<sup>139</sup> The required reading arose under Tennessee's "character education" curriculum, which was designed "to help each student develop positive values and to improve student conduct as students learn to act in harmony with their positive values and learn to become good citizens in their school, community, and society."<sup>140</sup> It is important to note that the analyses of the district and appellate courts turned on accepting that the required reading was not in the form of values inculcation, since

136. Gutmann, *supra* note 133, at 570.

137. *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987). The Sixth Circuit distinguished *Yoder*. "*Yoder* rested on such a singular set of facts that we do not believe it can be held to announce a general rule that exposure without compulsion to act, believe, affirm or deny creates an unconstitutional burden." *Id.* at 1067. This issue is addressed in greater detail in Part A concerning case law favoring subordination of parental prerogatives as against weightier state aims.

138. *Mozert v. Hawkins Cty. Pub. Sch.*, 647 F. Supp. 1194, 1195 (E.D. Tenn. 1986) ("The relief sought by plaintiffs includes money damages for the expenses incurred in sending their children to private school and an order of the Court requiring the school system to accommodate their religious beliefs by providing alternative reading instruction.").

139. *Mozert*, 827 F.2d at 1061.

140. *Mozert*, 827 F.2d at 1060 (quoting TENN. CODE ANN. § 49-6-1007 (Westlaw through Public Act 532)).

the task of helping students “develop positive values” still leaves students ostensibly free to choose from among a range of positive values.<sup>141</sup> The plaintiff parents found particularly objectionable those portions of the required reading that included topics such as magic, gender role reversal, pacifism, and the achievements of women outside their homes. Most notably, the parents objected to the fact that their children would be exposed to a range of differences without an accompanying statement observing “that the other views are *incorrect* and that the plaintiffs’ views are the *correct* ones.”<sup>142</sup>

Plaintiff parents prevailed at the lower court level, with the district court holding that the reading requirement posed an undue burden on their free exercise rights and required at least a partial opt-out for objecting parents.<sup>143</sup> Framing the issue as one of exposure to contrary ideas or values, the Sixth Circuit reversed, reasoning that “exposure to something does not constitute teaching, indoctrination, opposition or promotion of the things exposed” and was, therefore, missing the necessary compulsion that would implicate the Free Exercise Clause.<sup>144</sup> In remaining on one side of the “compulsion” line, the school was permitted to fulfill its compelling interest in educating the young by continuing with the required reading. The court stressed that there was “no proof in the record that any plaintiff student ‘was required to engage in role play, make up magic chants, [or] read aloud’ and that while ‘[b]eing exposed to other children performing these acts might be offensive . . . it does not constitute the compulsion’ necessary for a finding of unconstitutionality.”<sup>145</sup> In response to one plaintiff-mother’s assertion that a range of sensitive topics could never be addressed in the public school without direct offense to her religious beliefs, the court pointed to Supreme Court precedent from nearly two decades prior, holding that “it violates the Establishment Clause to tailor a public school’s curriculum to satisfy the principles or prohibitions of any religion.”<sup>146</sup>

The Sixth Circuit in *Mozert* was critical of the lower court’s reliance on cases in which plaintiffs were required to “make some affirmation or take some action that offends their religious beliefs.”<sup>147</sup> The court’s reference to *Bethel School District No. 403 v. Fraser*, decided by the Supreme Court only one year prior to *Mozert*, suggests that it was sensitive to what may lie between “*exposure*” and “*affirmation*.”<sup>148</sup> Noting how the Court

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141. See *Mozert*, 827 F.2d at 1063–64.

142. *Mozert*, 827 F.2d at 1062 (emphasis added).

143. *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1202–03 (6th Cir. 1987).

144. *Mozert*, 827 F.2d at 1063.

145. *Mozert*, 827 F.2d at 1066.

146. *Mozert*, 827 F.2d at 1064 (citing *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968)).

147. *Mozert*, 827 F.2d at 1065.

148. See *Mozert*, 827 F.2d at 1068.

in *Bethel* affirmed the role of public schools in inculcating fundamental values essential to a democratic society—values that include “tolerance of divergent political and religious views,” the Sixth Circuit read into *Bethel* an “apparent approval [of] the view that . . . public schools [serve] as an assimilative force that brings together ‘diverse and conflicting elements in our society ‘on a broad but common ground.’”<sup>149</sup> The concurring opinion in *Mozert* also relied on the Court’s pronouncement in *Bethel* that “the state through its public schools must ‘inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation,” adding that “[t]eaching students about complex and controversial social and moral issues is just as essential for preparing public school students for citizenship and self-government as inculcating in the students the habits and manners of civility.”<sup>150</sup>

In order to achieve this permissible end, *tolerance as respect*, or reciprocal positive regard for others, must be actively inculcated in students, not merely exposed to them. This kind of civil tolerance is *sine qua non* of life in a pluralistic society, captured, albeit insufficiently, by the authoring judge in *Mozert* in his admonition directed at the parents who sought latitude in the educational program of their children—“live and let live.”<sup>151</sup> As essential as this judicial charge may be in citizenship development, the standard of tolerance embraced in *Mozert* is simply not robust enough to achieve the social justice aims heretofore laid out. “Live and let live” suggests merely leaving folks from unfamiliar backgrounds or with different conceptions of the good life alone, not necessarily engaging with their differences. A “live and let live-*plus*” standard would preferably serve the aims of preparing children to exercise full citizenship and enrich our liberal democracy. Anti-bullying and anti-bias educational practices are good examples of such a heightened standard, as they demand not merely acceptance of, but awareness of, engagement *with*, and active respect *for*, differences.<sup>152</sup>

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149. *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1068 (6th Cir. 1987) (first quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); then quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979)).

150. *Mozert*, 827 F.2d at 1071 (Kennedy, C.J., concurring) (quoting *Bethel*, 478 U.S. at 681).

151. *Mozert*, 827 F.2d at 1069 (“The ‘tolerance of divergent . . . religious views’ referred to by the Supreme Court is a civil tolerance, not a religious one. It does not require a person to accept any other religion as the equal of the one to which that person adheres. It merely requires a recognition that in a pluralistic society we must ‘live and let live.’”) (quoting *Bethel*, 478 U.S. at 681).

152. “Anti-bias [education] requires critical thinking and problem solving by both children and adults. The overarching goal is creating a climate of positive self and group identity development, through which every child will achieve her or his fullest potential.” *Anti-Bias Education*, TEACHING FOR CHANGE (Mar. 8, 2019), <https://www.teachingforchange.org/anti-bias-education>. The Anti-Defamation League defines anti-bias education as:

#### D. *Race, Equality, and Racial Integration in the Public School*

Anti-bullying and anti-bias educational aims can be said to have their early roots in the efforts to force schools to live up to the core civic virtues that they were tasked to inculcate in our youngest citizens, most notably, *equality* under the law. Nowhere was this challenge more fraught with political and social tension than in the context of racial integration of public education, which can be said to serve as a template of sorts for the current educational challenge concerning inclusion of transgender and gender diverse students.

From the mid-nineteenth century until the present day, racial integration brought questions of social citizenship and the true meaning of equality under the law to the fore. Because public education was a civil institution that impacted nearly every citizen, it was hoped that desegregation in this forum would facilitate the inculcation of equality and tolerance on the broadest possible scale. As Stephen Macedo observes, racial desegregation of the public schools was “a controversial centerpiece” of the more inclusive public school system that had grown in the decades following *Meyer* and *Pierce*.<sup>153</sup> However, because its reach was so vast, it was inevitable that it would force these values into confrontation with parental preferences. When white parents opposed to integration were faced with the reality that black children would be learning alongside their own, many chose to withdraw their children from public schools altogether. Such was the case following the enrollment of the first black child in an all-white school, Ruby Bridges, in 1960, who spent her entire first year of “integrated” school in a class of *one*.<sup>154</sup> Images of angry white mobs opposed to racial integration—many of them parents, especially white mothers—drove home just how pitched the battle for control over the public schools had become.<sup>155</sup>

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An approach to teaching and learning designed to increase understanding of differences and their value to a respectful and civil society and to actively challenge bias, stereotyping and all forms of discrimination in schools and communities. It incorporates inclusive curriculum that reflects diverse experiences and perspectives, instructional methods that advance all students’ learning, and strategies to create and sustain safe, inclusive and respectful learning communities.

*What Is Anti-Bias Education*, ANTI-DEFAMATION LEAGUE, [HTTPS://WWW.ADL.ORG/EDUCATION/RESOURCES/GLOSSARY-TERMS/WHAT-IS-ANTI-BIAS-EDUCATION](https://www.adl.org/education/resources/glossary-terms/what-is-anti-bias-education) (last visited Feb. 16, 2020).

153. MACEDO, *supra* note 48, at 126.

154. The threats from white mobs, which included many parents opposed to racial integration of their neighborhood school, prompted the need for Federal Marshalls to escort six-year-old Ruby to and from school. Her ordeal was depicted by Norman Rockwell in his famous painting, *The Problem We All Live With*.

155. ELIZABETH GILLESPIE McRAE, *MOTHERS OF MASSIVE RESISTANCE: WHITE WOMEN AND THE POLITICS OF WHITE SUPREMACY 188* (2018).

Faced with what they saw as a wholesale attack on their values, politics, and cultural power, white segregationist women sought to stave off the invasion by extending their training for the next generation of Jim Crow's white activists . . . [and] their focus on white youth [described as the hope of the nation] intensified.<sup>156</sup>

Reflecting both the centrality of schools in political and social debates and the broader global tensions taking shape at the time of desegregation in the United States, allegations of ties between anti-segregationists and communists began to spread. Such propaganda was aimed at reframing opposition to racial integration as patriotic and consistent with our democratic values—part of a decades long effort to “collapse any distinction between support for segregation and the obligations and duties of national citizenship.”<sup>157</sup> Appreciating women's significance in shaping and transmitting mores and civic virtues, those who regarded education as critical in nurturing “the system of segregation,” saw children within the public schools as “the repositories of their efforts.”<sup>158</sup> Parents' efforts to perpetuate a racial caste system within the public school were ultimately successful. *Brown*, and particularly opposition to its implementation, brought to the fore how parental claims of authority could be used for repressive and discriminatory purposes, especially in districts where “racism and local control of schools were often allies.”<sup>159</sup> Indeed, objections to state mandated racial integration shifted from concerns over racial superiority to what may better be regarded as “‘core talking points of the New Right:’ parental authority over moral, sexual, and academic guidance and religion in the public sphere [and the

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156. *Id.*

157. *Id.* at 42.

158. *Id.* McRae references early pioneers in this movement such as educator, Mildred Lewis Rutherford, who:

[C]alled on white women to guarantee that the school curriculum and personnel taught lessons in white over black, maintained white supremacy, and erased the conflicts endemic to the rise of racial segregation. By encouraging white women to redouble their oversight of public education, she worked to combat white apathy about segregation's security. Rutherford reminded white southern women that they were the daily workers needed to guarantee that white children learned the lessons of segregated citizenship and that they grew up to be white supremacy's future activists. Their focus had to be public schools—the pivotal institution in the creation of a Jim Crow citizenship education.

*Id.* The role of white women in resisting integration was eclipsed in a telling of history that elevated the work of male leaders. “While men debated in legislative chambers and listened to challenges on the bench, women headed to school cafeterias, playgrounds and PTA meetings, doing the bulk of the behind-the-scenes work of supporting the politics of segregation.” Elizabeth Gillespie McRae, *The Women Behind White Power*, N.Y. TIMES (Feb. 2, 2018) <https://www.nytimes.com/2018/02/02/opinion/sunday/white-supremacy-forgot-women.html>.

159. MACEDO, *supra* note 48, at 126.

public school].”<sup>160</sup> This is a theme echoed in today’s debate over “gender ideology” and the ability of parents to avoid the state’s inculcation of progressive gender norms.

While “[e]galitarianism and inclusiveness were always part of the rhetoric of public schools,” serious efforts at racial integration—for the purpose of inculcating civic virtues aimed at fostering social harmony—did not begin until decades after the *Brown* decision in the 1960s and 1970s.<sup>161</sup> Busing and other efforts at racial integration in the public schools during that time were met with tremendous resistance among white parents who were able to effectively re-segregate schools through displacement and lawsuits aimed at ending forced integration efforts.<sup>162</sup> Parents opposed to the idea of racial integration could oppose the state’s effort to inculcate equality and [non-discrimination] as civic virtues by moving into all or nearly all white school districts, contributing further to the phenomenon of “white flight.”<sup>163</sup> In addition to this out-migration to the suburbs, antibusing protests emerged across the nation in response to the effort to forcibly create racially integrated schools.<sup>164</sup> Concomitantly, newly created private schools were also developed as an option for white parents who wished to escape busing.<sup>165</sup> As whites fled urban

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160. Ashleen Menchaca-Bagnulo, *Women’s Hidden Influence: Mothers, Race, and the American Republic*, PUB. DISCOURSE (Apr. 17, 2018), <https://www.thepublicdiscourse.com/2018/04/21274/>.

161. MACEDO, *supra* note 48, at 126.

162. See ANSLEY T. ERICKSON, MAKING THE UNEQUAL METROPOLIS: SCHOOL DESEGREGATION AND ITS LIMITS 143 (2016) (“[I]n some neighborhoods desegregated schools quickly became resegregated, as black people’s movement into some inner-ring suburbs and formerly white city neighborhoods was matched by quick and often total out-migration by white residents. And in the outlying suburbs, real estate agents, developers, and homeowners maintained strict boundaries in residential space, boundaries that could not be overcome by class.”). In exploring opposition to desegregation efforts in Nashville, Erickson reports that:

White parents exercised a range of options in removing their children from [the public] schools, by moving to the outer reaches of the county exempted from busing; moving outside of the county line, enrolling in private schools; seeking (and usually winning) transfer out of a particular school on claims of curricular interest or hardship; or, less frequently, sending their children to live with relatives in other districts or even states.

*Id.* at 237.

