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Families, Schools, and Religious Freedom

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Families, Schools, and Religious Freedom

Helen M. Alvaré*

Old and New Testament scriptures persistently point to human beings' romantic and familial relationships according to Christian norms as means of glimpsing foundational religious beliefs about God's identity, how God loves human beings, and how human beings are to love Him and one another. Christian families, therefore, are alarmed to witness public schools educating minors using normative materials directly opposing Christian norms, and doing so outside of courses subject to parental opt-ins or opt-outs. The Supreme Court has not weighed in on the precise question of parental rights respecting particular educational content of this type, but lower federal courts regularly uphold schools' decisions against parents' rights regarding both the free exercise of religion and the rearing of their own children. But these courts' arguments get the balance of authority between parents and schools wrong. They offer sometimes duplicitous interpretations of schools' activities, misunderstand existing Supreme Court precedent vindicating parents' rights, and ignore the promise of religious values for promoting the goods that the state claims it is forwarding.

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The views expressed in this Article are the author's own. – Eds.

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INTRODUCTION

Old and New Testament scriptures persistently point to human beings' ordinary romantic and familial relationships and experiences as pathways for glimpsing foundational religious beliefs—beliefs about the identity of God, His love for humanity, and how human beings are to love Him and one another. These relationships are likely even irreplaceable means of penetrating aspects of these beliefs which might otherwise seem impossible or irrational such as the trinitarian nature of God, Jesus's incarnation, the harmony of freedom and authority, radical human equality alongside diversity, the necessity to love every human being, and difference as the ground of unity. In other words, sex, marriage, and parenting are inextricable parts of the "language of Christian belief," and the very "architecture" of the faith.¹ They are not, as some rather believe,

1. MARY EBERSTADT, HOW THE WEST REALLY LOST GOD: A NEW THEORY OF SECULARIZATION 160 (2013); see also Gerard V. Bradley, *Catholic Schools and Transgender Students*, PUB. DISCOURSE (Feb. 9, 2021), <https://www.thepublicdiscourse.com/2021/02/73853/> [<https://perma.cc/RP7P-8DC4>] ("The lastingness of each person's reality ['identity'] as male or female is so integral to the faith's architecture, that to deny it—even to equivocate about it—is to undermine Catholic faith itself.").

a “purity code” designed to measure one’s own or another’s sanctity.²

Given this conviction about the role played by familial and romantic relations (hereafter, just “familial”) in understanding and transmitting faith, Christian families are alarmed to witness widespread repudiation of their familial norms—norms once widely accepted in the United States, and Western nations generally, as compatible with the observation of nature, human purpose and dignity, and the protection of vulnerable children.³ As summarized by eminent scholar John Witte, Jr., these include: “exclusive, monogamous, and enduring” marriage between a man and a woman as the place for sexual relations and the procreation of children.⁴ Powerful private actors, including corporations, the media, and prestigious academic institutions, regularly reject these norms.⁵ The state, too, has entered the fray by various means, including the communication of viewpoints to young students in some public schools.⁶ These express a very particular anthropology often directly opposed to a Christian anthropology.⁷ Sometimes, this occurs in the confines of courses regularly designated “sex-education,” “health,” or “family life” education (hereafter, collectively, “sex-ed”), but sometimes it occurs elsewhere in the curriculum.⁸

This Article will not address the material offered within sex-ed courses

2. See, e.g., Julie Ingersol, *How the ‘Extreme Abstinence’ of the Purity Movement Created a Sense of Shame in Evangelical Women*, CONVERSATION (Dec. 10, 2019, 8:55 AM), <https://theconversation.com/how-the-extreme-abstinence-of-the-purity-movement-created-a-sense-of-shame-in-evangelical-women-127589> [https://perma.cc/45CN-6SAD] (describing the ramifications of promoting “extreme abstinence” among young Christians).

3. See Charles J. Reid, Jr., *The Augustinian Goods of Marriage: The Disappearing Cornerstone of The American Law of Marriage*, 18 BYU J. PUB. L. 449, 461–62 (2004) (describing the prevalence of “natural law” in American common law during the early nineteenth century).

4. JOHN WITTE, JR., FAITH, FREEDOM, AND FAMILY: NEW STUDIES IN LAW AND RELIGION 457–82, 540 (Norman Doe & Gary S. Hauk eds., 2021) [hereinafter Witte, Faith, Freedom, and Family].

5. See, e.g., *Corporate Equality Index 2022*, HUM. RTS. CAMPAIGN FOUND., https://reports.hrc.org/corporate-equality-index-2022?_ga=2.196784298.741565400.1661449483-105250918.1661449483 [https://perma.cc/7GX8-ZUM3] (last visited Sept. 29, 2022) (rating workplaces based on LGBTQ+ equality); *Programs for Schools*, PLANNED PARENTHOOD OF METRO. N.J., <https://www.plannedparenthood.org/planned-parenthood-metropolitan-new-jersey/sexuality-education/programs-for-schools> [https://perma.cc/SUL9-FS7W] (listing schools participating in Planned Parenthood programs); David Folkenflik, *Is There Bias in Media’s Coverage of Gay Marriage Fight?*, NPR (June 27, 2013, 4:52 PM), <https://www.npr.org/templates/story/story.php?storyId=196338157> [https://perma.cc/3LFX-CTXB] (noting that media coverage generally publishes LGBTQ+ neutral or affirming coverage).

6. See *infra* Part III (detailing some public schools’ communications to minors about familial relations).

7. *Id.*

8. *Id.*

subject to parental opt-ins or opt-outs.⁹ It will also not evaluate age-appropriate communications touching upon sex, marriage, or parenting that have, as their object, the presentation of historic, scientific, or other factual material, or which are designed to promote kindness toward, and prevent bullying of, students who identify as sexual minorities or come from families identifying similarly. These not only pose no threat to religious liberty in a Christian vein, but overlap with its aims.¹⁰ Instead, this Article is concerned with state-sponsored *proselytizing* about familial topics possessing religious content, occurring *outside* the confines of classes subject to parental options. This might occur in courses not recognizing parental options, during school assemblies, or as woven into reading assignments and class discussions in courses as various as Reading, English, or History¹¹, which sometimes denigrate religious positions directly.¹² Respecting these materials, parents do not possess legislatively or judicially recognized methods to opt-out.

The Supreme Court has not weighed in on the precise question of parental rights to object to *particular* educational content in the public schools, save school prayer.¹³ However, the Court has spoken to broader questions about parental First Amendment Free Exercise and Fourteenth Amendment custodial rights respecting their children's education.¹⁴ But lower federal courts have addressed parental rights on educational content.¹⁵ With respect to familial material presented *outside* of sex-education courses, lower courts have held that parents who send children to public schools are subject to state decision-making about educational

9. See *State Policies on Sex Education in Schools*, NAT'L CONF. OF STATE LEGISLATORS (Oct. 1, 2020), <https://www.ncsl.org/research/health/state-policies-on-sex-education-in-schools.aspx> [<https://perma.cc/5ALU-X3QC>] (describing states' opt-in and opt-out policies for states' health, sex-education, or family life courses).

10. See, e.g., ROMAN CATHOLIC CHURCH, *THE CATECHISM OF THE CATHOLIC CHURCH* §2358 (2d ed. 1995) (“[Homosexual men and women] must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided. These persons are called to fulfill God's will in their lives . . .”).

11. See *infra* p. 601 and note 148.

12. See, e.g., *infra* notes 157–159 and accompanying text (providing example of Colorado material characterizing those who oppose affirming transgender identification as “mean” and “confused”).

13. See e.g., *Engel v. Vitale*, 370 U.S. 421, 421 (1962) (holding that the use of the public school system to encourage recitation of such prayer was inconsistent with the Constitution, though pupils were not required to participate over their or their parents' objection); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 203 (1963) (finding unconstitutional the requirement that schools begin each day with readings from the Bible).

14. See *infra* pp. 605–07 and notes 166–190 (discussing the scope of parents' constitutional rights according to lower federal courts).

15. See *infra* pp. 608–15 and notes 192–244 (discussing the leading arguments that federal courts propound in support of their conclusion that state interest trump parents' rights regarding familial values taught to students outside of sex classes).

content.¹⁶ Current cases employ numerous rationales to reach their nearly univocal conclusion.¹⁷ It proposes, for example, that the schools are merely “exposing” children to information, and not coercing belief, or that it is merely controlling “internal” matters.¹⁸ Lower courts claim that it is impracticable to give parents control over slices of educational content, and that, in any event, the state has overriding interests in promoting health and mutual tolerance among students.¹⁹ Lower courts insist that Supreme Court opinions broadly recognizing parents’ authority respecting their children’s formation—for example, *Pierce v. Society of Sisters* and *Wisconsin v. Yoder*—have no application to parents’ objections to familial educational content.²⁰

Arguing to the contrary is surely swimming upstream. But there are good reasons to try, even if the communications discussed are a narrow slice of the contents that public schools offer. It is impossible to know how much of this content is promulgated by the state, because school districts do not measure or report it, nor are they required to. It is certainly possible that I am writing a long article about a relatively limited phenomenon. Still, given what is at stake—the transmission of religious faith, parents’ authority over their children’s religious and moral formation, and the wellbeing of especially the most vulnerable minors—this topic is worth attention.

It is also worth the ink because lower court opinions are getting the balance of authority between parents and schools very wrong, using arguments bordering on the duplicitous concerning matters such as the degree of school/state coercion involved, the practicability of avoiding it, and how to advance tolerance and health among students.²¹ The lower courts also poorly analyze how much promise the Supreme Court’s existing parental rights’ decisions hold for vindicating parents’

16. *Id.*

17. *Id.*

18. *See infra* p. 608 and notes 192–194, pp. 611–13 and notes 210–231 (discussing rulings on internal affairs and lack of coercion in rejecting free exercise claims).

19. *See infra* pp. 610–11 and notes 205–209, p. 614 and notes 232–238 (referencing courts insisting that state efforts to inculcate certain of values into children regarding sex, sexual relations, and procreation are legitimate state interests and that the states believe incorporating this would render the delivery of education nearly impossible).

20. *See Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925) (“[W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”); *Wisconsin v. Yoder*, 406 U.S. 205, 205 (1972) (holding that the First and Fourteenth Amendments permit religious accommodations for Amish parents from the state’s mandatory public high school attendance statute). *See also infra* p. 615 and notes 239–244 (discussing *Yoder*’s applicability to current public school curriculum cases).

21. *See infra* pp. 616–38 and notes 245–354 (addressing the arguments for parental claims to possess rights to educational content proselytizing particular familial values).

constitutional free exercise and custodial rights, and the presence of less restrictive means for the state to advance its important interests in boosting tolerance and health among students.²² The lower courts also ignore the promise that a religious anthropology holds for promoting these goods.²³

In order to explore the question of religious parents' constitutional authority over materials about familial values that are not confined to sex-ed courses, this Article will proceed as follows: Part I will set out the theological argument, particularly as distilled by two Catholic theologians, that Christian beliefs about familial relations constitute the architecture of the faith and therefore play a crucial role in its transmission. This Part goes into much greater depth than required in a court of law in order to articulate a burden on free exercise and parental authority in a lawsuit. But I provide such depth to make more attractive and comprehensible the case for a close link between Christian familial teachings and a minor's ability to grasp central truths of the faith.

Part II will show that empirical sociological evidence affirms the Christian conviction that exposure to, and acceptance of, Christian beliefs about family structure and behaviors assists the transmission of faith. Part III will describe how some public schools hold and teach positions on familial matters that contradict Christian families' convictions, and how these are upheld against parental objections by lower federal courts. Part IV will describe the scope of parents' constitutional rights according to lower federal courts. Finally, Part V will rebut lower federal courts' rationales. It will also demonstrate in detail how Supreme Court decisions concerning parents' rights and the religion clauses support a greater role for parental authority.

Again, while this Article treats a small portion of some public schools' educational content, it proposes that this content has significant implications for parents' rights respecting transmitting faith to their children.

I. ROMANTIC AND FAMILY RELATIONS AS PATHS TO RELIGIOUS BELIEF AND UNDERSTANDING

New Testament scriptures and Christian theology feature the theme that romantic and familial relations are crucial means by which human beings better understand and accept the identity of God, how He loves humanity, and how humanity is to love Him and one another, among

22. *Id.*

23. *See infra* Part I (analyzing romantic and family relations as paths to religious belief and understanding); *infra* pp. 617–19 and notes 249–264 (analyzing the state's compelling interest).

other central aspects of the faith. These themes are a continuation and further elaboration of similar themes within the Old Testament. The book of Genesis's creation account, for example, states that:

God said: Let us make human beings in our image, after our likeness. Let them have dominion over the fish of the sea, the birds of the air, the tame animals, all the wild animals, and all the creatures that crawl on the earth.

God created man in his image; in the image of God he created them; male and female he created them.

God blessed them and God said to them: Be fertile and multiply; fill the earth and subdue it.²⁴

In short, human beings as *imago Dei* ("image of God") are created as two-sexes, and capacitated for sexual union, which is procreative.²⁵

The Old Testament is replete with references to Israel as a bride and to God as the bridegroom, to marriage as an icon of the relationship between God and Israel, to God as a parent (mother and father), and to Israel as His beloved child.²⁶ The New Testament contains similar content. Jesus repeatedly calls Himself the bridegroom in relation to the bride—meaning all men and women. For example, He asks: "Can the wedding guests mourn as long as the bridegroom is with them?"²⁷ Perhaps the most well-known passages analogizing God's love to that of a bridegroom and urging Christians to love likewise appear in St. Paul's letter to the Ephesians, wherein Paul likens marriage to God's love for His people, stating: "[Marriage] is a great mystery, but I speak in reference to Christ and the church."²⁸ Shortly afterward, Paul urges: "Husbands, love your wives, even as Christ loved the church and handed himself over for her . . ." ²⁹ In short, God's love looks like Jesus's self-surrender, His death on a cross for humanity.³⁰

Jesus also speaks of the indissoluble obligations of the bride and bridegroom when he exhorts that the married couple is "no longer two

24. *Genesis* 1:26–28.

25. *See id.*; *Genesis* 2:24 ("This is why a man leaves his father and mother and clings to his wife, and the two of them become one body.")

26. *See, e.g., Isaiah* 54:5 ("For your husband is your Maker . . . Your redeemer, the Holy One of Israel, called God of all the earth."); *Jeremiah* 2:2 ("I remember the devotion of your youth, how you loved me as a bride . . ."); *Jeremiah* 3:1 (comparing a wife returning to her husband to an individual returning to Israel); *Exodus* 4:22 ("Thus says the Lord: Israel, my son, my firstborn.")

27. *Matthew* 9:15.

28. *Ephesians* 5:32.

29. *Ephesians* 5:25.

30. *See* RICHARD B. HAYS, *THE MORAL VISION OF THE NEW TESTAMENT: A CONTEMPORARY INTRODUCTION TO NEW TESTAMENT ETHICS* 27 (1996) (explaining that the cross and Jesus's crucifixion are symbolic of the ultimate demonstration of God's love because he acted for the redemption of the world).

but one flesh. Therefore what God has joined together, no human being must separate.”³¹ He teaches that His followers should love and trust Him as a child loves a parent: “‘Amen, I say to you, whoever does not accept the kingdom of God like a child will not enter it.’ Then he embraced them and blessed them, placing his hands on them.”³²

Jesus also asks His followers to trust that He gives good gifts like a father: “‘If you then, who are wicked, know how to give good gifts to your children, how much more will the Father in heaven give the Holy Spirit to those who ask him?’”³³ He teaches His followers to pray to God as “[o]ur Father.”³⁴

From the early days of Christianity, based upon these scriptures, combined with observations of the creation they believed God ordered, Christians developed a code of family behavior. Christians’ “conspicuous chastity,” one of their most noted characteristics, included opposition to divorce, polygamy, nonmarital relations, abortion, infanticide, and same-sex relations.³⁵ These commitments found their way into Roman law when Christianity became the official religion of the empire, and thereafter strongly influenced the law of Western Europe, which in turn influenced the United States.³⁶ From the founding of the United States to the twentieth century, there remained an overlapping consensus between U.S. family law (which, however, always remained under civil authority) and Christian ideals, in important part, because both relied on observations of nature to formulate norms—norms encouraging beneficial behavior and discouraging behavior threatening it.³⁷ Both recognized the special status of the union of male and female for its procreative purpose, its ability to create the commitment of both parents for a long period of time supporting vulnerable children, and the way

31. *Mark* 10:6–9.

32. *Mark* 10:13–16.

33. *Luke* 11:11–13.

34. *Matthew* 6:9.

35. See KYLE HARPER, *FROM SHAME TO SIN: THE CHRISTIAN TRANSFORMATION OF SEXUAL MORALITY IN LATE ANTIQUITY* 100 (2013) (asserting that “conspicuous chastity” attributed to Christianity allowed for prejudicial dismissal of sexual depravity charges).

36. See generally JOHN WITTE, JR. & GARY S. HAUKE, *CHRISTIANITY AND FAMILY LAW: AN INTRODUCTION* (2017).

37. See Don S. Browning, *Modern Law and Christian Jurisprudence on Marriage and Family*, 58 EMORY L.J. 31, 37 (2008) (explaining how Christian marriage rationally weaves in naturalistic observations about the patterns of nature.); see also WITTE, *FAITH, FREEDOM, AND FAMILY*, *supra* note 4 (explaining that Christian theological language often confirms what is taught by nature and philosophical teachings in describing the economic, social, communicative, and contractual dimensions of the marital family).

paternal certainty incentivized greater paternal investment.³⁸ In order to promote the wellbeing, especially of children, the law therefore valorized marriage and censured nonmarital sex, adultery, and divorce.³⁹

But, especially since the twentieth century, this overlapping consensus has significantly shrunk.⁴⁰ In response, religious leaders and theologians from many Christian denominations began to write more intentionally about the significance of Christian familial norms, for individual, family, and social progress, and also as a crucial path toward glimpsing divine realities.⁴¹ Such reflections constitute, for example, central ideas in the writings of Pope St. John Paul II, Pope Benedict XVI, Methodist theologian Richard Hays, and Anglican theologian N.T. Wright.⁴²

Luigi Giussani, a twentieth and early twenty-first century Italian theologian and spiritual leader, and Angelo Cardinal Scola, Archbishop of Milan and an eminent theologian, are two Catholic theologians whose works are particularly helpful in explaining how human romantic and familial relationships—involving sexual difference, oriented to union, and capable of procreation—provide unparalleled access to knowledge of

38. Jordan W. Moon, *Religion and Sexual Behavior*, INST. FAM. STUD.: BLOG (July 26, 2022), <https://ifstudies.org/blog/religion-and-sexual-behavior> [https://perma.cc/75ZN-TZAJ]. See generally Brief of Amicus Curiae of Helen M. Alvaré in Support of Hollingsworth and Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (No. 12-144, 12-307), 2013 WL 432943.

