

## FREE-MARKET FAMILY POLICY AND THE NEW PARENTAL RIGHTS LAWS\*

MAXINE EICHNER\*\*

*How can government best support children's interests? Recently, federal and state policies have suggested conflicting answers to this question. One answer comes from a series of economic measures supporting families that were passed by Congress during the pandemic. These measures rested on the rationale that families do better when they are buffered from the market. A second answer has emerged from the many states that have passed "parental rights" bills restricting children's education in public schools. Supporters of these measures contend that children do better when their parents are given broad authority to rear them. This Article juxtaposes the family economic support measures with parental rights laws. It shows that these two sorts of policies were developed to respond to different pressures and problems and are likely to have very different impacts on children as a result. Specifically, family economic supports responded to the significant economic hardship experienced by U.S. families during the pandemic and produced demonstrable and significant benefits for children's well-being. In contrast, recent parental rights measures are motivated by a convergence of interests among political elites seeking partisan gain and voters expressing cultural backlash against progressive change and their threatened loss of privilege. Perhaps unsurprisingly, given their origins, these measures appear likely to stymie both children's well-being and their adequate education for citizenship. The fact that parental rights measures appear likely to become long-lasting fixtures of American law while family economic supports were largely withdrawn as the pandemic waned should therefore cause alarm for those who support children's best interests.*

*Part I discusses the weakness of the United States' free-market family policy before and during the pandemic, and the effectiveness of the emergency economic measures provided to families during the COVID-19 outbreak in supporting children's well-being. Part II describes the more recent rise in proposed state measures to safeguard parental rights from government. Part III argues that the new parental rights measures harm children and overstep the important but*

---

\* © 2023 Maxine Eichner.

\*\* Graham Kenan Distinguished Professor of Law, University of North Carolina School of Law; J.D., Ph.D.

*limited authority that parents properly wield vis-à-vis government to the detriment of both children and the civic health of our democracy.*

INTRODUCTION .....	1306
I. U.S. FREE-MARKET FAMILY POLICY AND THE NEED FOR FAMILY ECONOMIC SUPPORTS .....	1311
A. <i>The Failures of U.S. Free-Market Family Policy in Normal         Economic Circumstances</i> .....	1311
B. <i>The Suspension of Free-Market Family Policy During the         COVID-19 Pandemic and the Relief It Delivered to Families</i> .....	1318
II. THE RISE OF PARENTAL RIGHTS LAWS AS PRO-FAMILY REFORM .....	1323
A. <i>The Parental Rights Campaign</i> .....	1323
B. <i>The Elite Push Behind Parental Rights</i> .....	1325
C. <i>Voter Support for Parental Rights</i> .....	1329
III. THE HARMS INFLICTED BY PARENTAL RIGHTS MEASURES .....	1332
A. <i>The Government's Responsibility To Support Children's Well-         Being</i> .....	1333
B. <i>The Government's Responsibility To Develop a Baseline Level of         Autonomy in Children</i> .....	1340
C. <i>The New Parental Rights and Government's Responsibility To         Educate Students for Citizenship</i> .....	1342
CONCLUSION .....	1348

## INTRODUCTION

U.S. public policy has long been premised on the expectation that families will supply the resources and conditions they need almost exclusively through their own market earnings, a policy regime that I call “free-market family policy.”<sup>1</sup> The first two years of the COVID-19 pandemic exposed glaring weaknesses in this policy regime. For many Americans, the private stream of income the United States expects them to rely on to support their families ran dry, as stores, restaurants, and other service establishments shuttered their doors, and warehouses and offices closed or cut back hours, leaving employees

---

1. See generally MAXINE EICHNER, *THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED)* (2020) [hereinafter EICHNER, *FREE-MARKET FAMILY*] (discussing the increasingly large toll that economic inequality and insecurity are taking on U.S. families).

with significantly reduced pay or without paychecks entirely.<sup>2</sup> Combined with the many others who had to leave work to take care of children when schools and daycares closed, more than four in ten parents living with children in the United States reported in March and April 2020 that their households suffered a significant income shock.<sup>3</sup>

The absence of public support meant that these private shocks translated into hardship for U.S. children at the most basic levels. Overall in 2020, the income of one in six families with children dropped below the U.S. poverty line.<sup>4</sup> Worse still, in late June 2020, at the peak of the economic disruption, almost one in five children—about fourteen million children—were not even getting enough to eat because their families simply could not afford to buy food.<sup>5</sup> By early September 2021, almost one in four renters (twenty-three percent) living with children reported that they were behind on rent.<sup>6</sup>

The disastrous consequences of the U.S. free-market family approach in the face of the pandemic caused Congress to take unprecedented steps to support U.S. families.<sup>7</sup> In 2020 and 2021, Congress passed a series of measures to ensure that American families had the cash and conditions they needed to thrive, regardless of their market earnings: It provided a weekly federal

2. See Kim Parker, Juliana Menasce Horowitz & Anna Brown, *About Half of Lower-Income Americans Report Household Job or Wage Loss Due to COVID-19*, PEW RSCH. CTR. (Apr. 21, 2020), <https://www.pewresearch.org/social-trends/2020/04/21/about-half-of-lower-income-americans-report-household-job-or-wage-loss-due-to-covid-19/> [<https://perma.cc/3MB7-FXC4>].

3. See LAUREN BAUER, KRISTEN BROADY, WENDY EDELBERG & JIMMY O'DONNELL, BROOKINGS INST., *TEN FACTS ABOUT COVID-19 AND THE U.S. ECONOMY 14* (2020), [https://www.brookings.edu/wp-content/uploads/2020/09/FutureShutdowns\\_Facts\\_LO\\_Final.pdf](https://www.brookings.edu/wp-content/uploads/2020/09/FutureShutdowns_Facts_LO_Final.pdf) [<https://perma.cc/5ZZ6-W7BE>].

4. See Callie Freitag & Heather D. Hill, *1 in 6 US Kids Are in Families Below the Poverty Line*, CONVERSATION (May 20, 2022, 8:14 AM), <https://theconversation.com/1-in-6-us-kids-are-in-families-below-the-poverty-line-183323> [<https://perma.cc/5YL9-S8YU>]; see also Emily A. Shrider, Melissa Kollar, Frances Chen & Jessica Semega, *Income and Poverty in the United States: 2020*, U.S. CENSUS BUREAU (Sept. 14, 2021), <https://www.census.gov/library/publications/2021/demo/p60-273.html> [<https://perma.cc/K77U-AG62>] (providing other statistics on income and poverty in 2020).

5. See Lauren Bauer, *About 14 Million Children in the US Are Not Getting Enough To Eat*, BROOKINGS INST. (July 9, 2020), <https://www.brookings.edu/blog/up-front/2020/07/09/about-14-million-children-in-the-us-are-not-getting-enough-to-eat/> [<https://perma.cc/NLC4-DXGH>].

6. See CTR. ON BUDGET & POL'Y PRIORITIES, *THE COVID-19 ECONOMY'S EFFECTS ON FOOD, HOUSING, AND EMPLOYMENT HARDSHIPS* (2022), <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-economys-effects-on-food-housing-and> [<https://perma.cc/K2Z3-YYEN>].

7. I develop the contrasts between what I call the “free-market family policy” of the United States and the “pro-family policy” of other wealthy democracies in more detail in my recent book, *The Free-Market Family: How the Market Crushed the American Dream (and How It Can Be Restored)*. EICHNER, *FREE-MARKET FAMILY*, *supra* note 1, at 19–42. For other critiques of the market's ability to support families, see JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (2014) and Meredith Johnson Harbach, *Childcare Market Failure*, 2015 UTAH L. REV. 659.

supplement to state unemployment benefits for workers who lost their jobs;<sup>8</sup> issued three pandemic relief checks to adults and children;<sup>9</sup> appropriated billions of dollars in emergency aid to help renters facing eviction;<sup>10</sup> and required employers to provide employees paid family leave,<sup>11</sup> among other measures. And, as the pandemic continued, in 2021, Congress approved monthly checks to most families with children for the first time in the nation's history.<sup>12</sup>

Congress framed all these public actions, however, as temporary measures to allow families to weather the extraordinary economic conditions of the pandemic.<sup>13</sup> The question that remained was whether measures like these would, or should, become more permanent changes in the nation's public policy. In the pandemic's second year, the Biden administration and many congressional Democrats pushed for public supports for families going forward, including continued child-benefit checks, universal preschool for all three- and four-year-olds, a cap on childcare costs, paid family and sick leave, expanded free school meals, and money for affordable home and rental assistance.<sup>14</sup> The administration's "Build Back Better" measure, however, failed to make it through the equally divided Senate, despite a push by the administration and congressional Democrats in the fall of 2021.<sup>15</sup>

8. Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. No. 116-136, § 2104, 134 Stat. 281, 318 (2020) (codified as amended at 15 U.S.C. § 9023 (2021)).

9. *See id.* § 2201(a), 134 Stat. 335–40 (codified as amended at 26 U.S.C. § 6428 (2020)); COVID-Related Tax Relief Act of 2020, Pub. L. No. 116-260, § 272, 134 Stat. 1182, 1965–76 (codified at 26 U.S.C. § 6428A (2020)); American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9601, 135 Stat. 4, 138–44 (codified at 26 U.S.C. § 6428B (2021)).

10. Consolidated Appropriations Act, 2021, § 501, 134 Stat. at 2069–78 (codified as amended at 15 U.S.C. § 9058a (2021)).

11. Families First Coronavirus Response Act, Pub. L. No. 116-127, § 3102, 134 Stat. 178, 189–91 (2020) (codified as amended at 29 U.S.C. § 2620 (2020)).

12. American Rescue Plan Act of 2021, §§ 9611–622, 135 Stat. at 144–53 (codified in scattered sections of 26 U.S.C.).

13. *See infra* Section I.B.

14. Build Back Better Act, H.R. 5376, 117th Cong. §§ 130001, 137102, 23001–02, 24001, 40001–12 (2021); *see also* Tami Luhby & Katie Lobosco, *Here's What's in Biden's Build Back Better Plan*, CNN POL. (Nov. 19, 2021), <https://www.cnn.com/2021/09/12/politics/house-reconciliation-package-explainer/index.html> [<https://perma.cc/V2ST-NEBB>].

15. On November 19, 2021, the U.S. House of Representatives passed a version of the Build Back Better Act, but it did not include family supports of the original version. Build Back Better Act, H.R. 5376, 117th Cong. (2021); *see also* *Actions Overview: H.R. 5376 — 117th Congress (2021-2022)*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/5376/actions?q=%7B%22search%22%3A%5B%22hr5376%22%2C%22hr5376%22%5D%7D&r=1&s=1> [<https://perma.cc/AVV9-WR85>]. This version of the Act never reached a vote in the Senate. *See* Lynn Mucenski Keck, *The Build Back Better Plan Is Stalling: What's the Issue?*, FORBES (Jan. 10, 2022, 10:00 AM), <https://www.forbes.com/sites/lynnmucenskikeck/2022/01/10/the-build-back-better-plan-is-stalling-whats-the-issue/?sh=3f33a9aa7378> [<https://perma.cc/8H5W-YDS4>]; Kelsey Snell, Deirdre Walsh & Alana Wise, *Democrats Are Forced To Regroup as Biden's Signature Spending Bill Stalls*, NPR (Dec. 16,

At about the same time that federal efforts to institute permanent economic supports for families failed, politicians in many states were beginning to propose and pass very different kinds of measures that they asserted were needed to support families.<sup>16</sup> These legislators equated support for families with giving parents the right to dictate what their children learn in school about particular issues.<sup>17</sup> Some of these measures, like the Florida law informally called the “Don’t Say Gay” law, prohibit teachers in early grades from discussing issues of sexual orientation and gender identity and in later grades prohibit these issues from being discussed in ways that are “not age appropriate or developmentally appropriate”—language some believe is deliberately vague to chill discussion of these issues.<sup>18</sup> Some of these laws also give parents greater rights in being notified about children’s mental health and well-being.<sup>19</sup> The Parents’ Bill of Rights passed by the North Carolina Senate contains a similar bar on teaching issues of sexual orientation or gender identity to young children and would also require schools to notify parents if any student, regardless of grade, begins to question their gender identity in school, including if a student asks to use a different name or pronoun to describe themselves.<sup>20</sup> Still other measures ban the teaching of “divisive” concepts such as so-called “critical race theory” (“CRT”).<sup>21</sup> Finally, some measures ban school boards from imposing mask mandates or vaccine requirements to allow parents to make their own decisions about masking and vaccinations for their children in schools.<sup>22</sup>

---

2021, 7:23 PM), <https://www.npr.org/2021/12/16/1064927774/democrats-forced-to-regroup-as-bidens-signature-spending-bill-stalls> [<https://perma.cc/S35P-VXTH>].

16. See Brooke Schultz, *EXPLAINER: The History Behind ‘Parents’ Rights’ in Schools*, ASSOCIATED PRESS (Nov. 14, 2022), <https://apnews.com/article/religion-education-gender-identity-0e2ca2cf0ef7d7bc6ef5b125f1ee0969> [<https://perma.cc/ZWA5-KSSP>].

17. See *id.*

18. See, e.g., FLA. STAT. § 1001.42(8)(c)(3) (2022) (mandating that teachers in grades K–3 cannot discuss sexual orientation or gender in a manner that is “not age-appropriate or developmentally appropriate for students in accordance with state standards”); Melissa Block, *Teachers Fear the Chilling Effect of Florida’s So-Called ‘Don’t Say Gay’ Law*, NPR (Mar. 30, 2022, 5:00 AM), <https://www.npr.org/2022/03/30/1089462508/teachers-fear-the-chilling-effect-of-floridas-so-called-dont-say-gay-law> [<https://perma.cc/E834-79HV>].

19. See, e.g., FLA. STAT. § 1001.42(8)(c)(1) (“[Schools must] adopt procedures for notifying a student’s parent if there is a change in the student’s services or monitoring related to the student’s mental, emotional, or physical health or well-being . . .”).

20. H.B. 755, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021).

21. See, e.g., Protect Students First Act, § 1-2, 2022 Ga. Laws 719 (codified at GA. CODE ANN. § 20-1-11 (2022)); Act of Mar. 14, 2022, 2022 Miss. Laws 355 (codified at MISS. CODE ANN. § 37-13-2 (2022)); Va. Exec. Order No. 1, 38 Va. Reg. Regs. 1510 (Jan. 31, 2022) (LEXIS); H.B. 3979, 87th Leg. (Tex. 2021) (codified as amended at TEX. EDUC. CODE ANN. § 28.002 (2021)).

22. See, e.g., Act of Feb. 16, 2022, 2022 Va. Adv. Legis. Serv. 1, 1–2 (LexisNexis) (codified at VA. CODE ANN. § 22.1-2.1 (2022)); Tex. Exec. Order No. GA-36, 46 Tex. Reg. 3325 (May 28, 2021); Unmask Georgia Students Act, § 2, 2022 Ga. Laws 23, 23–24 (codified at GA. CODE ANN. § 20-2-59 (2022)); Act of May 20, 2021, ch. 139, § 28, 2021 Iowa Acts 333, 340 (codified at IOWA CODE § 280.31 (2021)); Act of May 3, 2021, ch. 8, § 18, 2021 Fla. Laws 94, 116 (codified at FLA. STAT. § 381.00316

This Article juxtaposes these two very different types of measures—economic supports for families versus parental rights measures in schools. Advocates of each type of measure claim their programs position the government to support families and children in important ways. Yet, as this Article shows, these two measures respond to very different pressures and problems and, partly as a result, produce very different impacts on the well-being of children. Specifically, family economic supports respond to the real and significant economic hardship experienced by U.S. families in today’s economy. The family economic supports installed during the pandemic offered a test case in how effectively these measures would allay economic hardship, producing demonstrable and significant benefits for children’s well-being. In contrast, recent parental rights measures, this Article suggests, are motivated less by responding to real needs of children than by the confluence of interests among libertarian elites seeking to siphon political pressure away from adopting family economic supports, Republican politicians reaching for their next wedge issue to motivate their base and swing voters, and less educated voters enacting backlash in response to perceived threats to their position in the social hierarchy.

Perhaps unsurprisingly, given these motivations, parental rights measures may provide some psychic benefits to their supporters, but they are unlikely to produce demonstrable benefits for children. The opposite is likely true: by targeting vulnerable children, they are likely to produce significant harm. Furthermore, these measures violate government’s responsibility to ensure that children develop the capacities to choose their own course in life and to become citizens capable of collective self-rule in a liberal democracy.<sup>23</sup> For those interested in children’s well-being and the well-being of the country, the fact that implementation of family economic supports at present appear to have been confined to the first years of the pandemic, and that parental rights laws appear as if they will have a longer-term impact, should therefore be treated with grave concern.

Part I describes the weakness of the United States’ free-market family policy before and during the pandemic, and demonstrates the effectiveness of the emergency economic supports provided to families during the pandemic. Part II discusses the more recent rise in proposed state measures to safeguard parental rights from government. Part II also contextualizes the parental rights

---

(2022)); Act of Nov. 12, 2021, ch. 6, 2021 Tenn. Pub. Acts 1, 4–7 (codified at TENN. CODE ANN. §§ 14-2-101 to -104 (2021)).

