

Safeguarding Parental Rights and Protecting Children from Federally Mandated Gender Ideology

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KEY TAKEAWAYS

A growing administrative state is endangering children’s minds, bodies, and family relationships by pushing destructive gender ideology in schools and health care.

Parents have inherent, natural rights to direct the upbringing, education, and care of their children. But courts have not protected parental rights consistently.

Congress should guarantee that parental rights are treated as fundamental rights that cannot be overridden by ideologically driven policies.

After the COVID-19 lockdowns and remote learning allowed parents to see what their children are being taught in school, they rose up at school boards and in state legislatures to protest their children’s indoctrination in the radical and toxic tenets of critical theory on race and gender. Florida and Arizona have enacted parental rights laws that recognize and strengthen the fundamental right of parents to direct the upbringing, education, and care of their children.¹

However, the federal government is enacting policies in both education and health care that could override state protections of parental rights.² Congress should therefore pass a statute to confirm that parental rights are fundamental rights in order to ensure that courts apply the highest legal standard of review—“strict scrutiny”—to federal government

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policies. The standard will strengthen parents' ability to challenge federal policies that exclude them from crucial decisions for their children.

Gender Ideology and “Gender-Affirming Care”

Gender ideology poses new threats to children's minds and bodies, as well as to their family relationships. To understand the potential impact of gender ideology in education, and even child custody proceedings, it is vital to understand the medical standard of care.

Gender ideology substitutes a scientific understanding of the male and female sexes with a person's self-determined sense of “gender identity.” A boy or girl who experiences confusion or dissatisfaction over his or her biological sex and identifies as the other sex—or no sex, or both sexes (“non-binary”)—should, of course, be treated with dignity and respect. There is heated public debate over the proper standard of medical care for minors experiencing gender confusion, or who have a clinical diagnosis of gender dysphoria.³

The Biden Administration is promoting “gender-affirming care” for minors suffering from gender confusion. This “care” begins with “social transition” (selecting clothing, name, pronouns, restrooms, and other facilities to present as a different gender). It is followed by “medical transition,” where a child receives puberty blockers, masculinizing or feminizing hormones, and “gender-affirming” surgeries, such as mastectomies and hysterectomies.

This approach was developed through experiments with children in the Netherlands who were given puberty blockers at age 12 and cross-sex hormones at age 16. Unlike in the United States, the test subjects were screened for psychological comorbidities and excluded if they, for example, had severe depression. Alarming, 100 percent of children who were given puberty blockers according to this “Dutch Protocol” went on to receive cross-sex hormones that can result in permanent sterility and other serious health consequences. And this despite the evidence that clearly shows that upwards of 90 percent of children with gender confusion simply grow out of it if no “affirming” interventions are undertaken, social or otherwise. The “affirming” model is now facing increasing scrutiny around the world by scholars, medical professionals, “detransitioners” (those who have ceased to identify and present themselves as the opposite sex), and concerned parents who question if puberty blockers are a one-way street to even more harmful medical transition—rather than a harmless “pause button” as some proponents claim.⁴

Recently, two leading doctors in the U.S. who have performed physical interventions on children, and who identify as transgender themselves, expressed caution and emphasized the need for parental involvement.⁵ European countries (including Finland, Sweden, and the United Kingdom) that formerly followed the Dutch Protocol have now placed strict limits on “gender-affirming” medical interventions for minors,⁶ especially because evidence shows that such interventions do not cure existing depression or suicidality and instead tend to lock them in and make them worse.⁷

A lawsuit brought by a female detransitioner against Britain’s main gender clinic highlighted the lasting physical, emotional, and mental damage experienced by thousands of young people.⁸ In addition, scholars and medical professionals are pointing to flaws in gender-affirmative research presented by leading medical organizations, such as the American Academy of Pediatrics.⁹

A growing number of medical professionals now recommend “watchful waiting” (instead of the Dutch Protocol) to allow parents and doctors to observe whether the experience of puberty leads to resolution of gender confusion, with some studies showing that the confusion naturally resolves itself in up to 90 percent of children.¹⁰ This approach minimizes the risks associated with medical interventions that can lead to sterilization and other life-long consequences.