39. See HELEN M. ALVARÉ, PUTTING CHILDREN'S INTERESTS FIRST IN U.S. FAMILY LAW AND POLICY: WITH POWER COMES RESPONSIBILITY 1 (2018) (explaining that prioritizing adult sexual behavior can increase nonmarital births, which undermine the stability of the parental partnership that children need.). See generally Brief of Amicus Curiae of Helen M. Alvaré, *supra* note 38.

40. See generally DON S. BROWNING, MARRIAGE AND MODERNIZATION: HOW GLOBALIZATION THREATENS MARRIAGE AND WHAT TO DO ABOUT IT 1–2 (2003); WITTE, FAITH, FREEDOM, AND FAMILY, *supra* note 4, at 656–62; Pope Francis, *Not Just Good, but Beautiful*, in NOT JUST GOOD, BUT BEAUTIFUL: THE COMPLEMENTARY RELATIONSHIP BETWEEN MAN AND WOMAN (Plough Publ'g House 2015).

41. See generally BROWNING *supra* note 40, at 14–24 (discussing two diverging solutions to the problem of “family disruption” defined as increasing divorce rates, non-marital births, and cohabitation outside of marriage); WITTE, FAITH, FREEDOM, AND FAMILY, *supra* note 4; DON S. BROWNING, FROM CULTURE WARS TO COMMON GROUND: RELIGION AND THE AMERICAN FAMILY DEBATE (2d ed. 2000) [hereinafter FROM CULTURE WARS TO COMMON GROUND]; Helen M. Alvaré, *Christian Teachings About Sex and Family Are Grounded in Love of God and Neighbor: A Response to Jordan Moon*, INST. FAM. STUD.: BLOG (Aug. 30, 2022), <https://ifstudies.org/blog/Christian-teachings-about-sex-and-family-are-grounded-in-love-of-god-neighbor> [https://perma.cc/L5V8-MXMV].

42. See N.T. Wright, *From Genesis to Revelation*, in NOT JUST GOOD BUT BEAUTIFUL, *supra* note 40 (explaining that man and woman are “complementaries” such that “man and the woman together are a symbol of something which is profoundly true of creation as a whole”). See, e.g., *Luke* 11:11–13 (explaining that if mortal fathers can see fit to care for their children, then God as heavenly Father shall see fit to provide); see generally RICHARD B. HAYS, THE MORAL VISION OF THE NEW TESTAMENT: A CONTEMPORARY INTRODUCTION TO NEW TESTAMENT ETHICS (Harper Collins 1st ed. 1996); JOHN PAUL II, MAN AND WOMAN HE CREATED THEM: A THEOLOGY OF THE BODY (Michal Waldstein trans., 2006); POPE BENEDICT XVI, GOD IS LOVE: DEUS CARITAS EST (2006).

God's identity, His love relationship with humanity, and how human beings are to love God and one another.⁴³ Scola has written that: "The family is not a 'sector' of pastoral work, but a dimension that extends through the entire mission of the church, in both the content and method of evangelization."⁴⁴

For reasons of length, and because these two theologians so well articulate perennial Catholic teachings about family as the architecture of the faith in ways that non-theologians might understand, this Article will focus upon their scholarship, while noting from time to time how other documents or scholars have expressed similar points. Both scholars insist upon and celebrate human beings' ability to learn a great deal about fundamental human and divine matters by means of reason and visible evidence, even as humans are both intellectually and physically limited creatures and will not be able to plumb divine mysteries fully. Rather, they learn about these matters through observation of the human—given that humans are *imago Dei* and all have families—and by observing all of the creation they believe God has made.⁴⁵ Such observations include the existence of a two-sexed humanity, with both similarities and differences, capacitated to form a one-flesh union, which is procreative.⁴⁶

Catholic authors such as Guissani and Scola reflect upon the possible reasons why God designed humanity in this way, in order to discover some truths about human beings and about God.⁴⁷ Such a way of learning is distinct, in the words of Cardinal Scola, from the "disincarnate spiritualism" characterizing especially first-world societies today.⁴⁸ It holds that humanity can learn from "practical human existence."⁴⁹ Both Guissani and Scola go so far as to say that it is hard or even impossible to imagine a set of feelings, experiences, and understandings *other* than those involving romance or the family that could so helpfully illuminate

43. See generally, LUIGI GIUSSANI, THE RELIGIOUS SENSE (J. Zucchi trans., 1997) [hereinafter GIUSSANI, RELIGIOUS SENSE]; LUIGI GIUSSANI, AT THE ORIGIN OF THE CHRISTIAN CLAIM (V. Hewitt trans., 1998) [hereinafter GIUSSANI, ORIGIN]; LUIGI GIUSSANI, WHY THE CHURCH? (V. Hewitt trans., 2001) [hereinafter GIUSSANI, WHY?].

44. ANGELO CARDINAL SCOLA, THE NUPTIAL MYSTERY 210 (Michelle K. Borrás trans., 2005) (citing Cong. for Catholic Education, *Forming Seminarians for Ministry to Marriage and Family* (Mar. 19, 1995), <https://www.usccb.org/beliefs-and-teachings/vocations/priesthood/priestly-formation/upload/marriage.pdf> [<https://perma.cc/Z8XM-94KB>]).

45. See *infra* pp. 589–97 and notes 51–120.

46. *Id.*

47. See, e.g., SCOLA, *supra* note 44, at xxiv (“[O]nly in the incarnate Word do persons discover the truth about themselves.”).

48. SCOLA, *supra* note 44, at xvii.

49. See *id.* at 98 (establishing that Jesus is not “a fact of the past” but must be viewed through the lens of “practical human existence” so as not to lose His truth and substance).

crucial human and divine matters.⁵⁰ The following is an abbreviated discussion of their insights.

A. The Existence of Two Sexes as Pointing to the Existence of a Divine Who Is “Other,” Whom I Desire and Depend Upon

Giussani and Scola write that a human being’s recognition of, and longing for, the opposite sex opens the person to the reality that each person needs and longs for an “other,” who is “more,” and “beyond” a person’s individual experience—an “other” who, by his or her nature, is different from me, but *with* whom the experience of union—quite surprisingly—“fulfills me more than any experience of possession, domination, or assimilation.”⁵¹

Scola writes that the existence of two sexes, and a desire for the opposite sex, kindles an awareness of one’s finitude and incompleteness—a realization that there is more to humanity than the person’s “I,” and that this “more” cannot be possessed, dominated, or reduced, to me.⁵² A person’s desire to be loved definitively encounters the seeming insuperable difficulty of having its resolution in another who is not automatically available.⁵³ From this finitude and dependence, this “lack,” the human being can grasp easily that each is radically dependent on someone else.⁵⁴ This then renders comprehensible the possibility of humanity’s ontological, creaturely dependence on God.⁵⁵

Giussani uses the hypothetical of a child who is shipwrecked and alone.⁵⁶ When he reaches puberty, he begins longing for something he cannot specify.⁵⁷ He cannot even visualize a woman, because he has never seen one, but he experiences the desire for dialogue and for unity with another.⁵⁸ “What he senses within, because he is reaching puberty, is the need for something he does not know. He imagines that it may be like the reality surrounding him, yet different, *other*.”⁵⁹ He is led to conclude that “*There is something in the universe, in reality, that*

50. See GUISSANI, *THE RELIGIOUS SENSE*, *supra* note 43, at 167 (exploring the sense of “otherness”). See also SCOLA, *supra* note 44, at 5, 7, 9, 11–13, 25, 31, 39, 102, 131 (exploring the “I” in relation to the “Infinite”).

51. See GUISSANI, *THE RELIGIOUS SENSE*, *supra* note 50, at 115–16 (explaining that a person is defined in part through the union of another that embodies the parts of themselves that they lack).

52. SCOLA, *supra* note 44, at 114, 124.

53. *Id.* at 23, 124.

54. *Id.*

55. *Id.* at 23.

56. GUISSANI, *THE RELIGIOUS SENSE*, *supra* note 50, at 115–16 (exploring the hypothetical of the shipwrecked child).

57. *Id.*

58. *Id.*

59. *Id.*

corresponds to this want, this need, and it does not coincide with anything that I can grasp, and I don't know what it is."⁶⁰ This "something" is "implied in the dynamic of his person."⁶¹ And this dynamic—the human beings' experience of "incomparable wholeness in companionship . . . particularly between man and woman"—is analogous to the longing for God which also tends to be a "demonstrat[ion]" of God.⁶² Giussani concludes that there is no other "adequate meaning" that explains such a historically and globally constant human need.⁶³

B. *Who God Is*

Christianity also holds that familial relations can assist human beings to grasp some truths about God's identity, given that the Creator fashioned human beings in God's image and likeness.⁶⁴ According to Giussani, these relations might allow humanity to achieve the intuition, for example, that God is an eternal being, given how men and women in romantic relationships regularly express their need for eternal love through the wish that their romantic bond should last forever, that the other "cannot die."⁶⁵ In the Gospel of Mark when Jesus describes marital love, he highlights the man's "leaving his mother and his father and cleav[ing] to his wife," an image that connotes a permanent bond.⁶⁶ Jesus applies this teaching toward himself, stating that that believers should follow him even if it should cost possessions and familial relations.⁶⁷ He exhorts that

there is no one who has left house, or brothers or sisters or mother or father or children or lands for my sake, and for the gospel who will not receive a hundred times more now in this present . . . with persecutions, and eternal life in the age to come.⁶⁸

Giussani notes that it becomes "shocking" when Jesus "goes so far as to

60. *Id.*

61. *Id.*

62. GIUSSANI

63. *Id.*

64. See *Genesis* 1:27 ("God created mankind in his [own] image; in the image of God he created them; male and female created he them"); *Ephesians* 5:31–32 ("For this reason a man shall leave his father and mother, and shall be joined unto his wife, and they two shall be one flesh. This is a great mystery: but I speak in reference to Christ and the church.")

65. See e.g., GIUSSANI, *THE RELIGIOUS SENSE*, *supra* note 50, at 115 ("He loves who says to the other: you cannot die.") (internal quotations omitted).

66. *Mark* 10:7.

67. See *Mark* 10:29–30 ("There is no man that hath left house, or brethren, or sisters, or father, or mother, or wife, or children, or lands, for my sake, and for the gospel's sake, but he shall receive a hundredfold now in this time, houses, and brethren, and sisters, and mothers, and children, and lands . . . in the world to come eternal life").

68. *Id.*

compare himself with man's most intimate affections," but that he is both their *root*, and the thing *beyond* to which they point.⁶⁹

Human relations can also assist understanding of God as a parent. In addition to the fact that Jesus teaches that God is humanity's Father, every human being has the experience of their very existence being dependent upon procreation by an earthly father.⁷⁰ Such an awareness impresses the fact that humans are not "self-made."⁷¹ Jesus also speaks directly about himself as like a father who gives his children only good gifts, and guards them against dangers.⁷²

Human beings also understand that each person's very existence is dependent upon procreation by an earthly mother, a woman who not only gives life, but continuously shares gifts with her children, and protects them. Jesus refers to himself as a mother longing to protect Jerusalem from the consequences of rejecting the Son of God sent into its midst, when he laments: "Jerusalem, Jerusalem, that killeth the prophets and stone those sent to you, how many times I yearned to gather your children together, as a hen gathers her young under her wings, but you were unwilling!"⁷³

Familial relations can also assist human understanding of the very complex idea of the trinitarian nature of Christianity's God: as Father, Son, and Holy Spirit. Scola dwells upon this insight perhaps more than any other in his treatment of the family as a path to understanding the divine, perhaps because it is hard to imagine another communion of love so ongoing and organically united that could equally convey the complex concept of separateness in perfect union.⁷⁴

Scola begins by observing that the human being is free and rational but also fulfilled only in interpersonal communion with others—a communion which, in the case of the man and the woman, is also a one-flesh unity.⁷⁵ Likewise, the Trinity is a perfect communion of unending love, a "perfect identity in difference"⁷⁶ Scola concludes: "Here a

69. GIUSSANI, AT THE ORIGIN OF THE CHRISTIAN CLAIM, *supra* note 43, at 64 (explaining that Jesus is at both "the core of man's affection and freedom"); *see also* GIUSSANI, THE RELIGIOUS SENSE, *supra* note 50, at 115 (explaining that human nature itself yearns for what is *beyond*).

70. *See Luke* 11:1–2 ("He was praying in a certain place, and when he had finished, one of his disciples said to him, 'Lord, teach us to pray just as John taught his disciples.' He said to them, 'When you pray, say: Father, hallowed be your name, your kingdom come.'").

71. GIUSSANI, AT THE ORIGIN OF THE CHRISTIAN CLAIM, *supra* note 43, at 89.

72. *Id.* at 89–91 (citing *Luke* 11:11–13).

73. *Matthew* 23:37.

74. *See* SCOLA, *supra* note 44, at 73, 284–85 (explaining the Trinity as a metaphor for the family unit and the human experience through perfect equality stemming from the "unity of the two").

75. *Id.* at 12–13.

76. *Id.* at 88.

reason emerges for the existence of sexual difference: we see why man is created as man and woman.”⁷⁷ They must be two “in order to unite”⁷⁸ Twelfth century theologian and canonist, Theodore Balsamon, wrote similarly, that the “marital relation is . . . a reflection of the Trinitarian mystery: a spiritual correlation of two human hypostases [individual substances] bonded by ‘almost sameness’ of nature,” “perfect unity in differentiation, and distinctness in identity.”⁷⁹ For Balsamon, then, marriage “is not just a private affair, but a matter that models society, indeed the deeper cosmic order.”⁸⁰ That the love between a man and a woman can generate new life—at the intersection of sexual difference brought into unity—helps to penetrate another aspect of God’s trinitarian existence: how the love between the Father and the Son “co-spirates the Holy Spirit,” also a central tenet of Christian belief.⁸¹

Like Scola, Giussani also elaborates upon humans’ experience of unity in difference in the marital relationship—which does not cancel out the individual “I” nor reduce their unity—as a pathway to understanding God’s trinitarian nature. Quoting theologian Charles Moeller, Giussani observes:

With this “dual creation” it was God’s wish that man be complete only in a context of dialogue in which two people abandon themselves to each other. . . . It is so because God is Trinity: the relationships which are the substance, the very life of God demonstrates that freedom and self-giving are synonymous.⁸²

Scola instructs that romantic and familial encounters also aid human understanding of another complex but central Christian tenet about God’s identity: that Jesus Christ is two natures—human and divine—in one person.⁸³ He asserts that this difficult concept can be illuminated by the experience of two persons—male and female—becoming “one flesh.”⁸⁴ Scola points out that the words of the Council of Chalcedon about Jesus’s two natures in one person can be applied using an imperfect, but evocative, analogy to the union of the man and the woman.⁸⁵ At the

77. *Id.* at 73.

78. *Id.* at 57 (ideas accredited to thesis of Vladimir Solovyov, *Il Significato dell’Amore e Altri Scritti* [The Meaning of Love] (1983)).

79. John Anthony McGuckin, *Theodore Balsamon*, in *CHRISTIANITY AND FAMILY LAW* 125 (John Witte Jr. & Gary S. Hauk eds., 2017) (citing the thoughts and writings of twelfth century theologian Theodore Balsamon).

80. *Id.*

81. SCOLA, *supra* note 44, at 73, 83; *see also* POPE JOHN PAUL II, *supra* note 42, at § 246.

82. GIUSSANI, *WHY THE CHURCH?*, *supra* note 43, at 167 (citing 2 CHARLES MOELLER, *LITTÉRATURE DU XXE SIÈCLE ET CHRISTIANISME* 405–06 (1964)).

83. SCOLA, *supra* note 44, at 97; *see also* Pope John Paul II, *supra* note 42, at § 481.

84. SCOLA, *supra* note 44, at 97 (internal quotations omitted).

85. *Id.* at 100.

Council, Jesus was described as “two natures,” “*inconfuse, immutabiliter, indivise, inseparabiliter*”; that is, inconfusedly, unchangeably, indivisibly and inseparably.⁸⁶ Likewise, man and woman in a marital union remain individual persons in God’s image, not changed into one another, but joined in a true and indivisible union—a union that takes on a singular but new form of indivisibility in the presence of any child they conceive.⁸⁷

These last two points, concerning human sexual union and procreation as reflections of the Trinity and Jesus’s two natures, offer another crucial insight into God’s identity: that unity is the “full meaning of difference.”⁸⁸ This has both descriptive and normative functions. It describes what man and woman experience, and suggests that man and woman—as *imago Dei*—should seek unity, communion between themselves, as distinguished from hierarchy, domination, subjugation, objectification, or anything less than or opposed to union.⁸⁹ The social implications of this insight will be further examined in Part II.

C. How God Loves Humanity

Christian theology also holds that human romantic and familial relations convey information about how God loves the human race. Of course, this is already suggested by Jesus identifying himself as a parent, who generates loves, gives good gifts, and protects his children, and by Old and New Testament references to God as the bridegroom and humanity as the bride.⁹⁰

St. Paul’s letter to the Ephesians speaks directly about this: “For this reason a man shall leave his father and mother, and shall be joined unto his wife, and the two shall become one flesh. This is a great mystery, but I speak in reference to Christ and the church.”⁹¹ Catholic theology interprets this passage to mean that the joining of a man and a woman, in a permanent, faithful, one-flesh union, points to God’s love for humanity, and love is a permanent feature of this relationship.⁹² St. Augustine wrote that this passage adds to the *natural* goods of marriage, observable by all—mutual spousal love and children—a supernatural good, and “*sacramentum*,” which the Church interprets as indissolubility.⁹³ Lovers

86. *Id.*

87. *Id.* at 97–100.

88. *Id.* at 12.

89. *Id.*

90. SCOLA, *supra* note 44, at 97.

91. *Ephesians* 5:31–32.