23. I use the term “liberal democracy” to refer to the form of government we have in the United States, which focuses on rule by the majority combined with a strong emphasis on liberty, self-government, and the equal worth of citizens. My use of the term “liberal” is therefore broader than its use in common parlance to refer to those who hold liberal political beliefs. Those at both ends of our political spectrum, conservative Republicans as well as Democrats, hold commitments to liberal democracy.

campaign as a concerted, elite-driven effort to undermine much-needed reform of free-market family policy, which operationalizes sentiments of cultural backlash. Part III argues that the new parental rights measures harm children and overstep the important but limited authority that parents should properly wield vis-à-vis government to the detriment of both children and the civic health of our democracy.

#### I. U.S. FREE-MARKET FAMILY POLICY AND THE NEED FOR FAMILY ECONOMIC SUPPORTS

In a previous work, I demonstrated that U.S. family policy is constructed on the expectation that families will privately supply the resources, services, and conditions that family members need to thrive, largely without the assistance of government.<sup>24</sup> This part begins by summarizing that earlier discussion of free-market family policy and its shortcomings, focusing particularly on the failure of free-market family policy to provide adequate and consistent support for children's well-being. It then moves on to discuss how the economic dislocation caused by the pandemic caused such a massive disruption of private earnings and inflicted so much widespread suffering that it finally caused the federal government to roll back this misguided policy and to deliver a stream of public funding and other supports to families. Unfortunately, despite having demonstrated significant benefits for children's well-being, this part closes by detailing the defeat of the federal Build Back Better plan, which would have continued these measures beyond the pandemic.

##### A. *The Failures of U.S. Free-Market Family Policy in Normal Economic Circumstances*

The expectation embedded in U.S. family policy that families should privately supply the economic resources their members need makes the country an outlier among wealthy countries.<sup>25</sup> Every other wealthy democracy has built systems premised on the idea that families do their best when they receive public, as well as private, support.<sup>26</sup> The United States is the only wealthy democracy that does not provide parents child benefit checks to help ensure that children's needs for steady economic support are consistently met.<sup>27</sup> In contrast with others, it has not developed any large-scale system to provide,

---

24. See EICHNER, FREE-MARKET FAMILY, *supra* note 1, at 19–42.

25. *Id.*

26. *Id.*

27. See, e.g., Dylan Matthews, *Sweden Pays Parents for Having Kids—And It Reaps Huge Benefits. Why Doesn't the U.S.?*, VOX (May 23, 2016, 9:00 AM), <https://www.vox.com/2016/5/23/11440638/child-benefit-child-allowance> [https://perma.cc/QM3L-DNPS].

subsidize, or even regulate daycare for quality.<sup>28</sup> It is also the only wealthy country that does not provide any paid parental leave whatsoever.<sup>29</sup> The United States also stands apart from other countries in having few to no laws that help parents balance jobs with family responsibilities—no limits on mandatory work hours, no legal option for parents to work part-time, and no required paid (or even unpaid) vacation leave.<sup>30</sup>

Two macroeconomic changes in the last half century have made it much harder for U.S. families with children to secure sufficient stable incomes than in the past. The first shift relates to massive increases in economic inequality. Between 1973 and 2015, even as earnings among the top fifth of workers skyrocketed, the hourly wages of the two-thirds of men without college diplomas between the ages of twenty-five to fifty-four dropped eighteen percent in real dollars.<sup>31</sup> Further, the drop in the real value of the minimum wage in these decades and the large increase in the number of low-wage service jobs in the U.S. economy mean that far more jobs do not pay nearly enough to support a family. Almost a third of those in the workforce today make less than twelve dollars an hour, and few in these low-wage jobs receive benefits.<sup>32</sup> Many of these workers have children, and no matter how hard or long they work, they

28. See EICHNER, FREE-MARKET FAMILY, *supra* note 1, at 106–15; Jonathan Cohn, *The Hell of American Day Care*, NEW REPUBLIC (Apr. 15, 2013), <https://newrepublic.com/article/112892/hell-american-day-care> [<https://perma.cc/P3VB-J3M8>].

29. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601–654 (2012)); see Ellen Francis, Helier Cheung & Miriam Berger, *How Does the U.S. Compare to Other Countries on Paid Parental Leave? Americans Get 0 Weeks. Estonians Get More than 80.*, WASH. POST (Nov. 11, 2021, 11:08 AM), <https://www.washingtonpost.com/world/2021/11/11/global-paid-parental-leave-us/> [<https://perma.cc/KCS6-2P28> (dark archive)]. Recently, however, a growing number of states have begun to provide several weeks of paid family leave—an important advance, although the leaves are far shorter than other wealthy countries provide. See, e.g., Act of June 27, 2019, ch. 24, § 40, 2019 Cal. Stat. 983, 1012 (codified at CAL. UNEMP. INS. CODE § 3301(a)(1) (2021)) (eight weeks); Act of July 26, 2021, ch. 179, § 1, 2021 R.I. Pub. Laws 912, 913 (codified at R.I. GEN. LAWS § 28-41-35 (2021)) (six weeks); Act of Feb. 14, 2019, ch. 37, 2019 N.J. Laws 161, 218 (codified at N.J. STAT. ANN. § 43:21-39.3 (2021)) (twelve weeks); New York Paid Family Leave Law, ch. 54, pt. SS, §§ 1–5, 2016 N.Y. Laws 157, 157–59 (codified as amended at N.Y. WORKERS' COMP. LAW §§ 200–04 (2022)) (twelve weeks); Paid Family and Medical Leave Act, ch. 5, § 6, 2017 Wash. Sess. Laws 2044, 2052 (codified at WASH. REV. CODE § 50A.15.020(3)(a) (2022)) (twelve weeks); Universal Paid Leave Emergency Amendment Act of 2021, 68 D.C. Reg. 8692, 8695–97 (Aug. 23, 2021) (codified as amended at D.C. CODE § 32-541.04 (e-1)(3) (2022)) (twelve weeks).

30. See EICHNER, FREE-MARKET FAMILY, *supra* note 1, at 22–23.

31. See Ariel Binder & John Bound, *The Declining Labor Market Prospects of Less-Educated Men*, 33 J. ECON. PERSPS. 163, 163 (2020).

32. See ECON. POL'Y INST. & OXFAM AM., FEW REWARDS: AN AGENDA TO GIVE AMERICA'S WORKING POOR A RAISE 4–5, 12 (2016), [https://s3.amazonaws.com/oxfam-us/www/static/media/files/Few\\_Rewards\\_Report\\_2016\\_web.pdf](https://s3.amazonaws.com/oxfam-us/www/static/media/files/Few_Rewards_Report_2016_web.pdf) [<https://perma.cc/TSY3-RMLX>].

simply will not earn enough to get their kids what they need to do their best.<sup>33</sup> The economic situation is particularly tough for Black and Hispanic families. The income gap between the median Black and white household has lingered at about sixty percent for decades.<sup>34</sup> Meanwhile, the median Hispanic household earns only seventy-four percent of the median white household.<sup>35</sup>

Disparities in families' wealth have also mushroomed in the last five decades. Today, families in just the top one percent hold roughly twice as much wealth as those in the entire bottom ninety percent.<sup>36</sup> To make matters worse, the drop in net worth of households headed by adults younger than thirty-five—the families most likely to have young kids—has been particularly steep. In 1984, the median net worth of these younger households in 2010 dollars was \$11,521; in 2009, it was \$3,662.<sup>37</sup> Families headed by single mothers must also deal with the gender wage gap. Women, as a group, make eighty-two cents for every dollar men make.<sup>38</sup> For Black women, that figure drops to sixty-two cents.<sup>39</sup>

The second shift undercutting parents' ability to provide for their children is the steep rise in economic insecurity in the past five decades. Much of this increased insecurity comes from private companies offloading risks they once

33. See *Why the U.S. Needs a \$15 Minimum Wage: How the Raise the Wage Act Would Benefit U.S. Workers and Their Families*, ECON. POL'Y INST. (Jan. 26, 2021), <https://www.epi.org/publication/why-america-needs-a-15-minimum-wage/> [<https://perma.cc/TSY3-RMLX>].

34. See MARY C. DALY, BART HOBIJN & JOSEPH H. PEDTKE, FED. RSRV. BANK OF S.F., *DISAPPOINTING FACTS ABOUT THE BLACK-WHITE WAGE GAP* 2–3 (2017), <https://www.frbsf.org/economic-research/files/el2017-26.pdf> [<https://perma.cc/7QJ4-GE9P>]; Valerie Wilson, *Racial Disparities in Income and Poverty Remain Largely Unchanged Amid Strong Income Growth in 2019*, ECON. POL'Y INST. (Sept. 16, 2020, 10:49 AM), <https://www.epi.org/blog/racial-disparities-in-income-and-poverty-remain-largely-unchanged-amid-strong-income-growth-in-2019/> [<https://perma.cc/35YE-WWDV>].

35. See Wilson, *supra* note 34.

36. See Edward N. Wolff, *Household Wealth Trends in the United States, 1962 to 2016: Has Middle Class Wealth Recovered?* 9 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24085, 2017), [https://www.nber.org/system/files/working\\_papers/w24085/w24085.pdf](https://www.nber.org/system/files/working_papers/w24085/w24085.pdf) [<https://perma.cc/YN7T-R8LL>]; see also CONG. BUDGET OFF., *TRENDS IN FAMILY WEALTH, 1987 TO 2013*, at 1 (2016), <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51846-familywealth.pdf> [<https://perma.cc/KH5N-TWLM>]; Jesse Bricker, Lisa J. Dettling, Alice Henriques, Joanne W. Hsu, Lindsay Jacobs, Kevin B. Moore, Sarah Pack, John Sabelhaus, Jeffrey Thompson, Richard A. Windle, Peter Hansen & Elizabeth Llanes, *Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances*, FED. RSRV. BULL., Sept. 2017, at 1, 10, <https://www.federalreserve.gov/publications/files/scf17.pdf> [<https://perma.cc/BT4C-E46P>].

37. See RICHARD FRY, D'VERA COHN, GRETCHEN LIVINGSTON & PAUL TAYLOR, PEW RSCH. CTR., *THE OLD PROSPER RELATIVE TO THE YOUNG: THE RISING AGE GAP IN ECONOMIC WELL-BEING* 1 (2011), <http://www.pewresearch.org/wp-content/uploads/sites/3/2011/11/WealthReportFINAL.pdf> [<https://perma.cc/4UWY-2LCS>].

38. See Robin Bleiweis, *Quick Facts About the Gender Wage Gap*, CTR. FOR AM. PROGRESS (Mar. 24, 2020), <https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage-gap/> [<https://perma.cc/Q4QD-74HK>].

39. *Id.*

assumed onto American workers and their families.<sup>40</sup> In contrast to past practice, employers who need work done are now more likely to hire temporary employees or independent contractors, and they are more likely to lay workers off when business is slow, leading to fewer workers having steady, full-time jobs with benefits.<sup>41</sup> Employers have also moved to scheduling systems that shift employee staffing based on customer demand, which maximize employer profits at the cost of erratic paychecks for employees.<sup>42</sup> And, companies are also less likely to provide health insurance than in the past and, when they do, they are more likely to pass on more costs.<sup>43</sup>

Increases in income insecurity meant that more than one-third of all Americans—roughly ninety-eight million people—had incomes that dropped below the poverty line for at least two months between 2009 and 2012.<sup>44</sup> Still more are just one emergency away from that fate. In 2017, four in ten Americans

40. See generally JACOB S. HACKER, *THE GREAT RISK SHIFT: THE ASSAULT ON AMERICAN JOBS, FAMILIES, HEALTH CARE, AND RETIREMENT—AND HOW YOU CAN FIGHT BACK* (2006) (reporting that governments and corporations are increasingly transferring economic risks to workers and their families).

41. See *id.* at 68–69, 81–83; see also JONATHAN MORDUCH & RACHEL SCHNEIDER, *SPIKES AND DIPS: HOW INCOME UNCERTAINTY AFFECTS HOUSEHOLDS* 3 (2013), <https://static1.squarespace.com/static/53d008ede4b0833aa2ab2eb9/t/53d6e12ae4b0907fe7bedf6f/1410469662568/issue1-spikes.pdf> [<https://perma.cc/ZC78-PBCN>]; U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-168R, *CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS AND BENEFITS* 15–16 (2015), <https://www.gao.gov/assets/670/669899.pdf> [<https://perma.cc/XQ7K-5MXW>]; Lawrence Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States* 22 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22667, 2016), [https://www.nber.org/system/files/working\\_papers/w22667/w22667.pdf](https://www.nber.org/system/files/working_papers/w22667/w22667.pdf) [<https://perma.cc/D8FE-EMHF>]; *Contract Jobs Are the New Normal: NPR/Marist Poll*, NPR (Jan. 22, 2017), <https://www.npr.org/about-npr/579672112/contract-jobs-are-the-new-normal-npr-marist-poll> [<https://perma.cc/K42X-XY97>].

42. See LONNIE GOLDEN, *ECON. POL'Y INST., IRREGULAR WORK SCHEDULING AND ITS CONSEQUENCES* 1–2 (2015), <https://files.epi.org/pdf/82524.pdf> [<https://perma.cc/8PL9-BXVG>].

43. See THE KAISER FAM. FOUND. & HEALTH RSCH. & EDUC. TR., *EMPLOYER HEALTH BENEFITS: 2017 ANNUAL SURVEY* 8, 106 (2017), <https://files.kff.org/attachment/Report-Employer-Health-Benefits-Annual-Survey-2017> [<https://perma.cc/4AEC-FNNS>]; Cathy Schoen, David Radley & Sara R. Collins, *State Trends in the Cost of Employer Health Insurance Coverage, 2003–2013*, COMMONWEALTH FUND, Jan. 2015, at 1, 4, 6, [https://www.commonwealthfund.org/sites/default/files/documents/\\_\\_\\_media\\_files\\_publications\\_issue\\_brief\\_2015\\_jan\\_1798\\_schoen\\_state\\_trends\\_2003\\_2013.pdf](https://www.commonwealthfund.org/sites/default/files/documents/___media_files_publications_issue_brief_2015_jan_1798_schoen_state_trends_2003_2013.pdf) [<https://perma.cc/3244-HAXA>]; Lawrence Mishel, *Employers Shift Health Insurance Costs onto Workers*, *ECON. POL'Y INST.* (Aug. 15, 2006), [https://www.epi.org/publication/webfeatures\\_snapshots\\_20060816/](https://www.epi.org/publication/webfeatures_snapshots_20060816/) [<https://perma.cc/WHC8-96BG>].

44. See JONATHAN MORDUCH & RACHEL SCHNEIDER, *THE FINANCIAL DIARIES: HOW AMERICAN FAMILIES COPE IN A WORLD OF UNCERTAINTY* 159 (2017); *Table 3: People in Poverty 2 or More Months by Selected Characteristics: 2009 to 2012*, U.S. CENSUS BUREAU (Dec. 16, 2021), <https://www.census.gov/data/tables/time-series/demo/income-poverty/poverty-dynamics-09-12.html> [<https://perma.cc/3YA4-VRNQ> (staff-uploaded archive)] (click on the hyperlink for Table 3).

reported that they would not be able to cover an unexpected expense of \$400.<sup>45</sup> Even hourly workers with middle-class incomes commonly have shifts in income of thirty percent per month.<sup>46</sup> Families of color bear the brunt of this insecurity: nearly two-thirds of Black families and half of Hispanic families live in a household with moderate or high levels of economic insecurity.<sup>47</sup>

Under free-market family policy, the minimal public support U.S. families with children receive does not ensure children receive necessary resources. Most support comes in the form of two tax benefits: the Child Tax Credit<sup>48</sup> and the Earned Income Tax Credit.<sup>49</sup> The Child Tax Credit gives most U.S. families a yearly tax credit of up to \$2,000.<sup>50</sup> Because it is not fully refundable, however, the lowest-earning families, including twenty-seven million children, cannot get the full benefit of the credit.<sup>51</sup> The Earned Income Tax Credit, while specifically aimed at low-income families, is geared towards incentivizing work rather than ensuring that children's needs are met. Low-income families in which a parent works, accordingly, receive a refundable tax credit that pays out most in the amount at which a minimum-wage worker would earn in a year, and that decreases above that rate.<sup>52</sup> But the program does not ensure that even children's

45. See BD. OF GOVERNORS OF THE FED. RESRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2017, at 21 (2018), <https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf> [<https://perma.cc/6FCS-P4W4>].

46. See Patricia Cohen, *Steady Jobs, with Pay and Hours That Are Anything But*, N.Y. TIMES (May 31, 2017), <https://www.nytimes.com/2017/05/31/business/economy/volatile-income-economy-jobs.html> [<https://perma.cc/3F7L-SJF3> (staff-uploaded, dark archive)].

