

Protecting Children’s Access to a Sound Basic Education in the Age of Political Polarization, A Comment on Goodwin Liu and Kristine Bowman’s Essays on Children’s Education in the Restatement

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INTRODUCTION

Justice Goodwin Liu and Professor Kristine Bowman have taken two very different approaches in their essays commenting on the Restatement’s¹ coverage of the law governing children’s education. In *Some Thoughts on a Developmental Approach to a Sound Basic Education*,² Justice Liu focuses near exclusively on the Restatement’s articulation of the core educational standard, the “sound basic education,” and presses for an expanded application of that standard to children from birth through young adulthood.³ In *The New Parents’ Rights Movement, Education, and Equality*,⁴ Bowman addresses the entire structure of the educational provisions of the Restatement, which straddle Part 1, “Children in Families,”⁵ and Part 2, “Children in Schools,”⁶ and warns us of the fragility of the balance between these two sources

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¹ Note that this Essay cites prior drafts of the Restatement of Children and the Law. The section numbers of the Restatement have been updated since the time of publication.

² See generally Goodwin Liu, *Some Thoughts on a Developmental Approach to a Sound Basic Education*, 91 U. CHI. L. REV. 437 (2024).

³ *Id.* at 442 (“The developmental needs of our young people vary with social conditions, and just as earlier norms have given way to new standards, we might ask what an empirically grounded developmental approach now portends for the content of a sound basic education.”).

⁴ See generally Kristine L. Bowman, *The New Parents’ Rights Movement, Education, and Equality*, 91 U. CHI. L. REV. 399 (2024).

⁵ RESTATEMENT OF THE LAW, CHILDREN AND THE LAW pt. 1 (AM. L. INST., Tentative Draft No. 5, 2023) [hereinafter RESTATEMENT Draft No. 5].

⁶ RESTATEMENT OF THE LAW, CHILDREN AND THE LAW pt. 2 (AM. L. INST., Tentative Draft No. 4, 2022) [hereinafter RESTATEMENT Draft No. 4].

of educational control in our legal system. Attending these differences in focus are important differences in tone: Justice Liu is optimistically ambitious, calling for developments in the law that extend beyond what can currently be restated. Professor Bowman is pessimistic, predicting that the recent “parents’ rights movement”⁷ threatens the stability of the restated law, to the detriment of children’s and society’s well-being. At the same time, the two pieces share important common ground. Most significantly, they share a concern about the growing polarization in our society and a belief that our system of education must play a central role in resisting this trend.

In this Essay, I will first briefly set out the Restatement’s approach to education, which spans several chapters in two parts of the Restatement. Next, I will consider Professor Bowman’s essay addressing the threats she identifies and the role the Restatement can play in resisting those threats. I will then consider Justice Liu’s more optimistic anticipation of future developments in the law and the role the Restatement could play in fostering those developments. I will conclude by suggesting that avoiding Professor Bowman’s threats and achieving Justice Liu’s aspirations will largely depend on the democratic process, a process not governed by the Restatement, but perhaps subject to the influence of some of the legal principles it highlights.

I. EDUCATIONAL DUTIES AND AUTHORITY IN THE RESTATEMENT

The Restatement’s coverage of the law governing children’s education is addressed in both Part 1, “Children in Families,” and Part 2, “Children in Schools.” This dual coverage reflects an important and unusual aspect of the law in this area: legal duties and authority over education are expressly shared between parents and the state.⁸ This sharing of responsibility and of power developed gradually over the centuries.⁹ One of the challenges in drafting the Restatement was to set out all these developments in a manner that not only was true to this history, and the distinct lines of law that it produced, but also rendered coherent across these lines the body of law that governs children’s education.

⁷ Bowman, *supra* note 4, at 401–02 (“Second, I discuss in broad strokes the parents’ rights movement.”).

⁸ See, e.g., RESTATEMENT Draft No. 4 § 2.26 cmt. a (noting that “parents share [a] duty to educate children with the state”).

⁹ See *id.* § 1.20 cmt. a.

Parents' duty to educate their children has been recognized for centuries at common law.¹⁰ It was described by jurist William Blackstone in his *Commentaries on the Laws of England* as by "far of the greatest importance of any" parental duty,¹¹ and the protection of parents' *power* to educate, Blackstone explained, was "derived from" this duty "partly to enable the parent more effectually to perform his duty, and partly as a recompence for his care and trouble in the faithful discharge of it."¹² This important duty, however, was poorly enforced until the states assigned themselves a parallel duty to provide children with a free public education and undertook, through their compulsory attendance laws, to compel parents to meet their educational duty by sending their children to school.¹³ In the early twentieth century, to protect the balance between the authority of parents and the state to meet their shared educational duty to children, the Supreme Court imposed some federal constitutional constraints on the reach of the state's control over parents' educational choices, which recognized parents' right to educate their children outside public schools¹⁴ and limited the control the state could exercise over private schools' curricula.¹⁵

The allocation of authority and duty between the state and parent to educate children is set out in the Restatement in § 1.20,¹⁶ which focuses on parents' authority and the limits of that authority to educate children outside the public schools; § 2.26,¹⁷ which sets out the standard for educational neglect that allows the state to intervene to enforce parents' educational duty; and § 5.10,¹⁸ which addresses the state's obligation to provide a free public education for all school-aged children. The Restatement ties the three sections together by using common language to describe the standard that applies in all three contexts. This "sound basic education," set out in all three sections, is an education that "enables children to acquire the knowledge and skills necessary

¹⁰ *Id.*

¹¹ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 438 (Oxford, Clarendon Press 1765).