92. SCOLA, *supra* note 44, at 13–15.

93. David G. Hunter, *St. Augustine of Hippo*, in *CHRISTIANITY AND FAMILY LAW* 78 (John Witte Jr. & Gary S. Hauk eds., 2017).

intuit this as a good, and as an intrinsic feature of love, when they wish that their love for one another should be forever, and that the other “cannot die.”⁹⁴ Jesus speaks of this indissolubility in describing the marital union as when the man “shall leave his father and mother and be joined to his wife” and in instructing: “Therefore, what God has joined together, no human being must separate.”⁹⁵ Also characteristic of the divine bridegroom-love that marriage conveys—especially long-term, indissoluble marriage—is its radically sacrificial quality and mutual submission “out of reverence for Christ.”⁹⁶

A final thought from Giussani regarding how stable familial relations can open our eyes to the quality, and certainty, of God’s love for us is his description of how a child grows certain of their mother’s love and spouses of the love of one another. He writes:

To acknowledge a mother’s love for her child is not the conclusion of a logical process: it is evident, a certainty, or a proposal made by reality whose existence one must admit. The existence of . . . my mother’s attachment to me, even if [this] should not be [a] logically developed conclusion[], [is a] realit[y] that corresponds to truth, and it is reasonable to affirm [it].⁹⁷

He imagines a vignette in which a child will not eat food prepared by his loving mother because he suspects it is poisoned.⁹⁸ Giussani concludes that the child’s reaction is so irrational that a psychiatrist could help the child more than a chemist!⁹⁹

Giussani also imagines the experience of a long-married couple, looking back and recalling their first meeting: “Do you remember the first time we met in the mountains? Who would ever have imagined what was going to happen?”¹⁰⁰ Their experience with one another over time reveals the “hidden meaning in one particular instant of [their] life,” the crucial importance of an encounter that would be revealed over the long series of interactions that their “life story and time would gradually reveal.”¹⁰¹ From these experiences—a series of loving exchanges and behaviors over time between a parent and a child or a husband and wife—human beings

94. GIUSSANI, *THE RELIGIOUS SENSE*, *supra* note 50, at 115 (quoting French philosopher Gabriel Marcel).

95. *Mark* 10:7; *Matthew* 19:6.

96. See *Ephesians* 5:21 (“Submit to one another out of reverence for Christ.”); *Ephesians* 5:2 (“[A]nd live in love, as Christ loved us, and handed himself over for us as a sacrificial offering to God for a fragrant aroma.”).

97. GIUSSANI, *THE RELIGIOUS SENSE*, *supra* note 50, at 14–15.

98. *Id.* at 18–19.

99. *Id.*

100. GIUSSANI, *AT THE ORIGIN OF THE CHRISTIAN CLAIM*, *supra* note 43, at 62.

101. *Id.*

can learn that one can become certain about love.

According to Giussani, familial relationships help human beings accept the possibility of gaining certainty about God's love too, including how this was achieved by the first apostles and handed down to the present day by way of a succession of reliable witnesses.¹⁰² Giussani envisions how the apostles were able to testify with certainty that Jesus was perfect love, the "Messiah."¹⁰³ He highlights that part of the Gospel of John where John recalls two apostles' first meeting with Jesus.¹⁰⁴ They followed Jesus, after John the Baptist pointed to him and declared "Behold the Lamb of God!" Jesus invited them to "Come, and you will see."¹⁰⁵ Shortly thereafter, they report to Simon Peter, that "[w]e have found him, of whom Moses in the law and also the prophets wrote"¹⁰⁶ Giussani concludes that the apostles' first encounters with Jesus began a journey during which they witnessed his supernatural powers of healing and forgiving sins, his "coherent intelligence," "invincible dialectics," and, perhaps most importantly, a "gaze that recognized and loved him for what he was."¹⁰⁷ Then, "[b]y sharing his life, by constantly experiencing the sensation that Jesus was exceptional, it became highly reasonable to trust in him. With the passage of time, they acquired incomparable certainty about this man."¹⁰⁸

Likewise, Giussani concludes, certain family relations instruct us that we can arrive at certainty about love by "the fastest of methods, almost more like an intuition than a process."¹⁰⁹ Over time spent together, human intelligence intuits that the only reasonable interpretation of the convergence of "[t]housands of indications" is this: "my mother loves me."¹¹⁰ For people living nearly 2,000 years after Jesus, it is crucial for belief to be able to understand *how* Jesus's companions could come to a reliable conclusion that He was the Messiah and then transmit this to others. Stable parental and spousal relations support this path to belief.

D. How Human Beings Are to Love One Another

Giussani and Scola also write that family relations can illuminate how human beings are to love one another, a crucial Christian commandment according to Jesus: "[A]s I have loved you, you also are to love one

102. *Id.* at 53.

103. *Id.* at 58.

104. *John* 1:35–51.

105. *John* 1:35–39.

106. *John* 1:45.

107. GIUSSANI, AT THE ORIGIN OF THE CHRISTIAN CLAIM, *supra* note 43, at 53.

108. *Id.* at 58.

109. GIUSSANI, THE RELIGIOUS SENSE, *supra* note 50, at 19–20.

110. *Id.*

another.”¹¹¹ And how does God love according to Christianity? As described above, like a bridegroom loves a bride, and as a parent loves a child— short, radically, faithfully, generously, sacrificially, permanently.¹¹² Scola concludes, in fact, that “the love between man and woman constitutes the ‘form’ of love. . . . [O]ne can say it is the *analogatum princeps* of all the various forms of love,” including not only love within the family, but love of every “neighbor” one finds on their path, in the manner of the Good Samaritan.¹¹³

Loving another romantically and in familial relations can also clarify for human beings how a person might be both an *individual* and at the same time *radically bound* to another. This is a core Christian teaching: that, like Christ, human beings can only find themselves by losing themselves in love.¹¹⁴ They are only free when bound to God who is the meaning of life.¹¹⁵ Giussani analogizes this theological realization to the realization achieved by a man and a woman, or a parent and child, when they have experiences of being both “one” and bound to another.¹¹⁶ Giussani writes: “Man never says the word ‘I’ so intensely, never perceives the unity of his own identity with the same passion as when he says ‘you,’ or when, with the same love which he says ‘you,’ he says ‘we.’”¹¹⁷

Scola submits that this dynamic is the reason why, throughout recorded history, individuals and states have recognized the family as the “fundamental cell” of society.¹¹⁸ “In and through the family,” he writes, “each person experiences the possibility of being educated in his twofold dimension of selfness (identity) and difference.”¹¹⁹ But differences *always* oriented to unity.¹²⁰

These insights indicate that experiences of familial love might

111. *John* 13:34.

112. *See supra* Part I.B and C.

113. SCOLA, *supra* note 44, at 57.

114. *See generally* WORLD: VATICAN II’S PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD—PART I: THE CHURCH AND MAN’S CALLING (Peter Foote et al. eds., 1967); *see also* Vatican II, *Gaudium et Spes* § 24 (1965), https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html [<https://perma.cc/GUW5-XBUP>] (“[M]an, who is the only creature on earth which God willed for itself, cannot fully find himself except through a sincere gift of himself”).

115. Vatican II, *supra* note 114 (“[A]ll men are called to one and the same goal, namely God Himself.”).

116. GIUSSANI, *WHY?*, *supra* note 43, at 166–67.

117. *Id.* at 167.

118. SCOLA, *supra* note 44, at 211.

119. *Id.*

120. *See generally id.* at 131, 156, 213, 218–19, 231.

empower positive, pro-social care for human beings beyond the family, according to the command to love one another as God loves us.¹²¹ Care should go so far as to be faithful, generous, and sacrificial, like spousal or parental care. Familial love as a template for all love—given the diversity of family members alongside their equality and union—should also inspire: recognition of the radical equality of every person alongside diversity and irreducibility; recognition that differences between people are ultimately oriented toward union; and recognition that the union of differences is fruitful. These are radically pro-social insights.

Part I articulated the way in which Christian familial norms constitute the architecture of the faith, allowing those who appropriate them to gain understandings of foundational—and regularly otherwise mysterious or seemingly contradictory—Christian beliefs. Again, this exposition shows how these norms do not serve as a “purity code” to be imposed upon or to judge individual persons. Instead, Christians teach that these norms are a brilliant and graced path available to every human being—given all humans have families—for a better understanding of divine choices respecting creation, and in order to plumb questions ranging from God’s identity, humanity’s identity as *imago Dei*, the quality of God’s love for humanity, and how human beings are to love God and one another. This Part has made a theological claim that understanding the existence of two sexes, oriented to union and capable of procreation, plays an important role in grasping fundamental pillars of the Christian faith. Part II will show empirical sociological literature affirms that children exposed to these family norms tend more often to appropriate a Christian faith.

II. THE SOCIOLOGICAL EVIDENCE FOR A RELATIONSHIP BETWEEN FAMILY NORMS AND FAITH TRANSMISSION

There are both broad indications and focused sociological investigations suggesting that certain family patterns are more likely to allow for the preservation and transmission of the Christian faith to the next generation. As described below, some larger trends suggest that, while it is certainly true that religious belief sometimes structures family life, it is also quite possible that family life, in turn, helps the survival of a religion.

Author Mary Eberstadt, describes this as a “double helix” relationship.¹²² She points to data from both Europe and the United States showing how religious participation declined following the rise in

121. *John* 13:34.

122. EBERSTADT, *supra* note 1, at 106.

practices such as cohabitation, nonmarital births, and divorce.¹²³ She further observes that religiosity tends to increase with age, as does family formation.¹²⁴ Additionally, she articulates that family fragility—the rise of nonmarital births and the absence of stably committed parents—is a reason why urbanization and industrialization were followed by declining religious practice.¹²⁵ Additionally, both phenomena are associated with greater difficulties in forming and sustaining family life.¹²⁶ Family sociologist Andrew Cherlin also points to the opposite but likewise supporting phenomenon: looking through historical church membership data in the eighteenth and nineteenth centuries, one sees that “[a]s the ideal of marriage strengthened, so did religion.”¹²⁷

More focused sociological investigations also describe the possibility that family beliefs and practices affect faith transmission, with accounts that often echo the theological account. A highly regarded study of faith transmission, by Vern Bengtson and colleagues, examined 357 four-generation families, including about 3,500 grandparents, parents, grandchildren, and great-grandchildren, using data from the Longitudinal Study of Generations.¹²⁸ It first highlights the surprising conclusion that parental influence upon children’s religious beliefs did not weaken much between the 1970s and the early twenty-first century, when measured in terms of religious affiliation, intensity, participation (frequency of service-going), agreement with a literal or conservative interpretation of the Bible, and opinions regarding the importance of religion in civic life.¹²⁹ At the same time, to the degree religious transmission *has* weakened, the largest drop has occurred among Catholics.¹³⁰

Bengtson affirms findings from earlier research that children’s “relations with parents are linked to their first conceptions of God.”¹³¹ He measures these relations among many axes including, for example,

123. *Id.* at 106–11, 131–36.

124. *Id.* at 100–02.

125. *Id.* at 105–23.

126. *Id.* at 115–19.

127. ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* 58 (2009).

128. *See generally* VERN L. BENGTSON, *FAMILIES AND FAITH: HOW RELIGION IS PASSED DOWN ACROSS GENERATIONS* (2017). Winner of the Distinguished Book Award from American Sociology Association Sociology of Religion Section and Winner of the Richard Kalish Innovative Publication Award from the Gerontological Society of America. *Bengtson Wins Two Book Awards*, USC EDWARD. R. ROYBAL INST. ON AGING (July 11, 2015), <https://roybal.usc.edu/news/bengtson-book-awards/> [<https://perma.cc/VZ2S-4YMS>].

129. BENGTSON, *supra* note 128, at 54.

130. *Id.* at 59.

131. *Id.* at 71 (citing Dean Hoge et al., *Transmission of Religious and Social Values from Parents to Teenage Children*, 44 J. MARRIAGE & FAM. 569 (1982)).

emotional closeness and consistency and integrity respecting faith practices.¹³² He also finds that faith transmission is more dependent, on average, upon fathers' closeness and religious modeling than upon mothers'; though, both parents' modeling is very important.¹³³ Stable marital parenting supplies significant advantages for faith transmission, while grandparent support also plays a role, especially support from a dependable grandfather.¹³⁴

Eberstadt proposes additional experiential mechanisms that might rationally explain how family structures promote religious transmission. These closely echo the theological account in Part I above. She highlights the role that procreation might play, suggesting that bearing children, who are obviously made by "another," can lead to respect for and humility before the divine.¹³⁵ Additionally, the profound experience of parental love for a child, the realization of the immense care they require, and appreciation of incredible grief of losing a child, all communicate the inextricably sacrificial quality of love.¹³⁶ This helps make sense of a central Christian conviction that Christ is the exemplar of what it means to be human, because human beings are called to—and even fulfilled and freed by—dying to self and caring for others.¹³⁷ I would submit that this insight applies also to the mutual care spouses provide to one another, or children provide to aging parents, or the care any one relative provides for another in need.

As previously explained, Giussani suggested romantic and familial love can also provoke a belief in eternity; both types of relations inspire the sentiment and the hope of never-ending love.¹³⁸ This may be particularly true of parents' love for their children.¹³⁹ Finally, there is the potential for a better understanding of Jesus's calling *his* father "Our Father," when a father is present.¹⁴⁰

Faith transmission is further sustained in the presence of community

132. *Id.* at 72–73.

133. BENGTON, *supra* note 128, at 75–77, 107, 109, 115.

134. *Id.* at 103–104, 105, 186–88.

135. EBERSTADT, *supra* note 1, at 156–58.

136. *Id.* at 130, 156, 159.

137. THE CATECHISM OF THE CATHOLIC CHURCH § 482 (1994); *see supra* notes 107–108 (explaining that the apostles began to trust Jesus because he lived as they did).

138. *See supra* notes 107–108.

139. EBERSTADT, *supra* note 1, at 158–59 ("All men and women fear death; but only mothers and fathers can be counted upon to fear another individual's death more than their own, for almost all do.").

140. *Id.* at 161 ("[A] great many other people similarly find Christianity more distant these days precisely *because* of its insistence on the centrality not only of 'the family' in the abstract, but also on understanding a *particular* family from two thousand or so years ago—one peopled by a mother, an adoptive yet loving father, and a child for whom all sacrifices would come to be made.").

support for the parents' religious socialization. Bengtson writes that "religious socialization by parents is reinforced by experiences children receive at church or synagogue, with friends, at school, and in the community."¹⁴¹ Religious continuity is more disrupted, however, in the presence of messaging and authority figures drawing young people away.¹⁴² This set of conclusions has robust support from empirical data showing that all those who regularly interact with others in a group setting can importantly influence others—known generally as "social influence" literature.¹⁴³ I have treated this material at significant length elsewhere.¹⁴⁴ When such literature examines influences affecting religion, it may be published under the headings of the sociology or psychology of religion.¹⁴⁵ This literature strongly supports the notion that maintenance and transmission of beliefs and norms are strongly influenced by the presence of persons who are knowledgeable, confident, expert, relatable individuals who speak in favor of, and role model, the relevant beliefs and norms.¹⁴⁶ Overall, it supports the conclusion that group settings, such as public schools, where confident and authoritative leaders endorse particular beliefs and conduct, will have significant influence upon minor students.¹⁴⁷

The next Part will consider the kinds of beliefs and conduct some public schools are endorsing in programs or curriculum beyond parental powers of objection.

III. SOME PUBLIC SCHOOLS' COMMUNICATIONS TO MINORS ABOUT FAMILIAL RELATIONS

Public schools communicate familial information and values to minors, including values that largely overlap with religious material

141. BENGTON, *supra* note 128, at 121. *See generally* Mark D. Regnerus & Jeremy E. Uecker, *Finding Faith, Losing Faith: The Prevalence and Context of Religious Transformations During Adolescence*, 47 REV. RELIGIOUS RSCH. 217 (2006).

142. *See* BENGTON, *supra* note 128, at 117, 182.

143. *See* CASS SUNSTEIN, CONFORMITY (2021) (examining and describing the extensive social influence literature); Helen M. Alvaré, *Church Autonomy After Our Lady of Guadalupe School: Too Broad? Or Broad as It Needs to Be?*, 25 TEX. REV. L. & POL. 319, 354–70 (2021) (summarizing research conclusions on how "religious institution's personnel choices matter" in its ability to preserve and transmit the faith).

144. *See generally* Alvaré, *supra* note 143 (summarizing research conclusions on how "religious institution's personnel choices matter" in its ability to preserve and transmit convictions and noting the author has written extensively about the power of social influence on faith).

145. *See id.* at 355.

146. *See id.* at 354–70.

147. *See* HELEN M. ALVARÉ, RELIGIOUS FREEDOM AFTER THE SEXUAL REVOLUTION 96–103 (2022) (referencing a variety of studies and scholarship that highlight the influence everyday people have on adolescents' lives, often becoming inadvertent role models and describing how role models and environmental factors influence the transmission of faith).

about sex, marriage, and parenting. Some do this both within the confines of sex-ed courses—which in some states are subject to parental opt-ins and -outs—while others also host special assemblies or weave familial values through courses such as English, history, or reading.¹⁴⁸ This latter material is no less about sex, marriage, or parenthood than the material inside courses subject to parental options, and thus has no less potential to influence students’ thinking and behavior about matters that are also crucial to faith understanding and transmission. But parents do not generally have recognized statutory rights to object to these state interventions.

A detailed recounting of every state’s and locality’s separate laws and practices about parents’ rights respecting sex-education courses in particular is beyond the scope of this Article, but other authors have summarized this material.¹⁴⁹ It is instructive, however, to take a look at a representative statute that draws a line between sex, marriage, and parenting educational content that *requires* parental involvement and content *not* requiring it. California’s law provides: Health instruction; conflicts with religious training and beliefs:

(a) If any part of a *school's instruction in health* conflicts with the religious training and beliefs of a parent or guardian of a pupil, the pupil, upon written request of the parent or guardian, shall be excused from the part of the instruction that conflicts with the religious training and beliefs.

(b) For purposes of this section, “religious training and beliefs” includes personal moral convictions.¹⁵⁰

The law further states that opting out does *not* apply to “*instruction, materials, presentations, or programming* that discuss gender, gender

148. See generally Casey Leins, *These States Require Schools to Teach LGBT History*, U.S. NEWS (Aug. 14, 2019, 1:25 PM), <https://www.usnews.com/news/best-states/articles/2019-08-14/states-that-require-schools-to-teach-lgbt-history> [<https://perma.cc/D96J-PBXN>]; Sarah Schwartz, *Four States Now Require Schools to Teach LGBT History*, EDUC. WEEK (Aug. 12, 2019), <https://www.edweek.org/teaching-learning/four-states-now-require-schools-to-teach-lgbt-history/2019/08> [<https://perma.cc/4DTL-6GNG>]; Grace Chen, *Teaching Gay History in Public Schools: A Possible Mandate in California*, PUB. SCH. REV. (Aug. 14, 2021), <https://www.publicschoolreview.com/blog/teaching-gay-history-in-public-schools-a-possible-mandate-in-california> [<https://perma.cc/9AAG-HMUT>].