47. ROBERT P. JONES, DANIEL COX & JUHEM NAVARRO-RIVERA, PUB. RELIGION RSCH. INST., ECONOMIC INSECURITY, RISING INEQUALITY, AND DOUBTS ABOUT THE FUTURE: FINDINGS FROM THE 2014 AMERICAN VALUES SURVEY 11 (2014), <https://www.prii.org/wp-content/uploads/2014/09/PRRI-AVS-with-Transparency-Edits.pdf> [<https://perma.cc/2RBV-6HQL>]; see also JACOB S. HACKER, PHILIPP REHM & MARK SCHLESINGER, THE ROCKEFELLER FOUND., STANDING ON SHAKY GROUND: AMERICANS' EXPERIENCE WITH ECONOMIC INSECURITY 21–22 (2010), [http://www.economicsecurityindex.org/upload/media/ESI%20report%20final\\_12%2013.pdf](http://www.economicsecurityindex.org/upload/media/ESI%20report%20final_12%2013.pdf) [<https://perma.cc/VF2N-FKFA>]; Jacob S. Hacker, *Understanding Economic Insecurity: The Downward Spiral of the Middle Class*, 22 CMTYS. & BANKING 25, 27 (2011).

48. 26 U.S.C. § 24(a).

49. *Id.* § 32(a)(1).

50. This figure is the result of a temporary increase in 2017 from the permanent level of \$1,000 in exchange for elimination of the dependency exemption. See *id.* § 24(h)(2).

51. See Chuck Marr, Kris Cox, Stephanie Hingtgen & Katie Windham, *Congress Should Adopt American Families Plan's Permanent Expansions of Child Tax Credit and EITC, Make Additional Provisions Permanent*, CTR. ON BUDGET & POLY PRIORITIES (May 24, 2021), <https://www.cbpp.org/research/federal-tax/congress-should-adopt-american-families-plans-permanent-expansions-of-child> [<https://perma.cc/77RR-ZY75>]; Grover (Russ) Whitehurst, *Will Tax Reform Provide More Support for Children and Their Families? Follow the Money*, EVIDENCE SPEAKS REPS., Oct. 18, 2017, at 1, <https://www.brookings.edu/wp-content/uploads/2017/10/follow-the-money-report1.pdf> [<https://perma.cc/H6EF-DQ7L>].

52. See 26 U.S.C. § 32(a)–(b); INTERNAL REVENUE SERV., TAX GUIDE 2022: FOR INDIVIDUALS 106 (2023), <https://www.irs.gov/pub/irs-pdf/p17.pdf> [<https://perma.cc/CNC7-KTRC>];

most basic needs are met or provide any benefits to the poorest American children whose parents earn no income.<sup>53</sup>

Even U.S. safety-net programs do not fill the gap in ensuring that children receive adequate material support. In 1979, 82 in 100 poor families received cash benefits.<sup>54</sup> Today a majority of states require income below half the amount of the poverty line to be eligible for cash benefits under the Temporary Assistance for Needy Families Program (“TANF”), and most of these programs require income below thirty percent of the poverty line.<sup>55</sup> Further, under federal law, every state must set a lifetime TANF cap for families of five years or less;<sup>56</sup> some states have set the cap at as few as twelve months.<sup>57</sup> Roughly a third of states also cap or reduce TANF benefits on the birth of a new child if the family was receiving benefits when the child was born.<sup>58</sup> The result of TANF’s restrictions and exclusions is that only twenty-one percent of poor families nationally receive benefits.<sup>59</sup> And, the few families declared eligible for benefits will receive little help: in two-thirds of states, their benefits will not raise them to even a third of the poverty line.<sup>60</sup> Moreover, despite the steep rise in rents

---

CTR. ON BUDGET & POL’Y PRIORITIES, POLICY BASICS: THE EARNED INCOME TAX CREDIT 3–4 (2018), <https://www.cbpp.org/sites/default/files/atoms/files/policybasics-eitc.pdf> [https://perma.cc/YW4Z-EBB9].

53. See 26 U.S.C. § 32; Whitehurst, *supra* note 51, at 5.

54. ADITI SHRIVASTAVA & GINA AZITO THOMPSON, CTR. ON BUDGET & POL’Y PRIORITIES, TANF CASH ASSISTANCE SHOULD REACH MILLIONS MORE FAMILIES TO LESSEN HARDSHIP: ACCESS TO TANF HITS LOWEST POINT AMID PRECARIOUS ECONOMIC CONDITIONS 20 app. tbl.2 (2022), <https://www.cbpp.org/sites/default/files/atoms/files/6-16-15tanf.pdf> [https://perma.cc/8X44-HMM2].

55. See GENE FALK, CONG. RSCH. SERV., R43634, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF): ELIGIBILITY AND BENEFIT AMOUNTS IN STATE TANF CASH ASSISTANCE PROGRAMS 3–4 fig.1 (2014).

56. See CONG. RSCH. SERV., R44668, THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: A LEGISLATIVE HISTORY 6 (2022).

57. See Mary Jo Pitzl, *Arizona Limits Poverty Aid to 1 Year; Strictest in U.S.*, AZCENTRAL (July 1, 2016, 10:40 AM), <https://www.azcentral.com/story/news/politics/arizona/2016/07/01/arizona-limits-poverty-aid-1-year-strictest-us/86499262/> [https://perma.cc/9P2B-QHB2].

58. See ELISSA COHEN, SARAH MINTON, MEGAN THOMPSON, ELIZABETH CROWE & LINDA GIANNARELLI, OFF. OF PLAN., RSCH. & EVALUATION, OPRE REPORT 2016-67, WELFARE RULES DATABOOK: STATE TANF POLICIES AS OF JULY 2015, at 157–58 (2016); ELIZABETH LOWER-BASCH & STEPHANIE SCHMIT, CTR. L. & SOC. POL’Y, TANF AND THE FIRST YEAR OF LIFE: MAKING A DIFFERENCE AT A PIVOTAL MOMENT 12 (2015), [https://www.clasp.org/sites/default/files/public/resources-and-publications/body/TANF-and-the-First-Year-of-Life\\_Making-a-Difference-at-a-Pivotal-Moment.pdf](https://www.clasp.org/sites/default/files/public/resources-and-publications/body/TANF-and-the-First-Year-of-Life_Making-a-Difference-at-a-Pivotal-Moment.pdf) [https://perma.cc/66JX-SLMV].

59. CTR. ON BUDGET & POL’Y PRIORITIES, POLICY BASICS: TEMPORARY ASSISTANCE FOR NEEDY FAMILIES 6–7 (2021), <https://www.cbpp.org/sites/default/files/atoms/files/7-22-10tanf2.pdf> [https://perma.cc/W3UH-L3RY].

60. LOWER-BASCH & SCHMIT, *supra* note 58, at 6.

across much of the country, the United States' housing subsidy programs are vastly underfunded and waiting lists are generally extremely long.<sup>61</sup>

All this means that, even before the pandemic, far fewer U.S. children received the consistent cash support they need to do their best compared to children in other wealthy countries. A 2017 comparative study concluded that the United States had by far the highest rate of young children living in relative poverty of the sixteen wealthy countries that were compared: twenty-one percent.<sup>62</sup> Nearly half of U.S. single-mother families—forty-six percent—were poor.<sup>63</sup> And U.S. families headed by Black, Hispanic, or Native American women were disproportionately likely to be poor.<sup>64</sup> Even when comparing poverty rates based on an absolute poverty standard (a standard that defines deprivation without taking the wealth of the country into account), the United States fared poorly, dropping only to a fourteen percent poverty rate for young children—a startlingly high rate for the world's wealthiest country.<sup>65</sup>

Even families above the poverty line cannot afford to provide the circumstances that research shows are most important for children to do their best.<sup>66</sup> This contrasts with other wealthy countries, which subsidize or provide these circumstances so that most or all children can access them.<sup>67</sup> For example, the median length of maternity leave that U.S. women who work report taking is less than eleven weeks, as opposed to the almost eleven *months* taken in Finland (which subsidizes this leave), despite research showing that such short leaves are subpar for infants' development.<sup>68</sup> And, when U.S. children wind up in daycare, fewer than ten percent of them are placed in care rated "very high quality"; the majority of daycare U.S. children receive is rated either "fair" or "poor" by experts.<sup>69</sup> Finally, while research makes it clear that children benefit

61. See Nat'l Low Income Hous. Coal., *The Long Wait for a Home*, 6 HOUS. SPOTLIGHT, no. 1, 2016, at 1, 3, [https://nlihc.org/sites/default/files/HousingSpotlight\\_6-1.pdf](https://nlihc.org/sites/default/files/HousingSpotlight_6-1.pdf) [<https://perma.cc/Z526-FRS4>]; see also *Policy Basics: Federal Rental Assistance*, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 11, 2022), <https://www.cbpp.org/research/housing/federal-rental-assistance> [<https://perma.cc/GNQ3-FPUQ>].

62. The relative poverty standard applies a relative standard of income within the country, thereby adjusting for the nation's wealth; it is the standard that most poverty experts believe best reflects poverty's impact on children. See Janet C. Gornick & Emily Nell, *Children, Poverty, and Public Policy: A Cross-National Perspective* 11 tbl.2 (Lux. Income Study, Working Paper No. 701, 2017), <http://www.lisdatacenter.org/wps/liswps/701.pdf> [<https://perma.cc/EB9W-M359>].

63. *Id.* at 13.

64. See AMANDA FINS, NAT'L WOMEN'S L. CTR., NATIONAL SNAPSHOT: POVERTY AMONG WOMEN & FAMILIES, 2020, at 1–2 (2020), <https://nwlc.org/wp-content/uploads/2020/12/PovertySnapshot2020.pdf> [<https://perma.cc/FBG8-JAXQ>].

65. See Gornick & Nell, *supra* note 62, at 9 tbl.1.

66. See EICHNER, FREE-MARKET FAMILY, *supra* note 1, at 120–28.

67. See *id.* at 114.

68. See *id.* at 104.

69. *Id.* at 109.

from high-quality prekindergarten,<sup>70</sup> just sixty-seven percent of U.S. four-year-olds are enrolled. In contrast, thirteen countries enroll ninety-five percent or more of four-year-olds. France and the United Kingdom enroll a full hundred percent.<sup>71</sup>

B. *The Suspension of Free-Market Family Policy During the COVID-19 Pandemic and the Relief It Delivered to Families*

The COVID-19 pandemic took an economic situation that was already tough for most families and created unprecedented hardships. Between February and April of 2020, the unemployment rate rose from 3.5% to 14.7%, and the employment-to-population ratio fell from 61.1% to 51.3%.<sup>72</sup> In April 2020, roughly three in ten adults said they or someone in their household was laid off or lost their job due to the outbreak.<sup>73</sup> Altogether in 2020, almost half of U.S. families reported a significant drop in income as a result of the pandemic; households with children were particularly affected.<sup>74</sup> Upward of three out of five low-income households with children, disproportionately from non-white households, reported that they experienced an income shock from the pandemic.<sup>75</sup> One in four Black and Hispanic children lived in families that fell below the poverty line.<sup>76</sup> Female-headed households were particularly impacted, as the closure of schools and daycares meant that millions of mothers were forced to take unpaid time off or leave their jobs entirely to care for children.<sup>77</sup>

Faced with the economic disruptions caused by COVID-19, Congress passed extraordinary measures, many of which put government cash directly in the hands of family members: Congress supplemented states' unemployment

70. *See id.* at 101.

71. *Id.* at 113.

72. William G. Gale & Grace Enda, *Economic Relief and Stimulus: Good Progress but More Work To Do*, BROOKINGS INST., <https://www.brookings.edu/research/economic-relief-and-stimulus-good-progress-but-more-work-to-do/> [<https://perma.cc/9ZCQ-T7D8>] (last updated Jan. 22, 2021).

73. Parker et al., *supra* note 2.

74. *See id.*

75. *See* BAUER ET AL., *supra* note 3, at 14.

76. *See* Melissa Jenco, *Study: COVID-19 Pandemic Exacerbated Hardships for Low-Income, Minority Families*, AM. ACAD. PEDIATRICS (June 3, 2020), <https://publications.aap.org/aapnews/news/pdfDownload/13838> [<https://perma.cc/7HR3-FRZ7>].

77. *See* Sarah Jane Glynn, *Millions of Families Are Struggling To Address Child Care Disruptions*, CTR. FOR AM. PROGRESS (June 22, 2021), <https://www.americanprogress.org/issues/women/news/2021/06/22/500847/millions-families-struggling-address-child-care-disruptions/> [<https://perma.cc/Y45M-FNNC>]; Heather Long, *'The Pay Is Absolute Crap': Child-Care Workers Are Quitting Rapidly, a Red Flag for the Economy*, WASH. POST (Sept. 19, 2021, 6:00 AM), <https://www.washingtonpost.com/business/2021/09/19/childcare-workers-quit/> [<https://perma.cc/YB99-S8BK> (staff-uploaded, dark archive)].

benefits for workers who had lost jobs by \$600 per week in federal money.<sup>78</sup> It also authorized three rounds of direct relief payments to Americans, totaling up to \$3,200 for adults and up to \$2,700 for children.<sup>79</sup> Further, it appropriated \$46.5 billion for emergency aid to help renters facing eviction.<sup>80</sup> Last, but hardly least, in March of 2021, Congress temporarily made the Child Tax Credit fully refundable and raised the credit to \$3,600 for children younger than age six and \$3,000 for those between ages six and seventeen.<sup>81</sup> Half of these benefits were paid out in monthly benefit checks of \$300 per child under six and \$250 for children between ages six and seventeen.<sup>82</sup> Congress also passed measures that required employers to provide eighty hours of paid family leave to employees who missed work to care for children who were either sick with COVID or at home because of school or daycare closures.<sup>83</sup>

These measures delivered much-needed relief to U.S. families. The unemployment benefits kept 5.5 million people out of poverty in 2020 and were

---

78. See CARES Act, Pub. L. No. 116-136, § 2104, 134 Stat. 281, 318 (2020) (codified as amended at 15 U.S.C. § 9023). The \$600 per week CARES Act supplement ended in late July 2020. Subsequent legislation contained a \$300 per week supplement until September 6, 2021. See American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9013, 135 Stat. 4, 119 (codified at 15 U.S.C. § 9023(b)(3)(A)(ii), (e)(2)); see also SUZAN G. LEVIN, EMP. & TRAINING ADMIN., U.S. DEP'T OF LAB., UIPL NO. 15-20, CHANGE 4, AMERICAN RESCUE PLAN ACT OF 2021 (ARPA) § 3(a) (2021), [https://wdr.doleta.gov/directives/attach/UIPL/UIPL\\_15-20\\_Change\\_4.pdf](https://wdr.doleta.gov/directives/attach/UIPL/UIPL_15-20_Change_4.pdf) [<https://perma.cc/W5NV-JH5D>].

79. In March 2020, the CARES Act provided payments of up to \$1,200 per adult and \$500 per child under age seventeen. See CARES Act § 2201, 134 Stat. at 335 (codified as amended at 26 U.S.C. § 6428). In December 2020, the Continued Assistance for Unemployed Workers Act of 2020 paid up to an additional \$600 per person. See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 203, 134 Stat. 1182, 1953 (codified as amended at 15 U.S.C. § 9023(e)). In March 2021, Congress authorized payment of up to an additional \$1,400 per person. See American Rescue Plan Act § 9601, 135 Stat. at 138 (codified at 26 U.S.C. § 6428B). The payments were reduced for individuals making more than \$75,000 per year and married couples making more than \$150,000 per year. See *id.*

80. See Consolidated Appropriations Act § 501, 134 Stat. at 2069–70 (codified as amended at 15 U.S.C. § 9058a) (appropriating \$25 billion); American Rescue Plan Act § 3201, 135 Stat. at 54–55 (codified as amended at 15 U.S.C. § 9058c) (appropriating \$21.55 billion); see also *Emergency Rental Assistance Program*, U.S. DEP'T TREASURY, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program> [<https://perma.cc/H3FP-HNGY>] (providing information about the two Emergency Rental Assistance programs).

81. Full funding was available for individual parents with children and an adjusted gross income of less than \$75,000, less than \$112,500 for heads of household, or less than \$150,000 for a married couple filing jointly. See American Rescue Plan Act, Pub. L. No. 117-2, § 9611, 135 Stat. 4, 144–45 (codified as amended at 26 U.S.C. § 24 (2011)).

82. See *id.*; see also *The Child Tax Credit*, WHITE HOUSE, <https://www.whitehouse.gov/child-tax-credit/> [<https://perma.cc/8A6V-9EU2>].