¹² *Id.* at 440.

¹³ RESTATEMENT Draft No. 4 § 1.20 cmt. a.

¹⁴ *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

¹⁵ *See Farrington v. Tokushige*, 273 U.S. 284, 298 (1927); *see also Meyer v. Nebraska*, 262 U.S. 390, 403 (1923).

¹⁶ RESTATEMENT Draft No. 4 § 1.20.

¹⁷ *Id.* § 2.26.

¹⁸ *Id.* § 5.10.

to prepare them to participate effectively and responsibly as adults in the economy, in society, and in a democratic system of self-governance.”¹⁹ This “sound basic education” standard was developed and applied to states in what is commonly called “the school finance litigation” and applies to parents through state laws that require parents to send their children to public school or to provide them with an alternative education that is “substantially equivalent,”²⁰ or “comparable.”²¹

A significant portion of Part 2 of the Restatement is devoted to children’s constitutional rights in public schools, addressing students’ rights of expression, religious exercise, due process, and privacy.²² I note that neither Professor Bowman nor Justice Liu devotes much attention to these chapters.²³ This is understandable, as these chapters are largely grounded in a distinct body of law—the U.S. Constitution’s Bill of Rights—and press issues distinct from those that are these authors’ focus. But it is worth emphasizing that children’s constitutional rights in public schools are an important aspect of children’s educational rights and these rights, too, are under threat from the recent developments Bowman discusses. I will also suggest, in considering Bowman’s essay, that these constitutional rights may offer the best hope for judicial protection of the public school’s important role in fostering the “shared civic identity” that Bowman champions.²⁴

II. PROFESSOR BOWMAN’S FEARS

The sharing of educational duty and authority between parent and state set out in Parts 1 and 2 of the Restatement, respectively, support the development of an educational system that balances the protection of pluralism against the fostering of social harmony demanded of a diverse society committed to democratic self-governance.²⁵ Bowman approves of this balance and notes its

¹⁹ *Id.* §§ 1.20(a), 5.10; *see also id.* § 2.26(a).

²⁰ *See, e.g.*, *Blackwelder v. Safnauer*, 689 F. Supp. 106, 126–27 (N.D.N.Y. 1988) (noting that “substantially equivalent” language in New York’s compulsory attendance law is well defined in statutory requirements and extensive regulations governing public schools).

²¹ *See, e.g.*, MICH. COMP. LAW ANN. § 380.1561 (West 2016).

²² Students’ constitutional rights are currently addressed in Chapters 7–10, but when the Restatement is finalized, these will be renumbered as Chapters 6–9.

²³ *See* Bowman, *supra* note 4, at 410 n.62.

²⁴ *See id.* at 400.

²⁵ As Justice Liu acknowledges, aspirations for social, racial, and cultural integration through public schooling are at best imperfectly achieved, as law, wealth, and history sort children geographically by class, race, and religion. Liu, *supra* note 2, at 446 (noting

alignment with Professor Amy Gutmann's Democratic State of Education theory.²⁶ The law has largely achieved this balance, as Bowman notes, by allowing the state to exercise control over public schools (and preventing parents from altering the public school curriculum) while allowing parents to opt out of public schools and educate their children separately and differently in private schools and at home.²⁷ She worries, however, that this balance is being threatened by a growing "parental rights" movement that not only expands the ability of parents to *opt out*, but, more troublingly, also gives parents the authority to *push in* to the public schools and to impose their own values there.²⁸

As Bowman concedes, the growing legal and policy support for parents who wish to opt out of public schools is not new.²⁹ Voucher and school choice programs began to become popular in the 1990s, and the numbers of these programs have grown over the years.³⁰ In addition, homeschooling, once illegal in most states, is now legal in all, and some states have only reduced their regulation of homeschooling over time.³¹ These trends are concerning, particularly where they come with decreased government oversight and therefore an increased risk that children are

that children can be "hampered by an overarching reality"). Even within schools, tracking and the disparate application of special education rules continue to segregate children by race and class. See Todd McCardle, *A Critical Historical Examination of Tracking as a Method for Maintaining Racial Segregation*, EDUC. CONSIDERATIONS, March 2020, at 1, 1–2; see also Todd E. Elder, David N. Figlio, Scott A. Imberman & Claudia I. Persico, *Segregation and Racial Gaps in Special Education: New Evidence on the Debate over Disproportionality*, EDUC. NEXT (Feb. 16, 2021), <https://perma.cc/6SEN-NEPR> (finding that Black and Latino children attending school with white children are placed disproportionately in special education classes in schools with few minority students). Moreover, for many children, the education offered in their public schools falls well below the sound basic education their state constitutions are committed to provide. See, e.g., KATHRYN M. NECKERMAN, *SCHOOLS BETRAYED: ROOTS OF FAILURE IN INNER-CITY EDUCATION*, at vii–ix (2007).

²⁶ See AMY GUTMANN, *DEMOCRATIC EDUCATION* 41–47 (1987).

²⁷ Bowman, *supra* note 4, at 409.

²⁸ *Id.* at 402.

²⁹ See *id.* at 400 (noting that "[i]n previous decades, claims of parents' rights in education focused largely on parents opting their children . . . out of traditional public schools and into charter schools, private schools, or homeschools").