149. See, e.g., SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., STATE PROFILES: SEX ED STATE LAW AND POLICY CHART (2022) [hereinafter SIECUS Guide], https://siecus.org/wp-content/uploads/2020/05/SIECUS-2020-Sex-Ed-State-Law-and-Policy-Chart_May-2020-3.pdf [<https://perma.cc/4Y5K-PJ4G>] (showing subjects for which parents can opt out and request instruction materials); see also Lauren Batterham, *Why Planned Parenthood Is Better Than Un-Planned Parenthood: Why United States Sexual Education Should Remain Modernized*, 26 ANNALS HEALTH L. ADVANCE DIRECTIVE 49, 61 (2017) (summarizing the number of states that require teaching on sexual education, whether it must be “medically, factually, or technically accurate,” and whether parents can opt-out).

150. CAL. EDUC. CODE § 51240 (effective Sept. 29, 2004) (emphasis added).

identity, gender expression, sexual orientation, discrimination . . . relationships, or family . . .”¹⁵¹

Massachusetts’s law is similar. It requires that parents receive “notice and the opportunity to exempt their children from curriculum which *primarily* involves human sexual education or human sexuality issues.”¹⁵² But the schools do not apply this statutory exemption to parents in connection with materials outside of such curriculum, including to schools’ distribution of books that the state acknowledged “celebrate” same-sex unions and “intended to influence” the children, on the grounds that materials did “not primarily involve human sexual education or human sexuality issues.”¹⁵³

Below, I note some of the public-school messages about familial values communicated outside of courses requiring parental involvement. It is worth noting, as an introduction, that groups advocating not only particular sex-education courses—but the integration of normative sexual and familial materials into public-school curricula—are supported by the leading interest group representing teachers and administrators in all the nation’s public schools, the National Education Association (“NEA”).¹⁵⁴ Other groups advocating the same are hired to train individual public-school districts. In Colorado, for example, school districts partner with “A Queer Endeavor” designed not only to “just include[e] LGBTQ-themed material into the curriculum,” but to achieve “institutional change” and to “shift[] cultural norms.”¹⁵⁵ One of these groups, the Sexuality Information and Education Council of the U.S. (“SIECUS”), for example, instructs teachers to provide “affirming . . . instruction” about a wide variety of sexual identities, states that biological sex is

151. CAL. EDUC. CODE § 51932 (effective Jan. 1, 2016) (emphasis added).

152. *Parker v. Hurley*, 514 F.3d 87, 90 (1st Cir. 2008) (emphasis added) (citing MASS. GEN. LAWS ch. 71, § 32A (1996)).

153. *Parker*, 514 F.3d at 90, 106.

154. See, e.g., FUTURE OF SEX EDUC. INITIATIVE, NATIONAL SEXUALITY EDUCATION STANDARDS: CORE CONTENT AND SKILLS, K-12 (2011), <https://advocatesforyouth.org/wp-content/uploads/2019/09/josh-fose-standards-web.pdf> [<https://perma.cc/E6ZQ-CVYM>] (citing SIECUS and the National Education Association (NEA) Health Information Network for its role in developing the National Sexuality Education Standards. See SIECUS Guide, *supra* note 149 (stating the guide’s purpose as “remov[ing] state-level legal and policy barriers to LGBTQ-inclusive sex education in schools and require LGBTQ-inclusive programs.”).

155. Jennifer Brown, *Boulder Valley Schools Leading the Way in Training Teachers for LGBTQ Culture Change*, DENVER POST (Nov. 12, 2016, 8:42 PM), <https://www.denverpost.com/2016/11/12/boulder-valley-schools-teachers-lgbtq-culture-change> [<https://perma.cc/L8YV-7QE9>]; *A Queer Endeavor Shifting Cultural Norms and Making a Difference in the Lives of Students and Educators*, UNIV. COLORADO, BOULDER SCH. OF EDUC. (Nov. 23, 2015), <https://www.colorado.edu/education/2015/11/23/queer-endeavor-shifting-cultural-norms-and-making-difference-lives-students-and-educators> [<https://perma.cc/2LER-4ZTD>].

“assigned,” and affirms abortion as a good choice.¹⁵⁶

There have been some materials presented outside of sex-ed courses provoking parental backlash. In Colorado, for example, children from kindergarten through fifth grade were exposed to a school play performed by a transgender choir, celebrating transgender identification, and involving repeated audience chanting of “Who we are in the inside is who we are.”¹⁵⁷ The school did not initially offer a parental opt-out for the play, but after some parents complained to the media, the school offered one.¹⁵⁸ It did not, however, permit an opt-out from mandatory video-watching and classroom discussion celebrating transgender identification, including by a cuddly teddy bear who laments that some people who are “mean,” “confused,” and do not agree with individuals’ choice of their own sex, will eventually “know better.”¹⁵⁹

In Massachusetts, beginning in the seventh grade, children were given free access to condoms and related literature, including in bathroom vending machines, without the possibility of a parental opt-out.¹⁶⁰ Also in Massachusetts, kindergarten children read texts celebrating same-sex marriage.¹⁶¹ Other Massachusetts children were exposed to a mandatory school-wide assembly involving the simulation of aspects of sexual intercourse, with audience participation and role-playing.¹⁶² As described by the court, students attending the assembly reported that the performer hired by the public school:

156. See SIECUS *supra* note 149, at 6 (“States have different requirements regarding discussion of abortion in sex education classes. Some state laws prohibit instruction on abortion or require inclusion of medically inaccurate information written to dissuade students from viewing abortion as an acceptable outcome of pregnancy, while curricula that are affirming of abortion promote or include instruction that is medically accurate, unbiased information about abortion as a valid outcome of pregnancy.”).

157. Jones v. Boulder Valley Sch. Dist. RE-2, No. 20-CV-03399-RM, 2021 WL 5264188, at *5 (D. Colo. Oct. 4, 2021).

158. See *id.* at *4 (“The School . . . agreed to provide opt-out options for children from scheduled instructional events but declined to allow opt-outs for organic classroom discussions.”).

159. *Id.* (describing the qualifications under the opt-out program); see generally Complaint for Money Damages at ¶ 10, Jones v. Boulder Valley Sch. Dist. RE-2, No. 20-CV-03399-RM-NRN, 2021 WL 5264188 (D. Colo. Nov. 16, 2020).

160. See Curtis v. Sch. Comm. of Falmouth, 652 N.E.2d 580, 583 (Mass. 1995) (“The FSC condom program does not provide for an ‘opt out’ for students’ parents whereby the parents have the option of excluding their student child from the availability of condoms. Nor is there a parental notification provision in the FSC program by which parents would be notified of their children’s requests for condoms.”).

161. See Parker v. Hurley, 514 F.3d 87, 92–93, 102 (1st Cir. 2008) (describing a book read by Massachusetts kindergarten students entitled *Who’s In a Family?*, which depicted different families, including a family with two dads and two moms).

162. See Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 529, 534 (1995), *abrogated by* Martinez v. Cui, 608 F.3d 54 (1st Cir. 2010) (detailing a high school assembly in which students observed sexually explicit monologues and skits to raise awareness for AIDS and sex education).

1) told the students that they were going to have a “group sexual experience, with audience participation”; 2) used profane, lewd, and lascivious language to describe body parts and excretory functions; 3) advocated and approved oral sex, masturbation, homosexual sexual activity, and condom use during promiscuous premarital sex; 4) simulated masturbation; 5) characterized the loose pants worn by one minor as “erection wear”; 6) referred to being in “deep sh—” after anal sex; 7) had a male minor lick an oversized condom with her, after which she had a female minor pull it over the male minor’s entire head and blow it up; 8) encouraged a male minor to display his “orgasm face” with her for the camera; 9) informed a male minor that he was not having enough orgasms; 10) closely inspected a minor and told him he had a “nice butt”; and 11) made eighteen references to orgasms, six references to male genitals, and eight references to female genitals.¹⁶³

Many parents have sought to intervene to prevent public schools from influencing their children with content over which parents have no notice or authority.¹⁶⁴ The Supreme Court has not weighed in precisely on the question of parents’ rights to intervene in public education about particular educational content—save prayer in schools—but has strongly defended parents’ natural rights to direct their children’s moral and religious education generally.¹⁶⁵

The next Part will first set out those Supreme Court opinions acknowledging parents’ rights, respecting their children’s education both as a matter of the Free Exercise guarantee and as a matter of parents’ Fourteenth Amendment substantive due process rights, respecting their children’s custody and care. Thereafter, the Article will consider and respond to the ways that lower federal courts have rejected parents’ attempts to foreclose the state from proselytizing their children respecting familial values directly contradicting families’ religious convictions.

IV. THE SCOPE OF PARENTS’ CONSTITUTIONAL RIGHTS ACCORDING TO FEDERAL COURTS

On the matter of parents’ and the states’ overlapping interests in children’s education, the Supreme Court has held generally that “[i]t is

163. See *Brown*, 68 F.3d at 529 (listing the various sexually explicit aspects of the high school student assembly).

164. See *infra* notes 187, 201, 210, 212 (listing cases in which the Court made a determination of the proper line between parental intervention and what the state has deemed best for children).

165. See *infra* Part IV (detailing the scope of parents’ rights in the United States based on federal court rulings to apply the courts’ logic and precedent to this particular matter that has not been explicitly ruled on before).

cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”¹⁶⁶ The Court has further held that there exists a “private realm of family life which the state cannot enter.”¹⁶⁷

The Court’s leading education precedents include *Meyer v. Nebraska*,¹⁶⁸ *Pierce v. Society of Sisters*,¹⁶⁹ and *Wisconsin v. Yoder*.¹⁷⁰ In *Meyer*, the Court struck down a law that forbade schools from teaching any foreign language prior to the eighth grade as interfering with parents’ substantive due process right to educate their children.¹⁷¹ There, the Court recognized that the Fourteenth Amendment’s liberty guarantee assured citizens a right “to marry, establish a home and bring up children”¹⁷² This included parents’ “right of control” respecting their children, which included a right to “engage [a German teacher] so to instruct their children.”¹⁷³

Parents’ rights were also vindicated against a law requiring children to attend public as opposed to private schools in *Pierce v. Society of Sisters*.¹⁷⁴ There, the Supreme Court included within parents’ substantive due process rights the choice to educate their children in private schools.¹⁷⁵ The *Pierce* opinion contained the memorable observation that: “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.”¹⁷⁶ The *Yoder* decision identified these additional obligations to “include the inculcation of moral standards, religious beliefs, and elements of good citizenship.”¹⁷⁷ When speaking about the “power of the state reasonably to regulate all schools” concerning the curriculum, however, the *Pierce* Court said only that the state “must” teach “certain studies plainly essential to good citizenship” and “nothing . . . manifestly inimical to the public welfare.”¹⁷⁸ The implications of this allocation of authority will

166. *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000).

167. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

168. *See generally* 262 U.S. 390 (1923).

169. *See generally* 268 U.S. 510 (1925).

170. *See generally* 406 U.S. 205 (1972).

171. 262 U.S. at 397, 403.

172. *Id.* at 399.

173. *Id.* at 400.

174. 268 U.S. at 530.

175. *Id.* at 534.

176. *Id.* at 535.

177. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

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

be discussed further in this Part.

Wisconsin v. Yoder is another important parents' rights case related to the question of whether it might provide heightened protection of parents' interests respecting the state communications highlighted in this Article. In *Yoder*, the Court required Wisconsin to grant an exemption to Amish families from compulsory schooling laws requiring them to attend until age sixteen.¹⁷⁹ The Amish removed their children from organized schools at age fourteen, in order to integrate them into the Amish existence and prepare them for an Amish adulthood.¹⁸⁰ The *Yoder* Court relied both upon parents' free exercise and substantive due process rights respecting care, custody, and control of children.¹⁸¹ It recognized states' important interests in educating children to be both capable citizens and self-sufficient, productive adults.¹⁸² But it deferred to expert evidence that the state's compulsory education law directly contradicted Amish beliefs and threatened the very continued existence of the religion.¹⁸³ It therefore concluded that even a state's compelling interests in fostering an educated citizenry were insufficient grounds for enforcing the law against Amish culture.¹⁸⁴ Rather, Amish adults live separately and do not need to receive the same education as children living in the wider society.¹⁸⁵ Furthermore, Amish training likely *better* prepared children for adult self-sufficiency, as evidenced by their 200-year record on this matter.¹⁸⁶

Troxel v. Granville is not a case concerning parental rights respecting children's education, but it is worthy of mention here because the Court spoke at some length about the relative weight of parental authority.¹⁸⁷ There, in a case pitting a mother against her children's paternal grandparents who wanted more visitation than the mother was willing to grant, the Court held that judges are required to give "special weight" to a mother's wishes regarding her children's visits with others, with exceptions only regarding parents who are "unfit."¹⁸⁸ The Court stressed that the "interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court," and included "the right of parents to 'establish

179. *Yoder*, 406 U.S. at 207.

180. *Id.*

181. *Id.* at 209, 213–15.

182. *Id.* at 221.

183. *Id.* at 219.

184. *Id.* at 234.

185. *Yoder*, 406 U.S. at 225.

186. *Id.* at 223, 226–27.

187. *See generally* 530 U.S. 57 (2000).

188. *Id.* at 68, 69.

a home and bring up children” and “to control the education of their own.”¹⁸⁹ The Court also reaffirmed the traditional family law presumption that a fit parent acts in her child’s best interests, citing a prior decision that had observed:

The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.¹⁹⁰

While none of these opinions specifically adjudicate the question of parental rights to opt-out of familial material presented at a public school, they do strongly support the conclusion that parents’ legal authority regarding their children’s upbringing and education is broad, even as they grant states’ interests in providing the education necessary to form citizens prepared to live in a pluralistic democracy and to be self-sufficient. But lower federal courts more recently are holding that parents’ rights *cannot* trump states’ interests not only in *introducing* their children to familial values material, but also in endorsing—as truthful or beneficial—certain beliefs or conduct concerning sex, sexual identity, sexual relations, and procreation.¹⁹¹ There is no simple or easy path to overcoming the many arguments and objections these lower federal court opinions raise. But, as indicated above, there are good reasons to seek one.

Below, I set out the leading arguments that federal courts propound in support of their conclusion that the states’ interests trump parents’ rights regarding familial values taught to students outside of sex-education classes.

A. “Internal Affairs”

First, the state supreme court in Massachusetts held that a high school program allowing children to request a condom from the school, or buy them in vending machines, without available parental opt-outs, was a matter of the government’s “internal affairs” and not a matter for the family.¹⁹² The court analogized the program to the factual situation in *Lyng v. Northwest Indian Cemetery Protective Association*, wherein the Supreme Court affirmed the government’s ability to determine the fate of

189. *Id.* at 65.

190. *Id.* at 68-69 (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979)).

191. See *infra* Part IV (discussing the scope of parents’ constitutional rights in federal courts).

192. *Curtis v. Sch. Comm. of Falmouth*, 652 N.E.2d 580, 588 (Mass. 1995).

its own land despite the effects that its decision to develop land could have upon a Native tribe that relied upon it for important religious rituals.¹⁹³ It further analogized it to the government's authority over its own social security program against a person holding a religious belief rejecting the assigning of a number to a person.¹⁹⁴

B. No "Tailoring"

Second, courts sometimes opine that not only does the free exercise guarantee not provide parents a right to "tailor" the curriculum to their religious beliefs, but such tailoring could itself be a violation of the Establishment Clause.¹⁹⁵ In *Epperson*, the Supreme Court ruled that it was a violation of the Establishment Clause for Arkansas to ban the teaching of evolution in its public schools.¹⁹⁶ It reasoned that Arkansas had banned the subject "for the sole reason that it is deemed to conflict with a particular religious doctrine."¹⁹⁷ The Court wrote that states could not, consistent with the Establishment Clause, "tailor[]" teaching or learning to the "principles or prohibitions of a religious sect or dogma."¹⁹⁸

Lower federal courts sometimes further characterize parents' efforts as attempts to "restrict the flow of information in the public schools," or "generally to direct how a public school teaches their child."¹⁹⁹ Lower federal courts' repetition of this principle has achieved string cite status. For example, in *Parker v. Hurley*, a case concerning a school giving five- and six-year-olds children books celebrating same-sex marriage, the court wrote about parents:

[T]hey do not have a constitutional right to "direct *how* a public school teaches their child." *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir.2005). That proposition is well recognized. *See, e.g., C.N.*, 430 F.3d at 184 (recognizing a "distinction between actions that strike at the heart of parental decision-making authority on matters of the greatest importance and other actions that, although perhaps unwise and

193. *Id.* at 588 (citing *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988)).

194. *Id.* (citing *Bowen v. Roy*, 476 U.S. 693, 699–700 (1986)) ("The Free Exercise Clause affords an individual protection from certain forms of compulsion").

195. *See, e.g., id.* at 588–89; *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968); *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1064 (6th Cir. 1987)) (each case indicating that the Supreme Court "has clearly held that it violates the Establishment Clause to tailor a public school's curriculum to satisfy the principles or prohibitions of any religion.").

196. 393 U.S. at 109.

197. *Id.* at 103.

198. *Id.* at 106.

199. *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 534 (1st Cir. 1995), *abrogated by* *Martinez v. Cui*, 608 F.3d 54 (1st Cir. 2010); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005).

offensive, are not of constitutional dimension”); *Leebaert*, 332 F.3d at 141 (“*Meyer*, *Pierce*, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught.”); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir.2001) (“It has long been recognized that parental rights are not absolute in the public school context and can be subject to reasonable regulation.”); *Swanson*, 135 F.3d at 699 (“The case law in this area establishes that parents simply do not have a constitutional right to control each and every aspect of their children's education”); see also *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1207 (9th Cir. 2005), amended by 447 F.3d 1187 (9th Cir. 2006). Indeed, *Meyer* and *Pierce* specified that the parental interests they recognized would not interfere with the general power of the state to regulate education, including “the state's power to prescribe a curriculum for institutions which it supports.” *Meyer*, 262 U.S. at 402.²⁰⁰

Brown v. Hot, Sexy & Safer Productions, Inc. is a particularly surprising and extreme application of the conclusion that parents have no rights regarding state decisions to instruct their children about sex and sexual relations outside of sex-ed courses.²⁰¹ The presentation at issue, described above, was a public school’s compulsory, school-wide, sex-ed assembly—with no parental opt-out available—featuring a graphic, ninety-minute presentation staged by a company called Hot, Sexy, and Safer, Inc. and involving student/audience participation.²⁰² Still, the First Circuit held that *Meyer* and *Pierce* do not give parents a “fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children.”²⁰³

C. Impracticability

Third, sometimes courts combine a denial of parents’ rights with remarks about how impracticable and undesirable it would be to grant parents greater say in schools’ programming or course content.²⁰⁴ They make a “floodgates” argument, in other words, stating that in a pluralistic society, innumerable parents would object to some part of the curriculum and render the delivery of education nearly impossible.²⁰⁵ In the words of the *Brown* court:

200. *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008).

