

## Testing the Boundaries of Parental Authority Over Education: The Case of Homeschooling

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When political theorists write about the boundaries of parental and state authority over education, they often write about two United States court cases -- the Supreme Court's 1972 decision in *Wisconsin v. Yoder* and the Sixth Circuit Court's 1987 decision in *Mozert v. Hawkins County Board of Education*.<sup>1</sup> Such a staple of discussion are these two cases that it seems scarcely a book or an article on the topic of liberalism and civic education in the past decade has failed to address at least one of the cases in some detail.<sup>2</sup>

The unusual focus on these two cases is understandable, for they help to illustrate a number of central tensions in liberal theory generally, and a number of tensions in the demands of liberal civic education more specifically. The *Yoder* case, in which Amish

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### NOTES

<sup>1</sup> *Wisconsin v. Yoder* (1972), 406 U.S. 205; *Mozert v. Hawkins County Board of Education* (1987), 827 F. 2<sup>nd</sup> 1058.

<sup>2</sup> For some of the more prominent examples, see Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Cambridge, MA: Harvard University Press, 2000); Meira Levinson, *The Demands of Liberal Education* (Oxford: Oxford University Press, 1999); Walter Feinberg, *Common Schools, Uncommon Identities* (New Haven, Yale University Press, 1998); Eamonn Callan, *Creating Citizens* (Oxford: Clarendon Press, 1997); Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995); Jeff Spinner, *The Boundaries of Liberal Citizenship* (Baltimore: The Johns Hopkins University Press, 1994); Nomi Stolzenberg, "He Drew A Circle That Shut Me Out': Assimilation, Indoctrination and the Paradox of Liberal Education," *Harvard Law Review* Vol. 106 (1993): 581-667; Amy Gutmann, "Civic Education and Social Diversity," *Ethics* 105 (1995): 557-79; William Galston, "Two Concepts of Liberalism," *Ethics* 105 (1995): 516-534; Shelley Burtt, In Defense of *Yoder*: Parental Authority and the Public Schools," in *NOMOS XXXVIII: Political Order*, eds. Ian Shapiro and Russell Hardin (New York: New York University Press, 1996): 412-437; Richard Arneson and Ian Shapiro, "Democratic Autonomy and Religious Freedom: A Critique of *Wisconsin v. Yoder*," in *NOMOS XXXVIII: Political Order*, eds. Ian Shapiro and Russell Hardin (New York: New York University Press, 1996): 365-411; and John Tomasi, "Civic Education and Ethical Subsistence: From *Mozert* to *Santa Fe* and Beyond," *Political and Moral Education: NOMOS XLII*, Macedo and Tamir, eds. (New York: NYU Press, 2002).

parents were granted an exemption from compulsory attendance laws, raises a number of difficult questions about the scope of religious liberty, about the significance of claims that a cultural group's very existence may be threatened by state regulations, and about how much schooling is necessary to develop the bare essentials of citizenship. The *Mozert* case, in which Christian Fundamentalist parents were not granted an exemption from state regulations requiring public school children to read from textbooks exposing them to a diversity of value orientations, raises questions about how the clash between religious conviction and secular authority should be resolved within public schools, about whether exposure to value diversity constitutes an indoctrination in secular humanism, and about the limits of state authority in prescribing curricular materials for students. Both cases highlight questions about whether parents possess actual *rights* to direct the upbringing of their children and about how a liberal state should strike the proper balance among parents' interests, state's interests, and children's interests in education. These assorted questions are obviously of deep importance and warrant repeated analysis and scrutiny.