³⁰ *Fast Facts*, EDCHOICE (Apr. 17, 2023), <https://perma.cc/K6RH-3F78> (showing the growth of students' enrollment in voucher and related programs over the years); see also *50-State Comparison: Vouchers*, EDUC. COMM'N OF THE STATES (Mar. 2021), <https://perma.cc/X8KG-2FFL> (providing fifty-state information about voucher programs).

³¹ See JOSEPH MURPHY, *HOMESCHOOLING IN AMERICA: CAPTURING AND ASSESSING THE MOVEMENT* 36 (2012); see also Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection*, 62 ARIZ. L. REV. 1, 43–49 (2020) (documenting the current political movement to deregulate home schooling).

not receiving a sound basic education.³² These trends also undermine, as Bowman points out, children's exposure to those who are different from them and the opportunity to forge a shared civic identity across these differences that comes with this exposure.³³ That said, while a shift in total numbers will have some impact on the overall balance between public and private education and the values they each serve, these opt-out regimes are a fundamental aspect of the current legal regime's overall design.³⁴

More concerning, because it presses against this design, are incursions into public schools in the name of parental rights. I share Bowman's concern that these developments, which have gained tremendous force in recent years, threaten to dramatically change our system of education in ways that disserve child and societal well-being. To consider how these developments relate to the law set out in the Restatement, I want to give closer attention to many of the specific legal and policy changes Bowman identifies. Because these legal trends are all asserted in the name of parental rights, it is easy to lump them together. But the different developments implicate the law in different ways, only some of which are in potential conflict with the Restatement.

Among these trends, one important distinction separates reforms that allow parents to intervene in ways that affect only their own child's experience in school from those that alter all students' school experience. For this second category of reforms, which affect all children in a school, the invocation of parental rights is misleading and has nothing to do with the rights safeguarded in the Constitution and set out in § 1.20. As noted, the parental right to control a child's education is a right against the state.³⁵ It is intended to protect individual parents' ability to educate their children in ways that conflict with the state's policy preferences.³⁶ When certain parents motivate the democratic process to change public school education for all children, they are acting as the state itself, not seeking to remain free of the state's control. And when parents are given authority through school board policy or legislation to intervene and object to curricular

³² Bartholet, *Homeschooling*, *supra* note 31, at 46–47. *But see* Brian D. Ray, *Academic Achievement and Demographic Traits of Homeschool Students: A Nationwide Study*, ACAD. LEADERSHIP, Feb. 3, 2010, at 1, 27 (documenting the academic success of homeschooled students).

³³ Bowman, *supra* note 4, at 430.

³⁴ *See id.* at 400.

³⁵ *See* RESTATEMENT Draft No. 4 § 1.20 cmt. a.

³⁶ *See id.*

content or books in the library, they are doing so in collaboration with the state, at the state's invitation.³⁷ The very balance Bowman celebrates gives the state considerable authority in setting educational programming, and this is no less true when a politically powerful minority of parents engages the political process to define the state's agenda to conform to their own preferences.

Likely because Bowman recognizes that parents engaging the political process in this way are acting with the state, or even as the state, rather than against it, she calls for a third educational authority to be added to the balance: the professional educator.³⁸ In decrying the skyrocketing introduction of anti-egalitarian legislation and policies,³⁹ Bowman is objecting, not to a shift in authority from state to parent, but to an abandonment of wisdom in the state's exercise of its educational authority. I share Bowman's view that this is a deeply troubling trend, particularly as it targets material aimed at reducing bigotry and discrimination and increasing understanding and tolerance among students.⁴⁰ Later in this Essay I will draw on Justice Liu's essay to suggest that this disregard of professional wisdom, though not illegal, conflicts with the Restatement's commitment to social and scientific understanding of child development that undergirds its "developmental approach."⁴¹

In contrast, some of the book bans, in addition to reflecting misguided policy, may be unlawful. This is not because these bans give parents too much power over public school programming, but because they may give some parents, acting as the state or in collaboration with the state, too much power over students. Put another way, if the courts can do anything to resist the current drive to shape children's access to information in schools to conform with the views of a minority of politically active parents, they will do this through the protection of students' constitutional rights, not through a curtailment of parental rights.

³⁷ See Bowman, *supra* note 4, at 432–34.

³⁸ *Id.* at 433 (stating that she is convinced by Gutmann's argument that "the best way for schools to help sustain democracy is to have parents, professional educators, and the state all involved in decision-making," and expressing concern when "parents' rights supplant the rights of the state, professional educators, and arguably students").

³⁹ See *id.* at 421–28.

⁴⁰ See *id.* at 432.

⁴¹ See generally Liu, *Thoughts on a Developmental Approach*, *supra* note 2; RESTATEMENT OF THE LAW, CHILDREN AND THE LAW intro. (AM. L. INST., Council Draft No. 9, 2023) [hereinafter RESTATEMENT Draft No. 9] (noting that the Restatement "draw[s] extensively on developmental science and other empirical research in explaining and supporting the black letter rules").