83. Emergency Paid Sick Leave Act, Pub. L. No. 116-127, § 5102, 134 Stat. 195, 195–96 (2020) (codified as amended at 29 U.S.C. §§ 2612(a)(1)(F), 2620).

projected to have kept 6.7 million people out of poverty in 2021.<sup>84</sup> The first two rounds of relief checks issued by the government lifted 11.7 million people above the poverty line, including 3.2 million children.<sup>85</sup> Emergency rental assistance helped more than 5.7 million households with past due and current rent bills, keeping them from eviction.<sup>86</sup>

The one-year expansion of the Child Tax Credit was particularly transformative for American households with children. The monthly child benefit payments reached sixty-one million children—roughly eighty-four percent of all U.S. children.<sup>87</sup> The Center on Poverty and Social Policy at Columbia University calculated that the first payment in July of 2021 lifted three million children out of poverty—representing a twenty-five percent cut in the monthly child poverty rate.<sup>88</sup> After the second payment, the number of households with children who did not have enough to eat fell by one-third, or nearly 3.3 million, based on Census Bureau data.<sup>89</sup>

The most striking result of the expanded benefits to families during the pandemic is not that they eased the poverty of the many families in economic crisis during the pandemic, but that they lowered child poverty rates *significantly below prepandemic rates*. In *Washington Post* journalists Paul Waldman's and Greg Sargent's words, the benefits accomplished

84. CTR. ON BUDGET & POL'Y PRIORITIES, ROBUST COVID RELIEF ACHIEVED HISTORIC GAINS AGAINST POVERTY AND HARDSHIP, BOLSTERED ECONOMY (2022), [https://www.cbpp.org/sites/default/files/2-24-2022pov\\_1.pdf](https://www.cbpp.org/sites/default/files/2-24-2022pov_1.pdf) [<https://perma.cc/HQ7L-ZER6>]; *How the American Rescue Plan Saved Lives and the U.S. Economy: Hearing Before the H. Comm. on the Budget*, 117th Cong. 43 (2022) [hereinafter Statement of Sharon Parrott] (statement of Sharon Parrott, President, Ctr. on Budget and Pol'y Priorities).

85. KRIS COX, SAMANTHA JACOBY & CHUCK MARR, CTR. ON BUDGET & POL'Y PRIORITIES, STIMULUS PAYMENTS, CHILD TAX CREDIT EXPANSION WERE CRITICAL PARTS OF SUCCESSFUL COVID-19 POLICY RESPONSE 2 (2022), <https://www.cbpp.org/sites/default/files/6-22-22fedtax.pdf> [<https://perma.cc/448S-JWET>].

86. Statement of Sharon Parrott, *supra* note 84, at 43.

87. See Press Release, U.S. Dep't of the Treasury, Treasury and IRS Disburse Sixth Monthly Child Tax Credit to Families of 61 Million Children (Dec. 15, 2021), <https://home.treasury.gov/news/press-releases/jy0533> [<https://perma.cc/QH4H-Q7JJ>]; Erin Duffin, *Number of Children in the U.S. in 2020, by Age Group*, STATISTA (Sept. 30, 2022), <https://www.statista.com/statistics/457786/number-of-children-in-the-us-by-age/> [<https://perma.cc/5KGX-7FX9>].

88. Zachary Parolin, Sophie Collyer, Megan A. Curran & Christopher Wimer, *Monthly Poverty Rates Among Children After the Expansion of the Child Tax Credit*, POVERTY & SOC. POL'Y BRIEF, Aug. 20, 2021, at 1, <https://static1.squarespace.com/static/610831a16c95260dbd68934a/t/6125831bb2d0cb07e98375b9/1629848348974/Monthly-Poverty-with-CTC-July-CPSP-2021.pdf> [<https://perma.cc/A45Q-F47P>].

89. See Claire Zippel, *After Child Tax Credit Payments Begin, Many More Families Have Enough To Eat*, CTR. ON BUDGET & POL'Y PRIORITIES (Aug. 30, 2021, 12:00 PM), <https://www.cbpp.org/blog/after-child-tax-credit-payments-begin-many-more-families-have-enough-to-eat> [<https://perma.cc/MP33-VWJH>].

something extraordinary during the worst parts of the coronavirus pandemic: In the midst of a crisis that affected every part of our society and could have been economically calamitous, we drove poverty *down*. As economically painful as the crisis was, the aggressive public spending passed across the Trump and Biden presidencies dramatically mitigated the hardship Americans suffered.<sup>90</sup>

The Center on Budget and Policy Priorities' ("CBPP") analysis showed that child poverty fell sharply in 2021 and reached a record low of 5.2%, as measured by the Supplemental Poverty Measure ("SPM").<sup>91</sup> That figure, the CBPP found, is the lowest figure on record dating back to 1967.<sup>92</sup> In comparison, in 2018, 13.7% of children fell below the SPM poverty line.<sup>93</sup> CBPP concluded that the year-to-year decline in the child poverty rate was the largest ever on record.<sup>94</sup> The significance of such a steep reduction of poverty within a year to the well-being of U.S. children is, as the Brookings Institution put it, "hard to overstate."<sup>95</sup>

The Child Tax Credit expansion was the largest driver of this decrease. The CBPP reported that "[i]n the absence of the expansion, child poverty would have fallen to 8.1 percent, rather than 5.2 percent, and some 2.1 million more children would have lived in families with incomes below the poverty line."<sup>96</sup> The drop in the poverty rate for Black children was particularly stunning: in 2018, nearly one in four children lived in families below the poverty line; in 2021, fewer than one in ten did.<sup>97</sup>

Yet all these measures were temporary: The pandemic relief checks were characterized as one-time cash payments.<sup>98</sup> The mandatory paid family leave

90. Paul Waldman & Greg Sargent, *The Stunning Drop in Child Poverty Is a Huge Story*, WASH. POST (Sept. 13, 2022, 5:39 PM), <https://www.washingtonpost.com/opinions/2022/09/13/poverty-decline-pandemic-relief/> [<https://perma.cc/69BB-GG8T> (dark archive)].

91. Press Release, Sharon Parrott, President, Ctr. on Budget & Pol'y Priorities, *In Pandemic's Second Year, Government Policies Helped Drive Child Poverty Rate to a Record Low, Cut Uninsured Rate, New Census Data Show* (Sept. 13, 2022), <https://www.cbpp.org/press/statements/in-pandemics-second-year-government-policies-helped-drive-child-poverty-rate-to-a> [<https://perma.cc/6WB7-R6BK>].

92. *Id.*

93. *Id.*

94. *Id.*

95. Christopher Pulliam & Richard V. Reeves, *New Child Tax Credit Could Slash Poverty Now and Boost Social Mobility Later*, BROOKINGS INST. (Mar. 11, 2021), <https://www.brookings.edu/blog/up-front/2021/03/11/new-child-tax-credit-could-slash-poverty-now-and-boost-social-mobility-later/> [<https://perma.cc/9NUN-B43G>].

96. Press Release, *supra* note 91.

97. *See* Pulliam & Reeves, *supra* note 95 (depicting a graph showing the decrease in child poverty rates across racial groups).

98. *See* CARES Act, Pub. L. No. 116-136, § 2201, 134 Stat. 281, 335 (2020) (codified as amended at 15 U.S.C. § 6428); COVID-related Tax Relief Act of 2020, Pub. L. No. 116-260, § 272, 134 Stat. 1964, 1965 (codified at 26 U.S.C. § 6428A); American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9601, 135 Stat. 4, 138 (codified at 16 U.S.C. § 6428B).

passed by Congress ended on December 31, 2020, and the optional extension ended September 30, 2021.<sup>99</sup> Enhanced unemployment benefits also ended in September 2021.<sup>100</sup> By the end of 2021, states were beginning to run out of the federal pandemic rental assistance funds they had been passing on to renters.<sup>101</sup> The child-benefit checks also expired at the end of 2021.<sup>102</sup> While almost all Democrats and the Biden administration wanted to continue these checks, Democrat Senator Joe Manchin III (D-W. Va.) refused, and the measure failed to come to a vote in an equally divided Congress.<sup>103</sup> Without that continued extra income, almost four million children fell back into poverty in January 2022 by the Center on Poverty & Social Policy's estimate—a forty-one percent increase in child poverty, with Latino and Black children experiencing the highest increases (7.1 percentage points and 5.9 percentage points, respectively).<sup>104</sup>

In sum, even before the COVID-19 pandemic, free-market family policy was failing the nation's families, and particularly its children. During the pandemic, policies aimed at providing economic relief to families amidst the crises demonstrated the capacity for public supports to remedy this failure. Implementation of the Build Back Better legislation could have permanently changed this situation.<sup>105</sup> But at the time of this writing, passage of more family-supportive policies at the federal level seems unlikely. Instead, public attention

99. See Emergency Paid Sick Leave Act, Pub. L. No. 116-127 § 5109, 134 Stat. 195, 198 (2020) (codified as amended at 29 U.S.C. §§ 2612(a)(1)(F), 2620); see also *Tax Credits for Paid Leave Under the American Rescue Plan Act of 2021: Overview*, INTERNAL REVENUE SERV. (Mar. 3, 2022), <https://www.irs.gov/newsroom/tax-credits-for-paid-leave-under-the-american-rescue-plan-act-of-2021-overview> [<https://perma.cc/HUY3-ZB2M>].

100. See Continued Assistance for Unemployed Workers Act of 2020, Pub. L. No. 116-260, § 201, 134 Stat. 1950, 1950 (codified as amended at U.S.C. § 9021(c)).

101. See, e.g., Ben Sessoms, *NC's Pandemic Relief Program To Stop Taking Applications*, NEWS & OBSERVER (Dec. 17, 2021, 3:54 PM), <https://www.newsobserver.com/article256653082.html> [<https://perma.cc/4GAV-P4QM> (dark archive)] (discussing that North Carolina, Oregon, and Texas were closing rental assistance programs because of lack of funds); Christopher Connelly, *Texas' Rental Assistance Program Will Soon Run Out of Money*, KERA NEWS (Nov. 4, 2021, 5:00 PM), <https://www.keranews.org/business-economy/2021-11-04/texas-rental-assistance-program-will-soon-run-out-of-money> [<https://perma.cc/3643-DXZS>]; Annie Nova, *Several States Have Run Out of Rental Assistance*, CNBC (Jan. 6, 2022, 7:00 PM), <https://www.cnbc.com/2022/01/06/several-states-have-run-out-of-federal-rental-assistance-.html> [<https://perma.cc/P5EC-4F9X>] (describing that New York, New Jersey, Texas, Oregon, and Washington, D.C., were halting aid).

102. See American Rescue Plan Act § 9611, 135 Stat. at 144 (codified as amended at 26 U.S.C. § 24).

103. See Deepa Shivram, *The Expanded Child Tax Credit Expires Friday After Congress Failed To Renew It*, NPR (Dec. 30, 2021, 2:03 PM), <https://www.npr.org/2021/12/30/1069143123/expanded-child-tax-credit-expires-friday-congress> [<https://perma.cc/WT24-TDEK>].

104. See *Absence of Monthly Child Tax Credit Leads to 3.7 Million More Children in Poverty in January 2022*, CTR. ON POVERTY & SOC. POL'Y AT COLUM. UNIV. (Feb. 17, 2022), <https://www.povertycenter.columbia.edu/publication/monthly-poverty-january-2022> [<https://perma.cc/442L-BZP9>].

105. See Build Back Better Act, H.R. 5376, 117th Cong. (2021).

has shifted away from addressing children's well-being through needed and effective economic support to addressing alleged threats to children's well-being through parental rights measures.

## II. THE RISE OF PARENTAL RIGHTS LAWS AS PRO-FAMILY REFORM

As the battle to institute permanent family economic supports was waged in Congress, the conversation outside of congressional halls over what families needed from government shifted. Increasingly, this new conversation began to focus on parental autonomy rather than on public economic supports. This part discusses the rising number of parental rights laws being proposed and adopted in states. It argues that this shift should be viewed as an attempt by elite conservatives to avoid much needed economic family supports and to develop a wedge issue that would motivate both base and swing voters to vote for Republican politicians. This elite effort has been extremely effective in generating support by tapping into older voters' sentiments of cultural backlash, in which they react with resentment, anger, and fear in response to emerging demographic and cultural changes among younger generations.

### A. *The Parental Rights Campaign*

In November 2021, Glenn Youngkin pulled off an upset in the Virginia governor's race, beating former governor Terry McAuliffe. The fact that Youngkin won in a state that was increasingly seen as Democratic—no Republican had won statewide office in a dozen years—caused heads to turn.<sup>106</sup> Particularly stunning were the issues on which Youngkin centered his winning campaign: shoring up parental rights in schools.<sup>107</sup> Youngkin repeatedly hammered his opponent for a statement McAuliffe made debating parents' authority to keep controversial books off school bookshelves: "I don't think parents should be telling schools what they should teach."<sup>108</sup> In pushing back, Youngkin argued for a broad platform of parental rights. The candidate contended that parents, not the schools, should decide their children's pandemic precautions, and therefore opposed school systems' mask mandates, vaccination

106. See Anthony Zurcher, *Glenn Youngkin Wins in Virginia: Key Takeaways from Bad Night for Biden*, BBC (Nov. 4, 2021), <https://www.bbc.com/news/world-us-canada-59149005> [<https://perma.cc/3ZM8-AU7V>].

107. See Elaine Godfrey & Russell Berman, *If Democrats Can Lose in Virginia They Can Lose Almost Anywhere*, ATLANTIC (Nov. 3, 2021), <https://www.theatlantic.com/politics/archive/2021/11/youngkin-republican-virginia-governor/620562/> [<https://perma.cc/H29D-S4LD> (dark archive)].

108. Molly Ball, *The Education of Glenn Youngkin*, TIME, <https://time.com/6191623/glenn-youngkin-interview-education-masks/> [<https://perma.cc/NM4P-67BV>] (last updated June 30, 2022, 4:22 PM); see Dana Goldstein, *In Virginia, Frustration with Schooling During the Pandemic Played a Part in Youngkin's Win*, N.Y. TIMES, <https://www.nytimes.com/2021/11/14/us/elections/in-virginia-frustration-with-schooling-during-the-pandemic-played-a-part-in-youngkins-win.html> [<https://perma.cc/2JWN-QLF7> (dark archive)] (last updated Nov. 14, 2021).

requirements for student athletes, and quarantine requirements for nonsymptomatic children with COVID.<sup>109</sup> But it was on the teaching of race and racism that Youngkin focused most. His hallmark campaign pledge was to ban the teaching of what he called “CRT” in schools on his first day in office.<sup>110</sup> He kept that promise, issuing an executive order that banned the teaching of CRT and other “inherently divisive concepts” in public schools.<sup>111</sup> Subsequently, Youngkin’s Board of Education issued policies giving the last word to parents on what names, nicknames, and pronouns should be used for students by teachers and school staff; and whether their child could express a gender different from their child’s sex.<sup>112</sup>

The last time parental rights wielded significant heft as a political issue was in between the late 1970s and the mid-1990s, when Christian evangelicals contested sex education programs in schools.<sup>113</sup> Passage during the Reagan administration of the Adolescent Family and Life Act, which encouraged abstinence-only sex education and prohibited discussion of abortion, energized this movement.<sup>114</sup> In the 1990s, the mantle of parental rights expanded to include pushback on schools’ efforts to become more LGBT-inclusive.<sup>115</sup> In 1994, the GOP’s legislative agenda, “Contract with America,” included a broad statement about parents’ rights to control their children’s education.<sup>116</sup> Two years later, though, the crushing defeat of a proposed constitutional amendment that would have explicitly installed parental rights in the Colorado Constitution effectively killed the movement for a quarter of a century.<sup>117</sup>

In 2021, Youngkin was the first candidate to ride a new wave of parental rights enthusiasm to statewide success, a wave that was just beginning to swell when he jumped on.<sup>118</sup> Over the course of 2021, and into 2022, more than

109. See Ball, *supra* note 108.

110. See Mica Soellner, *Education, Critical Race Theory Dominate Virginia’s Governor’s Race*, WASH. TIMES (July 8, 2021), <https://www.washingtontimes.com/news/2021/jul/8/education-critical-race-theory-dominate-virginia-g/> [<https://perma.cc/2CWX-SPXB>].

111. Va. Exec. Order No. 1-2022, 38 Va. Regs. Reg. 1510 (Jan. 31, 2022); see Brad Dress, *Youngkin Signs Executive Orders Banning Critical Race Theory, Lifting Masks Mandate in Virginia Public Schools*, HILL (Jan. 15, 2022, 8:17 PM), <https://thehill.com/homenews/state-watch/589923-youngkin-signs-executive-orders-banning-critical-race-theory-lifting/> [<https://perma.cc/S2BE-RQJ2>].

112. *2022 Model Policies on the Privacy, Dignity, and Respect for All Students and Parents in Virginia’s Public Schools*, VA. DEP’T EDUC., <https://www.doe.virginia.gov/programs-services/student-services/student-assistance-programming/gender-diversity> [<https://perma.cc/DQ2A-PWL2>].

113. Valerie J. Huber & Michael W. Firmin, *A History of Sex Education in the United States Since 1900*, 23 INT’L J. EDUC. REFORM 25, 40–43 (2014); Peter Scales, *Sex Education in the ’70s and ’80s: Accomplishments, Obstacles and Emerging Issues*, 30 FAM. RELS. 557, 558 (1981).