201. See generally 68 F.3d 525.

202. *Id.* 529.

203. *Id.* at 533.

204. See generally *id.*; *Jones v. Boulder Valley Sch. Dist. RE-2*, No. 20-CV-03399-RM-, 2021 WL 5264188 (D. Colo. Oct. 4, 2021).

205. See e.g., *Brown*, 68 F.3d 525; *Jones*, 2021 WL 5264188.

If 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. We cannot see that the Constitution imposes such a burden on state educational systems²⁰⁶

A federal district court in Colorado opined similarly about the unworkability of parental involvement in *Jones v. Boulder Valley Sch. Dist. RE-2*.²⁰⁷ As described above, parents in that case had objected to presentations celebrating the right to subjectively determine one's own sex, and to videos and class discussions doing the same, which also denigrated persons who disagreed with this viewpoint.²⁰⁸ On the subject of the impracticability of allowing parental say over such matters, the court wrote:

In other words, if a second grader were to ask the teacher, "Why does Jane have two daddies?," or a third grader were to ask, "Why does Sam always dress and act like a girl?—He's a boy and ought to behave that way," the teacher could not even answer the question by explaining that families are different, and urging understanding and tolerance for all people, but instead would be required to send the questioning child to the principal's office and immediately alert the Parents. This illogical response is not required under the Constitution and the refusal to allow opt-outs from organic classroom conversations or questions about gender or non-traditional families that may arise (while granting opt-outs from formal instructional events) is not a violation of the family's right to the free exercise of their religion.²⁰⁹

D. "Just Exposure" Thus No Burden on Free Exercise

Fourth, courts' most common argument rejecting parents' free exercise claims is that parents cannot even demonstrate a burden upon such rights, because they cannot show any form of coercion, such as a compulsory

206. *Brown*, 68 F.3d at 534.

207. *Jones*, 2021 WL 5264188, at *12.

208. I set aside the ambiguity of Colorado's opt-out statute, which could be interpreted to recognize parental opt-out rights whenever any aspect of "sexuality" was addressed. The defendant School District's policies stated that: "Under Colorado law, parents may excuse students from any portion or portions of the School District's comprehensive health education, including human sexuality education." Ex. 16 Exclusion Form, *Jones*, 2021 WL 5264188, ECF No. 13-16 (listing the various topics that parents may opt their children out of, including "negative influences and myths regarding sexual activity," "gender expression and identity, sexual orientation," "labels and stereotypes regarding gender identify and sexual orientation," healthy relationships, dating, marriage and intimacy").

209. *Jones*, 2021 WL 5264188, at *12.

demand, punishment for disobedience, or indoctrination.²¹⁰ Courts insist that schools are rather merely “exposing” minors to information which will assist their health, tell them what the law is, or ensure tolerance and safety for fellow students.²¹¹ Different courts express sometimes contradictory opinions about the line between exposure and coercion, which will be considered further below, while always managing to arrive at the same conclusion: no coercion occurred.

The “just exposure” argument was prominently elaborated in the Sixth Circuit’s opinion in *Mozert v. Hawkins County Board of Education*.²¹² This is not a case about schools’ discussion of sex but is regularly referenced by cases concerning sexual material as providing a strong argument on behalf of schools’ authority over curricula as “exposure” versus “indoctrination.”²¹³ The parents in *Mozert* raised a First Amendment Free Exercise claim in response to materials presented in the school’s reading curriculum, which they claimed proposed ideas about the divine opposed to their beliefs.²¹⁴ The court held that there was no evidence of coercion; rather students were merely being exposed to a variety of ideas, without being required to “affirm or deny a religious belief”²¹⁵ Being required to read particular materials and attend reading classes is not compulsion, the court opined.²¹⁶ Compulsion, said the court, is a requirement “to do or refrain from doing an act forbidden or required by one’s religion, or to affirm or disavow a belief forbidden

210. See generally *id.*; *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008); *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

211. See, e.g., *Jones*, 2021 WL 5264188, at *2 (describing the challenged programming as efforts by the school to “teach tolerance and understanding of transgendered individuals”); *Curtis v. Sch. Comm. of Falmouth*, 652 N.E.2d 580, 582–83 (Mass. 1995) (describing the school’s condom program); *Parker*, 514 F.3d at 93, 95 (describing the school’s use of a particular book as “promoting tolerance, including for the children (and parents) of gay marriages”); *id.* at 102, 106 (recognizing the school’s interests in “seeking to eradicate bias against same-gender couples” and ensure the safety of all students and holding that the parents had notice of the school’s intent to promote tolerance of same-sex marriage); *Jones*, 2021 WL 5264188, at *3–4 (describing a school’s decision to show a movie about the transgender community in line with the school district’s policy to support students and staff who are transgender or gender nonconforming).

212. 827 F.2d 1058 (6th Cir. 1987).

213. See, e.g., *Jones*, 2021 WL 5264188, at *10 (citing *Mozert* to support the contention that parents have no fundamental right to exempt their children from educational programming they find objectionable); *Parker*, 514 F.3d at 105 (stating that *Mozert* held that “exposure to ideas” through required reading in school is not a constitutionally significant burden on the free exercise of religion); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 537 (1st Cir. 1995), *abrogated by* *Martinez v. Cui*, 608 F.3d 54 (1st Cir. 2010) (stating that *Mozert* held that, since the Free Exercise Clause does not restrict school boards from setting curricula, their authority is bounded only by the Establishment Clause).

214. 827 F.2d at 1060–61.

215. *Id.* at 1069.

216. *Id.*

or required by one's religion”²¹⁷

Interestingly, *Mozert* did suggest that coercion might be found if teachers obtained student participation in role play, practice of what the book taught, or even “read[ing] aloud.”²¹⁸ The court did not detect coercion, however, in the fact that these precise activities were recommended in the accompanying teachers’ manual because they did not find evidence that they were actually carried out.²¹⁹ The evidence given by a teacher in *Mozert* was that she “looks at the lesson plans in the teachers’ editions, but ‘does her own thing.’”²²⁰ Furthermore, the court held that mere offense at ideas or beliefs opposed to one’s own, or having one’s beliefs placed in doubt, is not sufficient to constitute a burden on free exercise.²²¹

The “just exposure” rationale was also used in *Parker v. Hurley*, even though students were given books which, in the court’s words, “celebrate[d]” same-sex marriage.²²² The *Parker* court further acknowledged that “[i]t is a fair inference that the reading of *King and King* was precisely *intended* to influence the listening children toward tolerance of gay marriage. That was the point of why that book was chosen and used.”²²³ But, it continued, “[e]ven assuming there is a continuum along which an intent to influence could become an attempt to indoctrinate . . . this case is firmly on the influence-toward-tolerance end. There is no evidence of systemic indoctrination. There is no allegation that Joey was asked to affirm gay marriage.”²²⁴

Like the *Parker* court, the *Jones* court resisted seeing coercion in the school’s activities and instructions to teachers.²²⁵ Having children repeatedly chant statements of belief in matters opposed to their religion, or listening to cuddly teddy bears denigrate their family’s religious beliefs, were not judged to be coercive activities.²²⁶ Nor was the *Jones* court persuaded by the school district’s written communication to teachers to “weave . . . into your everyday teaching practice or an

217. *Id.* at 1066.

218. *Id.*

219. *Id.* at 1064.

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

221. *Id.* at 1068 (citing *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1533, 1541–43 (9th Cir. 1985)).

222. 514 F.3d 87, 90 (1st 1stCir. 2008).

223. *Id.* at 106.

224. *Id.*

225. *Jones v. Boulder Valley Sch. Dist. RE-2, No. 20-CV-03399-RM-NRN*, 2021 WL 5264188, at *11–12 (D. Colo. Oct. 4, 2021) (“[E]xposure in school . . . to concepts or ideas that are antithetical to one’s religious beliefs does not violate the Free Exercise Clause”).

226. *Id.* at *13–14.

upcoming lesson” the “affirming” of particular familial beliefs or conduct.²²⁷

The *Jones* court also suggested that parents are free to rebut the schools’ arguments after-the-fact. It wrote: “After all, the first question many parents ask their elementary-age children is ‘what did you learn today at school?’”²²⁸ From this it concluded that “[p]arents would quickly find out what their children are learning and can then take steps to address arguably offensive content with the appropriate school administrator—or, as the [p]arents ultimately did here, remove their children from the school if no resolution is reached.”²²⁹

Like the *Mozert* court, the *Parker* court acknowledged that it could imagine state behavior that would constitute impermissible indoctrination. This would include forcing children to read the books on “pain of suspension,” or subjecting them to a “constant stream of like materials,” or “many books” affirming familial beliefs and conduct opposed to their religion.²³⁰ The reading by a teacher of one book, or even three—even if to a young and impressionable child—does not constitute “indoctrination.”²³¹

E. Sufficient State Interests

Fifth, courts insist that state efforts to inculcate certain values into children regarding sex, sexual relations, or procreation are justified by various legitimate state interests.²³² These include the promotion of tolerance for differing children and children from differing families and the promotion of children’s health.²³³ The school involved in *Parker* further claimed that it was educating students about the law, specifically, Massachusetts’ recognition of same-sex marriage.²³⁴

227. *Id.* at *8.

228. *Id.* at *17.

229. *Id.*

230. *See Parker v. Hurley*, 514 F.3d 87, 106 (1st Cir. 2008) (citing *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1079 (6th Cir. 1987) (Boggs, J., concurring)) (concluding that such facts could constitute a burden on free exercise, although such a burden would be constitutionally permissible in the public school context if parents still retained other educational options such as private schools).

231. *Id.* at 107.

232. *See generally Jones v. Boulder Valley Sch. Dist.* RE-2, No. 20-CV-03399-RM-NRN, 2021 WL 5264188 (D. Colo. Oct. 4, 2021); *Curtis v. Sch. Comm. of Falmouth*, 652 N.E.2d 580 (Mass. 1995); *Parker*, 514 F.3d 87.

233. *See Jones*, 2021 WL 5264188, at *2 (“The case arises from the efforts of the School to teach tolerance and understanding of transgendered individuals through specialized programming.”); *Curtis*, 652 N.E.2d at 582–83 (describing the high school’s condom availability program which accompanied educational information on AIDS/HIV and sexually transmitted diseases).

234. *Parker*, 514 F.3d at 93, 95.

The school district in *Jones* also forwarded the tolerance rationale, in particular, tolerance of children who identify as transgender.²³⁵ In *Jones*, parents were permitted (after publicizing their plight) to opt-out of a play celebrating transgender identification. But they were not permitted to opt-out of a class discussion of the play, nor videos also affirming and celebrating the possibility of subjective sexual identities, while featuring a host and a talking teddy bear who labeled opposing views as “mean” and “confused,” and asserted that someday people who hold differing views will know better.²³⁶

It should be underscored here that the plaintiffs in both *Parker* and *Jones* accepted that the school system had legitimate interests in seeking to eradicate prejudice against same-sex couples and to ensure the safety of all public-school students.²³⁷ They countered that they were rather objecting to the schools’ proselytizing in favor of particular familial beliefs or acts.²³⁸

F. *Yoder Isn’t Applicable*

A sixth and important argument made by courts siding with public schools is that *Wisconsin v. Yoder* cannot protect the parents in their objections to particular curricular material. These courts regularly distinguish *Yoder* from the demands at issue by claiming the following.

First, as the *Parker* court opined: *Yoder* considers the Amish situation and its holding “sui generis,” given that “few sects could make a similar showing of a unique and demanding religious way of life that is fundamentally incompatible with *any* schooling system.”²³⁹ *Parker* asserted that *Yoder* could therefore only apply to communities pursuing a completely distinct lifestyle:

The heart of the *Yoder* opinion is a lengthy consideration of “the interrelationship of belief with [the Amish] mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization,” and how as a

235. *Jones*, 2021 WL 5264188, at *2; *see also Parker*, 514 F.3d at 102 (recalling the school asserted an interest in eliminating bias to ensure a safe environment for LGBTQ+ students).

236. *See Jones*, 2021 WL 5264188, at *3–4 (describing the parents’ allegations against the school district).

237. *Parker*, 514 F.3d at 102; *Jones*, 2021 WL 5264188, at *3–4.

238. *See Jones*, 2021 WL 5264188, at *4–5, *8 (“[Parents] alleged that the District was violating state law, creating a hostile environment for families of faith, and injecting into the curriculum a quasi-religious ideological opinion that is highly controversial and political in nature, and is not scientifically based.”); *Parker*, 514 F.3d at 92, 102 (internal quotations omitted) (highlighting the parents’ concern that the book *Who’s in a Family?* attempted “to “indoctrinate young children into the concept that homosexuality and homosexual relationships or marriage are moral and acceptable behavior”).

239. *Parker*, 514 F.3d at 100.

result compulsory high school education would “substantially interfer[e] with the religious development of the Amish child and his integration into the way of life of the Amish faith community.”²⁴⁰

Second, that *Yoder* plaintiffs could show what public-school parents in the above situations cannot, which is that refusing to accommodate parents’ demands would pose a “very real threat of undermining the Amish community and religious practice as they exist today.”²⁴¹

Third, that, unlike the Amish, the public-school parents who object to particular content have private school options available.²⁴² And, unlike in *Yoder*, there are no criminal statutes punishing parents if they educate their children in other ways.²⁴³

The *Brown* court disclaimed the relevance not only of *Yoder*, but also of the *Meyer* and *Pierce* decisions, opining that the latter protect only parents’ choosing of a particular educational “path” as distinguished from curriculum contents.²⁴⁴ But these observations are sometimes irrelevant, often incomplete, and fail to grapple with all the facts surrounding current controversies. At the very least, they need to grapple with the objections described in the next section.

V. QUERYING CLAIMS THAT STATES’ INTERESTS TRUMP PARENTS’ INTERESTS

Even though courts are nearly univocal in rejecting parents’ claims to possess rights to object to educational content proselytizing particular familial values, there are strong arguments on the other side. I will address these in the order of the arguments set forth in Part IV.

A. *Internal Affairs?*

The courts’ claim that instructions about familial matters concern “internal” governmental matters is disturbing and incomplete on its face for three reasons. One, this claim rests upon a fundamental misconception of the baseline allocation of authority to pursue children’s best interests, as between parents and the state, under cases such as *Pierce*

240. *Id.* at 99 (alterations in original).

241. *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1067 (6th Cir. 1987) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)).

242. *Id.* at 1067.

243. *Compare id.* at 1066 (finding that the high school attendance requirement in *Yoder* posed a “very real threat [of] undermining the Amish community and religious practice” where “[n]o such threat exists in the present case”), with *Parker*, 514 F.3d at 105 (“The parents do not allege coercion in the form of a direct interference with their religious beliefs, nor a compulsion in the form of punishment for their beliefs, as in *Yoder*. Nor do they allege denial of benefits.”).

244. *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995), *abrogated by* *Martinez v. Cui*, 608 F.3d 54 (1st Cir. 2010).

and *Yoder*. As law professor Stephen Gilles reminds us:

Parentalists and statists agree that young children should *not* have rights to control their own educations . . . because they lack the maturity to exercise such rights in ways consistent with their long-run self-interest. . . . The point of disagreement concerns whose judgment regarding the child's best interests should be controlling when parents and the state disagree.²⁴⁵

Pierce supports

the power of the State reasonably to regulate all schools . . . to require that all children of proper age attend some school . . . that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.²⁴⁶

Gilles correctly concludes that the “*Pierce* Court’s specific formulations speak volumes about how limited the scope of ‘reasonable’ regulation of education is: the state may require only ‘plainly essential’ studies, and it may forbid only ‘manifestly inimical’ ones.”²⁴⁷ And, *Yoder* asserts that parents’ authority specifically over their children’s religious upbringing weighs quite heavily in the balancing process applied to competing family/state claims.²⁴⁸ The *Yoder* Court wrote:

As [*Pierce*] suggests, the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society. Thus, a State’s interest . . . however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, “prepare (them) for additional obligations.”²⁴⁹

Two, whether minors begin to question their sexual identity and/or orientation, and even act upon their reflections through surgeries or other conduct, whether they enter into a nonmarital sexual relationship, whether they get pregnant, and whether they seek an abortion—to name just a few choices public schools normalize or encourage—each of these choices has huge and far reaching psychological, financial, familial relations, health, and other consequences for the minor’s family, for any

245. Stephen G. Gilles, *Liberal Parentalism and Children’s Educational Rights*, 26 CAP. U. L. REV. 9, 11 (1997).

246. *Pierce v. Soc’y of Sisters of the Holy Name of Jesus & Mary*, 268 U.S. 510, 534 (1925).

247. Gilles, *supra* note 245, at 26.

248. *See Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972) (“[W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a ‘reasonable relation to some purpose within the competency of the State’ is required to sustain the validity of the State’s requirement under the First Amendment.”).

249. *Id.* at 205, 213–14 (internal citations omitted) (alteration in original).

children the minors conceive, and for the minor herself or himself. Educators have no remotely similar interests. Stephen Gilles correctly concludes that schools' interests in students' familial choices are small or sometimes problematic as contrasted even with parents' merely practical interests, over and above their love for their children.²⁵⁰ To wit: parents stand in a long-run relationship with children and seek to avoid "massive and continuing responsibilities" for problematic children; they want a long-run relationship with children that inspires mutual love and flourishing; and they want children who do not attract social opprobrium for themselves or their families.²⁵¹ By contrast, teachers spend a "fraction of [their] day" with other people's children, bear no or a tiny amount of the costs associated with children's harmful choices, and may even in some cases be one of many "rent seekers"—such as book publishers, teachers' unions, and other education bureaucrats—whose *raison d'être* is not the educational best interests of other people's children, but some other financial or ideological end.²⁵² There is no rational way to conclude that children's beliefs and conduct respecting sex, marriage, and parenting are primarily or even much the "internal affairs" of schools.

Three, it is certainly conceivable that if schools are framing their discussions of familial matters to inform—about what the law provides, about social changes respecting sexual choices or family forms, about the science undergirding sexual identity, or about historical movements for homosexual- or transgender-identifying persons—or to engender tolerance for differing persons and families, their lessons fit within the educative mission. All of these might be done in a way that prepares citizens for a pluralistic world and for their responsibilities in a democratic society. But schools are doing something else. They are offering normative answers to moral questions about familial matters which are always also religious matter, and thus, inseparable from what *Pierce* and *Yoder* firmly agreed belongs to parents' constitutional authority respecting their children.²⁵³ As described in Part I, the subject matter over which parents are seeking to assert their authority fits squarely within what the *Yoder* Court defined as "religious beliefs"—beliefs based upon religious scriptures, which structure behavior, and are

250. See generally Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996).

251. *Id.* at 954.