In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*,⁴² a plurality of the Supreme Court ruled that

local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” . . . Such purposes stand inescapably condemned by our precedents.⁴³

The *Pico* plurality sets out two principles that are, as the Court noted, consistent with the law’s overall treatment of schools’ authority and students’ First Amendment protections. The first principle is that schools have their greatest authority over curriculum and less authority over other aspects of students’ school experience, including their opportunity to engage in “voluntary inquiry” in the school library.⁴⁴ This distinction is helpful for students in contexts such as book bans, where some parents are engaging the democratic process to assert the role of the state in shaping school programming. But as I will explain below, this same distinction may leave individual students unprotected in contexts where their parents are resisting exercises of the school’s authority over them. Outside the curricular context, the state’s authority over parents, as well as over children, is likely diminished.

The second principle set out in *Pico* gets more directly to Bowman’s concerns: *Pico* specifically objects to the removal of books due to a disagreement with the ideas expressed.⁴⁵ Schools can clearly remove books they determine are at too high or too low a

⁴² 457 U.S. 853 (1982) (plurality opinion).

⁴³ *Id.* at 872 (citing *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). This plurality opinion, authored by Justice William Brennan, was joined in full by Justices Thurgood Marshall and John Paul Stevens, and joined in large part by Justice Harry Blackmun. Justice Blackmun also wrote a concurrence embracing the idea that school boards cannot remove books from shelves but emphasized that book removals only violated the Constitution if done for the “sole purpose of suppressing exposure to . . . ideas,” particularly where the state disapproves of those ideas for “partisan or political reasons.” *Id.* at 877, 879 (Blackmun, J., concurring) (emphasis in original). Justice Byron White, who provided the fifth vote, concurred in the judgment on procedural grounds and did not address the substantive constitutional standard. *See id.* at 883 (White, J., concurring).

⁴⁴ *Id.* at 869 (plurality opinion) (emphasis in original):

[The school] might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values. But we think that petitioners’ reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom.

⁴⁵ *See Pico*, 457 U.S. at 872.

reading level for their students, address content of little interest or educational value to students, or include sexually explicit material.⁴⁶ Likely for this reason, many of the current book bans are framed in language that targets books that contain “indecent” or “pornographic” material,⁴⁷ although the concern is that these terms are read (and intended to be read) broadly to reach content (such as same-sex relationships) opposed by the book banners for their ideas rather than for a more viewpoint-neutral objection to their sexual content. The one lower court case that has addressed recent book removals and book bans from school libraries on the merits thus far focused on the sexually explicit content targeted to deny challengers’ attempt to block implementation of the ban.⁴⁸

Where a parental rights claim is asserted to challenge the application of a school’s programming only to a parent’s own child, this claim takes the form protected, in some contexts, by the U.S. Constitution and represents the other side of the public-private balance. As set out in the Restatement and highlighted by Bowman, courts have rejected parents’ assertion of a right to intervene to alter their child’s curriculum in public school.⁴⁹ Bowman considers this constraint central to maintaining the balance between the two sides of the scale.⁵⁰ But no law prevents schools from giving individual parents more control over their children’s education than schools are constitutionally required to give them, and common exemptions from sexual education programs are a routine example of this.⁵¹

Outside the curricular context, parents may in fact have a constitutional *right* to exercise control over their child’s educational experience. In recent years, there have been many examples of parents’ efforts to exercise this control, and schools’ efforts to defer to them, and I will focus on two types. The first are child-specific constraints parents have authority to impose on their children’s exercise of constitutional rights, especially First

⁴⁶ *Id.* at 871.

⁴⁷ *See, e.g.*, Sensitive Materials in Schools Act, H.R. 374, 64th Leg., Gen. Sess. (Utah 2022). The description of the bill states that it “prohibits certain sensitive instructional materials in public schools,” which are defined as “pornographic or indecent material[s]” in § 3(1)(g)(i) (codified at UTAH CODE 53G-10-103(1)(g)(i) (2022)).

⁴⁸ *See, e.g.*, C.K.-W *ex rel.* T.K. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 916–17 (E.D. Mo. 2022), *appeal dismissed*, 2023 WL 2180065 (8th Cir. Jan. 17, 2023).

⁴⁹ RESTATEMENT Draft No. 4 § 1.20 reporters’ note, cmt. d.

⁵⁰ Bowman, *supra* note 4, at 421.

⁵¹ *Id.* at 422 n.135.

Amendment rights. The second are child-specific constraints parents are given authority to impose on their own children who seek to change the gender identity by which they are officially recognized in school.

The extent to which children's constitutional rights in school may be subject to their parents' control has never been addressed by the Supreme Court. In *Pico*, the plaintiffs asserting their First Amendment rights were the children themselves, but they were supported by their parents, who acted as "next friend" in the suit.⁵² Similarly, in *Tinker v. Des Moines Independent Community School District*,⁵³ the student plaintiffs pressed their First Amendment claim "through their fathers."⁵⁴ In other cases asserting students' constitutional rights, including *West Virginia Board of Education v. Barnette*,⁵⁵ parents joined as co-parties.⁵⁶ All these cases established the rights of students against the state (as school), and none of them considered whether parents' opposition to their children's exercise of rights might alter the state's authority.⁵⁷

The interplay between children's constitutional rights against the state and parents' right to control their children's upbringing is expressly addressed in Part 4 of the Restatement,⁵⁸ and forcefully challenged by Professors Anne Dailey and Laura Rosenbury in their essay *Beyond Home and School*.⁵⁹ In Chapter 18 of Part 4, the Restatement acknowledges the law's clear distinction in the context of children's civil rights and civil liberties between state action (constrained by the Constitution), and parental action (constrained only by abuse and neglect laws).⁶⁰

⁵² *Pico*, 457 U.S. at 853.