114. See Huber & Firmin, *supra* note 113, at 41.

115. Catherine Caruso, *The Parental Rights Movement Is History Repeating Itself*, DAME (Mar. 9, 2022), <https://www.damemagazine.com/2022/03/09/the-parental-rights-movement-is-history-repeating-itself/> [<https://perma.cc/R7ZD-THYW>].

116. *Id.*

117. See *id.*

118. See *id.*

eighty-four parental rights bills were introduced in state legislatures.<sup>119</sup> At first, these measures were primarily motivated by government responses to COVID-19, explicitly granting parents the right to determine whether their child would wear a mask, and banning vaccination requirements in schools.<sup>120</sup> As time went on, the bills began to target different political and social issues. Some measures, like Florida's "Don't Say Gay" law, focus on limiting discussions of sexuality, gender identity, and sexual orientation.<sup>121</sup> Some would require schools to flag sexually explicit content in curriculum and library materials to give parents the ability to opt their child out from exposure.<sup>122</sup> Others aim to ban the teaching of CRT and other "divisive concepts."<sup>123</sup> An Indiana bill, for example, regulates the teaching of sex, race, ethnicity, religion, color, national origin, and political affiliation,<sup>124</sup> and an Oklahoma law prohibits teachers from telling students that an individual is inherently racist, sexist, or oppressive by virtue of their race or sex.<sup>125</sup>

#### B. *The Elite Push Behind Parental Rights*

At first blush, the new push for parental rights may appear the product of a grass-roots movement, but in truth, much of it was orchestrated by a network of elite right-wing actors.<sup>126</sup> As journalist Jane Mayer and political scientist Alexander Hertel-Fernandez have separately pointed out, conservative activists and donors like the Koch brothers have, over the last five decades, constructed a powerful infrastructure to advance coordinated efforts to undermine

119. Bella DiMarco, *Legislative Tracker: Parent-Rights Bills in the States*, FUTUREED (June 6, 2022), <https://www.future-ed.org/legislative-tracker-parent-rights-bills-in-the-states/> [<https://perma.cc/J7A9-Q97X>].

120. See, e.g., S.B. 345, 156th Gen. Assemb., Reg. Sess. (Ga. 2022); S.B. 2006, 123d Gen. Assemb., Reg. Sess. (Fla. 2021); S.B. 739, 2022 Gen. Assemb. Reg. Sess. (Va. 2022); Tex. Exec. Order No. GA-36, 46 Tex. Reg. 3325 (May 28, 2021).

121. Act Relating to Parental Rights in Education, ch. 2022-22, § 1, 2022 Fla. Laws 248, 248–51 (codified at FLA. STAT. § 1001.42(8) (2022)).

122. For example, see S.B. 1277, Gen. Assemb., Reg. Sess. (Pa. 2022), a Pennsylvania bill, which has passed the house and is currently in the senate.

123. For a list of states in which such measures have been adopted, see Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUCATIONWEEK, <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> [<https://perma.cc/9JXS-VCQ2> (staff-uploaded, dark archive)] (last updated Feb. 27, 2023).

124. For example, see H.R. 1134, 122d Gen. Assemb., 2d Reg. Sess. (Ind. 2022), an Indiana resolution, which has passed the house and is currently in the senate.

125. 70 OKLA. STAT. ANN. tit. 70, § 24-157 (Westlaw through emergency effective legislation through Ch. 1 of the First Reg. Sess. of the 59th Leg. (2023)).

126. Perry Bacon Jr., *How the GOP Is Making National Policy One State at a Time*, WASH. POST (June 20, 2022, 8:59 AM), <https://www.washingtonpost.com/opinions/2022/06/20/gop-making-national-policy-one-state-time/> [<https://perma.cc/W2ZA-U3UJ> (staff-uploaded, dark archive)].

acceptance of social-welfare programs.<sup>127</sup> This conservative network catalyzed several critical features of the new parental rights movement.

One important role that the conservative network played was in popularizing and weaponizing the term “critical race theory.” As *The New Yorker* reported, the term was activated for right-wing purposes by conservative journalist and activist Christopher Rufo.<sup>128</sup> In the summer of 2020, Rufo was scrutinizing literature from anti-racism work trainings conducted following the Black Lives Matter protests when he discovered references to literature from the academic movement by that name dating back to the 1990s legal academy.<sup>129</sup> That earlier movement, of whom prominent scholars included Derrick Bell, Kimberlé Crenshaw, and Angela Davis, argued that racism was a structural feature of American life and law.<sup>130</sup> Rufo correctly suspected that the term could become a potent weapon for conservative activists.<sup>131</sup> As he explained:

“Political correctness” is a dated term and, more importantly, doesn’t apply anymore. It’s not that elites are enforcing a set of manners and cultural limits, they’re seeking to reengineer the foundation of human psychology and social institutions through the new politics of race . . . . The other frames are wrong, too: “[C]ancel culture” is a vacuous term and doesn’t translate into a political program; “woke” is a good epithet, but it’s too broad, too terminal, too easily brushed aside. “Critical race theory” is the perfect villain.<sup>132</sup>

Rufo added: “Strung together, the phrase ‘critical race theory’ connotes hostile, academic, divisive, race-obsessed, poisonous, elitist, anti-American.”<sup>133</sup>

Once Rufo used the term “critical race theory” in an online article for the magazine of the Manhattan Institute, one of the many right-wing think tanks associated with the Koch network, other conservative elites swung into action. In early September, Tucker Carlson invited Rufo for an interview on FOX News, a major player in the conservative infrastructure.<sup>134</sup> President Trump then invited Rufo to the White House, and subsequently issued an executive

127. JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* 58–59 (2016); ALEXANDER HERTEL-FERNANDEZ, *STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESS, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES – AND THE NATION* 143–46 (2021).

128. Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict over Critical Race Theory*, *NEW YORKER* (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory> [https://perma.cc/W3L4-YNHL (dark archive)].

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

order prohibiting CRT's use in diversity training by federal contractors.<sup>135</sup> In December 2020, the American Legislative Exchange Council ("ALEC"), a conservative pay-to-play organization closely affiliated with the Koch network, which promulgates model legislation on a variety of issues, hosted a workshop titled "Against Critical Theory's Onslaught" as part of its annual States and Nation Policy Summit.<sup>136</sup> The workshop opposed not only CRT's use in diversity training in workplaces, but also its supposed infiltration into public schools' curriculum.<sup>137</sup> The training was led by speakers from across the conservative network, including the Heritage Foundation, the American Enterprise Institute, and the Woodson Center.<sup>138</sup> Thirty-one state legislators from twenty states attended.<sup>139</sup> Bills modeled on ALEC's anti-CRT legislation were subsequently introduced in the majority of states by June 2021, and enacted in a number of red states.<sup>140</sup>

At the same time, the Koch network was fomenting and organizing pushback by parents against mask mandates and vaccination requirements in schools during the pandemic. As the *Washington Post* reported, "a conservative network built on the scaffolding of the Koch fortune and the largesse of other GOP megadonors" helped organize parents to argue that it was their "parental right" to decide if their children should wear masks.<sup>141</sup> The Independent Women's Network was a key player in building support for this movement, circulating a model letter to its members and suggesting they send it to their schools to oppose masking and vaccination requirements.<sup>142</sup> After Youngkin's win, the same group placed a supportive op-ed in the *Washington Post*.<sup>143</sup> Despite the organization's nonpartisan name, a former board chair noted that it constituted a unique tool in the "Republican conservative arsenal" because, "[b]eing branded as neutral but actually having the people who know, know that you're actually conservative puts us in a unique position."<sup>144</sup>

135. *Id.*

136. Don Wiener & Alex Kotch, *ALEC Inspires Lawmakers To File Anti-Critical Race Theory Bills*, CTR. FOR MEDIA & DEMOCRACY (July 27, 2021, 1:14 PM), <https://www.exposedbycmd.org/2021/07/27/alec-inspires-lawmakers-to-file-anti-critical-race-theory-bills/> [https://perma.cc/CUS3-5TX9].

137. *Id.*

138. *Id.*

139. *Id.*

140. *See id.*

141. *See* Isaac Stanley-Becker, *Koch-Backed Group Fuels Opposition to School Mask Mandates, Leaked Letter Shows*, WASH. POST (Oct. 1, 2021, 1:00 PM), <https://www.washingtonpost.com/politics/2021/10/01/masks-schools-koch-money/> [https://perma.cc/6RBA-NV3T (dark archive)].

142. *Id.*

143. *See* Mary Vought, *Another Win for Parental Rights in Virginia*, WASH. POST (Apr. 25, 2022, 11:30 AM), <https://www.washingtonpost.com/opinions/2022/04/25/another-win-parental-rights-virginia/> [https://perma.cc/6Q2B-2X2T (dark archive)].

144. Stanley-Becker, *supra* note 141.

Why would a network of organizations focused on small government and low taxes take up the cudgel against pandemic safety measures, anti-racist education, and trans children? As a means to an end, that being the Koch network's effort to dismantle the welfare state.<sup>145</sup> That network, and the Republican politicians it supports, think it will help them at the ballot box. As Randall Balmer, a Dartmouth professor who studies politics and the Religious Right put it, "They have an interest in keeping the base riled up about one thing or another, and when one issue fades, as with same-sex relationships and same-sex marriage, they've got to find something else."<sup>146</sup> And it is not just the base. Republican strategists found that once they added issues of trans students in bathrooms and on sports teams to the mix of issues they were pushing, they developed a useful wedge issue to which conservative Democrats and independents approvingly responded.<sup>147</sup> Put another way, Republicans and their big-money conservative networks believe that using hot-button racial and LGBTQ issues as a wedge will draw enough working-class voters to win elections that will enable them to block economic legislation.<sup>148</sup> They are using these issues to motivate this bloc of voters to vote against their economic interests at the expense of economic supports that would provide tangible benefits to their families.

Using these wedge issues to circumvent passage of reforms that would greatly benefit families has a considerable amount in common with the phenomenon that Thomas Frank described two decades ago in his book, *What's the Matter with Kansas?* In it, Frank argued that elite "conservatives won the

145. See MAYER, *supra* note 127, at 58–59; HERTEL-FERNANDEZ, *supra* note 127, at 143–46.

146. Kate Sosin, *Why Is the GOP Escalating Attacks on Trans Rights? Experts Say the Goal Is To Make Sure Evangelicals Vote*, PBS NEWS HOUR (May 20, 2022, 3:37 PM), <https://www.pbs.org/newshour/politics/why-is-the-gop-escalating-attacks-on-trans-rights-experts-say-the-goal-is-to-make-sure-evangelicals-vote> [<https://perma.cc/4H8R-NE2S>].

147. Gabby Orr, *The Wedge Issue That's Dividing Trumpworld*, POLITICO MAG. (Aug. 7, 2020, 7:08 AM), <https://www.politico.com/news/magazine/2020/08/07/wedge-issue-dividing-trumpworld-392323> [<https://perma.cc/B5DX-GQLA>] ("American Principles Project had partnered with a behavioral science firm to assess whether focusing on transgender issues could turn educated suburbanites into Republican voters. . . . 'What we found was the sports issue got the most powerful response from people, specifically conservative Democrats and independents,' Schilling would explain to me later.").

148. In Ezra Klein's words,

For decades, the Republican Party has been an awkward alliance between a donor class that wants deregulation and corporate tax breaks and entitlement cuts and guest workers and an ethnonationalist grass roots that resents the way the country is diversifying, urbanizing, liberalizing and secularizing. The Republican Party, as an organization, mediates between these two wings, choosing candidates and policies and messages that keep the coalition from blowing apart.

Ezra Klein, *Three Reasons the Republican Party Keeps Coming Apart at the Seams*, N.Y. TIMES (Jan. 15, 2023), <https://www.nytimes.com/2023/01/15/opinion/mccarthy-republicans-coming-apart.html> [<https://perma.cc/P9W3-NLA3> (staff-uploaded, dark archive)].

heart of America” by using wedge issues to convince Kansans and other Americans of modest means to vote against their own economic interests.<sup>149</sup> The result was “a populist uprising” that caused significant economic detriment to those who provided the crucial votes.<sup>150</sup> The political agenda their leaders implemented, despite paying lip service to the interests of the people that Sarah Palin would soon call the “real America,”<sup>151</sup> was in truth directed at an economic agenda that funneled money to the wealthy and away from working-class voters.

Some of Frank’s argument is now outdated. Since Donald Trump’s candidacy and then presidency, as well as the rise of powerful, ethnonationalist media companies, the Republican party has reached an uneasy rebalance between its libertarian and ethnonationalist wings that allows significant policy victories to the latter, including on immigration and abortion.<sup>152</sup> The new parental rights measures are a win for both wings of the party insofar as they elect right-wing politicians who will oppose family economic supports—the payoff for libertarian elites—and directly express the ethnonationalist motivations that drive the other wing of the party. As discussed in the next section, the expressive features of these measures mean that the many voters who support these measures are indeed receiving payoffs, in contrast to the Kansans that Frank described, even if these payoffs involve psychic benefits to voters and parents rather than economic benefits to families. Regardless, much of Frank’s point still holds when it comes to family policy: a network of conservative elites has used parental rights measures to siphon off energy for badly needed economic reforms for U.S. families.

### C. Voter Support for Parental Rights

Elites advocating parental rights argue that these measures are the family supports that U.S. families truly need.<sup>153</sup> In doing so, they make arguments similar to those made by advocates of family economic supports. Yet family economic supports yield quantifiable benefits for families’ overall well-being,

149. See THOMAS FRANK, *WHAT’S THE MATTER WITH KANSAS? HOW CONSERVATIVES WON THE HEART OF AMERICA* 113–37 (2004).

150. See *id.* at 108–09.

151. George Packer, *How America Fractured into Four Parts*, ATLANTIC (July/Aug. 2021), <https://www.theatlantic.com/magazine/archive/2021/07/george-packer-four-americas/619012/> [<https://perma.cc/24VJ-QUZU>].

152. See Klein, *supra* note 148.

153. See, e.g., Paul Bois, *Kim Reynolds Declares ‘Parents Matter’ in SOTU Response Speech*, BREITBART (Mar. 1, 2022), <https://www.breitbart.com/politics/2022/03/01/kim-reynolds-declares-parents-matter-in-sotu-response-speech/> [<https://perma.cc/B7CD-CA45>] (“[K]eeping schools open is only the start of the pro-parent, pro-family revolution that Republicans are leading in Iowa and states across this country. Republicans believe that parents matter. It was true before the pandemic and has never been more important to say out loud.”).

and particularly for children's well-being.<sup>154</sup> To the extent that enacting parental rights laws yields concrete reforms in schools, these reforms yield no tangible benefits in well-being for families; in fact, as the next part shows, these measures likely reduce the well-being of children considerably.<sup>155</sup> Evidence suggests that the voters who respond favorably to parental rights measures are not voting with children's best interests in mind, but instead reacting to perceived threats to their dominant position in the social hierarchy by opposing changes that could undermine their position.<sup>156</sup>

Youngkin's campaign secured his victory in part by convincing white, less-educated women to vote for him. As NBC put it, "the 12-point gap Republicans enjoyed in 2020 among white women who didn't go to college grew to a 49 point gulf Tuesday, with Youngkin winning the demographic 74 to 25 percent."<sup>157</sup> Observers attributed the swing to Youngkin's focus on parental rights in public schools.<sup>158</sup> The women in this key demographic, however, are among those who stand much to gain from economic policy supports for families. The median household income in 2020 for households of high school graduates was only \$47,400.<sup>159</sup> Yet the average annual cost of infant care in Virginia was \$14,063 and the average cost of childcare for a four-year-old was \$10,867.<sup>160</sup> This means that Virginia parents with two preschool-aged children would spend roughly \$25,000—more than half of the income of a household of high school graduates—simply to get good quality daycare for their children. The Build Back Better Measure, with monthly child benefit checks, caps on childcare costs, and universal preschool for all three- and four-year-olds would have vastly benefited these families. Nevertheless, these voters voted enthusiastically for Youngkin's parental rights platform.

At least when it comes to the centerpiece of Youngkin's parental rights measures—banning the teaching of CRT—Virginia parents stood little to gain in terms of policy. As NBC News observed: "There's little evidence critical race theory [was] even taught in Virginia schools . . ."<sup>161</sup> To the extent the term was being used to describe a real phenomenon, it had been misappropriated to push

154. See *supra* Section I.B. See generally EICHNER, *FREE-MARKET FAMILY*, *supra* note 1 (describing benefits of economic supports).

155. See *infra* Part III.

156. See *supra* Section II.B.

157. Alex Seitz-Wald & Sahil Kapur, *How White Women Helped Propel Republicans to Victory in Virginia*, NBC NEWS (Nov. 4, 2021, 4:30 AM), <https://www.nbcnews.com/politics/elections/how-white-women-helped-propel-republicans-victory-virginia-n1283153> [<https://perma.cc/32T3-KH9R>].