But the unusual attention devoted to these cases is in my opinion excessive. In my view, the gallons of ink spilled on *Yoder* and *Mozert* actually serve to sidetrack discussion of these more general questions to the extent that the best legal or moral resolution of neither case hinges on a widely applicable criterion of the limits of parental authority in education. Liberals, for example, may agree with conservatives that *Yoder* was correctly decided while disagreeing sharply about the appropriate scope of parental authority. Similarly, rival perspectives on *Mozert* depend crucially on how we interpret the educational demands of the plaintiffs.<sup>3</sup> If theorists really want a test case that compels us to focus on the limits of parental authority over the education of their children, and to consider the proper balance of parents', state's, and children's interests in education, we should stop fixating on *Yoder* and *Mozert*. We should instead be looking at a burgeoning and,

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<sup>3</sup> Feinberg and Galston agree about *Yoder*, for example, but differ greatly on the appropriate scope of parental authority. Callan and Tomasi reach different conclusions about *Mozert* on the basis of very different interpretations of the plaintiff's demands.

compared to the number of Amish defectors or Christian Fundamentalists challenging public school curricula, far more prevalent educational phenomenon: homeschooling.

Homeschooling is the education of children under the supervision of their parents within the home, apart from any campus-based school. As such, homeschooling represents the paradigmatic example of the realization of complete parental authority over the educational environment of their children. In no other setting are parents as able to direct in all aspects the education of their children, for in homeschools they are responsible not only for determining what their children shall learn, but when, how and with whom they shall learn. If it is permissible for parents to homeschool their children, then we will have gone a long way toward identifying the wide scope of parental authority over the education of their children, or put conversely, toward severely limiting the role of the state in educational supervision.

While *Yoder* and *Mozert* do raise questions about the extent of parental authority, it is homeschooling that throws these questions into sharpest relief. At bottom, *Yoder* asks whether parents of a self-segregated religious order may exempt their children from compulsory attendance laws *after eight years of regular school attendance*.<sup>4</sup> The Amish exemption applies only to the final two years of required attendance. At bottom, *Mozert* asks whether state authorities have the power to require students *in public schools* to read from specified texts that might expose a child to values other than or in opposition to those held by the child's parents. The *Mozert* parents were always free to withdraw their children from public schools and send them to a religious school in which the curriculum adhered more closely to their own beliefs.<sup>5</sup> Homeschooling raises the stakes over parental authority

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<sup>4</sup> The importance of the limited exemption in the Court's ruling was reflected in Justice White's concurring opinion: "This would be a very different case for me if respondents' claim were that their religion forbade their children from attending any school at any time and from complying in any way with the educational standards set by the State" (406 U.S. 205 at 238).

<sup>5</sup> Indeed, one of the reasons to be concerned about the actual outcome of *Mozert* is that, from a strictly practical standpoint, the likely result of the decision is to hasten the exit of Christian Fundamentalists in Tennessee from public schools into private schools or homeschools. If exposure to value diversity is an important element of the civic education required in public schools, the long term consequence of *Mozert* is almost certain to result in the children of fundamentalist believers receiving less exposure. On this reasoning, it might have been better to permit the exemption the *Mozert* parents requested on the grounds

considerably: should parents have the authority to educate their children of any and all ages apart from any formal, institutional setting, public or private, where in current practice the regulations are minimal, often unenforced, and sometimes non-existent? Homeschooling thus illustrates in its purest form the instantiation of parental authority over the education of their children, and therefore provides the ideal test case of the boundaries of this authority.

In this chapter, I take up the question of homeschooling. In the first section, I look at the recent history of homeschooling in the United States, showing that beyond its interest in purely theoretical terms, the actual practice of homeschooling also provides powerful reasons to focus attention on it. In section two, I canvas a trilogy of interests in education -- the parents', the state's, and the child's -- as a prelude to considering the justifiability of homeschooling. While each party shares an interest in educating a child to become an adult who is capable of independent functioning, the state has an independent interest in educating for citizenship, and the child has an independent interest in education for autonomy, neither of which is necessarily shared by parents. On the basis of these three interests and a consideration of what to do when interests clash, I argue in section three that at a bare minimum one function of any school environment must be to expose children to and engage students with values and beliefs other than those of their parents. Because homeschooling is structurally and in practice the least likely to meet this end, I argue that while the state should not ban homeschooling it must nevertheless regulate its practice with vigilance. I conclude by briefly offering a few suggestions about the best means at the state's disposal to exercise regulatory authority and by considering some problems with regulation.