⁵³ 393 U.S. 503 (1969).

⁵⁴ *Tinker*, 393 U.S. at 504.

⁵⁵ 319 U.S. 624 (1943).

⁵⁶ *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251, 252 (S.D. W. Va. 1942); see also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 651 (1995); *Lee v. Weisman*, 505 U.S. 577, 584 (1992).

⁵⁷ See generally *Pico*, 457 U.S. 853; *Tinker*, 393 U.S. 503; *Barnette*, 319 U.S. 624; *Acton*, 515 U.S. 646; *Lee*, 505 U.S. 577.

⁵⁸ RESTATEMENT Draft No. 5 pt. 4.

⁵⁹ See generally Anne C. Dailey & Laura A. Rosenbury, *Beyond Home and School*, 91 U. CHI. L. REV. 567 (2024).

⁶⁰ RESTATEMENT Draft No. 5 § 18.10(a) ("This right [of speech, religious exercise, and political participation] constrains government actors' power to limit or punish minors' exercise of these rights but does not prevent parents or guardians from exercising their authority to prevent their children from exercising these rights."); *id.* § 18.11(a) ("Th[e] right constrains government actors' power to restrict minors' access to speech and other expressive material but does not prevent parents from exercising their authority to prevent their children's access to such material.").

Although the state cannot prevent children's access to most information in contexts other than school, parents clearly can prohibit this access or punish it after the fact. Similarly, parents can prohibit children from participating in a lawful protest or attending a political rally even though children have a First Amendment right against the state to do these things.⁶¹ Dailey and Rosenbury capture the harm that can come to children from these sorts of parental prohibitions,⁶² but the thrust of their argument is that allowing such parental restrictions is bad policy, rather than illegal.

The same distinction between state and parental authority surely applies to children's in-school behavior. If parents want to prohibit their children from wearing black armbands or to punish their children for doing so, nothing in First Amendment law prevents them.⁶³ The harder question, also explored in both Dailey and Rosenbury's essay and Professor Elizabeth Scott's response to their essay, is whether the state can play an active role in enforcing the parents' prohibitions or even make its protection of students' constitutional rights contingent on parents' permission.⁶⁴ Many current reforms are taking this form: parents are given authority to block their children's access to books,⁶⁵ or participation in clubs,⁶⁶ or their children's ability to decline to say the Pledge of Allegiance.⁶⁷ In the commercial context, the Supreme Court has rejected, on First Amendment grounds, a state's claim of power to require parental permission before a merchant can sell a violent video game to a minor,⁶⁸ but the Court has protected

⁶¹ See *id.* § 18.10 cmt. a.

⁶² Dailey & Rosenbury, *supra* note 59, at 577.

⁶³ See *Tinker*, 393 U.S. at 504, 514; see also RESTATEMENT Draft No. 5 § 18.10 cmt. a.

⁶⁴ See Dailey & Rosenbury, *supra* note 59, at 577–79; Elizabeth S. Scott, *Comment on Part 4 Essays: Goodwin and Dailey and Rosenbury*, 91 U. CHI. L. REV. 633, 645 (2024).

⁶⁵ See, e.g., H.R. 900, 88th Leg., Reg. Sess. § 35.005 (Tex. 2023) (requiring parental permission before students can access books with sexual content); Ariana St Pierre, *Students at Maine School Will Need Parental Consent for Books Containing Adult Themes*, WGME (June 6, 2023), <https://perma.cc/TJJ9-MV3U> (reporting on Hermon High School's implementation of a requirement that students receive prior permission from a parent before accessing books with sexual content).

⁶⁶ See, e.g., *Student Handbook for the 2023–2024 School Year*, RANKIN CNTY. SCH. DIST., <https://perma.cc/C87T-TM5Z>. The student handbook for Rankin County, Mississippi, schools requires students to obtain parent's written permission before attending or becoming a member of a school-sponsored or student-led club. *Id.*

⁶⁷ H.R. 2523, 56th Leg., Reg. Sess. § 15-506(A)(5) (Ariz. 2023) (requiring students to recite the Pledge unless a parent requests that the child be allowed to opt out).

⁶⁸ See *Brown v. Enter. Merchs. Ass'n*, 564 U.S. 786, 805 (2011).

the state's power to block children's purchase of sexualized material absent parental permission.⁶⁹ As noted above, this exception, based on the First Amendment's lesser protection for sexually explicit material, has been applied in schools to cover materials addressing sexual orientation, among other themes.

Even in *Brown v. Entertainment Merchants Association*,⁷⁰ addressing minors' right to purchase violent video games, the Court recognized the possibility that a merchant might be appropriately required to block entry of a child into an event that the child had a First Amendment right to attend, if a parent had informed the merchant, in advance, of his opposition to his child's admission.⁷¹ We might expect courts to allow states greater authority in their role as educators, than in their role as commercial regulators, to defer to parental preferences in circumscribing their children's exercise of rights. Indeed, in a case decided before *Brown*, the Eleventh Circuit upheld Florida's requirement that a student obtain written parental permission before being exempted from saying the Pledge of Allegiance, concluding that "[t]he State, in restricting the student's freedom of speech, advances the protection of the constitutional rights of parents: an interest which the State may lawfully protect."⁷²

Such parent-controlled inroads into children's freedom to exercise their rights, especially their First Amendment rights in school, represent a serious threat to the approach to education Gutmann advocated in *Democratic Education* and endorsed by Bowman. The cases protecting students' constitutional rights routinely emphasize, not only that children, like adults, are persons, and therefore entitled to constitutional protections, but also that protecting children's rights in school plays an especially important role in teaching children how to contribute successfully

⁶⁹ See *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (noting that the state has an interest in supporting parents in exercising control over their children's access to sexually explicit material).