163. *Id.* at 243.

164. *Id.* at 193.

165. See *A History of Private Schools & Race in the American South*, SOUTHERN EDUC. FOUND., <https://www.southerneducation.org/publications/historyofprivateschools> (last visited Feb. 27, 2020) (“Private schools in the South were established, expanded, and supported to preserve the Southern tradition of racial segregation in the face of the federal courts’ dismantling of ‘separate but equal.’ White students left public schools in droves to both traditional and newly formed private schools. From 1950 to 1965 private school enrollment grew at unprecedented rates all over the nation, with the South having the largest growth.”)

school districts and busing, suburban areas experienced more economic development as urban areas lost some of their tax base, leading to the very disparities in quality of education and educational resources that were at the heart of *Brown*.<sup>166</sup>

But such efforts to oppose integration were the limit of what these parents could do to oppose the state in its effort to inculcate new racial equality norms, despite whatever personal, political, or religious values upon which parents based their opposition to racial integration. Indeed, so critical to our progress as a nation was the matter of racial integration that parents were not empowered to exercise their democratic voice to directly determine whether or not it would happen on a local level, nor were parents permitted to determine within the scope of parental authority whether racial integration was consistent with the personal values they wished to inculcate in their children.<sup>167</sup>

This Article posits that the issue of gender identity and “gender theory” is of even greater magnitude in social depth and scope, largely because it cannot be countered with the same resistance strategy of removal and isolation. While one might be able to isolate one’s children in racially homogenous school districts,—effectively, although perhaps only temporarily, escaping exposure to the idea of racial equality—such is not the case with gender. Gender, unlike race, is inescapable, cutting across racial, class, and cultural divides. Since gender—gender identity, gender expression and gender diversity—is *everywhere*, it continues to make itself manifest even in racially resegregated schoolrooms. It is precisely the ubiquity of gender that makes it particularly ripe for achieving the transformation of “hearts and minds” that *Brown* could not because of the many de facto opt-outs available to white parents.

### E. *Gender Identity and Expression in the Public School*

Matters of identity, including race, gender, and sexual orientation, occupy a unique place in the pantheon of civil rights claims. After racial equality, some advocates note, transgender equality has emerged as the next “civil rights issue of our time.”<sup>168</sup> In many ways, the path

166. ERICKSON, *supra* note 162, at 243.

167. Parents who were opposed to racial integration *were* able to exercise parental choice by essentially opting out of the public schools through relocation away from districts where integration was ordered. Public schools became effectively resegregated after *Brown* due to residential segregation and socioeconomic stratification, since, in theory, only parents with reasonable financial means to relocate—whites—would be able to exercise this option, leaving poorer, more likely black and brown families behind. Michelle Chen, *Our Schools Are Actually Resegregating*, NATION (June 20, 2017), <https://www.thenation.com/article/our-schools-are-actually-re-segregating/>.

168. Joe Biden, *Introduction to SARAH MCBRIDE, TOMORROW WILL BE DIFFERENT: LOVE, LOSS, AND THE FIGHT FOR TRANS EQUALITY*, at xii (2018) (“We are at an inflection point in the fight for transgender equality, what I have called the civil rights issue of our time.”).



that transgender inclusion has taken through social and political debates resembles that charted decades ago on the racial equality front, including the ways in which both issues have been litigated in the context of diversity and inclusion within the public schools.<sup>169</sup> The symmetrical arcs of these social justice causes was never more evident than in 2017 when the Supreme Court seemed poised to weigh in on the matter of transgender high school student Gavin Grimm’s quest for equal access to gender-specific spaces—specifically the boy’s bathroom that corresponded with his male gender identity—in his public school.<sup>170</sup> Though Grimm’s quest for equality did not end with a seminal *Brown v. Board of Education* opinion for the ages,<sup>171</sup> Grimm’s four-year lawsuit has come to embody the national debate about transgender student rights.<sup>172</sup>

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169. The analogous ways in which the issue of racial discrimination and discrimination on the basis of gender identity have emerged were made clear in the Fourth Circuit opinion comparing transgender plaintiff Gavin Grimm’s quest with that of “Dred Scott, Fred Korematsu, Linda Brown, Mildred and Richard Loving, Edie Windsor, and Jim Obergefell, to name just a few—who refused to accept quietly the injustices that were perpetuated against them.” *G.G. v. Gloucester Cty. Sch. Bd.*, 853 F.3d 709, 730 (4th Cir. 2017)(Davis, J., concurring). Said Judge Davis:

G.G.’s case is about much more than bathrooms. It’s about a boy asking his school to treat him just like any other boy. It’s about protecting the rights of transgender people in public spaces and not forcing them to exist on the margins. It’s about governmental validation of the existence and experiences of transgender people, as well as the simple recognition of their humanity. His case is part of a larger movement that is redefining and broadening the scope of civil and human rights so that they extend to a vulnerable group that has traditionally been unrecognized, unrepresented, and unprotected.

*Id.*

170. *G.G.*, 853 F.3d at 715–16.

171. See Liam Stack, *Transgender Students Turn to Courts as Government Support Erodes*, N.Y. TIMES (July 14, 2017), <https://www.nytimes.com/2017/07/14/us/transgender-students-trump.html>; see also Caitlin Emma, *Transgender Students Asked Betsy DeVos for Help. Here’s What Happened.*, POLITICO (Aug. 18, 2018), <https://www.politico.com/story/2018/08/18/transgender-students-betsy-devos-trump-education-department-743162>.

172. On August 9, 2019, Federal District Judge Arenda Allen ruled in Grimm’s favor and struck down the school board’s policy, finding that there is “no question” the policy was discriminatory. She wrote that transgender “students are singled out, subjected to discriminatory treatment, and excluded from spaces where similarly situated students are permitted to go.” *Grimm v. Gloucester Cty. Sch. Bd.*, 400 F. Supp. 3d 444, 457 (E.D. Va. 2019). In September 2019, the Gloucester County School Board filed a notice of appeal. While the scope of this article does not extend to interpretation of Title IX as it relates to gender identity, a growing number of federal appellate and district court opinions—most recently, *Grimm* on remand—support application of Title IX protections to the claims raised by transgender students who seek access to sex-segregated spaces. See, e.g., *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017); *Grimm v. Gloucester Cty. Sch. Bd.*, 400 F. Supp. 3d 444 (E.D. Va. 2019); *Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1106 (D. Or. 2018); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704 (D. Md. 2018); Kasper

As they were in relation to racial integration, schools are a sort of ground zero in the quest for transgender equality. Indeed, the public school has emerged at the epicenter of one of our most contentious social and political debates about gender identity and transgender inclusion. Debates over how schools should accommodate transgender and gender expansive children are taking place in the backdrop *of*, and influenced *by*, what has been described as a national “crisis of connection” among the most divided American population in decades.<sup>173</sup> All the more unsurprising, therefore, that the division inside of school has come to mirror the divisions outside. The hot-button debates playing out beyond the school-house gate are with increasing frequency arising within the halls—or more specifically, bathroom, and locker rooms—of K-12 public schools.

How are schools currently approaching the topic of gender identity, transgenderism, and gender diversity? One measure of how schools are doing focuses on the preparation—or lack thereof—of those within the schools tasked with teaching about gender diversity and supporting gender diverse students. A 2014 study of school professionals who have worked with transgender children revealed how little prepared educators were to provide an affirming and inclusive environment for transgender and gender diverse children based on gaps in their own professional education and training.<sup>174</sup> Where LGBTQ issues were addressed in educator training, “the content was usually isolated in social foundations courses while other forms of diversity were more widely integrated across the curriculum.”<sup>175</sup> LGBTQ content is typically excluded from social foundations of education textbooks, or worse, the content “reinforce[s] negative stereotypes and marginalize[s] LGBT people.”<sup>176</sup> Researchers found that

v. Sch. Bd. of St. Johns Cty., 318 F. Supp. 3d 1293, 1325 (M.D. Fla. 2018) (concluding “that the meaning of ‘sex’ in Title IX includes ‘gender identity’ for purposes of its application to transgender students”); Doe v. Bd. of Educ. of Highland Local Sch. Dist., 208 F. Supp. 3d 850 (S.D. Ohio 2016); Appleberry v. Blue Springs R-IV Sch. Dist., 568 S.W.3d 420 (Mo. 2019). Title IX provides that no person “shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (Westlaw through P.L. 116-112); *see also* Education Programs or Activities, 34 C.F.R. § 106.31 (2020).

173. NIobe WAY ET AL., *THE CRISIS OF CONNECTION: ROOTS, CONSEQUENCES AND SOLUTIONS* 25–38 (2017) (exploring ideological gaps that have contributed to alienation, disconnection, and decreasing levels of empathy and trust in modern society); PEW RESEARCH CENTER, *THE PARTISAN DIVIDE ON POLITICAL VALUES GROWS EVEN WIDER* (2017), <http://assets.pewresearch.org/wp-content/uploads/sites/5/2017/10/05162647/10-05-2017-Political-landscape-release.pdf>.

174. Elizabeth Payne & Melissa Smith, *The Big Freak Out: Educator Fear in Response to the Presence of Transgender Elementary School Students*, 61 J. HOMOSEXUALITY 399, 400 (2014).

175. *Id.*

176. Ian MacGillivray & Todd Jennings, *A Content Analysis Exploring Lesbian, Gay, Bisexual, and Transgender Topics in Foundations of Education Textbooks*, 59 J. TEACHER EDUC. 170 (2008).

teacher educators often exclude LGBT topics unintentionally because the issues are beyond their consciousness or intentionally because they are unsure of how to discuss them or whether they are permitted to discuss them or because of their own anti-gay beliefs.<sup>177</sup>

Omission of material on sexual orientation and gender identity is problematic because of the likelihood that exclusion signals that those topics only matter to LGBT people—as if no one else has a sexual orientation or a gender identity—and of failing to call into question heterosexual assumptions about what is “normal.”<sup>178</sup> LGBTQ identities are often placed in text sections on suicide, depression, or sexually transmitted disease, which narrowly defines these students as victims or at-risk youth in need of protection or therapeutic intervention.<sup>179</sup> A meta-analysis of teacher education texts found that only one text explicitly “linked gender identity with transgender identities and explained what it means to be transgender.”<sup>180</sup> As Payne and Smith point out, “transgender children introduce the body—and, implicitly, *sexuality*—into the classroom,” prompting teachers faced with having to address these issues to experience anxiety and fears, including “reprisals from parents” “and wider public reaction, as well as specific concerns around how to appropriately introduce sexuality as a classroom subject.”<sup>181</sup> Teachers expressed fear that “objecting parents could ‘go public’ and call media attention to the work in school,” making it harder to teach anything at all, much less diverse genders and sexualities.<sup>182</sup> They “also feared that being seen as LGBT or an ally could put them at risk for personal violence and therefore often choose to keep any supportive work they do ‘invisible.’”<sup>183</sup> These fears have been “influenced by the explicit notion that schools are havens of childhood ‘innocence’” where children are “untouched” by the “sex” and “sexuality” concerns of the adult world.<sup>184</sup> To discuss gender transgression is to—by association—discuss sex. And to discuss sex in elementary school is strictly taboo.<sup>185</sup>

177. *Id.* at 171.

178. *Id.* at 183.

179. Payne & Smith, *supra* note 174, at 400.

180. *Id.*

181. *Id.* at 402.

182. *Id.*

183. *Id.*

184. Alexandra Allan et al., *Speaking the Unspeakable in Forbidden Places: Addressing Lesbian, Gay, Bisexual and Transgender Equality in the Primary School*, 8 *SEX EDUC.* 315, 315 (2008).

185. Payne & Smith, *supra* note 174, at 402. Payne and Smith add:

Conversations around sexuality or gender identity were often conflated with conversations about sex—which is taboo and must be strictly avoided. Participants expressed fear that a response might be ‘wrong’ or touch on ‘inappropriate’ topics for elementary school children, and we posit that this is a result of heteronormative discourses that frame the gender transgressing body as hypersexualized. Students who fall outside

The heightened awareness and visibility of transgender children and the increased frequency with which they are transitioning in K-12 schools inevitably brings teachers, staff, and students into greater contact with gender variance and “the other-ness” that deviation from gender norms seems to generate. For many, this awareness is accompanied by the anxiety that reasonably and naturally accompanies change.<sup>186</sup> Of course, in this specific context, the resulting anxiety is likely heightened by the nature of the encounter, which, “in our patriarchal culture where particular forms of masculinity are deeply aligned with power and dominance” regards “any gender variance or gender non-conformity [as] a threat to societal notions of the ‘rightness’ and ‘naturalness’ of the binary gender system that is at the core of our social structure.”<sup>187</sup> In the absence of meaningful knowledge about gender identity, gender variance, or transgender identity due to biases and/or significant limitations in their own professional development, educators sometimes approach the presence of transgender children “as a threat to the order of the school.”<sup>188</sup> “Educators’ actions in response to addressing the needs of transgender and gender diverse students are being dictated by fears of parents’ accusations of “promoting” an agenda or “exposing” their children to something inappropriate. Framing the education of a transgender student in this way leaves very little room for pedagogical innovations that could challenge or disrupt gender norms.”<sup>189</sup> Although they may have believed they were fulfilling a professional responsibility by accommodating transgender students in their classrooms, the educators who were surveyed may actually have been placing transgender students under surveillance by monitoring their movement rather than affirming their identities.<sup>190</sup> The narratives these educators shared beg the question: “Responsible to *whom*?” Many of their decisions imply they feel responsible to parents, community, or the myth of childhood innocence—not to the transgender child.<sup>191</sup>

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the heteronormative alignment of biological sex, normative gender, and hetero- sexual orientation are hyper-visible and often perceived as dangerous and hypersexual. In elementary school contexts, where childhood innocence is strictly defined and strictly protected, gender transgressions pose a significant threat to the taken-for-granted institutional order.

*Id.* at 408.

186. *Id.* at 403.