## **I. The History and Current Practice of Homeschooling**

Schooling in the home is the oldest form of education. Traditionally, and across cultures, children have been taught at home by their parents or, sometimes, by tutors. This was also true in the United States in the late 1700s and early 1800s. But with the advent of

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that at least their children would receive the benefits of the public school environment for the remainder of the school day.

publicly-funded common schools in the mid-nineteenth century and the widespread passage of compulsory education laws in the early twentieth century, homeschooling practically disappeared.<sup>6</sup> In the early 1970s, the number of children schooled at home was estimated to be around 10,000, and in 1983 around 60,000.<sup>7</sup> Parents who schooled their children at home were often prosecuted under compulsory attendance laws, and several states explicitly forbade homeschooling. Only since 1993 has homeschooling been legal in all fifty states.

During the 1990s, however, homeschooling exploded in popularity. Because many states do not collect data on homeschooling, and because parents sometimes resist the monitoring efforts of the state, accurate data do not exist.<sup>8</sup> But even conservative estimates of homeschooling pin the current number of students at 350,000 in 1990, 750,000 in 1996, and 1.9 million in 1999.<sup>9</sup> Growth has been exponential and, according to recent news reports, has accelerated due to fears of school safety following the shooting deaths of students at Columbine High School in April 1999.<sup>10</sup> Homeschooling is no longer a fringe phenomenon in American education.

To put these figures in perspective, it is helpful to compare the number of homeschooled students to the population of students enrolled in regular schools, public, private, or religious. If we take the conservative estimate of 1.3 million homeschooled students, we find that this figure is greater than the combined number of students enrolled in

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<sup>6</sup> For a history of the rise of common schools and the spread of compulsory attendance laws, see David Tyack, *The One Best System: A History of American Urban Education* (Cambridge: Harvard University Press, 1974).

<sup>7</sup> See Patricia Lines, "Homeschoolers: Estimating Numbers and Growth," U.S. Department of Education, Office of Educational Research and Improvement, 1998, 1; J. Gary Knowles, Stacey E. Marlow, James Muchmore, "From Pedagogy to Ideology: Origins and Phases of Home Education in the United States, 1970-1990," *The American Journal of Education*, February 1992, 196.

<sup>8</sup> Lines notes that "Many families do not file papers, although it is required. . . . Some families are homeschooling under a state constitutional or statutory provision that excuses religious-based homeschoolers from filing requirements" (Lines 1998, 2).

<sup>9</sup> Lines, who offers the most conservative estimate, uses current rates of growth to suggest a number of 1,000,000 in 1997. A cover story in *Newsweek* in 1998 claimed that up to 1.5 million children were being homeschooled. And the National Home Education Research Institute, an advocacy group, offers a high estimate of 1.9 million children in 2000.

<sup>10</sup> Mindy Sink, "Shootings Intensify Interest in Home Schooling," *The New York Times*, August 11, 1999, B7; Lynn Schnaiberg, "Home Schooling Queries Spike After Shootings," *Education Week*, June 9, 1999, 3.

schools in Wyoming, Alaska, Delaware, North Dakota, Vermont, South Dakota, Montana, Rhode Island, New Hampshire, and Hawaii, the bottom ten states in school enrollment.<sup>11</sup> The 1.3 million figure is almost double the number of students enrolled in conservative Christian schools, 737,000 in 1998.<sup>12</sup> As if to symbolize the mainstream acceptance of homeschooling, the U.S. news magazine *Newsweek* devoted a cover story to the topic in 1998, giving explicit instructions to parents on how to begin homeschooling, and the United States Senate passed a resolution declaring September 19, 1999 "National Home Education Week."<sup>13</sup> When we consider the relative popularity of homeschooling, compared to the numbers of Amish children or Christian Fundamentalists, it seems all the more important for political theorists and educational policymakers to devote serious attention to the phenomenon.