158. See, e.g., Goldstein, *supra* note 108.

159. Jill Mislinski, *Household Incomes 2020: The Value of Higher Education*, VETTAFI (Oct. 27, 2021), <https://www.advisorperspectives.com/dshort/updates/2021/10/27/household-incomes-2020-the-value-of-higher-education> [<https://perma.cc/Y6YD-LDUK> (staff uploaded archive)].

160. *Child Care Costs in the United States*, ECON. POL'Y INST. (Oct. 2020), <https://www.epi.org/child-care-costs-in-the-united-states/#/VA> [<https://perma.cc/9YRR-637Q>].

161. See Seitz-Wald & Kapur, *supra* note 157.

back against teaching children about the United States' history of slavery and Jim Crow, and discussing existing current racial inequities.<sup>162</sup> Beyond the CRT ban, while most families would be benefited by the supports in the Build Back Better measure, far fewer parents will have children who are LGBTQ; still fewer of these will disapprove of the LGBT-acceptance policies prohibited by parental rights measures and therefore feel substantively benefited by the greater control of their children authorized by these measures. No credible evidence suggests that children's well-being will benefit from these parental-rights measures; indeed, as discussed in the next section, such changes will likely harm children.

Rather than being directed at addressing actual needs, these measures are better viewed as motivated by cultural backlash. Political scientists have begun to pay significant attention to this phenomenon recently. As Pippa Norris and Ronald Inglehart describe, beginning in the 1970s, as opportunities for college education increased and one generation replaced another, there has been a shift in wealthy countries toward a more progressive culture.<sup>163</sup> This shift has in turn triggered a backlash among older generations and less educated sectors "who sense decline and actively reject the rising tide of progressive values, resent the displacement of familiar traditional norms," and "react angrily to the erosion of their privileges and status."<sup>164</sup> This cultural pushback against what they call "Cosmopolitan Liberalism," Norris and Inglehart argue, better explains voters' shift to populist candidates like Donald Trump than do explanations based on voters' economic insecurity.<sup>165</sup> Space constraints prevent a thorough explication of the argument that Youngkin's use of parental rights successfully tapped into backlash sentiments. However, the fact that the parental rights campaign focused on resisting education seeking to eradicate racism and white privilege, as well as on rejecting policies supporting the dignity of LGBTQ persons and the mutability of gender—two major cultural shifts that sought to topple the traditional status systems in which Virginia voters were raised—in combination

---

162. Fabiola Cineas, *What the Hysteria over Critical Race Theory Is Really All About*, VOX (June 24, 2021, 10:50 AM), <https://www.vox.com/22443822/critical-race-theory-controversy> [<https://perma.cc/46QR-8ZCR>].

163. Ronald F. Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash 3* (Harv. John F. Kennedy Sch. of Gov't Fac. Rsch., Working Paper Series, Paper No. RWP16-026, 2016).

164. *Id.*

165. *Id.*; see also Diana C. Mutz, *Status Threat, Not Economic Hardship, Explains the 2016 Presidential Vote*, 115 PROCS. NAT'L ACAD. SCIS. E4330, E4330 (2018) (arguing that increased preference for Donald Trump in 2016 over Mitt Romney in 2012 was better explained by anxiety among high-status groups that white Americans were under siege than economic anxiety among those who were left behind financially); Alan Abramowitz & Jennifer McCoy, *United States: Racial Resentment, Negative Partisanship, and Polarization in Trump's America*, 681 ANNALS AM. ACAD. POL. SCI. 137, 138–39 (2019) (explaining that Donald Trump's unusually explicit appeals to racial and ethnic resentment attracted strong support from white working-class voters).

with the absence of potential economic gain from these policies, suggests that the backlash phenomenon was at work here.

Perhaps ironically, given working-class whites' votes against CRT in Virginia, one of the founders of the CRT movement, Derrick Bell, four decades ago made observations that illuminate Virginia's voting patterns today. Bell described poorer whites motivated by their deeply-felt expectation "that white elites would maintain lower class whites in a societal status superior to that designated for blacks."<sup>166</sup> In particular, Bell observed, less-educated whites in the years after *Brown v. Board of Education*<sup>167</sup> particularly feared loss of control over their public schools.<sup>168</sup> The result was that poorer whites could be motivated to vote against their economic interests despite the fact that they would be better served by the same programs that would benefit Black Americans.<sup>169</sup> These same motivations may still be at work today.

In summary, in the last few years, parental rights have eclipsed economic supports in the conversation over what U.S. families need. Yet evidence suggests that this shift is not motivated by the well-being of children or families, but rather because it serves the interests of right-wing economic elites and is supported by voters motivated to express backlash. Unfortunately, the parental rights measures instituted as a result have considerable costs for children's well-being, autonomy, and the health of our nation.

### III. THE HARMS INFLICTED BY PARENTAL RIGHTS MEASURES

The parental rights measures passed in several states and proposed in many more do not simply constitute detours away from measures that would greatly benefit the nation's children: they create considerable harms and risks through violating the appropriate relationships among parents, children, and government. In our liberal democratic system of government,<sup>170</sup> although parents have considerable authority to raise children and to make decisions for them, parental authority is properly not unlimited. The state, too, necessarily has a significant responsibility to children.<sup>171</sup> Three of the state's responsibilities

166. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 525–26 (1980).

167. 347 U.S. 483 (1954).

168. Bell, *supra* note 166, at 525.

169. *See id.* at 525–26.

170. *See supra* note 23.

171. *See, e.g.,* *Murphy v. Arkansas*, 852 F.2d 1039, 1040–41 (8th Cir. 1988) (explaining that home-schooled children may be subjected to standardized testing to assess the quality of education the children are receiving, even over the parents' objections); *Duro v. Dist. Att'y*, 712 F.2d 96, 99 (4th Cir. 1983) (holding that the state's interest in requiring children to attend school outweighed the father's religious interest in homeschooling his child). This Article will not consider the extent to which the government has the responsibility to exercise these responsibilities for children outside of public schools.

to children in our system of government are undermined by the new parental rights laws: (1) the state's duty to support children's well-being;<sup>172</sup> (2) government's responsibility to ensure that children develop a baseline level of autonomy as they reach adulthood;<sup>173</sup> and (3) the state's obligations to ensure that youth are prepared to assume the mantle of collective self-government.<sup>174</sup> The new parental rights measures curtail the state's ability to fulfill each of these important responsibilities.

A. *The Government's Responsibility To Support Children's Well-Being*

In our system of government, we allow parents broad authority to make decisions for their children based on liberal democracy's deep respect for people's rights to pursue their own life plan, including raising children. This basic principle was first recognized a century ago by the Supreme Court, in its decisions in *Meyer v. Nebraska*<sup>175</sup> and *Pierce v. Society of Sisters*.<sup>176</sup> In *Pierce*, the Court overturned a state statute requiring that children between eight and sixteen years old be sent to public schools on the ground that it "unreasonably interfere[d] with the liberty of parents . . . to direct the upbringing and education of [their] children."<sup>177</sup> In the Court's words,

The fundamental theory of liberty . . . excludes any general power of the state to standardize its children . . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>178</sup>

More recently, in *Troxel v. Granville*,<sup>179</sup> the Supreme Court reaffirmed parents' decision-making rights for their children.<sup>180</sup> In Justice O'Connor's words,

[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.<sup>181</sup>

172. See *infra* Section III.A.

173. See *infra* Section III.B.

174. See *infra* Section III.C.

175. 262 U.S. 390, 400 (1923) (striking down a Nebraska statute that prohibited foreign language instruction because the Fourteenth Amendment protected the ability to teach in German and parents' ability to choose for their children to be instructed in German).

176. 268 U.S. 510 (1925).

177. *Id.* at 534–35.

178. *Id.* at 535.

179. 530 U.S. 57 (2000).

180. *Id.* at 57.

181. *Id.* at 68–69.

Parents' fundamental right to make decisions on behalf of their children is also founded on the recognition that respecting parental decision-making generally better serves children's welfare than does a vigorous platform of state intervention.<sup>182</sup> The fact of the matter is that parents are generally well motivated to act in children's interests. Bearing and rearing a child is certainly not a guarantee that parents will love their children and look out after their interests; in most instances, however, it works out that way. In a culture like ours in which there is a strong expectation that individuals will put their own interests first, the extent to which most parents will sacrifice their own welfare for their children's is remarkable. Parents will work for years in jobs they despise in order to put food on the dinner table or pay for health care for their children. They will work second and sometimes third jobs to enable their children to get the best education that they can obtain. In addition, on most issues, the state is not generally better positioned to second-guess parents' decisions. The state can ascertain whether children have what they need to achieve some minimal standard of development—for example, that they have adequate food, shelter, and supervision. Over and above this threshold, however, it becomes far more difficult for the state to say what is in children's best interests. Furthermore, most decisions about children above this basic threshold require knowledge about the individual child and are, therefore, better made by parents than the state.

Yet parents' authority is not unlimited. It has long been recognized that the state, too, has its own responsibilities to children and the polity that properly limit parental rights. One of these responsibilities, which is often referred to by courts as the government's *parens patriae* function, is to support children's well-being. This responsibility runs concurrently with parents' own responsibility to support children's well-being, and sometimes requires limiting parental authority. As the Supreme Court has stated, "[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."<sup>183</sup> The most obvious occasion on which the state exercises its responsibility to safeguard children's well-being is in abuse or neglect cases, when the state may decide to remove custody altogether from parents deemed to violate their responsibility to support children's well-being.<sup>184</sup>

---

182. See MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEAS* 71–90 (2010) [hereinafter EICHNER, *THE SUPPORTIVE STATE*]; see also Clare Huntington & Elizabeth Scott, *The Enduring Importance of Parental Rights*, 90 *FORDHAM L. REV.* 2529, 2529 (2022).

183. *Parham v. J. R.*, 442 U.S. 584, 603 (1979) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972)); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

184. See *id.* at 602–03.

The government's authority to support children's well-being, though, is often exercised in less drastic ways than through removing children from parents' custody. To take one example, the Supreme Court has for generations declared that the state can impose labor restrictions on children in their parents' custody, even when such laws violate their parents' religious beliefs. In the seminal case of *Prince v. Massachusetts*,<sup>185</sup> Justice Jackson described the government's power to enforce its mandates over parental objections:

On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children. . . . Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved. . . . It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens. . . .

....

Acting to guard the general interest in youth's well-being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.<sup>186</sup>

In the Court's construction of the appropriate division of power, even while children remain in their parents' custody, the state's responsibility to protect children's well-being authorizes substantial restrictions on parental freedom.<sup>187</sup>

The Supreme Court has long recognized that a key place in which the state may exercise its responsibilities for children is in public schools, and that this exercise may appropriately limit parental rights. Even as it made its first

---

185. 321 U.S. 158 (1944).

186. *Id.* at 165–67 (citations omitted).

187. *See id.*

assertion of parents' fundamental right in the *Meyer* case, the Court observed that the law challenged in that case, a prohibition on teaching German, would have been upheld if there were "adequate foundation for the suggestion that the purpose was to protect the child's health."<sup>188</sup> Furthermore, in the case of *Wisconsin v. Yoder*,<sup>189</sup> arguably the case in which the Court paid the most deference to parents' rights to raise children in accord with their own views, the Court announced that "[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. Providing public schools ranks at the very apex of the function of a State."<sup>190</sup> Schools are a particularly good place for the government to exercise its responsibility to support children's well-being vis-à-vis parents because doing so minimizes interference inside the home, the zone in which family privacy has its strongest claim.<sup>191</sup>

Courts have made clear that parents' rights to convey their own views to their children does not allow them to keep public schools from conveying lessons that educators believe children should receive, even when parents disagree. In the influential case of *Mozert v. Hawkins County Board of Education*,<sup>192</sup> the Sixth Circuit rejected parents' assertion that their rights to free exercise entitled them to remove their children from a reading program they deemed objectionable.<sup>193</sup> The students' exposure to ideas that their parents disagreed with, the Court held, did not constitute an infringement of the parents' free exercise rights.<sup>194</sup> The lesson: public schools have the legitimate authority to adopt curriculum they believe is in students' interests whether or not parents disagree. Consistent with this reasoning, the U.S. District Court for the District of Maryland noted that parents' "constitutional right to teach their children about sexual matters in their own homes" did not prohibit the state from teaching sex education in schools.<sup>195</sup> Furthermore, the fact that parents deem a particular curriculum to be morally, or even religiously,

188. See *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923); see also *Prince*, 321 U.S. at 164.

189. 406 U.S. 205 (1972).

190. *Id.* at 213 (citation omitted).

191. See *Poe v. Ullman*, 367 U.S. 497, 551–52 (1961) (Harlan, J., dissenting) ("[H]ere we have not an intrusion into the home so much as on the life which characteristically has its place in the home. . . . The home derives its preeminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.").

192. 827 F.2d 1058 (6th Cir. 1987).

193. See *id.* at 1058–59.

194. See *id.*

195. *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340, 342–44 (D. Md. 1969) ("The [sex education program] may be considered quite simply as a public health measure. As the Supreme Court indicated . . . the State's interest in the health of its children outweighs claims based upon religious freedom and the right of parental control." (citing *Prince v. Massachusetts*, 321 U.S. 158 (1944), *aff'd per curiam*, 428 F.2d 471 (4th Cir. 1970))).

repugnant is not sufficient ground to invalidate this programming, assuming that the programming does not require affirmation of particular religious beliefs.<sup>196</sup>

The new parental rights laws overstep parents' proper authority by preventing schools from implementing policies and programs that support children's well-being. This is perhaps most obviously the case with respect to laws that prohibit schools from requiring immunizations against COVID-19 and other diseases, policies designed to protect children's health. Public health professionals have already shown clearly how allowing parents to decide if their own children are masked and vaccinated for the coronavirus, instead of requiring such measures for all students, produces worse outcomes for children's well-being, particularly those with chronic health issues and other health vulnerabilities.<sup>197</sup>

Similarly, prohibiting discussion of same-sex sexual orientation and gender identity issues in early grades and chilling discussion in later grades through vaguely worded requirements that such discussion be "age appropriate" also undermine the well-being of LGBTQ youth. Few groups are more vulnerable than this. Suicide is the second leading cause of death among young people aged ten to thirty-four,<sup>198</sup> and LGBTQ youth are more than four times as likely to attempt suicide as their peers.<sup>199</sup> Rates of suicide attempts are even

196. *See id.* at 344.

197. *See* Jenna Gettings, Michaila Czarnik, Elana Morris, Elizabeth Haller, Angela M. Thompson-Paul, Catherine Rasberry, Tatiana M. Lanzieri, Jennifer Smith-Grant, Tiffany Michelle Aholou, Ebony Thomas, Cherie Drenzek & Duncan MacKellar, *Mask Use and Ventilation Improvements To Reduce COVID-19 Incidence in Elementary Schools—Georgia, November 16–December 11, 2020*, 70 MORBIDITY & MORTALITY WKLY. REP. 779, 779 (2021) (finding that COVID-19 incidence was thirty-seven percent lower in schools that required teachers and staff members to use masks); Y. Tony Yang, Sarah Schaffer DeRoo & Stephanie R. Morain, *State Mask Mandate Bans for Schools: Law, Science, and Public Health*, PEDIATRICS, Jan. 2022, at 1, 2 (finding that increases in pediatric COVID-19 case rates during the start of the 2021–2022 school year were smaller in U.S. counties with school mask requirements than in those without); *cf. Goe v. Zucker*, 43 F.4th 19, 34 (2d Cir. 2022) (holding that New York's allegedly burdensome standards governing medical exemptions from mandatory school immunization requirements, which required physicians to determine that student had contraindication or precaution to specific immunization consistent with certain national guidance and granted school officials authority to decide if such criteria were satisfied, were rationally related to state's legitimate interest in protecting public health through immunizations).

198. HOLLY HEDEGAARD, SALLY C. CURTIN & MARGARET WARNER, U.S. DEP'T OF HEALTH & HUM. SERVS., SUICIDE MORTALITY IN THE UNITED STATES, 1999–2017, at 1 (2018), <https://www.cdc.gov/nchs/data/databriefs/db330-h.pdf> [<https://perma.cc/2W9K-JPWB>].

199. *See* Michelle M. Johns, Richard Lowry, Jack Andrzejewski, Lisa C. Barrios, Zewditu Demissie, Timothy McManus, Catherine N. Rasberry, Leah Robin & J. Michael Underwood, *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts, 2017*, 68 MORBIDITY & MORTALITY WKLY. REP. 67, 67 (2019); Michelle M. Johns, Richard Lowry, Laura T. Haderkhanaj, Catherine N. Rasberry, Leah Robin, Lamont Scales, Deborah Stone & Nicolas A. Suarez, *Trends in Violence Victimization and Suicide Risk by Sexual Identity Among High School Students — Youth Risk Behavior*

higher among LGBTQ youth of color.<sup>200</sup> Two factors that put LGBTQ youth at significantly greater risk are rejection by their families<sup>201</sup> and bullying at school.<sup>202</sup> Such bullying is common: fifty-two percent of LGBTQ youth in middle and high school reported being bullied in the past year alone.<sup>203</sup> And its effects are severe: LGBTQ students who reported bullying had a three times greater likelihood of attempting suicide.<sup>204</sup> The most significant factors protecting against self-harm by LGBTQ youth include family support and affirming school environments.<sup>205</sup>

The new parental rights measures put LGBTQ students at significantly greater risk in several ways. First, these measures, since they make it harder to signal acceptance for LGBT persons, undermine schools' ability generally to create the affirming environments that protect LGBTQ students' well-being.<sup>206</sup> Second, these measures make it more difficult for schools to adopt an LGBTQ-inclusive curriculum, which students say helps create a supportive

---

*Survey, United States, 2015–2019*, 69 MORBIDITY & MORTALITY WKLY. REP. SUPPLEMENTS 19, 19 (2020).