187. *Id.* (quoting Graciela Slesaransky-Poe & Ana M. García, *Boys with Gender Variant Behaviors and Interests: From Theory to Practice*, 9 *SEX EDUC.* 201, 209 (2009)); see also Judith Butler, *Judith Butler: The Backlash Against “Gender Ideology” Must Stop*, *NEW STATESMAN* (Jan. 21, 2019), <https://www.newstatesman.com/2019/01/judith-butler-backlash-against-gender-ideology-must-stop>.

188. Payne & Smith, *supra* note 174, at 415.

189. *Id.*

190. *Id.*

191. *Id.*

What makes the above sentiment particularly alarming is captured by the other reliable measure of how schools are doing in supporting transgender and gender diverse students—survey data from students themselves and from transgender adults reporting on their experiences in K-12 schools. Transgender students consistently report the highest levels of harassment in schools than any other group of youth, with more than three-quarters (seventy-seven percent) of those who were out or perceived as transgender at some point during K-12 reporting that they “experienced some form of mistreatment, such as being verbally harassed, prohibited from dressing according to their gender identity, disciplined more harshly, or physically or sexually assaulted because people thought they were transgender.”<sup>192</sup> Seventeen percent of the respondents reported that the harassment was so severe that they actually left a K-12 school.<sup>193</sup> These early experiences of mistreatment in schools have a lasting impact on the adults these children become.<sup>194</sup>

The 2017 GLSEN National School Climate Survey confirms that the conditions and experiences described above continue to exist.<sup>195</sup> The survey revealed that almost all of the indicators of a negative school environment were present, including routinely hearing anti-LGBTQ language and experiencing victimization and discrimination at school.<sup>196</sup> Some policies particularly targeted transgender and gender nonconforming students: 42.1 percent of transgender and gender nonconforming students had been prevented from using their preferred name or pronoun; 46.5 percent of transgender and gender nonconforming students had been required to use a bathroom of their legal sex; and 43.6 percent

192. SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 4, 11 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

193. *Id.* at 4.

194. *Id.* at 132 (“[R]espondents who were out or perceived as transgender in K-12 and had one or more negative experiences [noted above] were: more likely to have attempted suicide (52%) than those who were out or perceived as transgender and did not have any of these negative experiences (37%); more likely to have experienced homelessness (40%) than those who were out or perceived as transgender and did not have any of the negative experiences (22%); [and] more likely to currently be experiencing serious psychological distress (47%) than those who were out or perceived as transgender and did not have any of the negative experiences (37%).”).

195. JOSEPH G. KOSCIW ET AL., THE 2017 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER YOUTH IN OUR NATION’S SCHOOLS (2018), <https://www.glsen.org/research/2017-national-school-climate-survey-0>.

196. *Id.* at xviii-xix (indicating that 94.0 percent of LGBTQ students heard negative remarks about gender expression; 62.2 percent heard these remarks often or frequently; 87.4 percent of LGBTQ students heard negative remarks specifically about transgender people; 45.6 percent heard them often or frequently; 56.6 percent of students reported hearing homophobic remarks from their teachers or other school staff; and 71.0 percent of students reported hearing negative remarks about gender expression from teachers or other school staff).

of transgender and gender-diverse students had been required to use a locker room of their legal sex.<sup>197</sup> Not surprisingly, as a result of these experiences of exclusion and victimization, many LGBTQ students avoid school activities or miss school entirely.<sup>198</sup> The discrimination, bullying, and marginalization that LGBTQ students, and especially transgender and gender diverse students, report reveals how far schools are from ensuring a safe and respectful learning environment in which all students have an equal opportunity to thrive. The risks that transgender and gender-diverse students continue to face offers compelling evidence that more must be done to live up to the promise in *Brown* of making education available to all on equal terms.<sup>199</sup>

### III. CHILDREN'S BEST INTERESTS AS GUIDING SCHOOL POLICY AND PRACTICE

It is axiomatic that the unique developmental needs of children dictate that their best interests should guide all decisions that impact them. A prioritization of best interests is reflected in almost all of the legal rules pertaining to child-related decision-making in the United States as well as across the globe. It is a central organizing principle reflected in the seminal human rights treaty pertaining to children, the Convention on the Rights of the Child.<sup>200</sup> So central is our commitment to the best interests of children that the concept serves as a touchstone for all child-related decision making in our nation's legal system.

In the context of domestic relations cases in which the court is tasked with custodial decision-making, all custody and visitation discussions and decisions are made with the ultimate goal of fostering and encouraging the child's happiness, security, mental health, and emotional development into young adulthood, in totality referred to as the child's best interests.<sup>201</sup> While there is no exhaustive list of factors that are taken

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197. *Id.* at xx.

198. *Id.*

199. Indeed, it can be argued that the experiences transgender and gender diverse children in K-12 face are as likely as racial segregation to "generate[] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494 (1954).

200. *See* United Nations Convention on the Rights of the Child, art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3 ("In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."), <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

201. *Id.* ("Courts make a variety of decisions that affect children, including placement and custody determinations, safety and permanency planning, and proceedings for termination of parental rights. Whenever a court makes such a determination, it must weigh whether its decision will be in the 'best interests' of the child.").

into account in determining a child's best interests, the range of individual factors are meant to balance concerns around present and future needs. Similarly, the rules in dependency and probate matters take guidance from domestic relations custody decision-making, so that decisions pertaining to children in child welfare and guardianship reflect the same emphasis on the best interests of the child.<sup>202</sup> Because it has effectively served as a ubiquitous standard for policy and legal decision-making in relation to children, there is no reason to believe that best interests would fail to do the same when applied to matters concerning education. Indeed, even the "parentalist" approach advanced by Gilles prioritizes the best interests of the child as a guiding principle in determining how children will be educated.<sup>203</sup> Few, therefore, would object to the idea that applying a best interest framework to how schools address gender identity, gender expression, and all matters pertaining to gender in youth simply makes sense, at least *conceptually*. In practice, however, tension would still, of course, arise with respect to the source upon which best interest determinations would be based—a call that this author makes in favor of evidence-based psychological and medical research, the growing body of which supports a gender affirmative approach.

Although the research is still relatively new, longitudinal studies reveal that overall adjustment for gender diverse children is best supported with affirmative practices and that socially supported transgender children might have better mental health outcomes than transgender children who are not supported in their identities.<sup>204</sup> As it relates to transgender children in particular, allowing children to present in everyday life as their gender identity rather than their natal sex is associated with developmentally normative levels of depression and anxiety.<sup>205</sup> As to the concern that social transitioning—which includes a range of entirely reversible behaviors like hairstyles, manner of dress, and pronoun and name use—"changes" kids in some way, the longitudinal research

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202. CHILD WELFARE INFORMATION GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 1 (2016), [https://www.childwelfare.gov/pubpdfs/best\\_interest.pdf](https://www.childwelfare.gov/pubpdfs/best_interest.pdf) ("Courts make a variety of decisions that affect children, including placement and custody determinations, safety and permanency planning, and proceedings for termination of parental rights. Whenever a court makes such a determination, it must weigh whether its decision will be in the 'best interests' of the child."); *see, e.g.*, 750 ILL. COMP. STAT. ANN. 5/602.5 (Westlaw through Pub. Act No. 101–622) (requiring courts in child custody cases to "allocate decision-making responsibilities according to the child's best interests"); 755 ILL. COMP. STAT. ANN. 5/11–5 (Westlaw through Pub. Act No. 101–629) (conditioning appointment of a guardian for a minor on "a find[ing] [that] the appointment of a guardian of the minor [is] in the best interest of the minor").

203. Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 951–52 (1996).

204. Kristina Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137 PEDIATRICS 1, 7 (2016).

205. *Id.*



suggests otherwise and, if anything, supports an affirmative approach.<sup>206</sup> Psychologist Kristina Olson, who conducted the first large-scale U.S. study of transgender children, explored the possibility that affirmation and support by a prepubescent child’s parents and in the school environments in which these children spend the majority of their days could be associated with good mental health outcomes in transgender children. As to the concern that supportive practices may themselves channel gender diverse children into further non-conformity, Olson advises that “making th[e] decision [to socially transition] is [not] going to necessarily put a kid on a particular path.”<sup>207</sup> Olson’s research supports the premise that “[c]hildren change their gender because of their *identities*; they don’t change their identities because they change their gender.”<sup>208</sup> Olson’s findings mirror those of other researchers who found an association between affirming practices and better mental health outcomes for youth.<sup>209</sup> Together, these studies provide “further credence to guidance that practitioners and other professionals should affirm—rather than question—a child’s assertion of their gender, particularly for those who more strongly identify with their gender.”<sup>210</sup>

In its 2018 Policy Statement, the American Academy of Pediatrics took note of the fact that youth who identify as transgender and gender diverse “often confront stigma and discrimination, which contribute to feelings of rejection and isolation that can adversely affect physical and emotional well-being” and recommended the adoption of a gender affirmative care model from which schools can take guidance.<sup>211</sup> The AAP advises that “providers work together to destigmatize gender variance, promote the child’s self-worth, facilitate access to care, educate families,

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206. Ed Yong, *Young Trans Children Know Who They Are*, ATLANTIC (Jan. 15 2019), <https://www.theatlantic.com/science/archive/2019/01/young-trans-children-know-who-they-are/580366/>.

207. *Id.*

208. Olson et al., *supra* note 204, at 4.

209. See, e.g., Jason Rafferty et al., *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 142 PEDIATRICS 1, 8 (2018); Stephen Russell et al., *Lesbian, Gay, Bisexual, and Transgender Adolescent School Victimization: Implications for Young Adult Health and Adjustment*, 81 J. SCH. HEALTH 223, 229 (2011); Caitlin Ryan et al., *Family Acceptance in Adolescence and the Health of LGBT Young Adults*, 23 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 205, 210–11 (2010).

210. Yong, *supra* note 206.

211. Rafferty et al., *supra* note 209, at 4 (noting that “in a Gender Affirmative Care Model, the following messages are conveyed: transgender identities and diverse gender expressions do not constitute a mental disorder; variations in gender identity and expression are normal aspects of human diversity, and binary definitions of gender do not always reflect emerging gender identities; gender identity evolves as an interplay of biology, development, socialization, and culture; and if a mental health issue exists, it most often stems from stigma and negative experiences rather than being intrinsic to the child”).

and advocate for safer community spaces where children are free to develop and explore their gender,” work that can greatly influence the way in which schools approach the task of creating safe learning environments.<sup>212</sup> A similar policy guideline issued in 2015 by the American Psychological Association advocates for “the provision of culturally competent, developmentally appropriate, and trans-affirmative psychological practice with transgender and gender non-conforming people” including youth.<sup>213</sup> The APA guidelines, however, remain ambivalent about the consensus that exists for treatment approaches with very young children, as opposed to adolescents for whom “there is greater consensus that treatment approaches for adolescents affirm an adolescents’ gender identity.”<sup>214</sup>

While policies and practices aimed at creating safe school environments that promote the best interests of all children do exist, structural legal hurdles impacting transgender and gender diverse youth remain the norm. At present, only 21 states, Puerto Rico, and the District of Columbia have adopted nondiscrimination laws that apply to schools and protect students from bullying by other students, teachers, and school staff on the basis of sexual orientation and/or gender identity.<sup>215</sup> Laws that ensure gender identity protections are necessary to achieve well-being aims but these laws are currently the exception. One such statute is California’s AB 1266, which gave transgender students in public K-12 schools the right “to participate in sex-segregated programs, activities, and facilities” according to their gender identities.<sup>216</sup> Other states such as Massachusetts, Connecticut, and Washington have statewide policies that ensure such protections but are not guaranteed by law.

Again, it is useful here to draw an analogy between race and gender for the ways in which both markers of identity impact a child’s experience in school, and hence, influence their overall well-being. However, as noted earlier, while both identifying markers impact a child’s

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212. Jenifer K. McGuire et al., *School Climate for Transgender Youth: A Mixed Method Investigation of Student Experiences and School Responses*, 39 J. YOUTH ADOLESCENCE 1175 (2010) (“[S]chools were open to education regarding gender diversity and were willing to implement policies when they were supported by external agencies, such as medical professionals.”).

213. Am. Psychol. Ass’n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCHOL. 832, 832 (2015).

214. *Id.* at 842.

215. *Safe School Laws*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality-maps/safe\\_school\\_laws](https://www.lgbtmap.org/equality-maps/safe_school_laws) (last visited Feb. 27, 2020).

216. CAL. EDUC. CODE § 221.5(f) (Westlaw through Ch. 3 of 2020 Reg.Sess). Massachusetts, Connecticut, and Washington also have legislation similar to California’s. See MASS. GEN. LAWS ch. 76, § 5 (Westlaw through Chapter 44 of 2020 2<sup>nd</sup> Annual Session); WASH. REV. CODE § 28A.642.080 (Westlaw through Ch. 29 of 2020 Reg. Sess.); CONNECTICUT STATE DEP’T OF EDUC., GUIDANCE ON CIVIL RIGHTS PROTECTIONS AND SUPPORTS FOR TRANSGENDER STUDENTS: FREQUENTLY ASKED QUESTIONS (2017), [https://portal.ct.gov/-/media/SDE/Title-IX/transgender\\_guidance\\_faq.pdf?la=en](https://portal.ct.gov/-/media/SDE/Title-IX/transgender_guidance_faq.pdf?la=en).

experience at school, only gender is virtually inescapable.<sup>217</sup> This is the case because, in the face of *Brown*'s dashed hopes of racially integrated learning environments, we have all too many examples of racially re-segregated learning spaces. In such racially homogenous spaces the issue of racial identity—particularly membership in a minority group and the encounter with “other-ness” as a matter of racial difference—is less likely to emerge within school as a social, cultural, or legal issue.