Nevertheless, the Biden Administration is aggressively promoting “gender affirmation” as the correct standard of care for gender-confused minors.¹¹ But states are beginning to push back to protect vulnerable children from these harms.¹² Some states are prohibiting the use of Medicaid funds for gender transition and are banning these procedures on minors.¹³ Notably, Florida medical licensing authorities recently held hearings on the efficacy of these treatments and, after an exhaustive review of the research, adopted a proposed standard of care that prohibits their use on children.¹⁴

The Biden Administration’s imposition of this dubious standard of care at the federal level (as well as on states), combined with the silencing of doctors, counselors, and teachers, reduces the choices of parents who want to—safely and ethically—care for their gender-confused children. (See below under “Gender Ideology in Federal Health Care Policies.”) The standard of care can also be determinative in child custody proceedings brought against parents (including married parents) by the government or a parent, guardian, or other family member who seeks “gender-affirming” care for their child.¹⁵

Gender Ideology in Federal Education Policies

American children are already bombarded with gender ideology in social media and entertainment. Children have become deeply confused after being exposed to the radical—and false—idea that they may be “born in the wrong body.”¹⁶ Medical researcher Lisa Littman and journalist Abigail Shrier have documented the explosion of transgender identification, especially in girls. They identify social contagion as the source of the sudden increase.¹⁷ According to one study of Pittsburgh high schools, up to 10 percent of teenagers identify as gender-diverse, including transgender, non-binary, and gender queer.¹⁸ Nationally, between 2017 to 2020, a study by the Williams Institute estimated that the number of teens ages 13 to 17 who identified as “transgender” doubled, rising from a long-time average of 0.7 percent to 1.4 percent of that population.¹⁹ According the study, 13-year-olds to 17-year-olds accounted for a disproportionately larger share of the transgender population. They were just 7.6 percent of the total U.S. population, but they made up roughly 18 percent of those who identify as transgender.²⁰

Now, taxpayer-funded schools are exacerbating the confusion by embedding gender ideology (and “gender-affirming care”) into children’s minds through school curricula and policies. This government gender policy will potentially affect 50 million students, including those in military schools.²¹

Some schools are using curricula and other materials that promote gender ideology and transgender identities to students. Other schools treat gender identity as part of a narrative of structural oppression that stigmatizes dissent and creates incentives to explore an experiment with non-conforming gender identities.²² Parents are often unaware that gender ideology is being taught to their children. When this information is hidden, it deprives parents of their ability to exercise their right to direct their children’s education. This is a fundamental right that does not end at the schoolhouse gate.

While federalism should prevent the federal government from interfering with the curricular decisions of states, more and more congressional and regulatory actions are imperiling parental rights by pushing gender ideology into public schools. The looming threat of the Equality Act could inject gender ideology into curricula nationwide through a misguided interpretation of the 1964 Civil Rights Act.²³ And the Biden Administration is preparing to issue a rule that would impose gender identity policies on K–12 schools throughout the country. This rule will profoundly affect both students and parents. In June, the Administration issued a Notice of Proposed Rulemaking (NPRM) stating that it would reinterpret prohibitions on “discrimination on the basis of sex” in Title IX of the 1972 Educational

Amendments to include “gender identity.”²⁴ The NPRM incorrectly relies on the U.S. Supreme Court’s decision in *Bostock v. Clayton County*, which applied only to employment, not education.²⁵

Nevertheless, Title IX’s redefinition of sex demolishes the reasonable separation of the sexes in sports, locker rooms, restrooms, and even overnight lodging on school trips, diminishing safety, privacy, and fairness for women and girls. It also endangers children’s mental health and undermines parental rights.²⁶