200. Rina Torchinsky, *Nearly Half of LGBTQ Youth Seriously Considered Suicide, Survey Finds*, NPR (May 5, 2022, 6:46 PM), <https://www.npr.org/2022/05/05/1096920693/lgbtq-youth-thoughts-of-suicide-trevor-project-survey> [<https://perma.cc/E29C-7AZE>].

201. See Caitlin Ryan, David Huebner, Rafael M. Diaz & Jorge Sanchez, *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 PEDIATRICS 346, 346 (2009); Janelle Taylor, *Mental Health in LGBTQ Youth: Review of Research and Outcomes*, 48 COMMUNIQUÉ 4, 4 (2019); Caitlin Ryan, *Generating a Revolution in Prevention, Wellness & Care for LGBT Children & Youth*, 23 TEMP. POL. & CIV. RTS. L. REV. 331, 335–38 (2014) (“LGBT youth who were highly rejected by their families and caregivers were: (1) More than eight times as likely to have attempted suicide; (2) Nearly six times as likely to report high levels of depression; (3) More than three times as likely to use illegal drugs; and (4) More than three times as likely to be at high risk for HIV and sexually transmitted diseases.”).

202. See Taylor, *supra* note 201, at 4.

203. THE TREVOR PROJECT, *THE TREVOR PROJECT RESEARCH BRIEF: BULLYING AND SUICIDE RISK AMONG LGBTQ YOUTH* 1 (2021), <https://www.thetrevorproject.org/wp-content/uploads/2021/10/The-Trevor-Project-Bullying-Research-Brief-October-2021.pdf> [<https://perma.cc/PGW3-WF5H>].

204. *Id.* at 2; see GLSEN, *THE SAFE SPACE KIT: GUIDE TO BEING AN ALLY TO LGBT STUDENTS* 24 (2016), <https://www.glsen.org/sites/default/files/GLSEN%20Safe%20Space%20Kit.pdf> [<https://perma.cc/7G9L-86MG>] (“74.1% of LGBT students were verbally harassed at school in the past year because of their sexual orientation; 55.2% were harassed because of their gender expression (acting ‘too masculine’ or ‘too feminine’).”).

205. See Taylor, *supra* note 201, at 4.

206. See *id.* at 4–6; *Facts About LGBTQ Youth Suicide*, TREVOR PROJECT (Dec. 15, 2021), <https://www.thetrevorproject.org/resources/article/facts-about-lgbtq-youth-suicide/> [<https://perma.cc/LDQ4-NYST>]. Research shows that access to LGBTQ-affirming spaces is associated with lower rates of attempting suicide. *Id.*

environment.<sup>207</sup> Third, these measures make it more difficult for schools to adopt anti-bullying programs geared toward protecting LGBTQ youth.<sup>208</sup>

These new laws also make it less likely that schoolteachers or staff will reach out to individual students grappling with LGBTQ identity issues because these measures discourage discussion of LGBTQ issues generally, often require reporting such overtures and conversations to parents, and sometimes require that acceptance behaviors regarding LGBTQ status first be approved by parents.<sup>209</sup> Yet having at least one accepting adult in their lives significantly reduces LGBTQ youths' suicide risk.<sup>210</sup> Finally, the requirement that teachers and staff report to parents any steps a child takes to acknowledge their LGBTQ status makes it more likely that information will be communicated that will cause some parents to reject their children, a significant stressor that raises LGBTQ youths' risk of suicide.<sup>211</sup>

Many of the issues that new parental rights laws cover—immunization, masking, programming, and otherwise dealing with LGBTQ issues—are central to children's well-being. They are therefore important issues over which schools should exercise their authority to support children's well-being. A significant problem with the way that the *parens patriae* doctrine has developed in U.S. law, however, is that courts have framed this doctrine as a negative right rather than a positive responsibility: Existing doctrine *authorizes* public schools to intervene to support children's well-being, even over the objection of parents. Yet that doctrine creates no *affirmative responsibility* for the state to do so. Because of this, parental rights laws effectively stymie the ability of public schools to support children's well-being. In effect, these laws are allowing a group of voters to

207. See JOSEPH G. KOSCIW, EMILY A. GREYTAK, NEAL A. PALMER & MADELYN J. BOESEN, GAY, LESBIAN & STRAIGHT EDUC. NETWORK, THE 2013 NATIONAL SCHOOL CLIMATE SURVEY 70 (2014) (finding that LGBT students in schools that included LGBT history in their curricula were significantly more likely to report that their classmates were somewhat or very accepting of LGBT people than students in schools without such curricula (75.2% vs. 39.6%) and LGBT-inclusive curriculums were also associated with better psychological outcomes for LGBT students and improved students' feelings of acceptance).

208. See Taylor, *supra* note 201, at 6–8.

209. See, e.g., FLA. STAT. § 1001.42(8)(c)(3) (2022) (mandating that teachers in grades K–3 cannot discuss sexual orientation or gender in a manner that is “not age-appropriate or developmentally appropriate for students in accordance with state standards”); Block, *supra* note 18 (explaining how Florida's measure may chill conversation regarding LGBT issues); FLA. STAT. § 1001.42(8)(c)(1) (“[Schools must] adopt procedures for notifying a student's parent if there is a change in the student's services or monitoring related to the student's mental, emotional, or physical health or well-being . . . .”); H.R. 7662, 117th Cong. (2021–2022); Ryan Tarinelli, *Cotton's Bill Would Require Parental OK for Schools To Use Transgender Students' Preferred Pronouns*, ARK. DEMOCRAT GAZETTE (Nov. 28, 2021, 2:50 AM), <https://www.arkansasonline.com/news/2021/nov/28/cottons-bill-would-require-parental-ok-for/> [http s://perma.cc/WY6A-NBNJ].

210. See *Facts About LGBTQ Youth Suicide*, *supra* note 206; Sunhee Lee, Chun-Ja Kim & Dong Hee Kim, *A Meta-analysis of the Effect of School-Based Anti-bullying Programs*, 19 J. CHILD HEALTH CARE 136, 136 (2015).

211. See *Facts About LGBTQ Youth Suicide*, *supra* note 206; see also Lee et al., *supra* note 210, at 136.

instantiate their own anti-LGBTQ and other preferences into law in ways that preclude the government's taking action to support the well-being of children. A few scholars have noted the need in U.S. law for more muscular articulation of the state's responsibility to support children.<sup>212</sup> Parental rights laws are a clear and pressing example of why development of such a positive responsibility in U.S. law is necessary to support American children.

B. *The Government's Responsibility To Develop a Baseline Level of Autonomy in Children*

Parental autonomy laws also encroach on a second governmental obligation: ensuring that children achieve at least a baseline level of autonomy by the time they reach adulthood. This responsibility derives from the same belief that grounds our system's deference to parental rights: liberalism's commitment to the principle that one's identity, commitments, and life plans are, on some basic level, "owned" by the person who holds them and are therefore entitled to respect.<sup>213</sup> When the next generation of children become adults, for their own life plans to deserve respect, they must also be able to own them in some meaningful sense. Achieving this level of autonomy requires more than that children have formal choices about how to live their lives when they become adults, but also that they have developed sufficient autonomy to be able to make these genuine choices. Insofar as parents claim that their views about their children are entitled to respect, these claims cannot be used to deny their children the same capacity to choose their own paths when they reach adulthood: in a liberal democracy, one person cannot be permitted simply to serve as a pawn to satisfy another's life plan, even when the other person is a parent.<sup>214</sup>

The state's responsibility to ensure young citizens develop autonomy does not mean that the state should undermine parents' imprint on a child or encourage the child to choose every aspect of their life plan from scratch. It

212. See, e.g., EICHNER, *THE SUPPORTIVE STATE*, *supra* note 182, at 3–13; Meredith Harbach, proposal, *The New Parens Patriae* (2022) (unpublished manuscript) (on file with the North Carolina Law Review); Lida Minasyan, *The United States Has Not Ratified the UN Convention on the Rights of the Child*, ATLAS CORPS (Sept. 30, 2018), <https://atlascorps.org/the-united-states-has-not-ratified-the-un-convention-on-the-rights-of-the-child/> [<https://perma.cc/8V2D-8CSP>]; Meredith Johnson Harbach, *Childcare, Vulnerability, and Resilience*, 37 *YALE L. & POL'Y REV.* 459, 461–62 (2019); see also Amy Rothschild, *Is America Holding Out on Protecting Children's Rights?*, ATLANTIC (May 2, 2017), <https://www.theatlantic.com/education/archive/2017/05/holding-out-on-childrens-rights/524652/> [<https://perma.cc/EZF7-SUXZ> (dark archive)]; Alexandra Gardiner, *Children's Rights: Why the United States Should Ratify the United Nations Convention on the Rights of the Child*, in *BANK STREET COLLEGE OF EDUCATION: GRADUATE STUDENT INDEPENDENT STUDIES* (2017).

213. See EICHNER, *THE SUPPORTIVE STATE*, *supra* note 182, at 137.

214. *Id.* at 137–38, 138 n.102; EAMONN CALLAN, *CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY* 147 (1997); AMY GUTMANN, *DEMOCRATIC EDUCATION* 30 (Princeton Univ. Press rev. ed. 1999).

does mean, however, that the state has the responsibility to ensure youth develop sufficient autonomy so that they can renegotiate their life plans insofar as they come to believe their parents' identity, values, and plans do not suit them in fundamental respects.<sup>215</sup> Put another way: liberal democracy properly gives parents the authority to raise children within parents' religious traditions, brought up according to parents' ethical principles, raised as members of their ethnic heritage, and even coaxed to support their sports teams. Yet children must also be given the tools to withdraw from such ways of life when they cannot embody these identities from the inside out. As moral philosopher Eamonn Callan succinctly put it, at a bare minimum, each child "must learn to ask the question of how we should live, and . . . how we answer it can be no servile echo of the answers others have given, even if our thoughts commonly turn out to be substantially the same as those that informed our parents' lives."<sup>216</sup>

Researchers who study identity have long recognized that adolescence is a critical period for identity formation, a time in which youth begin to self-consciously think about how they wish to define themselves in terms of social groups, and to separate in varying degrees from the identities assigned to them and associated with their parents.<sup>217</sup> Furthermore, adolescence is a period in which a number will come to grapple with their own sexual orientation and gender identity.<sup>218</sup> Access to information about LGBTQ identities and an accepting climate about these identities, research suggests, makes it easier for young people to assume them.<sup>219</sup> An accepting climate also makes LGBTQ youth more likely to come out to parents and family members, and to live publicly as LGBTQ.<sup>220</sup>

215. See EICHNER, *THE SUPPORTIVE STATE*, *supra* note 182, at 137 n.98; WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 82 (1996).

216. EICHNER, *THE SUPPORTIVE STATE*, *supra* note 182, at 137 (quoting CALLAN, *supra* note 214, at 154–55).

217. See Monique Verhoeven, Astrid M.G. Poorthuis & Monique Volman, *The Role of School in Adolescents' Identity Development. A Literature Review*, 31 *EDUC. PSYCH. REV.* 35, 35–63 (2019).

218. Seth T. Pardo & Aaron H. Devor, *Transgender and Gender Nonconforming Identity Development*, in *THE SAGE ENCYCLOPEDIA OF PSYCHOLOGY AND GENDER* 1, 2 (2017), [https://onlineacademiccommunity.uvic.ca/ahdevor/wp-content/uploads/sites/2247/2017/07/the-sage-encyclopedia-of-psychology-and-gender\\_i17126.pdf](https://onlineacademiccommunity.uvic.ca/ahdevor/wp-content/uploads/sites/2247/2017/07/the-sage-encyclopedia-of-psychology-and-gender_i17126.pdf) [<https://perma.cc/QBN2-MGPV>]; see LAURA KANN, TIM MCMANUS, WILLIAM A. HARRIS, SHARI L. SHANKLIN, KATHERINE H. FLINT, BARBARA QUEEN, RICHARD LOWRY, DAVID CHYEN, LISA WHITTLE, JEMEKIA THORNTON, CONNIE LIM, DENISE BRADFORD, YOSHIMI YAMAKAWA, MICHELLE LEON, NANCY BRENER & KATHLEEN A. ETHIER, *YOUTH RISK BEHAVIOR SURVEILLANCE — UNITED STATES, 2017*, at 8 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6002027/pdf/ss6708a1.pdf> [<https://perma.cc/B53H-RPMR>].

219. Ilan H. Meyer, *Does an Improved Social Environment for Sexual and Gender Minorities Have Implications for a New Minority Stress Research Agenda?*, 7 *PSYCH. SEXUALITIES REV.* 81, 87 (2016).

220. Pardo & Devor, *supra* note 218, at 5–6; see also William J. Hall, Hayden C. Dawes & Nina Plocek, *Sexual Orientation Identity Development Milestones Among Lesbian, Gay, Bisexual, and Queer People: A Systematic Review and Meta-analysis*, *FRONTIERS PSYCH.*, Oct. 21, 2021, at 1, 3.

The new parental rights measures violate the state's responsibility by deliberately attempting to derail youths from the inclination and ability to claim LGBTQ identities. They do so by seeking to stifle access to and information about LGBTQ possibilities for young people's identities, both making these identities harder for them to assume and increasing the possibility that youth who still come to adopt LGBTQ identities will see themselves in negative ways.<sup>221</sup> Unfortunately, as with the doctrine of *parens patriae* to protect children's well-being, U.S. legal doctrine incorporates no positive responsibility for the state to intercede on behalf of children's autonomy.<sup>222</sup> Because of this, the new era of parental rights laws remains insulated from legal challenge.

C. *The New Parental Rights and Government's Responsibility To Educate Students for Citizenship*

Third and finally, government has the responsibility to ensure that children are prepared to competently assume the mantle of citizenship in a liberal democracy. Even as the Supreme Court first articulated respect for parents' fundamental rights to raise their children, it recognized the state's power "to regulate all schools, [and] that certain studies plainly essential to good citizenship must be taught."<sup>223</sup> As the Supreme Court stated in *Prince v. Massachusetts*, "A democratic society rests, for its continuance, upon the healthy,

---

221. Pardo and Devor explain that

[s]ome aspects of trans\* and gender nonconforming identity development fit well within a classical identity development framework. Trans\* and gender nonconforming people usually report that their earliest memories of recognizing gender occurred around the typical childhood ages. However, their ages differ in when they recognized that they do not fit in the gender and sex to which they were assigned. Adolescence and young adulthood for trans\* and gender nonconforming people typically include age-appropriate periods of self-exploration, social exploration, and experimentation. However, puberty and the associated changes in social expectations are often times of extreme crisis for trans\* and gender nonconforming youth due to unwanted physical maturation into adult bodies misaligned with their gender identities. This is a time of alarmingly high risk for suicide among trans\* and gender nonconforming youth who lack sufficient familial supports. If they have not already articulated a trans\* or gender nonconforming identity, many transgender people first do so during adolescence.

Pardo & Devor, *supra* note 218, at 3.

222. Kay P. Kindred, *God Bless the Child: Poor Children, Parens Patriae, and a State Obligation To Provide Assistance*, 57 OHIO ST. L.J. 519, 522–23 (1996).

223. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925); *see also* *Mozert v. Hawkins Cnty. Pub. Sch.*, 647 F. Supp. 1194 (E.D. Tenn. 1986), *rev'd*, *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) ("The education of our citizens is essential to prepare them for effective and intelligent participation in our political system and is essential to the preservation of our freedom and independence."); *Mozert*, 827 F.2d. at 1071 ("Teaching students about complex and controversial social and moral issues is just as essential for preparing public school students for citizenship and self-government as inculcating in the students the habits and manners of civility."); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

well-rounded growth of young people into full maturity as citizens, with all that implies.”<sup>224</sup> This includes ensuring that citizens develop the fundamental values that ground liberal democracy, “includ[ing] tolerance of divergent political and religious views” and learning “consideration of the sensibilities of others.”<sup>225</sup> The Court has recognized approvingly the views of educators who see public schools as an “assimilative force” that bring together “diverse and conflicting elements” in our society “on a broad but common ground.”<sup>226</sup>

The new parental rights laws greatly impede schools’ ability to prepare youth to shoulder the tasks associated with collective self-rule. This is despite (as well, perhaps, because of) the fact that preparing the young for this task has seldom been more important than today, when critical bulwarks of democracy are under sustained attack.<sup>227</sup> Earlier, this Article argued that strong families that support children’s thriving do not just simply happen, but instead require the presence of particular conditions. The same is true for healthy democracies. It has become critically clear in the last decade in the United States that a vigorous liberal democracy cannot be sustained simply through formal elections and a basic framework of liberal democratic institutions. On the contrary, without a citizenry committed to upholding liberal democratic norms and principles of political and civil equality and the rule of law, the last few years have shown that our democracy is dangerously vulnerable to manipulation and abuse.