This is not the case with gender, as issues related to gender diversity, gender expression, and gender identity will surface even in racially segregated schools or same-sex institutions. There is abundant research about the relationship between students' sense of safety and their ability to succeed in school, and gender or how one expresses gender, is one of the factors that greatly impacts perceptions of safety.<sup>218</sup> As gender spectrum advocates note, “[o]ur society's limited understanding of, and appreciation for, gender diversity has a very important consequence: bullying.”<sup>219</sup> As a primary socializing agent, schools have a tremendous opportunity and responsibility to be inclusive of all students, regardless of their gender identity or expression, and to get at the root of what may be driving instances of bullying behavior. In this role, educational institutions and the professionals associated with them can significantly impact the degree to which gender diversity in children and teens is viewed—either positively or negatively.<sup>220</sup> As will be explored in greater detail in Part V, gender complex and LGBTQ-inclusive curricula both serve children's best interests by supporting gender diversity identity development while also accepting a broader and more inclusive vision of gender expression.

#### IV. SUBORDINATING PARENTAL PREROGATIVES TO PRIORITIZE THE BEST INTERESTS OF THE CHILD

##### A. *Curricular Matters as Beyond the Reach of Parents*

In order to achieve the educational aims discussed heretofore, the state's interest 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. This subordination of parental prerogatives rests, in part, on the notion that neither *Meyer*, *Pierce*, nor *Yoder*—notwithstanding their recognition of a parent's right to control his child's education—should be understood as conferring upon parents an absolute right to dictate curriculum content. Parents, nonetheless, are particularly motivated to advance their authority over curriculum on matters concerning sex and sexuality, and it is the body of

217. See discussion *supra* Subpart E.

218. See *KOSCIW ET AL.*, *supra* note 195, at 14–16.

219. *Education*, GENDER SPECTRUM, <https://www.genderspectrum.org/explore-topics/education/> (last visited Feb. 16, 2020).

220. See *id.*

case law concerning sex education that helps to bolster the instant claim that policies and practices grounded in gender complex and LGBTQ-inclusive curricula are beyond the reach of parents. The overwhelming majority of cases support the premise that parents do not have a constitutionally protected right to be the exclusive educators of their children in this domain, an argument that can be made with even greater force in relation to concepts around gender. This Part discusses several cases that touch upon the school's role in addressing matters of public health and citizenship formation and the permissible subordination of parental liberty claims.

Although the case is half a century old, *Cornwell v. State Board of Education* illustrates how alleged constitutional infringements can be justified by a greater state interest in citizenship formation, even in the face of parental claims of religious liberty. This is especially true when the underlying issue touches on matters of concern to the health and functioning of the general public, a claim that would seem to hold as much sway now as it did in 1969.<sup>221</sup> The plaintiffs in *Cornwell* challenged the enforcement of a Maryland bylaw passed by the board of education making sex education for all children an integral part of the curriculum.<sup>222</sup> In upholding the bylaw, the court ruled that the constitutional allegations were wholly insubstantial.<sup>223</sup> Justifying the sex education classes as an important public health measure that outweighed the individual rights of privacy, parental autonomy, or religious freedom, the court noted that “[a] democratic society rests . . . upon the health, well-rounded growth of young people into full maturity as citizens.”<sup>224</sup>

The second case concerning parental control in the area of sex education is the 1995 case of *Brown v. Hot, Sexy & Safer Productions*.<sup>225</sup> Grounding their claims in *Meyer* and *Pierce*, parent-plaintiffs in *Brown* alleged that the defendants violated their privacy right to direct the upbringing of their children and educate them in *accord* with their own views.<sup>226</sup> This, they maintained, is a constitutionally protected “fundamental right” and thus can only be infringed upon a showing of a “compelling state interest” that cannot be achieved by any less restrictive means.<sup>227</sup> Interpreting *Meyer* and *Pierce* as cases establishing “that the state cannot prevent parents from choosing a specific educational program—whether it be religious instruction at a private school or instruction in a foreign language,” the court in *Brown* accepted the premise that the state “does not have the power to ‘standardize its children’ or ‘foster a homogenous

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221. See *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340 (D. Md. 1969).

222. See *Cornwell*, 314 F. Supp. at 341.

223. See *Cornwell*, 314 F. Supp. at 344.

224. *Cornwell*, 314 F. Supp. at 344.

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

226. See *Hot, Sexy & Safer Prods.*, 68 F.3d at 530.

227. *Hot, Sexy & Safer Prods.*, 68 F.3d at 532.

people’ by completely foreclosing the opportunity of individuals and groups to choose a different path of education.”<sup>228</sup> The court, however, did not take this to mean that parents enjoyed a “fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children.”<sup>229</sup> Indeed, in distinguishing the claims in *Brown* from those raised in *Meyer* and *Pierce*, the court observed that:

We think it is fundamentally different for the *state* to say to a *parent*, ‘You can’t teach your child German or send him to a parochial school,’ than for the *parent* to say to the *state*, ‘You can’t teach my child subjects that are morally offensive to me.’ The first instance involves the state proscribing parents from educating their children, while the second involves parents prescribing what the state shall teach their children.<sup>230</sup>

Cautioned the court, “[i]f all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for *each* student whose parents had genuine moral disagreements with the school’s choice of subject matter.”<sup>231</sup> The resounding message from *Brown* and its progeny is that “the rights of parents as described by *Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools.”<sup>232</sup>

With respect to opt-out or opt-in provisions that might assuage objecting parents, it is the position of this author that such options should not be made available with respect to the policies and practices attendant to gender complex and LGBTQ-inclusive curricula. This position is grounded in both legal precedent, which does not establish a right for parents to opt their children out of offending educational content, and policy.<sup>233</sup> The benefit of these curricula lies in the manner in which they make gender diversity visible in the entire school environment—not only the discrete enclaves occupied by consenting parents—and provide opportunities for *all* students to engage in safe and respectful discussion on the topic—even those (perhaps *especially* those) whose parents provide alternate messaging. Because *exposure* to ideas and values contrary to those inculcated in the family is a necessary precondition to meaningful engagement in dialogue about the underlying issues, it should not be avoided on the basis of parental preferences. The issue of “state facilitated exposure” is at the heart of the following cases that favor subordination of parental prerogatives.

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228. *Hot, Sexy & Safer Prods.*, 68 F.3d at 533.

229. *Hot, Sexy & Safer Prods.*, 68 F.3d at 533.

230. *Hot, Sexy & Safer Prods.*, 68 F.3d at 534.

231. *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 534 (1st Cir. 1995).

232. *Hot, Sexy & Safer Prods.*, 68 F.3d at 534.

233. See generally *Hot, Sexy & Safer Prods.*, 68 F.3d at 534; *Mozert v. Hawkins Cty. Pub. Sch.*, 647 F. Supp. 1194 (E.D. Tenn. 1986); *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340 (D. Md. 1969).

The first of these cases, *Epperson v. Arkansas*, concerned an Arkansas anti-evolution statute that made it a criminal offense to teach the theory that man evolved from a lower form of animal life.<sup>234</sup> The Supreme Court held that the act was an unconstitutional violation of the Establishment and Free Exercise Clauses reasoning that a state may not proscribe the teaching of a particular segment of knowledge solely because it conflicts with a particular doctrine of a particular religious group.<sup>235</sup> Citing an early 1952 case concerning the revocation of a license for the showing of a film on the ground that it was, under state educational law, deemed “sacrilegious,” the Court in *Epperson* observed that “the state has no legitimate interest in protecting any or all religions from views distasteful to them.”<sup>236</sup>

The second case, *Mozert v. Hawkins*, is discussed at length in Part C in relation to democratic education in a pluralist society. It need not be reviewed at length again here except to note that it, like the other cases cited herein, could be read to support withholding an opt-out provision for parents in schools choosing to implement gender complex and LGBTQ-inclusive curricula, even in the face of religiously based objections.<sup>237</sup> As the district court in *Mozert* reminds, “[t]he mere fact that the [plaintiffs’] religious practice is burdened by a governmental program does not mean that an exemption accommodating [their] practice must be granted.”<sup>238</sup> The state may justify an inroad on religious liberty by showing that it is the *least restrictive* means of achieving some *compelling* state interest.<sup>239</sup> No one would argue that the provision of public education itself is not compelling, but I would add that our crisis of uncivility, increasing incidents of bias-based bullying, and the staggering data pertaining to elevated risk for LGBTQ students makes the compelling nature of the state’s claim—without an accommodation for objecting parents—especially clear, and most importantly, constitutional.<sup>240</sup> Of course, we don’t know whether the means to achieve the compelling interest in *Mozert* would ultimately have been determined to be the least restrictive since the Sixth Circuit avoided the means-ends test altogether by distinguishing the state activity in question as mere exposure to objectionable material—something which the court held was not actionable as a violation of free exercise.

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234. See *Epperson v. Arkansas*, 393 U.S. 97, 98 (1968).

235. See *Epperson*, 393 U.S. at 98.

236. *Epperson*, 393 U.S. at 107.

237. See *Mozert*, 647 F. Supp. 1194.

238. *Mozert*, 647 F. Supp. at 1200.

239. *Mozert v. Hawkins Cty. Pub. Sch.*, 647 F. Supp. 1194, 1200 (E.D. Tenn. 1986) (citing *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)).

240. “Providing public schools ranks at the very apex of the function of a state.” *Mozert*, 647 F. Supp. at 1201 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972)).

Because it concerns the matter of providing parents with an opt-out provision from lessons touching on LGBTQ identity, the third case, *Parker v. Hurley*, serves as an especially apt example of how the issues addressed in this Article might unfold in a legal challenge.<sup>241</sup> The 2008 appellate case upheld the dismissal of Massachusetts parents' claims alleging that the schools systematically indoctrinated their children about homosexuality and same-sex marriage in ways contrary to their religious beliefs.<sup>242</sup> Relying on *Meyer* and *Pierce*, these parents asserted a substantive due process right to parental liberty as well as their own and their children's rights to free exercise of religion.<sup>243</sup> Raising what have become familiar objections in relation to sex education in the K-12 curriculum, these parents did not object to the "nondiscrimination curriculum" itself, but rather to the school district's refusal to provide them notice of that curriculum and an opportunity to opt-out from instruction.<sup>244</sup> The parents attempted to rely on *Yoder* to buttress their claims with religious liberty concerns, but the court disagreed, concluding instead that "the state's interest in preventing discrimination, specifically discrimination targeted at students in school, justified the policy."<sup>245</sup> Although the parents asserted that their curriculum claim was a "logical extension: of their 'fundamental' parental liberty," the court found more persuasive the school district's argument that such a claim "runs afoul of the general proposition that, while parents can choose between public and private schools, they do not have a constitutional right to direct *how* a public school teaches their child."<sup>246</sup> In the end, since the school was merely providing material—effectively, *exposing* children to the rich diversity of families in the broader community—the curriculum in Massachusetts was not trying to instruct children that their religious understandings of marriage were necessarily wrong, but was rather encouraging civil tolerance toward *all* families, including those who appeared to be violating their religious tenets.<sup>247</sup>

Because *exposure* as a civic aim is, as Fleming and McClain proclaim, "eminently defensible," it must be safeguarded from parental overreach.<sup>248</sup> As Amy Gutmann observes:

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

242. *Parker*, 514 F.3d at 107.

243. *Parker*, 514 F.3d at 102.

244. *Parker*, 514 F.3d at 102.

245. *Parker*, 514 F.3d at 94–95.

246. FLEMING & McCLAIN, *supra* note 58, at 131.

247. See *Parker v. Hurley*, 514 F.3d 87, 105–06 (1st Cir. 2008).

248. FLEMING & McCLAIN, *supra* note 58, at 133. Exposure aims may be thwarted by statutes permitting parents to opt-out of sex education, an option that exists, according to the National Conference of State Legislators, in 35 states and the District of Columbia. *State Policies on Sex Education in Schools*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <https://www.ncsl.org/research/health/state-policies-on-sex-education-in-schools.aspx> (last visited March 21, 2019). However, most statutory



It is one thing to recognize the right (and responsibility) of parents to educate their children as members of a Family, quite another to claim that this right of familial education extends to a right of parents to insulate their children from exposure to ways of life or thinking that conflict with their own views.<sup>249</sup>

Liberal democratic education theorists make the point abundantly clear when observing that “schools cannot teach mutual respect [and cannot, therefore, achieve the aims of citizen formation] without exposing children to different ways of life,” even if such exposure can be argued to undermine or impede parents’ efforts to pass along their views.<sup>250</sup>

B. *No Fundamental Parental Liberty Interest to Care, Custody, and Control of Other People’s Children*

Parents’ groups have been among the most active in pushing back on school districts that have attempted to incorporate inclusive practices for transgender and gender diverse children, including when such practices have been instituted as curricular components of anti-bullying initiatives. Parents’ groups have organized in school districts across the country in response to a range of accommodations made by schools to facilitate transgender students’ access to sex-segregated spaces based on gender identity rather than legal sex.<sup>251</sup> In Minnesota, Illinois, Oregon, and Pennsylvania, objecting parents have sued school districts that made accommodations for transgender children, alleging that their children sharing locker rooms or bathrooms with transgender students was a violation of their parental right

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definitions of sex education focus on aspects of sexual reproduction, and would, therefore, not cover matters concerning gender identity or gender diversity. California, for example, expressly provides that sex education “does not apply to instruction, materials, presentations, or programming that discuss gender, gender identity, gender expression, sexual orientation, discrimination, harassment, bullying, intimidation, relationships, or family . . .” Cal. Educ. Code § 51932(b) (Westlaw through Ch. 3 of 2020 Reg.Sess).

249. GUTMANN, *supra* note 56, at 29. One factor complicating attempts to assert a parental liberty interest is the fact that if objecting parents are permitted to dictate a school’s policy of accommodation toward transgender and gender diverse children on the basis of an objecting parent’s professed parental prerogative, he or she is thereby empowered to use a claim of parental liberty over their *own* children to exert leverage over everyone *else’s* children. Most problematically, this overreach will likely be used to circumvent the authority of parents of transgender or gender expansive children.