⁷⁰ 564 U.S. 786 (2011).

⁷¹ *Brown*, 564 U.S. at 795 n.3 (emphasis in original):

[I]t perhaps follows from this that the state has the power to enforce parental prohibitions—to require, for example, that the promoters of a rock concert exclude those minors whose parents have advised the promoters that their children are forbidden to attend. But it does not follow that the state has the power to prevent children from hearing or saying anything without their parents' prior written consent.

⁷² *Frazier ex rel. Frazier v. Winn*, 535 F.3d 1279, 1284 (11th Cir. 2008) (per curiam).

as citizens in a diverse, self-governing society. As the Court noted in *Tinker*:

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'⁷³

Considerably more in the public eye than exercises of parental interventions in their children's exercise of constitutional rights in school are controversies over whether, and to what extent, parents should be involved in their children's choice of gender identity in school. Although some legislation and school district policies forbid students from changing their gender identification or pronouns without parental permission,⁷⁴ many laws and policies more narrowly require parents to be informed of any changes in their children's gender identification at school that are officially recognized by the school.⁷⁵ On the other side of the issue are many school districts that require a school's recognition of a student's changed gender identification to be concealed from the student's parents at the student's request.⁷⁶ This dispute captures, importantly, the lack of any well-developed law addressing identity rights that might apply here. If these gender choices (accompanied by changes in name and pronouns) are seen as a form of expression, children might have the right to make these choices under the First Amendment subject to the same analysis (and possible protection) of students' other constitutional rights, discussed above.

But, even if so conceived, it seems unlikely that students would have the right to prevent the school from sharing this information with the student's parents any more than they would have

⁷³ 393 U.S. at 512 (alteration in original) (quotation marks and citations omitted) (quoting *Keyishian v. Bd. of Regents of Univ. of St. of N.Y.*, 385 U.S. 589, 603 (1967)); see also *New Jersey v. T.L.O.*, 469 U.S. 325, 385–86 (1985) (Stevens, J., concurring in part and dissenting in part) (noting that giving students experience as rights holders is as important as acculturating students who will become state actors to constitutional commitments).

⁷⁴ See *Bowman*, *supra* note 4, at 426; see also Parents Bill of Rights Act, H.R. 5, 118th Cong. § 401(1) (2023) (requiring parental consent before honoring a student's request to change their gender-identifying pronouns in school).

⁷⁵ H.R. 1608, 123d Gen. Assemb., Reg. Sess. (Ind. 2023).

⁷⁶ See *List of School District Transgender-Gender Nonconforming Student Policies*, PARENTS DEFENDING EDUC. (last updated Aug. 28, 2023), <https://perma.cc/WS8C-6D6T> (providing a list of school districts with such policies).

a constitutional right to prevent the school from informing their parents that they wore black armbands to protest the Vietnam War.⁷⁷ Although Bowman includes these information-sharing provisions on her list of problematic parental rights developments,⁷⁸ these policies seem to be completely in line with well-established information-sharing policies that have long-predated the new parental rights movement she is challenging. Florida's original law on this subject,⁷⁹ known colloquially as the "Don't Say Gay" Bill,⁸⁰ required the sharing of this information with parents unless "a reasonably prudent person would believe that disclosure would result in abuse, abandonment, or neglect."⁸¹ This requirement, addressed to children's conduct unrelated to the curriculum, seems in keeping with the Restatement's reliance on parents to ensure their children's well-being. And while there will surely be parents who, short of engaging in abuse or neglect, do not provide effective support for their children in these circumstances, we should not expect the school to do better, on average, in ascertaining what that ideal support would entail for any particular child. In this context, sharing information with parents reinforces, rather than distorts, the balance to which Gutmann and Bowman aspire.

⁷⁷ Litigation asserting children's privacy rights, on the one hand, and parents' right to control children's education and upbringing on the other, have recently been filed in several jurisdictions. California's Attorney General sued a school district for requiring students' gender identity information to be shared with their parents. *See Amy Taxin & Sophie Austin, California Sues District That Requires Parents Be Notified If Their Kids Change Gender ID*, AP NEWS (Aug. 28, 2023), <https://perma.cc/WW6K-S2L4>. Similarly, in several states, parents have sued school districts that require the information to be kept secret at the child's request. *See, e.g., Foote v. Town of Ludlow*, 2022 WL 18356421, at *1 (D. Mass. Dec. 14, 2022) (dismissing parents' claims), *appeal docketed*, No. 23-1069 (1st Cir. Jan. 17, 2023); *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 622 F. Supp. 3d 118, 129 (D. Md. 2022) (rejecting parents' parental rights challenges to a policy that forbade information sharing with parents about a student's gender identity at the request of the student), *vacated*, 78 F.4th 622, 629–30 (4th Cir.2023) (finding that the parents lacked standing).

⁷⁸ Bowman, *supra* note 4, at 426.