Why do parents homeschool, who is choosing to homeschool, and what explains the rapid growth of the past decade? The scattered studies of homeschooling reveal a host of parental motivations to remove their children from school in order to teach them at home, ranging from a desire for pedagogical innovation, a rejection of the secular ethos of public schools, a belief that the special needs of some physically or mentally handicapped children are better served at home, to a fear for the safety of children in schools. But researchers tend to agree that, as one historical survey concluded, whereas homeschools of the 1970s "reflected a liberal, humanistic, pedagogical orientation," the vast majority of homeschools in the 1980s and 1990s "became grounds of and for ideological, conservative, religious

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<sup>11</sup> *Digest of Educational Statistics, 1998*, U.S. Department of Education, National Center for Educational Statistics (1999), 24.

<sup>12</sup> "Private School Survey, 1997-98," U.S. Department of Education, National Center for Educational Statistics (1999), 12. The categorization "conservative Christian" is not mine, but the Department of Education's.

<sup>13</sup> Barbara Kantrowitz and Pat Wingert, "Learning at Home: Does It Pass the Test?" *Newsweek*, October 5, 1998: 64-70; United States Senate Resolution 183, 106<sup>th</sup> United States Congress (1999). Echoing contested language first found in the *Pierce v. Society of Sisters* case (1925), the Senate declared in the resolution that the "United States recognizes the fundamental right of parents to direct the education and upbringing of their children."

expressions of educational matters.”<sup>14</sup> Today, it appears that the reason most, but not all, parents choose to educate their children at home is because they believe that their children’s moral and spiritual needs will not be met in campus-based schools. Like the Yoder and Mozert parents, most homeschooling parents have religious objections to placing their children in a public, or even a private, school environment.<sup>15</sup>

Two factors are primarily responsible for fuelling the expansion of homeschooling. First, the *Yoder* decision inspired many homeschool advocates to press their claims in state legislatures and courts, a strategy that has yielded significant victories.<sup>16</sup> Homeschooling is now legal in all fifty states and at least thirty-seven states have explicit homeschooling statutes. Second, over the past few years the internet has provided the means to create homeschooling networks, distribute curricular materials, and offer legal advice.<sup>17</sup> Moreover, with its growing popularity has come mainstream acceptability; this in turn has made homeschooling yet more popular.

Though homeschooling is legal everywhere, states still possess the authority to regulate its practice. Even in *Yoder*, the case granting parents the widest exemption from state regulations, the Court went to great lengths to indicate the singularity of the case, emphasizing that “Nothing we hold is intended to undermine the general applicability of the state’s compulsory school-attendance statutes or to limit the power of the state to promulgate reasonable standards. . . .”<sup>18</sup> But how states exercise their regulatory authority

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<sup>14</sup> James C. Carper, “Pluralism to Establishment to Dissent: The Religious and Educational Context of Home Schooling,” *Peabody Journal of Education* Vol. 75, Nos. 1&2, 16. See also Knowles, Marlowe, and Muchmore, “From Pedagogy to Ideology,” 227.

<sup>15</sup> See, for example, Cheryl Lange and Kristin Kline Liu, “Homeschooling: Parents’ Reasons for Transfer and the Implications for Educational Policy,” Research Report No. 29, University of Minnesota, College of Education and Human Development, 1999. For the most extensive survey on homeschooling parents, see Lawrence Rudner, “Scholastic Achievement and Demographic Characteristics of Home School Students in 1998,” *Educational Policy Analysis Archives*, Vol. 7, No. 8, 1999.