250. Gutmann, *supra* note 133, at 561.

251. In March 2019 in Arlington County, Virginia, parents formed the “Arlington Parent Coalition” to oppose the school district’s policy implementation procedure regarding transgender students. The group describes itself as “a diverse group of . . . parents and community members, who are committed to safeguarding parents’ rights to raise their children according to their family’s values and beliefs.” Among the group’s stated aims was a postponement of the policy implementation, based, in part on “religious/cultural objections to homosexuality and/or transgender behavior.” ARLINGTON PARENT COALITION, <https://arlingtonparentcoa.wixsite.com/arlingtonparentcoa> (last visited Feb. 20, 2020).

to direct the education and upbringing of their children.<sup>252</sup> Even where they are not central claims, parental objections have sometimes implicitly relied on First Amendment protections to inculcate religious values in their children.<sup>253</sup> Of all of the suits brought by parents that included a claim based on an alleged infringement of parental right to direct the education and upbringing of their children, none have yet been successful.

One factor complicating attempts to assert a parental liberty interest is the fact that if objecting parents are permitted to dictate a school's policy of accommodation toward transgender and gender diverse children on the basis of an objecting parent's professed parental prerogative, he or she is thereby empowered to use a claim of parental liberty over their *own* children to exert leverage over everyone *else's* children. Most problematically, this overreach will likely be used to circumvent the authority of parents of transgender or gender expansive children. Even an opt-out provision for objecting parents would serve to negatively impact other people's children, all in the name of accommodating parental preferences. Such accommodations should not follow from an assertion of parental liberty because of the harm that accommodations would render to other students and the community as a whole.

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252. See Complaint, *Privacy Matters v. U.S. Dep't of Educ.*, No. 16-CV-301 (D. Minn. September 7, 2016) (in which parents in Virginia, Minnesota filed a complaint against the school district and the U.S. Department of Education for protecting a transgender student from discrimination when using the locker room); *Students and Parents for Privacy v. U.S. Dep't of Educ.*, 2017 U.S. Dist. LEXIS 213091 (N.D. Ill. 2017) (in which parents sued a Palatine, Illinois high school after the school board, facing pressure from the Department of Education under the Obama administration, voted to allow a transgender girl access to the girls' locker room); *Parents for Privacy v. Dallas Sch. Dist.* No. 2, 326 F. Supp. 3d 1075 (D. Or. 2018) (in which objecting parents filed a lawsuit against a longstanding policy that protects transgender students from discrimination in Dallas School District in Oregon); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 515 (3d Cir. 2018) (in which a minor, through her parent, brought suit against the school district for allowing a transgender student access to sex segregated facilities used by cis-gendered students).

253. E.g., Complaint at 12, *Reynolds v. Talberg*, No. 1:18-cv-00069-PLM-PJG (W.D. Mich. Mar. 12, 2018), a 2018 Michigan case brought by parents against a school district for creating "a school environment that favorably promotes the agenda of alternative sexual lifestyle activists while creating an environment that is hostile toward and disfavors students and families that oppose these policies based on their sincerely held moral and religious beliefs." Likewise, parental interests were alleged to have been implicated in Gavin Grimm's case, *Grimm v. Gloucester Cty. Sch. Bd.*, as evidenced by the comments reported to have been made at school board meetings concerning bathroom access. *Grimm v. Gloucester Cty. Sch. Bd.*, 400 F.Supp.3d 444 (E.D. Va. 2019). Said one parent at a Gloucester County School Board public meeting, "We are born as male and female, and that's the way God created us and that's the way He intended it and as it was mentioned tonight earlier, God doesn't make any mistakes." Samantha German, *Transgender Bathroom Policy Debate Heats Up During Gloucester Co. School Board Meeting*, WTKR (Feb. 19, 2019, 11:21 PM), <https://wtkr.com/2019/02/19/transgender-bathroom-policy-debate-heats-up-during-gloucester-co-school-board-meeting/>.

Common law prior to *Meyer* and *Pierce* reflects precisely this view, as does the opinion in *Parker v. Hurley*.<sup>254</sup> Given the significance of *Meyer v. Nebraska* in clearly articulating for the first time the protected nature of parental authority in the context of education, this Article tends to cite for support only common law *after* the seminal 1923 opinion. However, as Professor Hirschoff observed in an exploration of parental control of the public school curriculum prior to *Meyer*:

The dominant rule in state courts at the turn of the century [was] that parents could have their children excused from public school instruction to which they objected, as long as exercise of the right did not affect the ‘efficiency and good order of the schools’ or interfere with the rights of other students in the school.<sup>255</sup>

It can hardly be said that parents who attempt to rely on exercise of their parental liberty interest to control the education and upbringing of *other* children do not interfere with the rights of said students to receive an equal education.

### C. *Parental Liberty is Already Subordinate to Concerns Against Harm to Children and Society at Large*

There are numerous examples of parental rights being subordinated to concerns against children and/or society at large. This Article explores two such examples arising in the context of childrearing to illustrate how the state already intervenes to achieve broad prosocial aims, sometimes even over individual parental objections. This is particularly true when the conduct in question serves to protect either an individual child or many children from harm.

#### 1. Immunization Mandates

The first instance concerns parental authority in the context of immunization. Immunization of all citizens who are medically able to undergo vaccination is critically important for both the health and safety of the general public. However, immunization rates of children are falling due to the rise in numbers of parents refusing to immunize their

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254. As Judge Wolf observed regarding the impact of parental opt-outs, “[a]n exodus from class when issues of homosexuality or same-sex marriage are to be discussed could send the message that gays, lesbians, and the children of same-sex parents are inferior and, therefore, have a damaging effect on those students.” *Parker v. Hurley*, 474 F. Supp. 2d 261, 265 (D. Mass. 2007).

255. Hirschoff, *supra* note 69, at 886 n.4 (citing cases predating *Meyer v. Nebraska*: “*Hardwick v. Board of School Trustees*, 54 Cal. App. 696, 205 P. 49 (1921) (objection to dancing exercises); *Trustees of Schools v. People*, 87 Ill. 303 (1877) (objection to grammar instruction); *Rulison v. Post*, 79 Ill. 567 (1875) (objection to bookkeeping class); *Kelley v. Ferguson*, 95 Neb. 63, 144 N.W. 1039 (1914) (parent wanted child instructed in music in lieu of domestic science); *School Bd. v. Thompson*, 24 Okla. 1, 103 P. 578 (1909) (objection to singing lessons); *Morrow v. Wood*, 35 Wis. 59 (1874) (objection to geography lessons).”) In almost all of these cases, parental objections were grounded in pedagogical, versus values, conflicts.

children, leaving the public, especially children too young to receive immunizations, and others who are immuno-compromised, at increased susceptibility to contracting communicable diseases.<sup>256</sup> In the summer of 2019, the U.S. witnessed the dire consequences of parental decision-making in certain communities where a concentration of parents refusing, on various grounds, to immunize their children contributed to outbreaks of deadly diseases once declared “eliminated,” including measles.<sup>257</sup> In the first nine months of 2019, the Centers for Disease Control reported that 1,276 individual cases had been confirmed in 31 states, the greatest number reported in the U.S. since 1992.<sup>258</sup>

Because herd immunity requires a certain tipping point or critical mass in order to be effective at halting disease transmission, childhood vaccinations are a classic example of parental decision-making that directly impacts the common good.<sup>259</sup> The decision a parent makes as to whether or not to vaccinate their child not only puts their child’s health at risk, but also the health of those who cannot be vaccinated for a variety of underlying health reasons. Parental sentiment opposing vaccinations and the corresponding rising incidence of vaccine refusal have contributed to a serious public health threat. The threat is severe enough to warrant the World Health Organization to list “vaccine hesitancy” as one of the ten threats to global health in 2019.<sup>260</sup>

While most states require some proof of vaccination for school age children attending public and nonpublic schools, most also allow parents to object to a required immunization or exam on religious or medical grounds.<sup>261</sup> A handful of states have enacted legislation to limit parental authority in this domain in the interests of public health, mostly in

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256. Julie Bosman, *Parents of Babies Too Young to Vaccinate Feel Trapped by Measles Outbreak*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/us/measles-babies-vaccine.html>.

257. Donald McNeil Jr., *Measles Cases Surpass 700 as Outbreak Continues Unabated*, N.Y. TIMES (Apr. 29, 2019), <https://www.nytimes.com/2019/04/29/health/measles-outbreak-cdc.html>.

258. *Measles Cases and Outbreaks*, CENTER FOR DISEASE CONTROL AND PREVENTION, [HTTPS://WWW.CDC.GOV/MEASLES/CASES-OUTBREAKS.HTML](https://www.cdc.gov/measles/cases-outbreaks.html) (last updated Feb. 3, 2020).

259. H. Cody Meissner, *Why is Herd Immunity So Important?*, 36 AAP NEWS (2015), <https://www.aapublications.org/content/aapnews/36/5/14.1.full.pdf> (noting that herd immunity threshold occurs when a sufficient number of people in a community are immune to a disease, thereby protecting persons who have not developed immunity).

260. *Ten Threats to Global Health in 2019*, WORLD HEALTH ORG., <https://www.who.int/news-room/feature-stories/ten-threats-to-global-health-in-2019> (last visited Feb. 14, 2020).

261. *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT’L CONF. OF ST. LEGISLATURES, [HTTPS://WWW.NCSL.ORG/RESEARCH/HEALTH/SCHOOL-IMMUNIZATION-EXEMPTION-STATE-LAWS.ASPX](https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx) (LAST VISITED JAN. 3, 2020).

those states that were most impacted by the recent measles outbreak. New York, in June 2019, became the fifth state to pass legislation to bar all nonmedical exemptions to vaccinations (and consequently joined California, Maine, Mississippi and West Virginia in enacting among the strictest vaccination laws in the country).<sup>262</sup> The New York law requires all children to begin getting their vaccines within the first two weeks of classes and complete them by the end of the school year.<sup>263</sup> Parents in New York who had previously been granted religious exemptions to vaccinations were faced with few alternatives if they did not comply with these stricter requirements: Either home school their children or move out of state to avoid the reach of the law.<sup>264</sup> Maine, where a new law barring all but medical exemptions does not go into effect until 2021, makes exceptions for special education students.<sup>265</sup> California, where nonmedical exemptions were ended in 2015, gave parents with nonmedical exemptions extra time to comply, and allowed districts to exempt disabled children.<sup>266</sup> Because the health of the public—an unambiguous common good—is so profoundly impacted by individual parental choice, the interests of the state in relation to this aspect of childrearing must be elevated above that of parents.

Said one mother of an infant too young to be vaccinated about the issue of parental choice: “It’s not a choice for me, because my baby cannot be vaccinated. The folks who are choosing not to vaccinate *their* children or be vaccinated themselves are putting *my* child in danger.”<sup>267</sup> A dynamic similar in nature to the above immunization debate plays out in the context of gender inclusive policies and practices in K-12. Without subordinating parental interests, parents who oppose the school’s efforts to implement gender inclusive accommodations on the basis of an alleged parental right to control the education and upbringing of *their* child are keeping *other* children—transgender and gender diverse students—in harm’s way.

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262. Alexandra Sandstrom, *Amid Measles Outbreak, New York Closes Religious Exemptions for Vaccinations—But Most States Retain It*, PEW RESEARCH CENTER: FACT TANK (June 28, 2019), <https://www.pewresearch.org/fact-tank/2019/06/28/nearly-all-states-allow-religious-exemptions-for-vaccinations/>.

263. Sharon Otterman, *Get Vaccinated or Leave School: 26,000 N.Y. Children Face a Choice*, N.Y. TIMES (Sept. 6, 2019), <https://www.nytimes.com/2019/09/03/nyregion/measles-vaccine-exemptions-ny.html>; see also N.Y. PUB. HEALTH LAW § 2164(7)(a) (Westlaw through L.2019, Ch. 758 & L.2020, Ch. 25); *School Vaccination Requirements*, N.Y. ST. DEP’T HEALTH, [https://www.health.ny.gov/prevention/immunization/schools/school\\_vaccines/](https://www.health.ny.gov/prevention/immunization/schools/school_vaccines/) (last updated Oct. 2019).

264. Otterman, *supra* note 263, at 2.

265. H.R. 798, 2019 Leg., Reg. Sess. (Me. 2021).

266. S.B. 276, 170th Leg., Reg. Sess. (Cal. 2019).

267. Bosman, *supra* note 256.

## 2. Conversion Therapy Bans

The second example, closer to the subject of this Article concerning transgender and gender diverse children, involves the state's indirect assertion of authority over parents who seek what is known as "conversion therapy" for their minor children. Once termed "reparative therapy," conversion therapy is a controversial practice aimed at changing an individual's sexual orientation or gender identity.<sup>268</sup> A 2018 study by the Williams Institute at UCLA School of Law estimates that about "698,000 LGBT adults (18 to 59) in the U.S. have received conversion therapy, including about 350,000 LGBT adults who received treatment as adolescents."<sup>269</sup> The study's researchers also estimate that 20,000 LGBTQ youths will undergo conversion therapy from a licensed health care professional before age 18.<sup>270</sup> Opposition to conversion therapies, however, has grown substantially over the past decade. Notably, these harmful practices, collectively labelled "sexual orientation change efforts" (SOCE), entered the public consciousness when they were featured in two 2018 cinema blockbusters: *Boy Erased* and *The Miseducation of Cameron Post*.<sup>271</sup> As of January 2020, 19 states and over 45 counties and municipalities have enacted legislation to ban conversion therapy for minors.<sup>272</sup> And yet, despite a virtual medical consensus on the psychological ill effects of conversion therapy, not everyone is supportive of these legal protections for LGBTQ youth. Because the conversion therapy bans are aimed at *practitioners*, not *parents*, suits challenging the constitutionality of these statutes have been filed claiming they are

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268. Sanam Assil, *Can You Work It? Or Flip It and Reverse It?: Protecting LGBT Youth from Sexual Orientation Change Efforts*, 21 CARDOZO J.L. & GENDER 551, 559 (2015).