⁷⁹ H.R. 1557, 2022 Leg., Reg. Sess. (Fla. 2022) (amending FLA. STAT. § 1001.42 to add subparagraph (c)(2)). Other state provisions requiring the information disclosure to parents also make an exception for circumstances if the information could lead the child to be "abused or neglected." *See, e.g., S. 150*, 2023 Leg., Reg. Sess. (Ky. 2023). The Florida legislature has since enacted a much more severely restrictive law, H.R. 1069, 2023 Leg., Reg. Sess. (Fla. 2023), that provides that "[i]t shall be the policy of every public K-12 educational institution . . . that a person's sex is an immutable biological trait and that it is false to ascribe to a person a pronoun that does not correspond to such person's sex." *Id.*

⁸⁰ *See* Jaclyn Diaz, *Florida's Governor Signs Controversial Law Opponents Dubbed 'Don't Say Gay'*, NPR (Mar. 28, 2022), <https://perma.cc/5HKS-49FE>.

⁸¹ Fla. H.R. 1557.

I end my discussion of Bowman's essay with this example to underline the point that not all parental rights claims are the same, nor do they all threaten the balance between private interests and the public good to the same extent, let alone in the same way. Moreover, few of the threatening trends that Bowman identifies reflect a departure from the law set out in the Restatement, nor can they be successfully resisted by the courts by holding fast to the law stated there. In this way, many of the current, troubling trends in education look like the troubling trends in juvenile criminal law that developed in the last decades of the twentieth century.⁸² Like those punitive trends, these democratically enacted changes in education policy are driven by a moral panic poorly informed by professional understandings. Nothing in twentieth-century criminal law prevented the tough-on-crime legislation that caused so much harm to children, but, as Justice Liu points out in his essay, an understanding of adolescent development supported by serious scientific and social scientific research led to a subsequent alteration in both public sentiment and law.⁸³ After considering what lessons Justice Liu draws for children's education from this experience, I will note how those lessons apply to Professor Bowman's concerns as well.

III. JUSTICE LIU'S ASPIRATIONS

Justice Liu aspires to employ the same sort of expertise in child and adolescent development that has supported vast reforms in the juvenile justice system to ensure that the state's obligation to provide a sound basic education is achieved for all children in a changing world.⁸⁴ His advocacy of an expansion of the states' obligation to provide a free education to the preschool years is well supported by numerous studies that demonstrate the value of early childhood education to low-income families, "including higher educational attainment, less involvement with the criminal justice system, better health, and higher rates of adult employment and income."⁸⁵ We can understand this proposed extension as an important tweak of the law covered by the Restatement,

⁸² NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., REFORMING JUVENILE JUSTICE 31–47 (2013) (recounting the late twentieth-century tough-on-crime approach and the reforms that followed).

⁸³ See Liu, *supra* note 2, at 437–38.

⁸⁴ *Id.* at 440.

⁸⁵ *Id.* at 443.

expanding educational rights to a larger proportion of all children, and, in fact, many states have already implemented universal preschool education, or are on track to do so in the future.⁸⁶ But Justice Liu's call for educational reforms at the other end of the age range is more than a tweak, as it extends the reach of "children's education" in two notable respects: first, it calls for an extension of the state's commitment to education beyond the age of minority into young adulthood; and second, it expands the definition of education to include public service work more akin to military service than to school.⁸⁷ Both of these ideas are supported by developmental themes in the Restatement, if not by the law as it exists today.

The first theme is that growing developmental, neuroscientific, and sociological understandings of childhood and the process of maturing into adulthood have called into question the appropriateness of drawing legal distinctions at age 18. In the context of the criminal legal system in particular, the ongoing development of brains and related behavior are highlighted by Justice Liu as a justification for extending the reach of the juvenile justice system, with its less punitive approach and more supportive programming, into young adulthood.⁸⁸ As Justice Liu notes, his state of California is one of a number of states to extend reforms that have shown success with young offenders to those in their 20s based on research suggesting that "brain development continues well beyond age 18 and into early adulthood."⁸⁹ Justice Liu suggests that states' extension of educational supports into young adulthood might share similar value, noting "an increase in inequality between those with less education and those with more, with negative ramifications for social mobility, social cohesion, and the health of our democracy."⁹⁰ He also suggests that a mandatory community service requirement for young adults might serve the educational interests of students and society alike.⁹¹

Although extending children's access to education into young adulthood would clearly come with significant individual and societal benefits, any form of *mandatory* extended schooling in line

⁸⁶ See Monica Potts, *Why More States Don't Have Pre-K*, FIVETHIRTYEIGHT (Feb. 3, 2023), <https://perma.cc/6GKV-DB22>.

⁸⁷ See Liu, *supra* note 2, at 445.

⁸⁸ *Id.* at 439.

⁸⁹ *Id.* (quoting *Senate Third Reading Analysis*, S. 261, 2015 Leg., Reg. Sess. 2 (Cal. 2015)).

⁹⁰ *Id.* at 445.

⁹¹ *Id.* at 446–47.

with current compulsory attendance laws or in line with a military draft would impose a significant constraint on young adults' autonomy, which is not similarly implicated in the criminal context. Is it appropriate for the law to extend the years of life during which we limit individuals' authority to make decisions for themselves? Already, politicians have pointed to the developmental arguments made in the criminal justice system to argue that individuals under 26 should not be able to give legal consent to reproductive health care and gender affirming care.⁹² We can expect politicians to point to a law that compels individuals' participation in educational programming beyond 18 as further evidence that the law does not treat young adults as competent decision-makers ready to take control of important decisions in their lives.