252. *Id.* at 955–57.

253. See, e.g., *Yoder*, 406 U.S. at 233 (holding that parents have a complete right to direct the religious upbringing of their children).

part of the rules of a church community.²⁵⁴

To elaborate further on Part I's materials about the religious nature of the subject matter that public schools are communicating, I would first note that the first chapters of the first book of the Old Testament provide a theological account of sexual identity, sexual union, procreation, and marriage.²⁵⁵ Jesus spoke directly about family relations. He affirmed the divine origins of marriage at "the beginning,"²⁵⁶ as the "one flesh" union of the man and the woman.²⁵⁷ He also spoke of marriage's indissolubility.²⁵⁸ Saint Paul preached against sexual practices threatening or contradicting marriage or the natural ends of sex: fornication, adultery, prostitution, and same-sex relations.²⁵⁹ Later, and as elaborated by numerous theologians, canonists, and popes, these teachings were codified in canon law and in magisterial teachings of the Catholic Church; they were also instantiated within Catholic institutions such as schools, hospitals, and social services.²⁶⁰ For almost two millennia, the law of the West was heavily influenced by Christianity and incorporated its leading familial provisions into its civil law *qua civil* (not religious) law; during this time, it has always been recognized that both church and state have important interests respecting sex, marriage, and parenting.²⁶¹

Think, for example, even of the religious implications of one category of public schools' current messaging: their affirmation that sexual identity is unrelated to biology and is rather, a matter of unlimited, subjective, individual autonomy. This notion directly undercuts basic structures of Catholic belief.²⁶² It denies God's sovereignty as creator, particularly his creation of two sexes, and teaches instead that God has fashioned persons with the "wrong" bodies. It severs the body from the

254. See *Yoder*, 406 U.S. at 216–17 (finding "the traditional way of life of the Amish is . . . one of deep religious conviction, shared by an organized group, and intimately related to [its] daily living").

255. See generally *Genesis* 1:26–31; 2:15–25; 3:1–24.

256. *Matthew* 19:8.

257. See *id.* at 19:5–6.

258. See *id.* at 19:6 ("Wherefore they are no more twain, but one flesh. What therefore God hath joined together, let not man put asunder.").

259. See 1 *Corinthians* 6:9 ("Be not deceived: neither fornicators, nor idolaters, nor adulterers, nor effeminate, nor abusers of themselves with mankind . . ."); see generally *Romans* 1:18–28.

260. These teachings and their adoption in Church law and institutions are summarized in ALVARÉ, *supra* note 144, at 63–86, 137–228.

261. See generally Martin Schultz, *Divorce in Early America: Origins and Patterns in Three North Central States*, 24 *SOCIO. Q.* 511 (1984); JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* (1997); *FROM CULTURE WARS TO COMMON GROUND*, *supra* note 41.

262. See generally CONGREGATION FOR CATH. EDUC., *MALE AND FEMALE HE CREATED THEM: TOWARDS A PATH OF DIALOGUE ON THE QUESTION OF GENDER THEORY IN EDUCATION* (2019).

person, as against Catholic teaching, that human bodies and souls are meant for one another, and—together—one sex. This further communicates that the developmental path fashioned by God for each person—in which one’s sex influences biological, physiological, emotional, and mental aspects of each person—is wrong.²⁶³ It also obliterates the notion that every human possesses a capacity for reciprocity and complementarity with the opposite sex, not only that which can make new life, but that which can enrich the world at large by virtue of differences that create the possibility for giving gifts.²⁶⁴ Denying sexual differences also precludes marriage and the one-flesh union.²⁶⁵ It obscures humans’ understanding of God’s love for humanity and humanity’s love for him presented in the bible as a bride-bridegroom relationship. In short, it upends the entire “architecture” of the faith that depends on the existence and the interactions of male and female.²⁶⁶

Even today, when Christian familial norms are increasingly rejected in U.S. family law, lawmakers have not ceased to acknowledge the religious character of matters concerning sex, sexual identity, marriage, and procreation.²⁶⁷ Religious marriage ceremonies suffice for state marriage recognition in every single state.²⁶⁸ The Supreme Court has acknowledged that marriage and family life are religious concerns, from its 1925 decision in *Pierce* when the Court acknowledged parents’ liberty

263. See PAUL C. VITZ ET. AL., *THE COMPLEMENTARITY OF WOMEN AND MEN: PHILOSOPHY, THEOLOGY, PSYCHOLOGY & ART* 182–215 (Paul C. Vitz ed., 2021) (supporting the proposition that sexual identity is not a subjective matter).

264. See *id.* at 89–131 (arguing that humans cannot achieve complementarity with members of the same sex).

265. See CONGREGATION FOR CATH. EDUC., *supra* note 262, at 11–12 (“But the utopia of the ‘neuter’ eliminates both human dignity in sexual distinctiveness and the personal nature of the generation of new life.’ The anthropological basis of the concept of family is thus emptied of meaning.”).

266. See Gerard V. Bradley, *Catholic Schools and Transgender Students*, PUB. DISCOURSE (Feb. 9, 2021), <https://www.thepublicdiscourse.com/2021/02/73853/> [<https://perma.cc/6RS9-F9H8>] (“The lastingness of each person’s reality as male or female is so integral to the faith’s architecture, that to deny it . . . is to undermine Catholic faith itself.”).

267. See *generally Parenting in America*, PEW RSCH. CTR. (Dec. 17, 2015), <https://www.pewresearch.org/social-trends/2015/12/17/1-the-american-family-today/> [<https://perma.cc/J4R3-BBQP>]; Amanda Barroso, *Key Takeaways on Americans’ Views of and Experiences with Dating and Relationships*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/08/20/key-takeaways-on-americans-views-of-and-experiences-with-dating-and-relationships/> [<https://perma.cc/TD9Z-A75S>]; *Attitudes on Same-Sex Marriage*, PEW RSCH. CTR. (May 14, 2019), <https://www.pewresearch.org/religion/fact-sheet/changing-attitudes-on-gay-marriage/> [<https://perma.cc/5EDW-9FVD>].

268. See *Who Can Officiate Weddings by State*, AM. MARRIAGE MINISTRIES <https://theamm.org/marriage-laws> [<https://perma.cc/FLU6-Z5BD>] (last visited Sept. 30, 2022) (listing and detailing the applicable law for each state).

interests to “direct the upbringing and education” of their children,²⁶⁹ to the 2015 same-sex marriage opinion in *Obergefell v. Hodges*, where the majority referred to the “religious” nature of marriage and the existence of “decent and honorable” religious objections to same-sex marriage.²⁷⁰ The *Bowen v. Kendrick* opinion concerning the use of federal dollars in abstinence education acknowledged the religious nature of questions about sexual intercourse and parenting, calling them “fundamental elements of religious doctrine,” even as it warned religious grantees of federal dollars to engage in secular discussions of these questions.²⁷¹ The federal government continues to direct grants to religious organizations to strengthen marriage and family life.²⁷² And, perhaps most relevant for the current discussion, state “opt-in” or “opt-out” programs for public-school courses touching on sex, marriage, and parenting recognize parents’ rights precisely on the grounds that families’ religious (or moral) convictions will be the source of their concerns about the contents of state sex-education programs. Recall that the California opt-out statute reported in Part III reads:

If *any* part of a school's instruction in health conflicts with the religious training and beliefs of a parent or guardian of a pupil, the pupil, upon written request of the parent or guardian, shall be excused from the part of the instruction that conflicts with the religious training and beliefs.²⁷³

Several state court opinions in the 1970s and 1980s, in fact, held that the only reason the courts did not find a burden on free exercise in connection with public schools’ sex-ed courses, was because the programs allowed parents to “opt out.”²⁷⁴ These cases are missing-in-action in the more recent set of decisions denying parents’ interests in their children’s education about sex, marriage, and parenting.

269. See *Pierce v. Soc’y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925) (declaring parents had a right to send their children to religious private school pursuant to their fundamental “liberty” guaranteed by the Fourteenth Amendment).

270. See *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015).

271. See *Bowen v. Kendrick*, 487 U.S. 589, 598 (1988) (emphasizing the religious nature of questions concerning the interplay between sexual intercourse and parenting).

272. See, e.g., *Virginia Healthy Marriage and Responsible Fatherhood*, DEPT. HEALTH & HUM. SERV.: ADMIN. CHILD. & FAM., <https://www.acf.hhs.gov/oro/virginia-healthy-marriage-and-responsible-fatherhood> [<https://perma.cc/MNN4-CTUD>] (last visited Sept. 30, 2022) (describing current federal grantees, including religious organizations).

273. CAL. EDUC. CODE § 51240, *supra* note 150.

274. See *Medeiros v. Kiyosaki*, 478 P.2d 314, 317–18 (1970) (“Inasmuch as plaintiffs have available the excusal system, they are under no direct governmental compulsion.”); see also *Smith v. Ricci*, 89 N.J. 514, 522–23 (1982) (“[W]here there was adequate provision for excusal on the grounds of conscientiously-held belief, sex education or family life education programs did not offend the Free Exercise Clause. . . . [T]he regulation, because of the excusal clause, does not inhibit the free exercise of religion.”).

B. Tailoring? Impracticable?

Regarding the claim that public schools may not “tailor” their curricula to meet parents’ free exercise or Fourteenth Amendment objections because this could constitute a religious establishment, or at the very least, be impracticable, this objection misconceives what the parents are demanding.

Parents in the cases discussed above are not asking public schools to teach religious content, or even to stop teaching about the science or history of various family forms, or about the very positive value of tolerance and kindness to all those persons or families who experience minority sexual attractions or identities. They are only asking the state to cease proselytizing in favor of particular norms respecting sex, marriage, and parenting, and to stick to science, history, or the business of getting kids to respect other students in school.²⁷⁵

Understanding what the parents are asking for is also key to the claim that parents’ demands are impracticable. In fact, in the same way that teachers are required to master speaking “about” religion as part of history, government, or civil society—as distinguished from endorsing a particular religion or religion over non-religion—parents are simply demanding that teachers distinguish between speaking “about” the scientific, historical, and biological aspects of sex, marriage, and parenthood while staying away from endorsing particular moral views about any of these topics.²⁷⁶

And the *Epperson* Court did not conclude that “[c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems;” rather, it stated that courts will not intervene in such conflicts so long as they do not “directly and sharply implicate basic constitutional values.”²⁷⁷ But schools urging students to accept contrary ideas about matters constituting the architecture of Christian faith directly and sharply implicates two basic constitutional values—parents’ authority to form their children and their free exercise rights.

C. Coercion

Regarding the claim that objecting parents have not stated a “burden” on their religious or parental rights that is cognizable by a court because there is no coercion, substantial evidence suggests that this is not a

275. See generally *infra* note 301.

276. See *id.* (citing to Part IV, which describes the degree to which a parent—exercising their constitutional rights—can impact school curriculum-related decisions).

277. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

credible conclusion in the cases discussed.

First, as a backdrop, it should be remembered that many parents cannot afford to send their children to private schools, and that attendance at elementary and secondary school is mandatory. Closely related is the fact that teachers are authority figures—they are the individuals who will assign students their grades and write their recommendation letters (or not). The Court recognized the relevance of these facts in its second evolution case, *Edwards v. Aguillard*, stating that, “Students in such [elementary and secondary] institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students’ emulation of teachers as role models and the child’s susceptibility to peer pressure.”²⁷⁸ *Edwards* continued, “Families entrust public schools with the education of their child, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.”²⁷⁹ These observations are no less true in the context of free exercise and Fourteenth Amendment’s substantive due process claims than they are in the context of establishment claims. This was expressly acknowledged by the *Parker* court, which stated that children’s impressionability remains a “relevant factor in the Establishment Clause context” as well as in Free Exercise cases.²⁸⁰ The Supreme Court’s later opinion in *Board of Education v. Mergens* also specifically acknowledged the greater likelihood that high school students would be persuaded by messages involving the participation of “‘teachers as role models’ and ‘mandatory attendance requirements.’”²⁸¹

Furthermore, the Supreme Court has set a low threshold for coercion of minors at school, especially regarding “social convention[s]” with attention to peer pressure.²⁸² The *Lee v. Weisman* opinion detected coercion in a thirty-second prayer that a public school helped organize for graduation ceremonies. Citing relevant data on peer pressure, it wrote that:

The undeniable fact is that the school district’s supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This

278. *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (internal citations omitted).

279. *Id.*

280. *Parker v. Hurley*, 514 F. 3d 87, 100–01 (1st Cir. 2008).

281. *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 251 (1990) (quoting *Edwards*, 482 U.S. at 584).

282. *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.

Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention. Brittain, Adolescent Choices and Parent-Peer Cross-Pressures, 28 *Am. Sociological Rev.* 385 (June 1963); Clasen & Brown, The Multidimensionality of Peer Pressure in Adolescence, 14 *J. of Youth and Adolescence* 451 (Dec. 1985); Brown, Clasen, & Eicher, Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self-Reported Behavior Among Adolescents, 22 *Developmental Psychology* 521 (July 1986). To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means.²⁸³

Second, some schools admit quite plainly that they are affirming or instructing the teacher to affirm, or celebrating particular familial choices or conduct.²⁸⁴ The materials taught to children consistently feature

283. *Id.* at 593–94.

284. *See Parker*, 514 F.3d at 90, 106 (describing a book that “depicts and celebrates gay marriage” used in elementary school classrooms); *see also* *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1064 (6th Cir. 1987) (recounting testimony proffered by a plaintiff parent referencing “various exercises and suggestions in the teachers’ manuals as support for her view that objectionable ideas were being inculcated as truth rather than being offered as examples of the variety of approaches possible”). *Cf. Jones v. Boulder Valley Sch. Dist.* RE-2, No. 20-cv-03399-

normative claims “some people aren’t boys or girls,” “it’s ok to be gay,” and “who we are on the inside is who we are.”²⁸⁵ They explicitly acknowledge that they are seeking to shift cultural norms and change whole institutions.²⁸⁶ But courts either ignore this or find reasons to explain away or excuse the behaviors. They re-categorize it as teaching tolerance or claim that it is not part of “too many” readings or a “stream” of material, or pattern of behavior.²⁸⁷ This dynamic holds even when the teacher’s manual recommends that students engage in role-playing.²⁸⁸ The *Jones* court did not even find evidence of coercion when the school district had communicated to all teachers an official policy encouraging them to “intentionally weave one of the following equity-centered . . . guiding principles into your everyday teaching practice or an upcoming lesson,” including “affirming” sexual identity or orientation choices—in order to “lead[] to systemic change on educational issues that impact social justice.”²⁸⁹

Interestingly, federal courts concluding that children were *not* coerced by the disputed activity before them will sometimes opine about what real coercion would actually look like. But when an activity they describe as coercive actually takes place in *another* jurisdiction, that jurisdiction inevitably concludes that it does *not* amount to coercion. For example, the *Curtis* court opined that “classroom participation,” or a requirement to “read [] literature” would be coercive,²⁹⁰ but the *Brown* court denied that participation in a lewd stage performance constituted coercion;²⁹¹ the *Parker* court found no coercion in assigning children literature “intended to influence” their opinion;²⁹² and the *Jones* court found no coercion in

RM-NRN, 2021 WL 5264188, at *8 (D. Colo. Oct. 4, 2021) (identifying the district superintendent’s statement that “[w]e are proud of our policies and practices that make our transgender students feel welcome and safe”).

285. *Jones*, 2021 WL 5264188, at *5. The video assigned to five- and six-year-old children: HE, SHE, AND THEY?!?—Gender: QUEER KID STUFF #2, YOUTUBE (Sept. 14, 2016), <https://www.youtube.com/watch?v=worlRz21QLA> [<https://perma.cc/KGT7-JXEX>]. See also Calvin Freiburger, *Parents Outraged Over “Queer Kid Stuff” Videos, Transgender Play*, LIFESITE (Nov. 19, 2018, 5:45 PM), <https://www.lifesitenews.com/news/parents-outraged-by-elementary-school-showing-queer-kid-stuff-videos-transg/> [<https://perma.cc/K7EL-7W5Z>].

286. See *Brown*, *supra* note 155 (noting that the Boulder Valley School District partnered with the Colorado University educational training program “A Queer Endeavor” for faculty diversity training).

287. See *supra* Part IV.D.

288. See, e.g., *Mozert*, 827 F.2d at 1066 (finding no proof that students were required to engage in any antithetical religious behavior suggested in the district’s teachers’ manual).

289. *Jones*, 2021 WL 5264188, at *8.

290. *Curtis v. Sch. Comm. of Falmouth*, 652 N.E.2d 580, 586 (Mass. 1995).

291. *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533–34 (1st Cir. 1995), *abrogated by* *Martinez v. Cui*, 608 F.3d 54 (1st Cir. 2010).

292. *Parker v. Hurley*, 514 F. 3d 87, 106 (1st Cir. 2008).

students being assigned videos and reading affirming particular familial values and requiring class discussion periods about the same.²⁹³ The *Parker* court suggested that requiring students to participate in discussions about disputed material could constitute coercion,²⁹⁴ while the *Brown* court found no coercion in calling students up to a stage in front of all of their peers and asking them to demonstrate sexual behaviors,²⁹⁵ and the *Jones* court found no coercion in inviting all students, again, in front of all of their peers, to repeatedly chant particular beliefs about transgender identity.²⁹⁶

Coercion is furthermore exacerbated by means of pressure from peers, which is very likely in today's environment to be a factor in classrooms receiving the content at issue here.²⁹⁷ In *Lee v. Weisman*, the Supreme Court took note that pressure upon impressionable school children was exerted through a combination of the contents of the state message and the group setting involved.²⁹⁸ In *Weisman*, high school students wishing to attend their graduation ceremony would feel pressured, at least, to show respect for a state-arranged prayer.²⁹⁹ It is beyond cavil that the current environment in many public schools is rife with peer pressure specifically concerning sex, marriage, and parenting matters.³⁰⁰ School districts are increasingly adopting policies that require messaging on these subjects to affect entire educational programs, and students are

293. *Jones*, 2021 WL 5264188, at *12–13.

294. *See Parker*, 514 F.3d at 106 (“Without suggesting that such showings would suffice to establish a claim of indoctrination, we note that the plaintiffs’ children were not forced to read the books on pain of suspension. Nor were they subject to a constant stream of like materials. There is no allegation here of a formalized curriculum requiring students to read many books affirming gay marriage.”).

295. *See Brown*, 68 F.3d at 533–34 (“We do not think, however, that this freedom encompasses a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children.”).