269. CHRISTY MALLORY ET AL., CONVERSION THERAPY AND LGBT YOUTH, WILLIAMS INST. 1, 2 (Jan. 2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-LGBT-Youth-Jan-2018.pdf>.

270. *Id.*

271. Chan Tov McNamarah, *Conversion Therapy Practitioners Lose First Round in Attack on Boca Raton & Palm Beach County Ordinances*, LGBT L. NOTES, Mar. 2019, at 3, 3.

272. *Conversion Therapy Laws*, MOVEMENT ADVANCE PROJECT, [https://www.lgbtmap.org/equality-maps/conversion\\_therapy](https://www.lgbtmap.org/equality-maps/conversion_therapy) (last visited Feb. 15, 2020). According to the Human Rights Campaign, "California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, New Jersey, New Hampshire, New Mexico, New York, Nevada, Oregon, Rhode Island, Vermont, Washington, the District of Columbia, and Puerto Rico all have laws or regulations" prohibiting conversion therapy. Moreover, "[a] growing number of municipalities have also enacted similar protections, including over sixty cities and counties in Arizona, Florida, Georgia, Michigan, Missouri, New York, Ohio, Pennsylvania, Washington, and Wisconsin." Nick Morrow, *HRC Lauds Adoption of Utah Regulations Protecting Youth from So-Called "Conversion Therapy"*, HUM. RTS. CAMPAIGN (Jan. 22, 2020), <https://www.hrc.org/blog/hrc-lauds-adoption-of-utah-regulations-protecting-youth-from-so-called-conv>.

a constitutionally invalid infringement on protected free speech rights. Practitioners in the Third and Ninth Circuits unsuccessfully challenged bans on the performance of such therapy on minors in New Jersey and California.<sup>273</sup> Nonetheless, since the decision to provide mental health treatment and to select the kind of treatment that will be pursued for a given problem is ostensibly within the range of decision-making authority traditionally granted to parents, state bans effectively subordinate parental interests to those of the state by removing parents' ability to access this particular course of therapy.

#### D. *Identity Interests Matter*

Finally, and arguably, most importantly, the issue of a child's identity is so core to the development of the self, and the development of the self so core to the skills needed for democratic self-governance, that it merits special protection from interference or repression by either the state or parents. Although her critique is focused on the regulation of parental conduct within the setting of the home, rather than the school, Orly Rachmilovitz's scholarship exploring whether the protection of children's identity development, a task at the center of children's self-determination and emotional well-being, might warrant an exception to parental rights, is particularly persuasive.<sup>274</sup> Although they are underprotected in law, children's identity interests are conceptually quite robust, Rachmilovitz posits, because they undergird such a significant aspect of development—"the development of understanding who we are, what we value, and where we are headed" all of which results in the achievement of a coherent sense-of-self.<sup>275</sup> Privileging parental authority in determinations that touch on gender identity in youth is particularly damaging because it "overly burden[s] children's self-determination and compromises children's safety and well-being."<sup>276</sup> These claims are all the more persuasive in instances where the assertion of parental authority is being made relative to *other* children's identity development. According to Rachmilovitz, because of the unique and lasting harms to children, parental pressures aimed at erasing non-heteronormative identities—including those of other people's children—"should join the existing categories of exceptions to parental rights."<sup>277</sup>

As Rachmilovitz observes in attending to the far-reaching effects of interfering with children's healthy identity development, identity impacts

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273. McNamarah, *supra* note 271, at 3; *See also* King v. Governor of the State of New Jersey, 767 F.3d 216 (3d Cir. 2014); Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014); *But see* Vazzo v. City of Tampa, 2019 WL 1048294 (M.D. Fla. 2019).

274. Orly Rachmilovitz, *Family Assimilation Demands and Sexual Minority Youth*, 98 MINN. L. REV. 1374 (2014).

275. *Id.* at 1384.

276. *Id.* at 1377.

277. *Id.* at 1380.



more than the individual. There is, indeed, a dynamic interplay between identity and social cohesion, which is the basis for a stable democracy. Professor Tiffany Graham elaborates this in her defense of same-sex married couples' ability to inculcate democratic values—once believed to be the sole preserve of heterosexual married couples: “The choices we make about our lives and the conclusions we draw *about who we are* can influence significantly our engagement with public life,” which is clearly at the core of civic virtue.<sup>278</sup> Touching again on aspects of self-governance, Graham observes that “the freedom to construct our identities—a more substantive vision of autonomy—is closely related to the goal of maintaining a democratic society.”<sup>279</sup>

The task of self-discovery prepares future citizens for the work of collective deliberation. As Graham notes, “as we construct our identities, we learn who we are by evaluating multiple strands of diverse, conflicting, incomplete information and drawing conclusions about ourselves that reflect our best judgment.” It is through this process that we learn not only about positions that speak to others, but also about which positions resonate with our ethical instincts, which yield the greatest personal and practical benefits; and which risks are worth taking. In this sense, practicing autonomy in our private lives prepares us for a self-governing public or civic life, and ideally allows us to develop individual habits of reason that transfer to the collective or common good.

## V. THE ROLE OF PUBLIC SCHOOLS IN NURTURING THE COMMON GOOD

This Article advocates not only limiting the authority of parents to oppose accommodations for transgender and gender expansive children within the public schools, but also dismantling the rigid gender binary that these opposing parents often seek to protect. Abandoning the gender binary holds an even greater promise to change “hearts and minds” because gender is so ubiquitous. Public schools encouraged to implement affirming policies and practices would replace the gender binary instead with a growing appreciation for the complexities of gender and a capacity to hold a space for the rich range of gender expressions and identities as they show up in our broader community. The common good to be thereby advanced is based upon a set of shared commitments to, among other beliefs, tolerance of our differences and a recognition that the diversity inherent in humanity, across all spectrums of identity, including race and gender, is our strength. Much as the promise that racially integrated public schools had to reshape our society by exposing our children to differences along with providing opportunities to live out the principles

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278. Tiffany C. Graham, *Something Old, Something New: Civic Virtue and the Case for Same-Sex Marriage*, 17 UCLA WOMEN'S L.J. 53, 106 (2008).

279. *Id.* at 106.

of equality, tolerance, and respect in their day-to-day peer interactions, so too does support and accommodation of transgender and gender diverse children in public schools. The way in which schools approach gender diversity can powerfully set the stage for the inculcation of virtues such as inclusion, equality, and respect—virtues critical to the health of an increasingly demographically diverse nation. Given that “[t]o the extent that the average American engages with transgender issues at all, he or she is more likely to do so *emotionally or intellectually* than legally,”<sup>280</sup> preparing children’s hearts and minds for the work of reasoning together about gender diversity seems quite compelling as a means of nurturing our common good (emphasis added).

#### A. *Teaching Proteophilic Competence as a Civic Virtue*

An underlying theme that emerged in the protracted civil rights struggle around racial integration was the fear that “race mixing,” especially among the young, would eventually lead to interracial “intimacies,” with the resulting multiracial offspring blurring racial boundaries that had served, up until 1954, to maintain rigid social boundaries and a historical racial hierarchy.<sup>281</sup> Anti-integrationists feared that once dissembled through “miscegenation,” the long-standing systems of privilege built into the existing social order based on racial classification would be difficult to maintain, for it would become increasingly difficult to categorize persons of ambiguous racial identity.<sup>282</sup> Just as opposition to racial integration was borne out of defense of a racial status quo, gender ideology is perceived as a threat to the gender status quo. According to those opposed to efforts to recognize and support transgender and gender expansive children in the public school, something graver and

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280. Graham Hillard, *Conservatives Shouldn’t Use Transgender Pronouns*, NAT’L REV. (Apr. 4, 2019, 6:30 AM), <https://www.nationalreview.com/2019/04/transgender-pronouns-conservatives-should-not-use/>.

281. Phoebe Godfrey, *Bayonets, Brainwashing, and Bathrooms: The Discourse of Race, Gender, and Sexuality in the Desegregation of Little Rock’s Central High*, 62 ARKANSAS HIST. Q. 42, 51–52 (2003).

282. The origin of the term “miscegenation” dates back to an 1864 pamphlet published anonymously that seemed to imply that mixing of the races would lead to a genetically superior race. Although not known at the time, the authors of the pamphlet were two staunch Democratic anti-abolitionists who were essentially “trolling,” in today’s parlance, the abolitionist Republican Party. While the ideas expressed therein were never supported by scientific evidence, the lasting impact of the “miscegenation” publication was the way in which it “brought to the surface the idea that race is a substantive and measurable quality, that race is expressed in visible bodily differences that index internal differences (whether they be biological, cognitive, emotional, or temperamental).” These beliefs sustained the fear that race mixing, unchecked, would inevitably lead to the disappearance of the differences between the races. Mark Sussman, *The “Miscegenation” Troll*, JSTOR DAILY (Feb. 20, 2019), <https://daily.jstor.org/the-miscegenation-troll>; see also MISCEGENATION: THE THEORY OF THE BLENDING OF THE RACES APPLIED TO THE AMERICAN WHITE MAN AND NEGRO (1864).

more sinister is lurking behind issues around pronoun use and bathroom access—an all-out “assault on the sexes” which is believed to attack “a basic reality—that all people have a biological sex, identifiable at birth and immutable through life, which makes them either male or female.”<sup>283</sup> The alleged assault—“an attack on the previously undisputed reality that human beings are created either male or female; that there are significant differences between the sexes; and that those differences result in at least some differences in the roles played by men and women in society”—supposedly has roots as far back as the modern feminist movement of the late nineteenth century and “the homosexual movement” that followed which “challeng[ed] the principle that men and women are created to be sexually complementary to one another.”<sup>284</sup> What is common to both the threat to racial and gender categorizations is the idea that rigid categorical divisions do indeed exist and, more importantly, need to be preserved. The ambiguity that results from the elimination of traditional categorical divisions is, for some, simply too upending.

Sociologist Zygmunt Bauman’s concepts of “proteophobia” and “proteophilia”—roughly understood as a fear of the unknown and a love for the unknown—developed from his observation of ambivalence arising from the desire to create classifications and structure through scientific discourse, are particularly useful in understanding the strong reactions generated by threats to the racial and gender status quo.<sup>285</sup> Fifty plus years after *Loving v. Virginia* with the elimination of anti-miscegenation laws and consistently increasing rates of interracial marriage, we have made great strides in embracing the reality of an increasingly multiracial society.<sup>286</sup> Survey data reveals that the public has become more accepting of interracial dating, marriage, adoption, and friendship, with a growing share of adults endorsing the trend toward intermarriage as “generally a good thing for American society.”<sup>287</sup> Similarly, on the whole, Americans have become more accepting of LGBT persons and equal rights for those who identify as lesbian and gay.<sup>288</sup> However, as we are only just

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283. PETER SPRIGG, HOW TO RESPOND TO THE LGBT MOVEMENT 1 (2018), <https://downloads.frc.org/EF/EF18B16.pdf>.

284. *Id.*

285. See generally Zygmunt Bauman, *Allosemitism: Premodern, Modern, Postmodern*, in MODERNITY, CULTURE, AND “THE JEW” 143, 143–56 (Bryan Cheyette & Laura Marcus, eds., Stanford University Press 1998) (establishing the concept of proteophobia, meaning a fear and horror of that which defies clean-cut categories).

286. See Kristen Bialik, *Key Facts About Race and Marriage: 50 Years After Loving v. Virginia*, PEW RES. CTR. (June 12, 2017), <https://www.pewresearch.org/fact-tank/2017/06/12/key-facts-about-race-and-marriage-50-years-after-loving-v-virginia/> (reflecting increasing rates of interracial marriage and persons who identify as multiracial over the past two decades).

287. Gretchen Livingston & Anna Brown, *Intermarriage in the U.S. 50 Years After Loving v. Virginia*, PEW RES. CTR. SOC. & DEMOGRAPHIC TRENDS (May 18, 2017), <https://www.pewsocialtrends.org/2017/05/18/2-public-views-on-intermarriage/>.

288. A 2018 Harris poll survey done on behalf of GLAAD revealed “a decline

now beginning to appreciate the complexity of gender identity, many still struggle when faced with subjective experiences of gender that may not align with biological sex or expressions of gender and gender roles that are non-normative.<sup>289</sup> Moreover, the concept of gender as defined along a spectrum and, therefore, outside of a binary classification, continues to be rejected by many.<sup>290</sup> The discomfort and disbelief is greatly exacerbated when these concepts are applied to young people, who are wrongfully assumed to be too young to possess an awareness of gender identity.<sup>291</sup> While the increasing visibility of transgender and gender diverse youth has proven these assumptions patently false, they are not without a still large cadre of staunch doubters.

As Grace McLaughlin observes, transgender and gender diverse students “who challenge gender in the public space of the school inspire a rhetoric of fear based not just in transphobia, but in both fears for children and in ‘proteophobia’—the fear of the socially disruptive force of the

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in overall comfort and acceptance of LGBTQ people from respondents ages 18 to 34, with allies steadily declining among this audience since 2016.” GLAAD Cautions:

While young people are identifying as LGBTQ in higher rates than ever before, there has also been an uptick in non-LGBTQ young people pushing back against acceptance. The younger generation has traditionally been thought of as a beacon of progressive values. We have taken that idea for granted and this year’s results show that the sharp and quick rise in divisive rhetoric in politics and culture is having a negative influence on younger Americans. . . . Closing the gap to full acceptance of LGBTQ people will not come from legislation on [sic] judicial decisions alone, but from creating a culture where LGBTQ people are embraced and respected. This year’s results demonstrate an urgent need for GLAAD to reach younger Americans with stories and campaigns that build acceptance.

The erosion in LGBTQ acceptance among younger people is seen in both male and female respondents, particularly in personal scenarios. GLAAD ACCELERATING ACCEPTANCE 2019 EXECUTIVE SUMMARY (2019), <https://www.glaad.org/sites/default/files/Accelerating%20Acceptance%202019.pdf>.