“Gender Support Plans” in Schools Threaten Parental Rights

The Biden Administration pushes schools to treat a child’s gender confusion through “social transition” to a different gender.²⁷ This involves school officials creating a gender support plan (GSP) for the student and helping the child to select names, pronouns, and clothing that align with the child’s self-perceived gender rather than with his or her biological sex. This social transition also includes requiring all faculty and other children to treat and address students under the GSP according to their declared gender identity. With the encouragement of the Biden Administration, schools are implementing these GSPs without any notice to or consent from an affected child’s parents. The Biden Department of Education’s Fact Sheet “Supporting Transgender Youth in Schools” tells schools to keep a student’s gender identity (including names and pronouns) private, unless disclosure is required by the law.²⁸ Parents who have discovered that their schools are helping to socially transition their children without notifying them or seeking their consent have filed lawsuits in Virginia, Wisconsin, Florida, and California.²⁹

In Kettle Moraine, Wisconsin, for instance, school officials defied the wishes of parents who did not want their 12-year-old gender-confused daughter to be treated as a boy. After the parents removed her from school and she received counseling, her distress subsided, and she once again embraced her biological sex. She concluded that gender affirmation “really messed me up” and fostered anger against her mother.³⁰

Kenneth Zucker, one of the world’s leading experts on gender dysphoria in children, warns that implementing a social transition plan is “a psychosocial treatment that will increase the odds of long-term persistence” of gender dysphoria.³¹ The vast majority of children will eventually “desist” from identifying as the opposite sex if allowed to naturally experience puberty. Therefore, schools that “socially transition” them with new pronouns and names may actively steer them away from reconciling with their sex.

Title IX and “Gender Support Plans”

Despite these dangers, the Biden Administration is pressuring schools to adopt GSPs that could lead to the exclusion and deception of parents who disagree with the gender-affirmation model.³² Excluding parents could increase suicidality rather than reduce it as transgender advocates often claim.³³

The Biden Administration has refused to commit to respecting the authority of parents to determine the best course of treatment for their child’s gender confusion. When asked by Representative Jim Banks (R-IN) if schools could keep a student’s gender transition secret from parents, Education Secretary Miguel Cardona demurred. Instead, he claimed that students may feel safer at school than at home, effectively demonizing parents who rightly believe that watchful waiting is a better approach to dealing with gender confusion. The Education Secretary then called teachers “the front-liners when it comes to supporting our students.”³⁴ President Joe Biden himself echoed a statist view of children at the White House. During an event celebrating teachers, President Biden stated, “They’re not somebody else’s children; they’re like yours when they’re in the classroom.”³⁵

But Title IX’s new definition of “unwelcome sex-based conduct” may cause schools to ignore or override explicit directions from parents to use a child’s given names and biologically accurate pronouns on the basis that it would create a supposed “hostile environment” for the student.³⁶

Such policies undermine the fundamental right of parents to direct the upbringing of their children, and to make decisions about their children’s moral upbringing, education, and health care in a manner consistent with the best evidence from science and medicine, as well as their moral and religious values.

There are some encouraging signs in lawsuits challenging these harmful policies that put children at risk. In *Ricard v. USD 475 Geary Cnty.*, a Kansas federal judge enjoined schools from requiring teachers to deceive parents. The judge wrote, “It is illegitimate to conceal information from parents for the purpose of frustrating their ability to exercise [their] fundamental right” to direct the education and upbringing of their child.³⁷

Usurping Parental Rights in Education Endangers Children

There is no evidence that “gender affirmation” improves a child’s mental health—quite the opposite.³⁸ Therefore, schools that treat parents with suspicion because they do not support social transition act on ideology,

not science. According to Stephen Levine, an expert in gender dysphoria and a Distinguished Life Fellow of the American Psychiatric Association, encouraging a child to “live radically different identities at home and at school, and to conceal what he or she perceives to be his or her true identity from parents, is psychologically unhealthy in itself, and could readily lead to additional psychological problems.”³⁹