<sup>16</sup> Knowles, Marlowe, and Muchmore, “From Pedagogy to Ideology,” pp. 211-2; see also James Tobak and Perry Zirkel, “Home Instruction: An Analysis of the Statutes and Case Law,” *University of Dayton Law Review*, Vol. 8, No. 1, 1982: 1-60.

<sup>17</sup> See, for example, Dana Hull, “Home Schooling’s High-Tech Wave,” *San Jose Mercury News*, October 24, 1999, A1.

<sup>18</sup> *Wisconsin v. Yoder* (1972), 406 U.S. 205 at 236. The Court also stated, “There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.”

varies widely. Some states require homeschooling parents to register with their local school districts, others establish minimal academic qualifications for parents who will offer instruction, and still others mandate that parents submit portfolios of student work to school district administrators or that children take and score at acceptable levels on standardized tests. In many or even most states, however, it appears that regulations go utterly unenforced. In California for example, a state without any statute explicitly permitting homeschooling and whose laws make it among the most difficult places to school at home, parents must either qualify their homeschool as a private school, offer instruction by a certified private tutor, enroll in an independent study program at home using the public school curriculum, or enroll in a private school satellite program and take independent home study. Yet, according to a recent news report, "[M]ost families do not report to the state at all, and many school districts turn a blind eye toward prosecuting parents for violating the compulsory public school attendance law."<sup>19</sup> At a more general level, James Dwyer argued recently that despite possessing the authority, "states and the federal government have effectively relinquished all authority to oversee private schooling. . . . [I]n contrast to the extensive regulatory scheme governing public schools in most states, there are virtually no constraints today on what religious schools teach or how they treat their students."<sup>20</sup> What Dwyer says of private and religious schooling applies with even greater force to homeschooling.

Even in states where regulations are enforced, the rules are often so minimal or full of loopholes that homeschools can be established and maintained with great ease and with barely any state monitoring. According to the Home School Legal Defense Association, forty-one states do not require homeschool parents to meet any specific qualifications and

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<sup>19</sup> Hull, "Home Schooling's High-Tech Wave," A20. For another example of non-enforcement, see Jeff Archer, "Woman in Maryland Home-School Case Acquitted," *Education Week*, October 30, 1996.

<sup>20</sup> James Dwyer, *Religious Schools v. Children's Rights* (Ithaca, NY: Cornell University Press, 1998), 2; see also p. 10.

only twenty-five states insist on standardized testing and evaluation.<sup>21</sup> In Virginia, for example, parents who intend to homeschool need only notify the local school superintendent, possess a baccalaureate degree, and submit a brief description of the curriculum they will use. And if the parents have sincere religious objections to these requirements, they are entitled to an exemption. In other words, parents with sincere religious beliefs in Virginia may legally remove their children from school and teach them at home without any state requirements or oversight of their homeschool whatsoever.<sup>22</sup> Similar religious exemptions exist in other states.

For both theoretical and practical reasons, then, homeschooling is an ideal test case for political theorists arguing about the boundaries of parental and state authority over children's education. From a strictly theoretical point of view, the very structure of homeschooling raises questions about whether the interests of the state in education can be met in a setting where parents control both the academic program and social interactions of children and can, if they so desire, effectively shield children from exposure to anything that offends the values and beliefs of the parents. From a strictly practical point of view, the actual practice of homeschooling reveals first that it is a widespread and growing phenomenon; second, that state regulations for establishing homeschools are often minimal and, even when in place, often go unenforced; and third, that the majority of parents who choose to homeschool have conservative religious motivations, similar to the sort of parent in a case like *Yoder* or *Mozert*.

## **II. A Trilogy of Interests: parents, the state, and the child**

As it currently stands in the United States, nearly two million children are homeschooled by their parents, learning in an educational environment that is more often

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<sup>21</sup> Christopher Klicka, *Homeschooling in the United States: A Legal Analysis* (Purcellville, VA: Home School Legal Defense Association, 1999). A note of caution: because the HSLDA is an advocacy group, the legal analysis likely interprets state laws in the light most favorable to homeschoolers.