289. A global poll on the topic of transgender acceptance revealed that although seventy-one percent of respondents in the U.S. reported that their country was becoming “more tolerant” of transgender people, among western countries, the U.S. is most likely to believe that transgender people have a mental illness (thirty-two percent), the most likely out of all countries surveyed to believe that transgendered people are committing a sin (thirty-two percent) and the most likely to say that society has gone too far in allowing people to dress and live as one sex even though they were born another (thirty-six percent). *Global Attitudes Toward Transgender People*, Ipsos (2017), <https://www.ipsos.com/en-us/news-polls/global-attitudes-toward-transgender-people>.

290. “According to Fusion magazine’s Massive Millennial Poll, fifty percent of the 1,000 people between the ages of 18 and 34 who were interviewed by telephone agreed with the statement Gender is a spectrum, and some people fall outside conventional categories.” Mitch Kellaway, *POLL: Half of Young People Don’t Believe Gender is Binary*, *ADVOCATE* (Feb. 5, 2015), <https://www.advocate.com/politics/transgender/2015/02/05/poll-half-young-people-dont-believe-gender-binary>.

291. Sacha M. Coupet, *Policing Gender on the Playground*, in *CHILDREN, SEXUALITY, AND THE LAW* 186, 215 (Sacha M. Coupet & Ellens Marrus eds., 2015).

ambiguous and unclassifiable.”<sup>292</sup> Bauman’s use of these terms is grounded in his analysis of the ways in which knowledge-building discourses unfold.<sup>293</sup> Ambivalence, in his framework, is considered a normal consequence of the classificatory practices used by society to order objects within their social space.<sup>294</sup> More specifically, “ambivalence occurs because of the inability to categorize and name objects encountered within social space.”<sup>295</sup> Those whom we cannot easily categorize, who fall within more than one category, or blur or disrupt category boundaries generate either an effective response of fear or one of affection. Proteophobia is a reaction of fear, describing the emotional response in moments of perceived threat or danger. Proteophilia describes the opposite—the love, enjoyment, and appreciation of difference and diversity—where those “with unknown, unpredictable ways [and] kaleidoscopic variety of appearances and actions” are a genuine source of pleasure.<sup>296</sup> A proteophobic response may, for example, include attempts to exclude strangers who disrupt traditional categories, whereas proteophilia welcomes the ambiguous other.<sup>297</sup>

The gender anxiety witnessed in schools today seems to be a direct product of proteophobia and may rest, in part, on unexamined beliefs about gender and gender identity.<sup>298</sup> Just as expanding the right to marry to same-sex couples forced a probing conceptual examination of what exactly was at the core of marriage (for example: How exactly should marriage be defined? What are the essential elements of marriage?), transgender and gender expansive identities have compelled deeper explorations of gender beyond binaries, an inquiry which is often regarded as highly disruptive to traditional norms pertaining to gender and sex. These are infinitely complex questions that go to the core of who we are and threaten many assumptions depending upon a purely binary definition of sex and gender. As writer and trans advocate Liam Lowery observed regarding moving beyond *acceptance* of transgender persons assimilating into cisgender lives:

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292. Grace McLaughlin, *Divergent Students, Disruptive Students: Gender Anxieties in U.S. K–12 Schools*, 4 QED: A J. IN GLBTQ WORLDMAKING 1, 3 (2017).

293. While Bauman developed the terms in reference to observations about anti-Semitism, later scholars, specifically Grace McLaughlin, apply it directly to gender fluid youth. *See id.* at 3; Bauman, *supra* note 285, at 144.

294. Jo HAYNES, MUSIC, DIFFERENCE, AND THE RESIDUE OF RACE 22 (2013).

295. *Id.*

296. *Id.*

297. *Id.* Zygmunt Bauman, in his last interview before his death in 2017, described bullying as “a matter of exclusion” in which the message of “[y]ou are not like us, you do not belong,” is reinforced along with the warning that “if you insist on sharing in our life, don’t be puzzled by all that beating, kicking, offending, degrading, and debasing.” Zygmunt Bauman & Thomas Leoncini, ‘*Evil Has Been Trivialized*’: A Final Conversation with Zygmunt Bauman, N.Y. BOOKS (Dec. 6, 2018), <https://www.nybooks.com/daily/2018/12/06/evil-has-been-trivialized-a-final-conversation-with-zygmunt-bauman/>.

298. McLaughlin, *supra* note 292, at 17–18.

The familiar [assimilation] narratives are so pervasive because they mean cisgender people don't have to confront their own gender identities, or disrupt the idea of gender as being binary by divine design. But once you acknowledge that *everyone* has a gender identity, that there is a spectrum of transgender identity and that no one is the pure, cisgender paragon, the truth is much more expansive.<sup>299</sup>

It is precisely because gender is so ubiquitous in our society that confronting ambivalence in this domain holds such promise. Proteophilic competence—something more than mere tolerance, but a genuine *appreciation* for how our diversity enriches us collectively along with the skills to effectively engage with diverse identities—can, and should, be brought to bear in teaching children to appreciate and respect the rich spectrum of gendered identities that exist, both their own and those of others. As this Article aims to establish, proteophilic competence may be one of the most important civic virtues schools can inculcate—the one that enables the respect, equality, and trust upon which our democracy rests.

Schools can better fulfill their social and emotional learning role—and their aim of fostering citizenship—when they help students develop the skills needed to deal effectively with ambiguity and a vast array of differences in identity, values, and viewpoints. In fostering connections in the face of differences, democratic education takes as a given that citizenship development in the classroom can shape the world outside of it. As political philosopher Danielle Allen explains, “[c]itizenship is the struggle, carried out through conversation, to achieve accounts of the world that *accord* with norms of friendship and provide grounds for action. We have this conversation in the classroom; we have it in the world.”<sup>300</sup>

#### B. *Getting from Diversity to Pluralism: ‘E Pluribus Unum’ in the Public Square and in the Public School*

At the conceptual level, a civic virtue is a trait that disposes its possessors to contribute to the well-being of the community and enhances their capacity to do so.<sup>301</sup> But even accepting such a simplistic definition, it is likely that these traits will reflect diversity in roles, perspectives, capacities, and needs—the naturally “different ways in which [each] member can contribute to the common good.”<sup>302</sup> Not only is such diversi-

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299. Liam Lowery, *The Transgender Rights Movement Is for Everyone*, NEWSWEEK (Jun. 10, 2015), <https://www.newsweek.com/transgender-rights-movement-everyone-341828> (emphasis added).

300. Danielle S. Allen, Assoc. Professor, Univ. of Chi., Aims of Education Address (Sept. 20, 2001), <https://college.uchicago.edu/student-life/aims-education-address-2001-danielle-s-allen>.

301. Frank Lovett, *Civic Virtue*, in THE ENCYCLOPEDIA OF POLITICAL THOUGHT (Michael Gibbons ed., 2015) <https://cpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/1/627/files/2017/02/2014.-Civic-Virtue-10fi3ya.pdf>.

302. William A. Galston, *Pluralism and Civic Virtue*, 33 SOC. THEORY AND PRAC. 625, 630 (2007).

ty a given; it's a *good* thing. But therein lies the challenge. The survival of our democratic republic requires inspiring people of diverse and distinct political, cultural, ethnic, and religious backgrounds to peacefully discern, deliberate, and decide upon matters that bear upon the common good, not through the application of any "comprehensive moral doctrine" nor an "attempt to secure agreement upon an orthodoxy concerning the best way of life," but rather through engagement, self-reflection, and respectful dialogue.<sup>303</sup> To that end, a democratic education that aims to give citizens "enduring habits of reflection and practices of collective conversation" must embrace the diversity of our experiences and identities, not merely for the sake of diversity alone, but for the unique democratic experiment that is American democracy.<sup>304</sup> Indeed, the kind of pluralism that can still be fostered within a national identity of shared values and principles is an ineluctable feature of modern America.

As we are reminded by our de facto national official motto, '*E Pluribus Unum*', our democratic republic "envisions one people, a common sense of a civic 'we,' but not [necessarily] one conscience: *unum* does not mean uniformity."<sup>305</sup> Pluralism, then, requires more than the mere *acceptance* that differences exist, but rather *knowledge* of the differences that shape our diverse society, a task for which our public school system is perfectly situated.<sup>306</sup> Unlike the vision embraced by the founders of public education, whose aims were largely assimilatory, the present call to action should aim to foster social cohesion through the development of proteophilic competence, the energetic engagement *with* diversity, and a shared commitment to the common good.<sup>307</sup> As we are perhaps witnessing in contemporary America, "[m]ere diversity without *real* encounter and relationship will [only] yield increasing tensions in our society," since "pluralism is not just tolerance, but the active seeking of understanding across lines of difference."<sup>308</sup> "Pluralism is the process of creating

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303. FLEMING & McCLAIN, *supra* note 58, at 115.

304. Allen, *supra* note 300. See generally GUTMANN, *supra* note 56.

305. *From Diversity to Pluralism*, PLURALISM PROJECT, <http://pluralism.org/encounter/todays-challenges/from-diversity-to-pluralism/> (last visited Feb. 15, 2020).

306. *See id.*

307. *Id.*

308. Diana Eck, *What is Pluralism*, PLURALISM PROJECT (2006), <http://pluralism.org/what-is-pluralism>.

Tolerance, while certainly important, may be a deceptive virtue by itself, perhaps even standing in the way of engagement. Tolerance does not require people to know anything about one another, and so can let us harbor all the stereotypes and half-truths we want to believe about our neighbors. Tolerance is definitely important, but it does little to remove our ignorance of one another.



a society through critical and self-critical encounter with one another, acknowledging, rather than hiding, our deepest differences.”<sup>309</sup>

Because public schools bring together an ostensibly representative range of the diversity in our society, they are well positioned to play an active role in shaping the norms for respectful encounter of the other, which undergirds the concept of deliberative democracy. In modeling for young people how to think through complex social problems, schools can facilitate the development of skills needed for democratic conversation and decision-making among our youngest citizens who, in a classroom setting, are experiencing community sometimes for the first time. “For most young children, being a ‘classmate’ . . . constitutes their first active participation in an ongoing social structure outside the family.”<sup>310</sup> “The vision of community that the classroom provides can color a child’s ideas and expectations about equity, cooperation and citizenship for a lifetime,” all of which can influence their commitment to the common good.<sup>311</sup> The mere fact that children are introduced to “other-ness” through their curriculum, as well as how that “other-ness” is framed, can shape them profoundly.<sup>312</sup>

As addressed elsewhere in this Article, it is inevitable in our pluralistic society, where public schools serve families with radically different values and ideals, that “deep and irresolvable normative conflicts” between parents and the state will arise with some frequency, especially over matters related to sex and gender identity.<sup>313</sup> While some propose to resolve these tensions by removing government altogether from the endeavor of schooling, others, like Stephen Macedo and Maxine Eichner, recognize that “some account needs to be provided of how future citizens acquire the character traits, habits and virtues they must have if the liberal political project is to survive and thrive.”<sup>314</sup> Our collective

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309. *From Diversity to Pluralism*, *supra* note 305.

310. JIM CARNES, *Introduction to STARTING SMALL: TEACHING TOLERANCE IN PRESCHOOL AND THE EARLY GRADES VI* (2008), [http://www.tolerance.org/sites/default/files/kits/Teachers\\_Study\\_Guide.pdf](http://www.tolerance.org/sites/default/files/kits/Teachers_Study_Guide.pdf).

311. *Id.*

312. *See, e.g.*, Christina Veiga, *NYU’s David Kirkland Explains the ‘Transformation’ Needed to Integrate the City’s Schools*, CHALKBEAT (Jan. 11, 2017), <https://www.chalkbeat.org/posts/ny/2017/01/11/nyus-david-kirkland-explains-the-transformation-needed-to-integrate-the-citys-schools> (“The research suggests, over and again, that people who are exposed to differences are more open-minded and more tolerant” as well as more compassionate, capable of more complex thought, and of working out difficult problems, all of which contributes to “civic readiness, the ability to participate in a multicultural democracy with people who are different than you are, in ways that inspire not tension but community and collaboration”).

313. MACEDO, *supra* note 48, at 17 (citing STEPHEN ARONS, *COMPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING* (1983)).

314. *Id.* at 20.

need to constitute citizens, especially those capable of engaging effectively in democratic conversations across differences, should be paramount, even if it “may have the effect of undermining some forms of religious faith, especially those that espouse moral values in tension with liberal democracy.”<sup>315</sup>

Although addressing a matter arising outside of the context of the public school, the concurring opinion in *Elane Photography LLC v. Willock* captures persuasively why subordination of parental privileges, even when grounded in claims of religious liberty, is consistent with precisely the kind of compromise we ask of fellow citizens committed to the common good.<sup>316</sup> The 2013 New Mexico case, which predated *Masterpiece Cakeshop*<sup>317</sup> by five years, concerned the right of a photographer to deny service to a same-sex couple on the basis of her genuinely held religious beliefs.<sup>318</sup> After the plaintiff filed a complaint with the New Mexico Human Rights Commission, the New Mexico Supreme Court upheld her claims. In a concurrence accompanying the court’s opinion, one justice wrote words that could as easily have been meant for any citizen called upon to contribute to the common good:

At some point in our lives all of us must compromise, if only a little, to accommodate the contrasting values of others. A multicultural, pluralistic society, one of our nation’s strengths, demands no less. [While all] are free to think, to say, to believe, as they wish; they may pray to the God of their choice and follow those commandments in their personal lives wherever they lead. The Constitution protects [all] in that respect and much more. But there is a price, one that we all have to pay somewhere in our civic life.

We are all asked to “channel” our conduct, not necessarily our beliefs:

[S]o as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. That sense of respect we owe others, whether or not we believe as they do, illuminates this country, setting it apart from the discord that afflicts much of the rest of the world. In short . . . it is the price of citizenship.<sup>319</sup>

315. *Id.* at 19.