Injecting gender ideology into school policy could also detract from examining underlying issues like anxiety, depression, and trauma.⁴⁰ After the Obama Department of Justice investigated a California school district for allegedly violating Title IX with respect to transgender issues, the school adopted a gender identity policy.⁴¹ The school then sought to socially transition female student Yaeli, who had been dealing with depression for years. The girl’s mother, Abigail Martinez, questioned the school’s response and sought help for her daughter’s underlying mental health issues. As a result, the school psychologist recommended that the Department of Child and Family Services (DCFS) remove the 16-year-old from her home.⁴² Although there was no finding of neglect or abuse, she was placed in a foster home. The DCFS did not take steps to address the girl’s underlying mental health challenges. Instead, she was given hormone injections to “affirm” a male gender identity—all without her mother’s consent. After being taken into state custody and starting cross-sex hormones, Yaeli ultimately committed suicide.

Because teens like Yaeli do not yet have the capacity to make rational decisions like adults do, laws have always sought to protect them from the consequences of decisions that they cannot understand, including self-medication or irreversible surgeries.⁴³ And the best protection for children’s minds and bodies is for caring parents to be involved in the decision-making at every step. Supporters of gender ideology seek to carve out an exception to this rule and kick parents out of medical decisions involving children. But schools are no more equipped to treat a student’s mental health than they are a student’s physical health. Parents provide a vital check against schools pushing social and medical transition on children.

Gender Ideology in Federal Health Care Policies

The Biden Administration is also imposing its standard of care for gender confusion through punishment of medical professionals using a non-discrimination prohibition in the Affordable Healthcare Act (Section 1557). Courts have enjoined enforcement of this “transgender mandate” because it would require medical professionals to dispense cross-sex hormones and perform sterilizing surgical procedures even if it violated their

consciences.⁴⁴ However, the mandate hangs like the sword of Damocles over medical professionals who want to avoid causing irreversible harm to children, or who believe it is best to see if a child desists from identifying as transgender as so many others do. In addition, the Biden Administration has announced its plans to defund therapists who believe that watchful waiting and addressing the underlying causes of gender confusion are a better approach.⁴⁵ By punishing doctors and counselors, the federal government is denying parents a choice of health care providers for their children.

In addition, the Biden standard of care is a threat to parents' custodial rights. State officials in Ohio and California have cited parents' disagreement with gender-affirming care as a basis for terminating custody.⁴⁶ The American Academy of Pediatrics' definition of child abuse and neglect includes "failure to follow a physician's instructions once medical advice has been sought."⁴⁷ And some physicians argue that doctors have an "ethical duty" to report parents who do not support "gender-affirming care" to Child Protective Services for neglect.⁴⁸

This threat creates an impossible dilemma for parents by forcing them to choose between going along with the transitioning of their child or losing custody of their child. Both the Biden standard of care and the transgender mandate threaten parents' ability to direct their children's care and custody.

State of the Law on Parental Rights

The U.S. Supreme Court has long recognized that the Constitution protects parental rights, concluding that parents have a "natural duty" and right to direct their child's education.⁴⁹ In *Pierce v. Society of Sisters*, the Court added: "[T]he 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."⁵⁰ And in *Wisconsin v. Yoder*, the Court stated: "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."⁵¹

In *Troxel v. Granville*, the Supreme Court reaffirmed the fundamental right of parents to make "decisions concerning the care, custody, and control" of their children, adding that the Constitution does not permit infringement on parental rights "simply because a state judge believes a 'better' decision could be made."⁵² But the *Troxel* decision failed to clarify that courts should apply the "strict scrutiny" test under which the government must demonstrate that its policies serve interests of the highest order that cannot otherwise be served.⁵³

As a result, lower federal and state courts have not consistently treated parental rights as fundamental. Some have not applied the strictest level of scrutiny to government conduct that infringes on parental rights. Lowering the standard of review unfairly places the burden of proof on parents.⁵⁴

Because of the lack of clarity about the correct standard of legal review, parents have little legal recourse when schools intrude on the legitimate decisions and prerogatives of parents in cases that do not involve abuse or neglect. Parents who want to challenge the Biden Administration's efforts to promote gender ideology in schools and health care will be at a disadvantage in jurisdictions that do not apply the strict scrutiny standard.