Although there is much support for the idea that a year or two of service work would benefit young people's healthy development and preparation for the assumption of adult responsibilities, the best argument Justice Liu offers in favor of making such service *mandatory*, and therefore not left to the independent decision-making of young adults, is that such service is necessary for the well-being of society.⁹³ Like Professor Bowman, Justice Liu fears the impact of increasing polarization on the ongoing health of our democracy.⁹⁴ We allow the government to compel people to join the military, not because we doubt people's decision-making ability, but because we are willing to override their own choices when the country needs them. Perhaps our polarization is creating an existential threat worthy of a draft.

The second theme of the Restatement undergirding Justice Liu's reform proposal is that children's education is secured through law in many ways other than a school curriculum. Already noted by Bowman is the law's protection of children's learning of

⁹² See, e.g., Texas Millstone Act, H.R. 4754, 88th Leg. (Tex. 2023). This Act was introduced by State Representative Tony Tinderholt, and it prohibits doctors from providing gender affirming procedures for anyone under 26 and rests this age limit on the "overwhelming scientific consensus" that the "human brain isn't fully developed until near the age of 25." See Tony Tinderholt (@reptinderholt), X (Mar. 14, 2023), <https://perma.cc/WDM2-C58X>; American College of Pediatricians, *Parental Involvement and Consent for a Minor's Abortion*, ACPEDS (May 2016), <https://perma.cc/MQX2-ZEHH> (citing "neuroscience research" finding that "the area of the brain involved in critical thinking and decision-making does not reach maturity until the early to mid-twenties" to argue that minors lack "the capacity to make an informed decision with regard to abortion").

⁹³ See Liu, *supra* note 2, at 446–47.

⁹⁴ *Id.* at 446.

values, skills, and culture in their families as part of parents' control of children's upbringing set out in Part 1 of the Restatement.⁹⁵ Also already noted is the learning about our system of government and skill building to prepare students to participate in that system that comes from protecting children's constitutional rights, including rights of expression in schools, set out in Part 2. In addition, the emphasis in Part 3, "Children in the Justice System,"⁹⁶ on children's amenability to change and therefore the centrality of rehabilitation in the law's response to juvenile offending⁹⁷ reflects the law's embrace of education, understood broadly, in the juvenile justice system.⁹⁸ And finally, aspects of Part 4, "Children in Society," emphasize the importance, for children, of being afforded increasing authority to access information, to speak, to engage in politics, and to move around their communities without adult supervision, so that they can begin to practice exercising adult responsibilities and participating in society while still afforded some of the special protections of childhood.⁹⁹

Like Professor Bowman, Justice Liu sees the increasing polarization of our society as a serious threat requiring an education-focused solution.¹⁰⁰ And like Bowman, his solution largely depends upon democratic forces employed, with the benefit of evidence-based professional insight, to educate children in a manner that "enables children to acquire the knowledge and skills necessary to prepare them to participate effectively and responsibly as adults in the economy, in society, and in a democratic system of self-governance."¹⁰¹ Justice Liu draws inspiration from the "developmental approach," built upon scientific and social-scientific research, that has supported ongoing reforms in the criminal legal system and

⁹⁵ Bowman, *supra* note 4, at 413.

⁹⁶ RESTATEMENT Council Draft No. 9 pt. 3.

⁹⁷ See, e.g., *id.* pt. 3, intro. (summarizing the developmental approach and its reliance on evidence-based programming that supports youth development and reduces recidivism).

⁹⁸ Perhaps worthy of note is the fact that, in Germany, the word used for "rehabilitation" in the juvenile justice system is *Erziehung*, which translates into English as education. Frieder Dünkler, *Youth Justice in Germany*, in OXFORD HANDBOOKS ONLINE 1, 3 (2016) (emphasis omitted):

The legislation of 1923 established three pillars of innovation. First, contrary to the general penal law for adults, the legislation of 1923 for the first time "opened the floor" for educational measures instead of punishment (and especially instead of imprisonment; the corresponding slogan was *Erziehung statt Strafe* [meaning education instead of punishment]).

⁹⁹ See RESTATEMENT Draft No. 5 § 18.10.

¹⁰⁰ See Liu, *supra* note 2, at 446.

¹⁰¹ RESTATEMENT Draft No. 4 §§ 1.20(a), 5.10.

importantly shaped the Restatement throughout.¹⁰² Professor Bowman, similarly, calls for a greater reliance on professional educators to right the ship, to regain the balance in our system of education between serving the interests of private families and the public good.¹⁰³ Perhaps she, too, can take inspiration from the history that preceded the emergence of the developmental approach in the criminal system. Like the current trend in education, legislatures at the turn of the twenty-first century engaged in a rash of seriously harmful lawmaking in response to an unfounded and poorly informed panic over the rise of the so-called juvenile “super-predator.”¹⁰⁴ This dangerous swing in the wrong direction amounted to a call to action among developmental scientists and well-informed policymakers, and their work then paved the way for the law’s embrace of the developmental approach. Our best hope is that the history that has so profoundly shaped Part 3 of the Restatement will repeat itself in the educational realm.

¹⁰² See Liu, *supra* note 2, at 437–38, 447.

¹⁰³ See Bowman, *supra* note 4, at 34–35.

¹⁰⁴ John DiLulio, *The Coming of the Super-Predators*, WASH. EXAM’R (Nov. 27, 1995), <https://perma.cc/6A5A-NQ4C>.