296. *Jones*, 2021 WL 5264188, at *5, *12–13 (noting that the district would in the future notify parents and provide an opt-out of any “‘instructional event’ involving transgender-tolerance programming,” but holding the parents were not entitled to opt-out of “future ‘programming’ or class discussions” on LGBTQ topics under the Free Exercise Clause because “[a]bsent coercion by the government . . . there is no free exercise problem”).

297. *See, e.g., Woke Schooling: A Toolkit for Concerned Parents*, MANHATTAN INST.: ISSUE BRIEF (June 17, 2021), <https://www.manhattan-institute.org/woke-schooling-toolkit-for-concerned-parents> [<https://perma.cc/8JVT-6JAV>] (describing some parents’ concerns with school curriculum regarding antiracism, critical race theory, equity, and other social-justice oriented topics).

298. *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

299. *Id.* at 592–93 (finding that prayer during a public school graduation ceremony creates a “state-sponsored and state-directed religious exercise in a public school” where “the student had no real alternative which would have allowed her to avoid the fact or appearance of participation”).

300. *See generally supra* notes 277–289.

feeling it.³⁰¹ Regarding LGBTQ+ matters, for example, Boulder, Colorado pays for its staff to be trained by “A Queer Endeavor” about how to embed LGBTQ+ worldviews throughout the curriculum, a program they call “queering the curriculum.”³⁰² Young students taught in such programs, according to their teachers, “want to please and take on the teacher’s tone, mimicking [the teacher]. She hears them in the dress-up corner: ‘Alex, that tiara looks great on you! It matches your rainbow tattoo.’”³⁰³ Likewise, in a perfect example of impressionability, a fourth-grade teacher at a Texas public school claimed that twenty of her thirty-two students came out to her as LGBTQ+.³⁰⁴

In the context of both free exercise and establishment cases then, courts should consider the setting and the message together when evaluating coercion. Messages delivered by or at the direction of teachers, or at a school-wide assembly, accompanied by, for example, role play and/or discussion about the familial behaviors and values of another student in the class or their family, as well as the obvious preferences of the school and the teacher, are bound to exert coercive pressure upon a dissenting student. To insist otherwise is not credible.

D. *Yoder Helps*

As a final and important defense to parents’ free exercise and custodial rights claims, the state regularly claims that the *Yoder* decision is of no help to parents’ claims.³⁰⁵ But states’ arguments are weak and imprecise. The state claims that parents objecting to particular materials in schools’ curricula must lose because they cannot make a showing that the parents’ religions are analogous to the separate communal life formed by the Amish—a separate community with centuries of successful preparation of children for adult lives of self-sufficiency. Further, the state claims that

301. See *supra* Part IV (describing the scope of parents’ constitutional rights regarding school curriculum).

302. See Brown, *supra* note 155 (describing the Boulder School District’s approach in administering LGBTQ+ diversity training to staff); see also SARA STALEY & BETHY LEONARDI, BREAKING THE SILENCE: HONORING THE VOICES OF LGBTQ YOUTH AND ALLIES IN SUPPORTING OUR TEACHERS 8 (2015), https://www.colorado.edu/education/sites/default/files/attached-files/Breaking%20the%20Silence_Facilitation%20Guide.pdf [<https://perma.cc/NY8C-UQLT>] (outlining the “A Queer Endeavor” training program and advocating for the importance of “queering the curriculum”).

303. Brown, *supra* note 155.

304. Chrissy Clark, *Texas Teacher Claims 20 Fourth Graders out of 32 Students Identify as LGBTQ*, DAILY CALLER (Mar. 29, 2022, 10:32 AM) <https://dailycaller.com/2022/03/29/texas-teacher-fourth-grade-students-lgbt-pride-week/> [<https://perma.cc/LY9J-ULUU>] (referencing internal messages from Austin Independent School District’s Blackshear Elementary School reviewed by the Daily Caller and originally obtained by the Twitter account, LibsofTikTok).

305. See *supra* Part IV.F (explaining the court’s argument that *Yoder* cannot protect parents in their objections to particular public school curriculum).

parents cannot show that the state's behavior threatens the very existence of their religious community, which is an end to the transmission of religion to the succeeding generation.³⁰⁶ The state also asserts that, unlike the Amish in *Yoder*, objecting families are not subject to criminal punishment for failure to accede to state requirements.³⁰⁷ But these are insufficient attempts to marginalize a *Yoder* analysis.

First, they overlook the substantial weight that the *Yoder* Court granted parental interests in their children's religious upbringing generally:

[T]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society. Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, "prepare (them) for additional obligations."³⁰⁸

Second, parents' showings in *Yoder* that they were a separate, religiously-determined community with a successful record of rearing self-sufficient children to adulthood were necessary to meet the *particular* state interests asserted in that case.³⁰⁹ They are not a necessary showing in the cases concerning this Article because the interests the state asserts in the cases we consider here are quite different. The parents' showing in *Yoder* engaged and defeated the state's claims that compulsory education of the Amish until age sixteen was necessary to prepare children for adult life in a pluralistic democracy and to enable them to be self-sufficient adults.³¹⁰ Amish "separateness" indicated that the first state interest was unnecessary with respect to their community.³¹¹ And the Amish record of successfully rearing self-sufficient adults not only indicated that the state's second interest was unnecessary respecting their community, it also suggested to the Court that their religious practices served the state's interest possibly *more*

306. *Id.*

307. *Id.*

308. *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972) (alteration in original).

309. *Id.* at 210, 225–26 (identifying the state's interests in compelling school attendance until age sixteen as preparing citizens to (1) "effectively and intelligently" participate in our political system, and (2) be "self-reliant and self-sufficient participants in society").

310. *Id.* at 228–29.

311. *Id.* at 225–26 (finding the "Amish qualities of reliability, self-reliance, and dedication to work" achieved the state's stated interest in in "fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade").

successfully than the state's rule.³¹²

But parents objecting to the public-school instruction described here face different rules than those at issue in *Yoder*, and the states correspondingly seek to justify those rules with a different set of state interests.³¹³ Thus, these parents do not have to rely on the rebuttals used by the Amish in *Yoder*. States are claiming that they are promoting certain familial viewpoints primarily to maintain the health and safety of children, especially children who differ—or whose families of origin differ—on the basis of sexual identity or orientation.³¹⁴ Sometimes, states also claim that interventions, including those related to contraception or abortion, serve the goal of promoting student health.³¹⁵ Evidence, therefore, that objecting families live in a separate community that successfully prepares its children for adulthood, is *irrelevant* to engaging these claimed interests. Objecting families need only address whether the states' claimed interests in teaching tolerance and promoting health are compelling state interests, as applied to *these* families, and whether they are being exercised by means least restrictive of religious freedom. Even if the schools' interests are subject only to a rational basis test, however, I will show below why they should lose to parents' claims.

Let me note here briefly that it is appropriate that the state apply a strict scrutiny test here for several reasons. In *Planned Parenthood v. Casey*³¹⁶ and *Troxel v. Granville*,³¹⁷ the Supreme Court referred to parents' interests in their children's education as fundamental.³¹⁸ *Casey* wrote that the "substantive component" of the Due Process Clause included the "aspect[s] of liberty protected against state interference" by *Pierce* and *Meyer*, among other cases.³¹⁹ It continued "the Constitution places limits

312. See *id.* at 223 (referencing expert testimony that the Amish "system of learning-by-doing was an 'ideal system' of education in terms of preparing Amish children for life as adults in the Amish community, and that 'I would be inclined to say they do a better job in this than most of the rest of us do'").

313. See generally *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008); *Mozert v. Hawkins Cnty Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533–34 (1st Cir. 1995), *abrogated by* *Martinez v. Cui*, 608 F.3d 54 (1st Cir. 2010).

314. See *Parker*, 514 F.3d at 95 ("Plaintiffs do not contest that the defendants have an interest in promoting tolerance, including for the children (and parents) of gay marriages."); *Mozert*, 827 F.2d at 1060–62 (noting the school district implemented a reading series which included topics such as secular humanism, supernaturalism, pacifism, magic, and "false views of death" to comply with a state statute requiring "character education" to "help each student develop positive values and improve student conduct"); see *Brown*, 68 F.3d at 529.

315. See *supra* Part IV.E.

316. 505 U.S. 833 (1992), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

317. 530 U.S. 57 (2000).

318. See *Casey*, 505 U.S. at 851; *Troxel*, 530 U.S. at 65.

319. *Casey*, 505 U.S. at 848.

on a State’s right to interfere with a person’s most basic decisions about family and parenthood,” and included among these “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”³²⁰ Likewise, the *Troxel* Court, citing to *Pierce* and *Meyer*, wrote that “[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”³²¹

The strict scrutiny test also would apply to families’ religious freedom claims in states possessing their own religious freedom restoration acts or a religious-freedom-protective state constitution.³²² Further, strict scrutiny should also be the test that applies in *any* education challenge involving parents exercising *both* religious freedom and Fourteenth Amendment/custody rights, given the Supreme Court’s holding in *Employment Division v. Smith* that *Yoder*-type cases involve both rights and merit strict scrutiny.³²³

Third, *Yoder* also stressed the relevance of impressionable audiences—like the audiences here—to parental free exercise claims, stating that “interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.”³²⁴

Fourth, like *Yoder*, the school content at issue here undermines the very architecture of their faith, as elaborated in Part I. These coercively framed viewpoints touch students’ beliefs and conduct regarding the identity of God, how God loves the human person, and how human beings are to love God and every neighbor.³²⁵ Of course, educational laws can burden free exercise and parents’ custodial rights, even if they do not

320. *Id.* at 849, 851.

321. *Troxel*, 530 U.S. at 65 (citing *Pierce v. Soc’y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923)).

322. See MICHAEL MCCONNELL, THOMAS C. BERG & CHRISTOPHER C. LUND, RELIGION AND THE CONSTITUTION 149–50 (5th ed. 2022).

323. 494 U.S. 872, 881–82 (1990) (first citing *Cantwell v. Connecticut*, 310 U.S. 296, 304–07 (1940); then citing *Pierce v. Soc’y of Sisters of the Holy Name of Jesus & Mary*, 268 U.S. 510 (1925); and then citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

324. *Yoder*, 406 U.S. at 218.

325. See generally Part I.

threaten a religion's very existence.³²⁶ But there is a strong argument that contradicting the familial architecture of the Christian faith does constitute a threat to its transmission, in a manner similar to Wisconsin's compulsory education regime in *Yoder*. The public-school communications described above threaten to obfuscate students' understanding of: God's parenthood; the way in which sexual difference point to an "other"—a spouse, a neighbor, a God—to whom we are meant to relate; each person being *imago Dei*; the importance of relationship across differences without domination or sublimation; the meaning of "union" as the fulfillment of differences without erasing identity or creating hierarchies; the significance of fruitfulness as a function of union; the reality of equality alongside diversity; and the necessity of recognizing the dignity of every single human being. To lose these is to lose the essential architecture of Christianity.

Furthermore, reliable empirical investigations show that a rejection of Christian familial teachings is one important reason that people reject the faith, and an important predictor of a breakdown in the transmission of faith, as described in Part II.³²⁷ *Yoder* noted in its conclusion that the behavior required by Wisconsin's mandate comprised an important reason that Amish children leave the faith, stating: "high school attendance with teachers who are not of the Amish faith—and may even be hostile to it—interposes a serious barrier to the integration of the Amish child into the Amish religious community."³²⁸ The same dynamic is present here.

Furthermore, the *Yoder* Court took into consideration that the state mandate threatened the continued transmission of faith, evidence that is surely relevant here:

The Amish mode of life has thus come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards. . . . As the record so strongly shows, the values and programs of the modern secondary school are in

326. See, e.g., *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2253 (2020) (holding that Montana's no-aid-to-religious-schools provision in its tax credit program for schools violated the Free Exercise Clause).

327. See *supra* Part II (arguing that certain family patterns allow the transmission of the Christian faith to the next generation). See also Brendan Hodge, *Special Report: Why Catholics Leave; Why Catholics Stay*, PILLAR (Nov. 9, 2021, 8:00 AM), <https://www.pillarcatholic.com/p/special-report-why-catholics-leave?s=r> [<https://perma.cc/9RX7-P32U>] (citing reports discussing factors that influence lifelong Catholic religious practice, why people say they leave the Church, and whether Catholics recently immigrated to the United States paint a different picture than other Catholics).

328. *Yoder*, 406 U.S. at 211–12.

sharp conflict with the fundamental mode of life mandated by the Amish religion . . .³²⁹

Likewise, with respect to convictions about sex, sexual relations, and parenting, the world around and affecting public schools has moved hydraulically in opposition to the familial values of Christianity.³³⁰ Reliable polling organizations describe lopsided majorities repudiating Christian beliefs in the reality and significance of two sexes, oriented to union, positively capacitated for procreation.³³¹ Additionally, sometimes draconian financial and reputational penalties are levied online and even respecting employment, upon individuals daring even to speak about the scientific debate over the wisdom of legal abortion, adolescent transgender interventions, or other neuralgic matters. Examples abound.³³² And the most visible corporations and websites like Apple or

329. *Id.* at 217.

330. See, e.g., *In a Politically Polarized Era, Sharp Divides in Both Partisan Coalitions*, PEW RSCH. CTR. (Dec. 17, 2019), <https://www.pewresearch.org/politics/2019/12/17/5-gender-family-and-marriage-same-sex-marriage-and-religion/> [<https://perma.cc/N7MD-HX2P>] (describing Americans' beliefs regarding gender, family, marriage, same-sex marriage, and religion).

331. See, e.g., Justin McCarthy, *Record-High 70% in U.S. Support Same Sex Marriage*, GALLUP POL. (June 8, 2021), <https://news.gallup.com/poll/350486/record-high-support-same-sex-marriage.aspx> [<https://perma.cc/9RT4-4MJ2>] (citing polling data on support for same sex marriage); Justin McCarthy, *Mixed Views Among Americans on Transgender Issues*, GALLUP POL. (May 26, 2021), <https://news.gallup.com/poll/350174/mixed-views-among-americans-transgender-issues.aspx> [<https://perma.cc/7YNS-45CU>] (noting a majority of Americans believe birth gender, rather than gender identity, should govern participation in competitive sports). Cf. Matt Loffman, *New Poll Shows Americans Overwhelmingly Oppose Anti-Transgender Laws*, PBS NEWSHOUR: POL. (Apr. 16, 2021, 5:00 AM), <https://www.pbs.org/newshour/politics/new-poll-shows-americans-overwhelmingly-oppose-anti-transgender-laws> [<https://perma.cc/HR29-F2MF>] (noting two-thirds of Americans oppose anti-transgender legislation); Juliana Menasce Horowitz et al., *Marriage and Cohabitation in the U.S.*, PEW RSCH. CTR. (Nov. 6, 2019), <https://www.pewresearch.org/social-trends/2019/11/06/marriage-and-cohabitation-in-the-u-s/> [<https://perma.cc/GYN2-69MU>] (identifying an increase in American acceptance of cohabitation for both married and unmarried couples).

332. See, e.g., Jon Swaine, *Mozilla CEO Brendan Eich Resigns in Wake of Backlash to Prop 8*, GUARDIAN (Apr. 3, 2014, 3:55 PM), <https://www.theguardian.com/technology/2014/apr/03/mozilla-ceo-brendan-eich-resigns-prop-8> [<https://perma.cc/L35E-F7AP>] (noting the chief executive of Mozilla resigned following a backlash for donations in support of a ban on gay marriage in California); Nathaniel Kline & Virginia Mercury, *Virginia School District Leaders Ask Court to Uphold Teacher Firing in Transgender Student Case*, INSIDENOVA (July 29, 2022), https://www.insidenova.com/headlines/virginia-school-district-leaders-ask-court-to-uphold-teacher-firing-in-transgender-student-case/article_f1d8aaba-0f22-11ed-bcfd-27fcc32dfe77.html [<https://perma.cc/62HX-DD27>] (recounting the firing of a high school teacher for refusal to use male pronouns to refer to a student who had undergone a gender transition); *Religious Teacher SACKED 'for Being Pro-Life' and Given Minutes to Collect His Things After 11 Years at School*, DAILY MAIL (Dec. 18, 2013, 8:39 AM), <https://www.dailymail.co.uk/news/article-2525633/Teacher-sacked-pro-life.html> [<https://perma.cc/JR5X-4AJ8>] (describing a high school teacher who believed they had been fired for opposing a nearby Planned Parenthood and for sharing anti-abortion views with students); Greg

TikTok, with powerful marketing campaigns directed to minors, celebrate beliefs and conduct about the family that directly contradict Christian norms.³³³

Teachers and school leaders sometimes reflect these lopsided opinions. The leading interest group representing the positions of public-school teachers and administrators openly aligns itself with groups recommending instructing children to affirm viewpoints controverting and negatively characterizing Christian positions.³³⁴ And, according to more than a few studies, teachers are lopsidedly inclined to take liberal versus conservative political positions: for example, the Pacific Research Institute reported that among English teachers, the ratio is ninety-seven to three and ninety-nine to one among health teachers.³³⁵

We cannot know the degree to which schools taking a position on these materials influences children as compared with other sources that mouth similar viewpoints. But no matter the amount of influence schools exert, their taking a side still communicates that nearly every influential actor in a child's universe outside their home takes the same side: corporations, the media, and now the child's teachers and school administrators.

Byrnes, *Principal in Undercover Video Reveals How Schools 'Get Away With' Sneaking in Woke Agenda, Anti-Catholic Bigotry*, PJ MEDIA (Aug. 31, 2022, 10:52 AM), <https://pjmedia.com/news-and-politics/gregbyrnes/2022/08/31/undercover-video-reveals-how-conn-schools-sneak-in-woke-agenda-anti-catholic-bigotry-n1625551> [<https://perma.cc/K72S-LBVK>] (alleging discriminatory hiring practices against Catholics in a Connecticut elementary school).

333. See Lori Gil, *How Apple Supports LGBTQ+ During Pride Month and All Year Long*, MORE (June 1, 2020), <https://www.imore.com/how-apple-supports-lgbtq-during-pride-month-and-all-year-long> [<https://perma.cc/VY9F-C3G8>] (detailing Apple's internal and external promotional activities towards the LGBTQ+ community); see also Brooke Migdon, *TikTok Bans Misgendering, 'Deadnaming' Transgender People*, HILL (Feb. 9, 2022), <https://thehill.com/changing-america/respect/equality/593514-tiktok-bans-misgendering-deadnaming-transgender-people/> [<https://perma.cc/6JHM-9VKN>] (describing TikTok's policies against "hateful" ideologies failing to cooperate with individuals' claimed identities).