What Congress Should Do

Congress has authority to enact federal legislation to protect parental rights from infringement by the federal government. Section 5 of the Fourteenth Amendment gives Congress the "power to enforce, by appropriate legislation, the provisions of this article." As discussed, the U.S. Supreme Court has recognized that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents."⁵⁵ By enacting legislation, Congress would be acting to enforce this constitutional guarantee.

Parental rights differ from the other unenumerated rights that the Supreme Court has identified under the Due Process Clause. Parental rights have a long, well-established history in Western legal thought and tradition. For a right to be protected under the Due Process Clause, as the majority wrote in the 2022 *Dobbs* decision, it must be "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty."⁵⁶

The Supreme Court has long recognized parental rights to be a fundamental right rooted in this nation's tradition and history.⁵⁷ Therefore, Congress should enact legislation that, at a bare minimum:

- **Codifies the fundamental nature of parental rights as "deeply rooted in our nation's history and tradition."**⁵⁸ Doing so would ensure that courts treat parental rights according to the highest standard of legal review: strict scrutiny.⁵⁹
- **Confirms that parents have the right to choose public, private, religious, or home school, as well as the right to make reasonable choices within public schools;** to direct the moral or religious training of the child, including on questions of sexuality and identity;⁶⁰

to access and review all medical records of the child; and to make and consent to all physical and mental health care decisions for the child.

- **Provides parents with a private right of action against the federal government** when their rights are violated.

Members of both the House and Senate have introduced other important bills to protect parental rights in education.⁶¹ Senator Tom Cotton (R-AR) has introduced a bill that would require schools to obtain parental consent before facilitating a child's gender transition and includes a private right of action when schools fail to do so.⁶² There are also parallel efforts in the states.⁶³

In the 117th Congress, Representative Debbie Lesko (R-AZ) introduced the Parental Rights Amendment to the U.S. Constitution.⁶⁴ Passing the Parental Rights Amendment will provide the highest level of protection for parental rights and should be the ultimate goal for Congress. In the meantime, enacting a statute to prohibit the federal government from violating parental rights in education and health care will equip parents to protect their children from federal overreach and radical and destructive ideologies.

Conclusion

Parents have a natural right to direct the moral upbringing, education, and physical and mental health of their children. These rights are deeply rooted in this nation's history and tradition. Congress should confirm that parental rights are fundamental rights in order to ensure that federal government policies never overrule these rights without the most compelling and particularized of reasons under law. The presumption must always be that mothers and fathers know and love their children best.

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Endnotes

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44. News release, "Federal Court Shuts Down Harmful Transgender Mandate," Becket, August 9, 2021, <https://www.becketlaw.org/media/federal-court-shuts-down-harmful-transgender-mandate/> (accessed December 5, 2022). (The U.S. Court of Appeals for the Fifth Circuit blocked the transgender mandate.)
45. See The White House, "Executive Order on Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals," June 15, 2022, <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/06/15/executive-order-on-advancing-equality-for-lesbian-gay-bisexual-transgender-queer-and-intersex-individuals/> (accessed December 5, 2022). See also "Biden's Repackaged Conversion Therapy," *National Review*, June 21, 2022, <https://www.nationalreview.com/2022/06/bidens-repackaged-conversion-therapy/> (accessed December 5, 2022).
46. See D'Ambrosio, "Florida Medical Boards Ban Gender-Affirming Care for Kids," and Florida Agency for Health Care Administration, "Let Kids Be Kids." In Yaeli's case, the school psychologist recommended that Department of Child and Family Services take custody of her so that she could receive testosterone treatments to treat gender dysphoria. See Allen, "This Mom Says Transgender Movement Took Her Daughter's Life."
47. Samuel Dubin et al., "Medically Assisted Gender Affirmation: When Children and Parents Disagree," *Journal of Medical Ethics*, Vol. 26 (2020), p. 298, <https://pubmed.ncbi.nlm.nih.gov/31892617/> (accessed December 5, 2022).
48. *Ibid.*
49. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).
50. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
51. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).
52. *Troxel v. Granville*, 530 U.S. 57, 66 (2000). The court reached the correct result in finding that a mother could determine her child's visitation schedule with grandparents as an exercise of her fundamental parental right.
53. There were six different opinions in the case (none with a majority).