Parental rights measures encroach on government’s legitimate ability to train its youth for citizenship, risking forward progress in several respects. For one thing, these new measures make it significantly more difficult to teach the racial lessons that U.S. children in particular need to become good citizens. Coming to understand the nation’s racial (and racist) history is critical to combat the high levels of bias that remain in our society, to evaluate critical policy issues that face the nation going forward, and to protect against threats to democracy that are deeply intertwined with racism.

Despite Chief Justice John Roberts’s statement that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of

224. *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944); *see also* *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (stating that public schools serve the purpose of teaching fundamental values “essential to a democratic society”).

225. *Bethel School Dist.*, 478 U.S. at 681.

226. *Ambach v. Norwick*, 441 U.S. 68, 77 (1979); *see* NEWTON EDWARDS & HERMAN G. RICHEY, *THE SCHOOL IN THE AMERICAN SOCIAL ORDER* 623–24 (2d ed. 1963).

227. *See* The Editorial Board, *This Threat to Democracy Is Hiding in Plain Sight*, N.Y. TIMES (Sept. 23, 2022), <https://www.nytimes.com/2022/09/23/opinion/trump-big-lie-elections.html> [<https://perma.cc/5KJ4-CDNA> (dark archive)]; David Leonhardt, *‘A Crisis Coming’: The Twin Threats to American Democracy*, N.Y. TIMES, <https://www.nytimes.com/2022/09/17/us/american-democracy-threats.html> [<https://perma.cc/A4N9-HNKF> (dark archive)] (last updated Sept. 21, 2021).

race,<sup>228</sup> racism cannot be dispelled in the next generation simply by ignoring the issue. Research shows that children as young as four make distinctions based on race; very young children also notice persistent distinctions in wealth based on race.<sup>229</sup> Lacking other explanations, children's biases cause them to believe that such distinctions are inherently the result of racial differences rather than the product of historical factors.<sup>230</sup> Teaching children about historical discrimination reduces their racial biases by providing an alternative explanation of racial disparities.<sup>231</sup> Unfortunately, studies show that although Black American parents discuss racism with their children (a conversation so significant that it has become known in popular parlance as "the Talk"), white American parents less often discuss the issue.<sup>232</sup> This means that it is only in school that most white students will come to learn that racial disparities are not the product of intrinsic differences, if they learn this at all. While studies of the effects of teaching such history are limited, they suggest that teaching white children America's racial history produces more positive and less negative attitudes toward Black Americans.<sup>233</sup>

By the same token, teaching young people about race and racism is necessary to ensure that they can fairly evaluate critical policy issues that face the nation going forward. Evidence shows that a number of significant public policy measures in the last decades have been driven by white Americans' racial animus, an illegitimate motivation in a liberal democracy. These include the passage of welfare reform in 1996 and Republicans' attempt to repeal the Affordable Care Act.<sup>234</sup> Education could address this: Children exposed to

228. *Parents Involved Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

229. Camilla Mutoni Griffiths & Nicky Sullivan, *In Schools, Honest Talk About Racism Can Reduce Discrimination*, SCI. AM. (Aug. 19, 2022), <https://www.scientificamerican.com/article/in-schools-honest-talk-about-racism-can-reduce-discrimination/> [<https://perma.cc/SV2X-Y82X>]; Rebecca S. Bigler, Cara J. Averhart & Lynn S. Liben, *Race and the Workforce: Occupational Status, Aspirations, and Stereotyping Among African American Children*, 39 DEVELOPMENTAL PSYCH. 572, 973 (2003); Clark McKown & Rhona S. Weinstein, *The Development and Consequences of Stereotype Consciousness in Middle Childhood*, 74 CHILD DEV. 498, 498–99 (2003).

230. Griffiths & Sullivan, *supra* note 229.

231. *Id.*

232. Phyllis Katz, *Racists or Tolerant Multiculturalists? How Do They Begin?*, 58 AM. PSYCH. 897, 907 (2003).

233. Julie M. Hughes, Rebecca S. Bigler & Sheri R. Levy, *Consequences of Learning About Historical Racism Among European and African American Children*, 78 CHILD DEV. 1689, 1695 (2007).

234. JONATHAN M. METZL, DYING OF WHITENESS: HOW THE POLITICS OF RACIAL RESENTMENT IS KILLING AMERICA'S HEARTLAND 3 (2019) (showing that resistance to the Affordable Care Act stems from racism); Martin Gilens, *"Race Coding" and White Opposition to Welfare*, 90 AM. POL. SCI. REV. 593, 601 (1996) (showing support for welfare reform tied to racist beliefs); Joe Soss, Sanford F. Schram & Richard C. Fording, *Introduction to RACE AND THE POLITICS OF WELFARE REFORM 1* (Sanford F. Schram, Joe Soss & Richard C. Fording, eds., Univ. of Mich. Press 2003) (showing support for welfare reform tied to racist beliefs); Vann R. Newkirk II, *The Fight for Health Care Has Always Been About Civil Rights*, ATLANTIC (June 27, 2017),

lessons about America's racial history reported stronger preference for racial fairness and more counter-stereotypic views of Black Americans.<sup>235</sup> Importantly, those lessons did not lead either white or Black children to hold more negative views of white Americans, which is a common objection by those who oppose teaching about racism.<sup>236</sup>

Ensuring students are educated about issues of race and racism is also necessary to address the powerful crisis in democracy we confront today: Most of the critical threats to democracy the U.S. faces—including restrictions on the right to vote, the undermining of confidence in voting and refusal to accept the results of valid elections, and the rise of political violence—are linked to white citizens' perceptions that they are in danger of losing their country as the nation becomes more diverse.<sup>237</sup> Further, ample evidence shows that support for former President Donald Trump, who has brought many of these threats to a head, is deeply associated with racist beliefs.<sup>238</sup> Addressing and dispelling racism in the next generation of citizens is therefore necessary not only to ensure that the policies adopted by the next generation are fair and just for all citizens, but also to ensure that the United States survives as a democracy.

One potentially unfortunate consequence of teaching this history is that older white children (above age seven) report higher levels of racial guilt when they are exposed to such lessons.<sup>239</sup> Should their feelings justify omitting lessons about the nation's racist past? The new parental rights measures suggest the

---

<https://www.theatlantic.com/politics/archive/2017/06/the-fight-for-health-care-is-really-all-about-civil-rights/531855/> [https://perma.cc/3WA3-VP9L (dark archive)].

235. Hughes et al., *supra* note 233, at 1691.

236. *Id.* at 1701; see also Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS INST. (Nov. 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/> [https://perma.cc/ZTU2-LU7R].

237. See, e.g., Benjamin Barber, *Racial Backlash Drives Restrictive Voting Laws, Study Finds*, FACING S. (2022), <https://www.facingsouth.org/2022/08/racial-backlash-resentment-voting-restrictions-study> [https://perma.cc/L5UZ-NS94] (finding that racial factors were a significant predictor of sponsorship of bills that make it more difficult to vote); Philip Bump, *How Concerns About Racial Disparities Become Allegations of Voter Fraud*, WASH. POST (Aug. 30, 2022, 2:08 PM), <https://www.washingtonpost.com/politics/2022/08/30/voter-id-fraud-fetterman-rick-scott/> [https://perma.cc/DJ7E-4MYS (dark archive)] (discussing the intersection of race, income, and strict voter identification laws as it relates to overstated claims of voter fraud); Zeeshan Aleem, *America's Growing Problem with Political Violence, Explained*, MSNBC (Nov. 23, 2021, 4:52 PM), <https://www.msnbc.com/opinion/america-s-growing-problem-political-violence-explained-n1284449> [https://perma.cc/XHA6-GHKG] (discussing how race relates to the recent uptick in political violence).

238. Marc Hooghe & Ruth Dassonneville, *Explaining the Trump Vote: The Effect of Racist Resentment and Anti-immigrant Sentiments*, 2018 AM. POL. SCI. ASS'N 528, 528; see also Vanessa Williamson & Isabella Gelfand, *Trump and Racism: What Do the Data Say?*, BROOKINGS INST. (Aug. 14, 2019), <https://www.brookings.edu/blog/fixgov/2019/08/14/trump-and-racism-what-do-the-data-say/> [https://perma.cc/2N48-BRU9].

239. Hughes et al., *supra* note 233, at 1695.

answer is yes.<sup>240</sup> But the regrettable consequence of this guilt is surely outweighed by the need for white children to come to grips with this history in order to counteract racist beliefs that may otherwise develop, to ensure racially just policies, and to put our democracy on a firmer footing. There should be no doubt that, as between white children seeing Black children more negatively because they do not understand our country's history of racism, and feeling guilty because they do, the latter choice is the just response. Furthermore, as researchers have noted, white children feeling guilty as a reaction to learning about racism may not be wholly negative, since such guilt has been shown in college students to motivate racial tolerance.<sup>241</sup> What is more, as historian Stephanie Coontz cogently observed, while studying this history “may — indeed should — be disturbing,” if it is taught right, it does not have to be demoralizing:

To tell the story of slavery is also to tell the story of those who championed a revolutionary alternative ideal — that all people are endowed with “inalienable” human rights. When we “whitewash” the past, we not only deny wrongs that still need to be righted, but we fail to honor the men and women — black, brown, and white — whose struggles for justice and equality prove beyond doubt that no group of Americans is “irredeemably sexist and racist.”<sup>242</sup>

The new parental rights measures also make it difficult for schools to teach a second lesson critical to students developing the commitment to political equality and respect for individual rights necessary to perpetuate a sound liberal democracy. That lesson involves coming to grips with what philosopher of education Eamonn Callan calls “the burdens of judgment,” after the political philosopher, John Rawls.<sup>243</sup> By this, Callan means that youth must come to acknowledge the principle that reasonable people can and will disagree about fundamental issues surrounding the good life and religion, and that disagreements about such “comprehensive philosophies” cannot be resolved by any mutually accessible standards.<sup>244</sup> It is through recognition of this fact that

240. See, e.g., Greg Allen, *Fla. Bill Bans Businesses and Schools from Making Anyone Feel Guilt About Race*, NPR (Feb. 8, 2022, 5:08 AM), <https://www.npr.org/2022/02/08/1079112803/fla-bill-bans-businesses-and-schools-from-making-anyone-feel-guilt-about-race> [<https://perma.cc/222V-4ACZ>].

241. Margo J. Monteith & Gina L. Walters, *Egalitarianism, Moral Obligation, and Prejudice-Related Personal Standards*, 24 PERSONALITY & SOC. PSYCH. BULL. 186, 193 (1998).

242. Stephanie Coontz, *Why Learning the History of Slavery in America Doesn't Have To Be Depressing*, HUBPAGES (Aug. 18, 2022), <https://discover.hubpages.com/education/Why-Learning-the-History-of-Slavery-in-America-Doesnt-Have-to-Be-Depressing> [<https://perma.cc/D3XS-8BK7>]; see also Stephanie Coontz, *Op-Ed: American History Is a Parade of Horrors — And Also Heroes*, L.A. TIMES (Aug. 4, 2022), <https://www.latimes.com/opinion/story/2022-08-14/stephanie-coontz-slavery-shame-american-history-abolition> [<https://perma.cc/968V-XAVM> (staff-uploaded, dark archive)].

243. CALLAN, *supra* note 214, at 25; JOHN RAWLS, POLITICAL LIBERALISM 54–55 (1993).

244. CALLAN, *supra* note 214, at 25–33.

citizens in a polity come to endorse the view that the power of the state should not be used to foist their comprehensive views on others—an essential tenet for preserving a government that supports individual freedom and pluralism.<sup>245</sup> Teaching the burdens of judgment is particularly important today, given rising threats to liberal democracy by those inside and outside of the United States who advocate “illiberal democracy” and “Christian nationalism.”<sup>246</sup>

Many of these new parental rights measures seek to ensure that children are not exposed to controversial views that conflict with those of their parents. Yet, as Callan shows, ensuring that children are exposed to deep differences in belief is critical to securing for future generations the liberty that parents who support parental rights measures seek to arrogate to themselves. Without the state’s ensuring that liberal democratic virtues are widely dispersed in the population, the state cannot guarantee that liberty will be protected in the future. An illiberal populace is more likely to support infringements on personal freedom. Its government would also need to exercise stricter controls on citizens who are less likely to respect basic liberal democratic principles. Accordingly, if respect for parents’ autonomy were allowed to preclude children from developing civic virtues, still more extensive infringements on citizens’ autonomy would result.

Furthermore, it must be recognized that the risks to personal liberties from allowing parents to pass on illiberal views do not fall equally on all citizens; instead, they fall on citizens who are members of disfavored groups, and particularly the LGBTQ and racial minorities that these measures target. Citizens who have not come to accept basic liberal ideals, such as the “burdens of judgment,” are more likely to tyrannize marginalized groups and deny them political equality on the basis of their own comprehensive views.<sup>247</sup> The significant opposition to same-sex marriage early in the twenty-first century (opposition that continues to exist, albeit among a smaller group of citizens) represented one flagrant example of illiberal citizens’ efforts to marginalize gays and lesbians based on their own comprehensive belief systems. The largest price for not teaching civic virtues of deference to the nation’s youth therefore will

245. *Id.* at 28; RAWLS, *supra* note 243, at 54.

246. See, e.g., David Smith, *Orbán Urges Christian Nationalists in Europe and US To ‘Unite Forces’ at CPAC*, GUARDIAN (Aug. 4, 2022), <https://www.theguardian.com/world/2022/aug/04/viktor-orban-cpac-speech> [<https://perma.cc/2VUJ-5X9V>]; Adam Liptak, *An Extraordinary Winning Streak for Religion at the Supreme Court*, N.Y. TIMES (Apr. 5, 2021), <https://www.nytimes.com/2021/04/05/us/politics/supreme-court-religion.html> [<https://perma.cc/6SKH-5NUB> (dark archive)]; Peter Smith & Deepa Bharath, *Christian Nationalism on the Rise in Some GOP Campaigns*, ASSOCIATED PRESS (May 29, 2022), <https://apnews.com/article/2022-midterm-elections-pennsylvania-religion-nationalism-8bf7a6115725f508a37ef944333bc145> [<https://perma.cc/C7GG-9NUX>].

247. See EICHNER, *THE SUPPORTIVE STATE*, *supra* note 182, at 133–37; CALLAN, *supra* note 214, at 50–51.

not be paid by the parents who advocate such measures, or even by the polity generally, but rather by the disfavored groups who bear the brunt of the majority's illiberal impulses. While dashing some of the hopes of parents who earnestly hold illiberal views should not be taken lightly, the rights of political minorities to the fundamental promise of liberal democracy cannot be sacrificed for these parents.

Put another way, the fact that parents hold views contrary to liberal democratic ideals does not give the government ground simply to fold its tent and go home. As Stephen Macedo counsels, liberal democracy's respect for pluralism requires that the state allow citizens to espouse illiberal views and to practice these views in their own lives.<sup>248</sup> It does not, however, require that the state give such views a level playing field when it comes to the next generation.<sup>249</sup> Instead, the state may and, indeed, must educate children for civic virtue precisely to preserve the freedom parents and others value so dearly for future generations. Respect for these parents' liberty means that, to the extent possible, children should receive the necessary civic education in institutions outside the family, including public schools. But it does not mean that the state can forgo the responsibility to teach basic liberal democratic principles entirely. The crafting of legal doctrine that requires the state to fulfill this responsibility and allows challenge of parental rights laws that undercut the state's duty is badly needed.

#### CONCLUSION

Two opposing models of what families need from the government to raise sound children have been voiced in the United States in recent years. The first, which argues that families need public economic supports, gained prominence during the first years of the pandemic, and was embodied in public policy during the pandemic's economic fallout. The second, which contends that parents need protection from schools to raise sound children, is gaining momentum in red and purple states, and measures premised on this model are increasingly being enacted into state law. Which of these models gains ascendance will greatly influence the well-being and soundness of the next generation. On that score, the United States' experience during the pandemic shows that government economic supports produce substantial gains for children's well-being. The same cannot be said for parental rights measures, which are being spearheaded by conservative elites seeking to stymie passage of economic supports and backed by voters who feel socially and culturally threatened. These measures impose significant costs on children's well-being,

---

248. See STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 13–16 (2000).

249. *Id.*

2023]

*FREE-MARKET FAMILY POLICY*

1349

as well as threaten their ability to develop key capacities to choose their own path in life and to one day assume the mantle of collective self-rule. The parental rights model should be resisted both because these measures reduce the capacity to implement the government economic supports that demonstrably contribute to children's well-being and because these parental rights policies themselves threaten marginalized children and teach the wrong lessons to other children.