334. See *supra* n. 154.

335. Lance Izumi, *Why Are Teachers Mostly Liberal?*, PAC. RSCH. INST. (Apr. 3, 2019), <https://www.pacificresearch.org/why-are-teachers-mostly-liberal/>; see also Ana Swanson, *Chart: The Most Liberal and Conservative Jobs in America*, WASH. POST (June 3, 2015, 10:57 AM), <https://www.washingtonpost.com/news/wonk/wp/2015/06/03/why-your-flight-attendant-is-probably-a-democrat/> [<https://perma.cc/8J8E-9HRD>] (indicating that a majority of teachers overall favor left-leaning political positions); cf. Alyson Klein, *Survey: Educators' Political Leanings, Who They Voted For, Where They Stand on Key Issues*, EDUC. WEEK (Dec. 12, 2017), <https://www.edweek.org/leadership/survey-educators-political-leanings-who-they-voted-for-where-they-stand-on-key-issues/2017/12> [<https://perma.cc/Z5YY-D5KB>] (detailing a survey in which 41 percent of teachers described themselves as Democrats while 22 percent described themselves as Republicans); Jay Greene & James Paul, *Political Opinions of K-12 Teachers: Results from a Nationally Representative Survey*, HERITAGE FOUND. (Nov. 16, 2021), <https://www.heritage.org/education/report/political-opinions-k-12-teachers-results-nationally-representative-survey> [<https://perma.cc/7CML-Z4VY>] (noting survey results which indicate that "teachers tend to be somewhat left of center on many topics").

Parents in such schools can demonstrate that the coercion described here is a sufficient burden and don't also need to show that, like the plaintiffs in *Yoder*,³³⁶ they would suffer a criminal penalty for refusing to participate. They do, of course, suffer the financial penalty of having to move their child out of a free state school and into a school that charges tuition. This, too, is a cognizable burden.

After parents have demonstrated that the state is burdening their free exercise, it is the state's responsibility to demonstrate the compelling nature of their interests in student health and teaching tolerance of students with a sexual minority background and that this interest is exercised by means least restrictive of religion. The subsequent section discusses these interests.

E. States' Compelling Interests?

Were parents to succeed in demonstrating a burden upon their free exercise, schools in states with religious freedom protections would have to show that their interests in teaching this material are compelling and exercised by means least restrictive of religious families' interests.³³⁷ But it is not rationally necessary, let alone urgent, for the state to "affirm" or "celebrate" or "role play" or make moral claims about particular sex, marriage, or parenting choices in order to promote kindness to fellow students or to promote student health. It is necessary only to affirm the equal dignity of every student as a fellow member of the human race. Furthermore, attempting to influence students in one direction about belief and conduct norms—and suggesting that those who disagree (often religious families) are "mean" or don't know better—directly undermines efforts to teach tolerance.³³⁸ Instead, this stokes division along with prejudice against religious or other people who dissent from the beliefs that the state is proselytizing.

Additionally, with regard to the states' claim that its interests in teaching tolerance are compelling, Supreme Court precedent holds that a state must show that this claim survives application to the "particular claimant whose sincere exercise of religion is being substantially

336. *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) ("The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious belief.").

337. See, e.g., *McConnell, Berg & Lund*, *supra* note 322, at 149–50 (describing the requisite standard).

338. See *Manhattan Institute*, *supra* note 297 (explaining terms used by school administrators and staff when teaching race and social justice); see also *Jones v. Boulder Valley Sch. Dist. RE-2*, No. 20-cv-03399-RM-NRN, 2021 WL 5264188, at *3–4 (D. Colo. Oct. 4, 2021) (describing the plaintiffs' allegations against the school district).

burdened”: Christian students and families.³³⁹ Yet it is precisely these students and their families who are quite likely to subscribe to a fundamental tenet of Christianity; a belief in the radical equality of every human person. Scholar Michael Perry writes that

No political argument for our nation taking the human rights of distant peoples seriously will begin to have the power of an argument that appeals at least in part to the conviction that all human beings are sacred and “created equal and endowed by their Creator with certain inalienable Rights”³⁴⁰

Christianity directly subscribes to this notion, albeit Christians, like all others, regularly fall short and require re-conversion to the notion. But radical human equality is a central tenet of their belief flowing from every person’s being *imago Dei* and the New Testament’s “[t]here is neither Jew nor Greek, there is neither slave nor free person, there is not male and female; for you are all one in Christ Jesus.”³⁴¹ Authoritative commentators and documents of Christian churches codify and teach these beliefs.³⁴² Thus, the states’ claimed interest in teaching tolerance cannot survive the *Yoder* Court’s conclusion that parents’ interests should prevail if their religious practice serves the state’s interest as well or better. The *Yoder* Court wrote that the Amish families had

carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education. In light of this convincing showing, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its

339. See, e.g., *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006) (citing 42 U.S.C. § 2000bb-1(b)) (“RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.”).

340. Michael J. Perry, *Is the Idea of Human Rights Ineliminably Religious?*, 27 U. RICH. L. REV. 1023, 1073 (1993).

341. *Galatians* 3:28.

342. See, e.g., THE CATECHISM OF THE CATHOLIC CHURCH, *supra* note 10, §2358 (“The number of men and women who have deep-seated homosexual tendencies is not negligible. This inclination, which is objectively disordered, constitutes for most of them a trial. They must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided.”); cf. RICHARD B. HAYS, THE MORAL VISION OF THE NEW TESTAMENT: A CONTEMPORARY INTRODUCTION TO NEW TESTAMENT ETHICS (1996), 391–94 (Methodist) (employing an image of “community, cross, and new creation” to interpret homosexuality in the New Testament).

admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.³⁴³

And what about states' claim that they have compelling interests in promoting the health of students by injecting particular familial values in the general curriculum? Here, too, the state may struggle to satisfy even the rational relationship test, let alone strict scrutiny. It will struggle to show that its values and the conduct it affirms are reliably beneficial for minors. At best, the evidence is conflicted and uncertain.

Let us turn, for example, to the currently controverted matter of transgender identification. An empirical dispute is finally joined regarding whether puberty blockers and follow-on transgender surgery is helpful or harmful to minors.³⁴⁴ There is also evidence that most minors experiencing gender dysphoria grow out of it.³⁴⁵ Further, a court in England wrote, what even a brief reflection indicates is likely, that it is effectively impossible to gain truly informed consent from a minor regarding matters such as whether or not she will mind losing the possibility of sexual pleasure or the ability to bear a child.³⁴⁶ Furthermore, there is no evidence yet that puberty blockers followed by gender transition surgeries produced superior psychological outcomes as compared with a “wait and see” approach, or psychological and

343. *Wisconsin v. Yoder*, 406 U.S. 205, 235–36 (1972) (citing *Sherbert v. Verner*, 374 U.S. 398 (1963), *abrogated by Holt v. Hobbs*, 574 U.S. 352 (2015)).

344. *See, e.g., Transgender Interventions Harm Children: No Evidence that Transgender Interventions Are Safe for Children*, AM. COLL. OF PEDIATRICIANS (2022), <https://acpeds.org/transgender-interventions-harm-children> [<https://perma.cc/88VB-YJZK>] (“There is not a single long-term study to demonstrate the safety or efficacy of puberty blockers, cross-sex hormones and surgeries for transgender-believing youth.”). *Cf. What Are Puberty Blockers? Find Out How They’re Making Life a Little Easier for Gender-Diverse Kids*, CLEVELAND CLINIC: HEALTHESENTIALS (Jan. 10, 2022), <https://health.clevelandclinic.org/what-are-puberty-blockers/> [<https://perma.cc/WH7E-4TJ9>] (“One study showed that transgender teens who were able to receive puberty blockers experienced ‘superior mental health outcomes’ when compared with those who wanted the medication but did not receive it.”). *See also* Denish Myshko, *FDA Updates Safety Labels for Group of GnRH Agonists*, FORMULARY WATCH (May 6, 2022), <https://www.formularywatch.com/view/fda-updates-safety-labels-for-group-of-gnrh-agonists> [<https://perma.cc/6ZJ7-BCND>] (noting a potential side effect of one puberty blocker known as gonadotropin-releasing hormone agonists (GnRH) may include elevated spinal fluid pressure in the brain).

345. *See, e.g.,* Thomas D. Steensma et al., *Factors Associated with Desistence and Persistence of Childhood Gender Dysphoria: A Quantitative Follow-Up Study*, 52 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 582 (2013) (“Many children who experience gender dysphoria . . . will not continue to experience dysphoria into adolescence and adulthood” based on a sample of 127 adolescents. “However, a substantial minority (2–27% across studies) will continue to report [gender dysphoria].”).

346. *See, e.g.,* *Bell v. Tavistock & Portman NHS Found. Trust* [2020] EWHC (Admin) 3274 [80]–[83] (Eng.) (recounting the story of a transgender person who began transitioning to male at age seventeen, but by age twenty had stopped taking testosterone and now wished to identify as a woman because they began to contemplate having children).

psychiatric interventions. The medical establishment both in England and France has recently opted to take a cautious approach with what the French National Academy of Medicine called the “epidemic-like phenomenon” of transgender identification brought about by means including excessive engagement with social media or influence by those in one’s social circle.³⁴⁷ It wrote, therefore:

[A] great medical caution must be taken in children and adolescents, given the vulnerability, particularly psychological, of this population and the many undesirable effects, and even serious complications, that some of the available therapies can cause.³⁴⁸

The French National Academy of Medicine noted a decision by a leading hospital in Stockholm to prohibit the use of puberty blockers.³⁴⁹ A study commissioned by the United Kingdom’s National Institute of Health and Care Excellence likewise concluded that the evidence for the positive efficacy of puberty blockers is “very low” and “subject to bias and confounding.”³⁵⁰

There is also emerging evidence that children with autism and adolescent girls are unusually prone to believe that they identify as the opposite sex, leading scientists to suggest that these cases should be treated with special caution and respect for the vulnerable children involved.³⁵¹

In short, there is abundant empirical evidence suggesting that some schools’ “health promotion” efforts may not promote health or may even compromise student health. I would even conclude that they constitute practicing medicine without a license, and against the current tide of evidence. Additionally—and mirroring the dynamic in *Yoder* whereby the objecting religious community is able to prove that they better serve

347. Press Release, French Nat’l Acad. of Med., *Medicine and Gender Transidentity in Children and Adolescents* (Feb. 25, 2022), <https://www.academie-medecine.fr/la-medecine-face-a-la-transidentite-de-genre-chez-les-enfants-et-les-adolescents/?lang=en> [https://perma.cc/CT9P-RCYV].

348. *Id.*

349. *Id.*

350. Deborah Cohen & Hannah Barnes, *Evidence for Puberty Blockers Use Very Low, Says NICE*, BBC: HEALTH (Apr. 1, 2021), <https://www.bbc.com/news/health-56601386> [https://perma.cc/G4DE-4NYN] (referencing an assessment commissioned by the National Institute of Health and Care Excellence (NICE)).

351. See, e.g., Lisa Littman, *Correction: Parent Reports of Adolescents and Young Adults Perceived to Show Signs of a Rapid Onset of Gender Dysphoria*, 14 PLOS ONE (Mar. 19, 2019), <https://doi.org/10.1371/journal.pone.0214157> [https://perma.cc/6BKX-UML6] (noting the increase of adolescents and young adults who are predominantly natal females having a sudden onset of gender dysphoria symptoms beginning during or after puberty); cf. Sanja Zupanič et al., CASE REPORT: ADOLESCENT WITH AUTISM AND GENDER DYSPHORIA, 12 FRONTIERS IN PSYCHIATRY 1 (May 26, 2021) (noting the increasing clinical evidence between gender variability, gender dysphoria (GD), and autism spectrum disorder (ASD)).

the state's claimed interest—there is evidence that practices coincident with Christian sex, marriage, and parenting norms prove quite helpful to students' long-term health and happiness.³⁵² These include practices like fewer sexual partners before marriage, avoiding cohabitation and abortion, and waiting until marriage to have children. These conclusions are supported by leading empirical scholars on the right and the left who agree broadly that these behaviors provide very significant economic, social, employment, cognitive, and health benefits to the persons who practice them.³⁵³ They are also socially beneficial, given that the cause of some of the most intractable and growing socioeconomic and racial gaps in the United States are based upon family structure.³⁵⁴

In sum, there are a lot of reasons why lower courts are mistaken in their nearly universally held conclusion that parents' constitutional free exercise and custodial rights do not require their involvement in schools'

352. See, e.g., Igor Gravovac et al., THE RELATIONSHIP BETWEEN CHRONIC DISEASES AND NUMBER OF SEXUAL PARTNERS: AN EXPLORATORY ANALYSIS, 46 BRIT. MED. J. SEXUAL & REPROD. HEALTH 100 (2020) (citing studies that show a greater number of sexual partners is associated with a greater risk of contracting STIs in adolescents); see also Olga Khazan, *Fewer Sex Partners Means a Happier Marriage*, ATLANTIC (Oct. 22, 2018), <https://www.theatlantic.com/health/archive/2018/10/sexual-partners-and-marital-happiness/573493/> [<https://perma.cc/JD6X-6CG2>] (citing studies showing marital satisfaction is higher with less initial sexual partners); cf. Administration for Children and Families, *Healthy Marriage: Healthy Marriage and Relationship Education for Adults*, U.S. DEP. HEALTH & HUM. SERVS. (Oct. 23, 2020), <https://www.acf.hhs.gov/ofa/programs/healthy-marriage-responsible-fatherhood/healthy-marriage> [<https://perma.cc/2X9N-58DJ>] (noting a strong family has significant implications for health and well-being for both adults and children); Chris Iliades., *Is There A Price to Pay for Promiscuity*, EVERYDAY HEALTH (July 15, 2010), <https://www.everydayhealth.com/longevity/can-promiscuity-threaten-longevity.aspx> [<https://perma.cc/A8AZ-35N7>] (stating a large number of sexual partners has been linked to poor sexual health and decreased longevity).

353. See *supra* note 352; Nicholas H. Wolfinger, *Does Sexual History Affect Marital Happiness?*, INST. FAM. STUD. (Oct. 22, 2018), <https://ifstudies.org/blog/does-sexual-history-affect-marital-happiness> [<https://perma.cc/GJ4C-EXJ5>]; Juliana Menasce Horowitz et al., *Marriage and Cohabitation in the U.S.*, PEW RSCH. CTR. (Nov. 6, 2019), https://www.pewresearch.org/social-trends/2019/11/06/marriage-and-cohabitation-in-the-u-s/?utm_source=AdaptiveMailer&utm_medium=email&utm_campaign=19-11-6%20Marriage%20&%20Cohabitation%20Press%20Release&org=982&lvl=100&ite=4890&lea=1113569&ctr=0&par=1&trk= [<https://perma.cc/3LTX-2VL5>]; David C. Reardon, *The Abortion and Mental Health Controversy*, 6 SAGE OPEN MED. (Oct. 2018); Matthias Pollmann-Schult, *Single Motherhood and Life Satisfaction in Comparative Perspective: Do Institutional and Cultural Contexts Explain the Life Satisfaction Penalty for Single Mothers?*, 39 J. FAM. ISSUES, 2061–84. See also BROOKINGS INST. & AM. ENTER. INST., OPPORTUNITY, RESPONSIBILITY, AND SECURITY: A CONSENSUS PLAN FOR REDUCING POVERTY AND RESTORING THE AMERICAN DREAM 30–41 (2015) (identifying research which links child wellbeing with two-parent married families).

354. See, e.g., W. Bradford Wilcox & Ian Rowe, *Three Facts About Family Structure and Race: Responding to the New York Times*, INST. FAM. STUD. (Dec. 12, 2019), <https://ifstudies.org/blog/three-facts-about-family-structure-and-race-responding-to-the-new-york-times> [<https://perma.cc/3V88-2CMF>] (emphasizing a two-parent family structure for the success of Black youth).

choices to influence students about sex, sexual relations, and parenting. Schools' activities and communications are not merely "internal matters," but of extraordinary, and often also of religious, concern to families. The families are not asking for curricula "tailored" to their religious interests, only the removal of increasing state pressure upon their children to believe and act in ways contrary to their religion. States' methods sometimes clearly fall on the wrong side of the line between "mere exposure" and coercion. And, like the plaintiff families in *Yoder*, the religious families here have strong, state-recognized interests in the transmission of religion and in their religion's very survival. Finally, the state's claimed interests are either ineffectively promoted by the sexual content they are promoting, or possibly *better* promoted by the religious norms the state opposes.

VI. CONCLUSION

Perhaps this Article is a missile aimed at a mouse, the mouse being some unknown quantity of material about sex, sexual relations, and parenting woven by public-school teachers into presentations outside traditional sex-ed to which parents might object. Why would any author get exercised about this? Some likely believe that children neither listen to nor retain a likely significant percentage of the contents poured into their minds. There are myriad influences shaping a child's growth and development, and this material is just a tiny part of the whole. Some embarrassment concerning sexual subjects, along with some mistakes in this arena, are normal parts of growing up.

All of this is true, but the arguments against effectuating parents' interests are quite poorly done, and sometimes bordering on duplicitous in their eagerness to avoid the obvious, with the result that the wrong balance is being struck as between parents' claims and the states'.

Schools' claims that they are *not* taking a side and exerting coercion are plainly preposterous. They are rather taking a side about matters that constitute important pillars of a religious faith. Schools also lack good empirical data showing that the beliefs and conduct they promote advantage minors' health, safety, or welfare. In fact, it seems likely that the conduct urged by Christian familial norms is equally or more likely to result in minors' flourishing. It is not an evil to be eradicated, as some schools' presentations seem to indicate, but rather an alternative proposal about human flourishing, supporting not only families and religious transmission, but also the larger society that benefits from all the pro-social, pro-equality, pro-dignity messages that Christian familial tenets support.

Some public-school educators are caught up in a particular cultural

moment, and not thinking things through on the basis of good evidence, and with children's long-run health in mind. The better view is that articulated by the *Yoder* Court—an educational vision for the state in which diverse ideas of human flourishing, including religious ideas about it, should be welcome:

We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.³⁵⁵

“Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage.”³⁵⁶

Of course, religious families can seek political solutions to the problem outlined in this Article. They can actively participate in school board elections. They can also walk away from one of the most valuable benefits the state confers—a free, public education—and homeschool their children or pay for a private school. But if they stay, they should not only win many of their as-applied challenges to public-school proselytization of the type chronicled in this Article, but they should also win a new balance of power with the state respecting their minor children's formation and a fair hearing for their finer proposals to promote children's well-being and mutual regard.

355. *Wisconsin v. Yoder*, 406 U.S. 205, 223–24 (1972).

356. *Id.* at 226.