54. In *Fields v. Palmdale*, 127 S.Ct. 725 (2006), the Ninth Circuit Court of Appeals permitted an elementary school to issue surveys about sex and trauma over parents' objections. The court concluded that parents "do not have a fundamental [due process] right generally to direct how a public school teaches their child." Other courts have stated, "It is not educators, but parents who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights." *Gruenke v. Seip*, 225 F.3d 290, 309 (3d Cir.2000). (*Gruenke* recognizes the parental liberty interest of a mother whose daughter was forced by her high school swim team coach to take a pregnancy test after he became suspicious that she was pregnant.)
55. *Troxel v. Granville*.
56. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).
57. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.") *Parham v. J. R.*, 442 U.S. 584, 602 (1979). ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.") *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). (The liberty specially protected by the Due Process Clause includes the right "to direct the education and upbringing of one's children.")
58. *Washington et al. v. Glucksberg et al.*, 521 U.S. 702, (1997).
59. The Parental Rights Amendment would also accomplish this goal. Parental Rights Foundation, "The Parental Rights Amendment," <https://parentalrights.org/amendment/> (accessed December 5, 2022).
60. On the question of parental control of how students should be addressed, The Heritage Foundation recommends model legislation called the Given Name Act, which would prohibit schools from referring to a child by any name other than that on his/her birth certificate and from using pronouns which do not correspond with the child's biological sex, unless the school has obtained written permission from parents or guardians to do so. See The Heritage Foundation, "The Given Name Act," <https://www.heritage.org/the-given-name-act#:~:text=a.%20student's%20parents%20or%20guardians>.
61. Senator Josh Hawley's (R-MO) Parents' Bill of Rights Act would empower parents to sue federally funded schools that do not protect certain basic rights, such as the right to know what their child is being taught and the right to know what outside groups are receiving school contracts. See https://www.hawley.senate.gov/sites/default/files/2021-11/Parents%20Bill%20of%20Rights%20-%20FILED_0.pdf (accessed December 5, 2022). Representative Julia Letlow (R-LA) and House Minority Leader Kevin McCarthy (R-CA) have also introduced a Parents' Bill of Rights that ensures transparency by protecting the right of parents to know which curricula are being taught, to protect their children's data, to be informed about mental health screenings, and to meet with school officials. See "Parents [sic] Bill of Rights Act," <https://republicanleader.house.gov/wp-content/uploads/2021/11/Parents-Bill-of-Rights.pdf> (accessed December 5, 2022).
62. S. 3037, Empower Parents to Protect Their Kids Act of 2021. Senator Cotton and Representative Banks have also introduced S. 4457, the Protecting Minors from Medical Malpractice Act, to allow individuals who suffer potentially sterilizing gender-transition procedures as minors to seek justice in court. Congress.gov, "S. 4457-Protecting Minors from Medical Malpractice Act of 2022," <https://www.congress.gov/bill/117th-congress/senate-bill/4457?s=1&r=4> (accessed December 5, 2022).
63. Arizona, Florida, and Oklahoma have passed laws that protect parental rights in education, including requiring schools to notify parents of their children's mental health issues, including gender confusion. These bills prohibit schools from treating a student's physical or mental health, including through social transition, without parents' notice and consent.
64. News release, "Lesko Introduces Constitutional Amendment to Protect Parental Rights," Debbie Lesko, October 18, 2022, <https://lesko.house.gov/news/documentsingle.aspx?DocumentID=2757> (accessed December 5, 2022). See also Parental Rights Foundation, "The Parental Rights Amendment."