316. *Cf. Elane Photography, L.L.C. v. Willock*, 309 P.3d 53, 79–80 (N.M. 2013) (Bosson, J., concurring) (arguing that a Christian photography business, which refused on religious grounds to work at a same-sex wedding, must “accommodate the contrasting values of others” because such tolerance is “the price of citizenship” in a multicultural and pluralistic society).

317. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, S. Ct. 1719, 1724 (2018) (holding that the Colorado Civil Rights Commission’s conduct in evaluating a cake shop owner’s reasons for declining to make a wedding cake for a same-sex couple violated the Free Exercise Clause).

318. *Elane Photography*, 309 P.3d at 59–60.

319. *Elane Photography*, 309 P.3d at 79–80 (Bosson, J., concurring).

### C. *Gender Complex and LGBTQ-Inclusive Curricula and the Common Good*

Built into the observation that public schooling should aim to inculcate civic virtues thought necessary to foster good citizenship—even when such inculcation requires exposure to ideas and values that do not align with those some parents wish to pass along to their children—is an assumption that young people have an understanding of the rich diversity that comprises our polity. That assumption, however, has to date proven incorrect, and persons from marginalized communities or identities are often excluded from the materials used to educate children.<sup>320</sup> Unfortunately, their invisibility invariably communicates their irrelevance. Creating a more inclusive curriculum is one step toward inculcating those civic virtues necessary for our deliberative democracy, for furthering the common good requires awareness about the richness of our diversity. To date, however, only five states—California,<sup>321</sup> New Jersey,<sup>322</sup> Oregon,<sup>323</sup> Colorado,<sup>324</sup> and Illinois<sup>325</sup>—have committed to mandating through education law that schools adopt inclusive and comprehensive public school curricula.<sup>326</sup> For example, the Illinois Inclusive Curriculum Act amends the state school code to require all textbooks be non-discriminatory and that the teaching of United States history include study of the roles of LGBTQ people in national and state history.<sup>327</sup> On a local level, state mandates have prompted individual school districts to adopt initiatives reflective of these broad inclusive aims.<sup>328</sup> Together with recent legislative efforts in so-called “No Promotion of Homosexuality (NPH)” or,

320. See, e.g., Margaret Smith Crocco, *The Missing Discourse About Gender and Sexuality in the Social Studies*, 40 THEORY INTO PRACTICE 65, 71 (2001); Laura Moorhead, *LGBTQ+ Visibility in the K-12 Curriculum*, PHI DELTA KAPPAN (Oct. 2018), <https://kappanonline.org/moorhead-lgbtq-visibility-k-12-curriculum/>.

321. S.B. 48, 2011–12 Reg. Sess. (Cal. 2011).

322. S. 1569, 218th Leg., 2018–19 Sess. (N.J. 2019).

323. H.R. 2023, 80th Legis. Assemb., Reg. Sess. (Or. 2019).

324. H.R. 1192, 72d Gen. Assemb., 1st Sess. (Colo. 2019).

325. HB 0246, Gen. Assemb., 99 Sess. (Ill. 2020).

326. See also Casey Leins, *These States Require Schools to Teach LGBT History*, U.S. NEWS & WORLD REP. (Aug. 14, 2019), <https://www.usnews.com/news/best-states/articles/2019-08-14/states-that-require-schools-to-teach-lgbt-history>.

327. Ill. HB 0246.

328. For example, the Chicago Public School’s recent Curriculum Equity Initiative includes the following aim:

All curriculum content designed for Chicago Public Schools, including assessments, must be free from bias; fair across race, religion, ethnicity and gender; and culturally relevant with the mindful integration of diverse communities, cultures, histories and contributions. This includes attention to African-American, Latinx, Asian, indigenous people, women, LGBTQ, religious minorities (including Muslims), working class people and youth.

CHI. BD. OF EDU., CURRICULUM EQUITY INITIATIVE 18 (2019), [https://www.cpsboe.org/content/documents/curriculum\\_equity\\_initiative\\_presentation\\_may\\_2019.pdf](https://www.cpsboe.org/content/documents/curriculum_equity_initiative_presentation_may_2019.pdf).

more colorfully, “No Promo Homo” states to lift curricular restrictions on LGBTQ content, the state curricula mandates suggest that the groundwork for inculcating civic virtues such as equality, respect, and tolerance through K-12 education is slowly being laid.<sup>329</sup>

For very young children, integrating gender nonconforming people into the curriculum can begin with picture books that feature LGBTQ protagonists. Certain children’s books offer opportunities to engage in dialogue around challenging the gender binary, as well as strong role models for transgender and gender diverse children. It’s also important to integrate the histories, narratives, and contributions of transgender, genderqueer, and gender nonconforming scientists and mathematicians, artists, or authors, who have long been left out of K-12 textbooks. Equally important is engaging in frequent dialogues about precisely who is left out or misrepresented in literature and picture books. “For example, asking students who is *not* included, why they think this happens, and who they can include and how not only builds critical thinking skills and empathy, but also sends positive messages about equity and inclusion.”<sup>330</sup>

Supporting children from the earliest verbal ages to tell us what pronoun they want us to use for them would serve to affirm who they are and signal that how they choose to self-identify is worthy of acknowledgment, a practice entirely consistent with anti-bullying and safe schools initiatives.<sup>331</sup> While teaching the binary of “boy” and “girl” offers an easy interpretation of gender, it excludes, oppresses, and marginalizes those with different identities. A gender-complex education, on the other hand, although initially more challenging to conceptualize, creates more inclusive, valuing, encouraging situations for the long term. It recognizes multiple forms of gender identities and challenges traditional thinking around gender, calling on educators to focus on critical actions which include, among others, acknowledging gender as fluid and recognizing transgender category oppression.<sup>332</sup> The International Literacy Associa-

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329. S. 1346, 44th Leg. (Ariz. 2019); S. Bill 196, 2017 Gen. Sess. (Utah 2017) repealed. Six states, Alabama, Louisiana, Mississippi, Oklahoma, South Carolina, and Texas, continue to have these laws. In Alabama, for example, the statute requires that in terms of sexual health education there must be an “emphasis, in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state.” ALA. S. C. § 16–40A-2(c)(8). Similarly, in South Carolina, health education “may not include a discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases.” S.C. STAT. § 59–32–30(5) (Westlaw through 2020 Act No. 115).

330. Dana Stachowiak, *Part 5: Creating a Gender-Inclusive Curriculum*, LITERACY DAILY (Aug. 9, 2018), [HTTPS://WWW.LITERACYWORLDWIDE.ORG/BLOG/LITERACY-DAILY/2018/08/09/PART-5-CREATING-A-GENDER-INCLUSIVE-CURRICULUM](https://www.literacyworldwide.org/blog/literacy-daily/2018/08/09/part-5-creating-a-gender-inclusive-curriculum).

331. KATIE KISSINGER, *ANTI-BIAS EDUCATION IN THE EARLY CHILDHOOD CLASSROOM: HAND IN HAND, STEP BY STEP* 68 (2017).

332. See Stachowiak, *supra* note 330.

tion, an organization whose literacy mission includes providing resources to educators, defines a gender-inclusive curriculum as “shifting the ways we provide and subscribe to gender education.”<sup>333</sup> In its simplest form, a gender complex curriculum would teach that “gender and sex are determined by a complex and interacting set of processes: historical, social, and biological.”<sup>334</sup>

Far from beneficial to *only* transgender and gender diverse children, these affirming and inclusive practices provide an opportunity to “challenge the ways that [gender binary] thinking and language limit *everyone’s* expression and lived experience with gender and anatomy.”<sup>335</sup> Indeed:

Creating an affirming environment for a transgender child is an opportunity for schools to become critically aware of the ways that their curricula, policies, and practices are dependent on the gender binary—and how this kind of dependence creates anxiety *for* and fear *of* anyone who falls outside normative “boyness” or “girlness.”<sup>336</sup>

A gender complex curriculum aims to:

Open[] up the possibility for young people to find their own way in a world that often confronts them with narrow and cruel social norms. To affirm gender diversity is therefore not destructive [or doctrinaire]; it affirms human complexity and creates a space for people to find their own way within this complexity.<sup>337</sup>

Keeping in mind the role of public schools in inculcating proteophilic competence, a gender complex curriculum:

Promotes a more fluid understanding of self and society, in particular by recognizing gender as something shaped and interpreted by a given social order, as opposed to an immutable biological fact. In questioning traditional concepts of identity, sexuality, and kinship, gender studies therefore destabilizes the [. . .] simple narrative of a native ‘us’ versus an alien ‘them.’<sup>338</sup>

Indeed, schools that explicitly recognize gender diversity establish conditions in which conversations and activities exploring *other* forms of difference become possible. In embarking on a path to expand students’ understanding about gender diversity, schools set a tone in which the examination of differences across multiple domains is accepted and encouraged:

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333. *Id.*

334. Butler, *supra* note 18.

335. KISSINGER, *supra* note 331, at 68.

336. Payne & Smith, *supra* note 174, at 416.

337. Butler, *supra* note 18.

338. Eliza Apperly, *Why Europe’s Far Right is Targeting Gender Studies*, THE ATLANTIC (June 15, 2019), <https://www.theatlantic.com/international/archive/2019/06/europe-far-right-target-gender-studies/591208/>.

Coming to recognize gender in all of its complexity allows students to see concepts in more realistic terms. Helping them understand the idea of a spectrum—a range of possibilities and not simply the “opposite ends” of a binary—builds their capacity to critically examine concepts in other areas of learning as well as building their appreciation for gender and other forms of diversity. In building students’ perspectives about gender and gender diversity, schools are able to introduce notions of ambiguity and degree that will serve them as they explore other complex topics for the rest of their lives.<sup>339</sup>

The measured benefits of gender complex and LGBTQ-inclusive curricula to address intolerance and bullying are profound. Supporters of Illinois’s recently enacted Inclusive Curriculum bill assert that “an inclusive curriculum benefits *all* students,” since “non-LGBTQ students would learn about the important contributions of LGBTQ people and have a fuller sense of the importance of a diverse society.”<sup>340</sup>

It is this author’s sincere hope that early exposure to the concept of gender diversity along with the inculcation of proteophilic competence will make the world a safer place for transgender and gender diverse children. However, the hope is that it will also improve the quality of life for *all* people. There is a universality to the plea to inculcate in the next generation of citizens—a generation already well-versed in the concept of gender diversity with far greater familiarity with a range of gender terms than previous generations—the virtues of solidarity and equality.<sup>341</sup> For “[t]hese movements are about *everyone* having the freedom to self-identify their gender identity and move through the world without being treated unequally because of it.”<sup>342</sup> Transgender and gender diverse children can be understood as today’s “canaries in the coal mine” whose reception in society reflects the state of our willingness to respect what we do not quite fully understand or to which we cannot individually relate, to strengthen our bonds across our differences and embrace even ambiguous diversity.

In reaching out to transgender and gender diverse children, we have the opportunity to understand what it takes and means to be genuinely “in community.” We have the opportunity to act intentionally and from a place of love and we have the opportunity to model those values

339. GENDER SPECTRUM, *supra* note 220.

340. *HB 246 Fact Sheet: Support the Inclusive Curriculum Bill*, EQUALITY ILLINOIS, [HTTPS://WWW.EQUALITYILLINOIS.US/HB-246-FACT-SHEET/](https://www.equalityillinois.us/hb-246-fact-sheet/).

341. “According to a 2016 survey from J. Walter Thompson Intelligence, 56 percent of U.S. Gen Z’ers (13 to 20 years old) said they know someone who uses gender-neutral pronouns such as they, them, or ze.” This generation eschews traditional gender roles, the survey adds, with fewer shopping for clothes assigned to their own gender and more agreeing that public spaces should provide access to all-gender restrooms. Shepherd Laughlin, *Gen Z goes Beyond Gender Binaries in New Innovation Group Data*, WUNDERMAN THOMPSON (Mar. 11, 2016), <https://www.jwtintelligence.com/2016/03/gen-z-goes-beyond-gender-binaries-in-new-innovation-group-data>.

342. Lowery, *supra* note 299.

for each other and for future generations. As education consultant Alexandra Scott observes, “[w]e have the opportunity to act intentionally and from a place of love . . . [and] to model those values for each other and for future generations.” Most importantly, “[b]ecause the history of heteronormativity is so ingrained in the fabric of our lives, the difficult work of learning to accept, love and nurture transgender and gender [diverse] students can open all of us to the joy of unconditional love, mutual support and the power of community building.” Nonetheless, as Scott notes, “students perform and learn best when they feel appreciated and understood.” The ideal learning environments “are collaborative and mutually supportive.”<sup>343</sup>

## VI. CONCLUSION

Transgender and gender diverse persons touch a particular chord in American society in part because of the ways in which they are regarded as threatening to the centrality of a binary conceptualization of gender—a well anchored concept that many are resistant to abandon. Transgender and gender diverse *youth*, in particular, also force us to confront our most deeply held assumptions about a core aspect of identity at the very same time that this identity is taking shape. Because the overwhelming majority of children spend their formative years in public school, their emerging identities inevitably unfold in a space regulated by the state—the same state charged with inculcating civic virtue, nurturing attributes of good citizenship, and fostering the full development of each individual so that he, she, *or they* can best contribute to the common good. Schools today are challenged in their effort to achieve these aims because the norms outside of the schoolhouse gate increasingly present a destructive counternarrative—one that fosters intolerance on the basis of identity, uncivility, and social discord, sometimes accompanied by strong parental opposition and resistance to any accommodations supportive of identity.

This Article aims to contribute to an ongoing exploration of the ways in which we can repair our fraying social fabric with a more civil discourse on the matters that divide us, using gender diversity and pedagogical strategies that highlight inclusivity within K-12 as the template for exploring differences and getting past our proteophobic reactions.

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343. Alexandra Scott, *Canary in a Coal Mine*, MEDIUM (Dec. 27, 2017), <https://medium.com/@TransActiveAlex/canary-in-a-coal-mine-390f90060b0>.