<sup>22</sup> *Ibid.*, p. v, pp. 105-106. See the Virginia Home School Statute, 22.1-254.1 [NEED TO FIND PROPER CITATION FORMAT FOR STATE STATUTES]

than not wholly or nearly unregulated by any state or federal authority. These children receive an education in which their parents have exclusive or nearly exclusive control and authority. From the perspective of the liberal state, is this a problem? What are the boundaries of parental and state authority in educational provision?

To answer these questions, it is necessary to indicate who has an interest in education and to spell out what these interests are. And the first comment to be made here is that it is not only interests of parents and the state at stake. Children, who are themselves subject to the education, and therefore are the party most directly affected by educational decisionmaking, also have an interest, one that may conflict with those of their parents or the state. To decide what the boundaries of parental and state authority in educational provision may be, therefore, we must consider the interests of the parents, the state, and the child.

Let me emphasize that it is beyond the scope of this chapter to defend a full-blown theory of parents', state's, and children's interests in education or to provide a complete account of the nature of parental authority over children generally. I aim more specifically to consider, given a general understanding of the interests at stake, the limits of parental control over educational provision. Thus, I limit myself here to sketching a general view of what these interests are and then asking the question, can the interests of the state and children be met when, as in the case of homeschooling, parents have near complete control over the provision of education?

### *Parents' Interests in Education*

Parents obviously have very strong interests in the education of their children.<sup>23</sup> In the abstract, these interests are twofold, grounded in the *self-regarding* interests of the parents themselves and grounded in the *other-regarding* claim that since children are dependent for their well-being on others, parents are best situated to promote their welfare. Let us consider each in turn.

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<sup>23</sup> By using the term “parents”, I do not mean to privilege biological parents over other kinds of parents. A more general, and for my purposes synonymous term, would be “guardians.”

Children are not mere extensions of their parents, they are not their parents' property. But we can acknowledge this truth while also giving due to the self-regarding interests of parents, or what Eamonn Callan calls the "expressive significance" of child-rearing. Parenting is for many people a central source of meaning in their lives. As Callan puts it, "Success or failure in the task [of parenting], as measured by whatever standards we take to be relevant, is likely to affect profoundly our overall sense of how well or badly our lives have gone."<sup>24</sup> Raising a child is never merely a service rendered unto another person, but the collective sharing of a life. If we think in commonsensical terms that adults often have children in order to fulfill their goal to have a family, and to live life as part of a family, the sense in which child-rearing is something in the self-regarding interest of parents becomes clearer.

Of course, the parental interest in exerting authority over the educational provision of their children is also grounded in the interest of the children themselves. Children are dependent beings, not yet capable of meeting their own needs or acting in their own interest. Parents, it is generally believed, are best situated (better situated than the state and the children themselves) to act in the best interests of their children, or, in an alternate formulation, to promote their general welfare. In modern society, the welfare of a child depends in part on being educated. Therefore, as the guardian of their children's best interests or welfare, parents have an interest in the education that their children receive.

There is a problem with the "best interests" or "general welfare" standard, however. Despite the fact that the "best interest of the child" is the coin of the realm in legal decisionmaking about children -- judges routinely make rulings on the basis of the best interests of the child -- it is not of logical necessity that a child's *parents* are the agents who will act on these best interests. Others -- grandparents, aunts and uncles, or state officials -- might be better able to promote the welfare of the child. And of course, when parents are clearly negligent or harmful to their children, whether intentionally or not, the state

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<sup>24</sup> Eamonn Callan, *Creating Citizens* (Oxford: Clarendon Press, 1997), 142. Callan's point in the book, however, is not to make parent-centered claims about education.

intervenes and awards guardianship to a relative or foster care family or, in the most dire situation, to the state itself (at a state orphanage, for example). Who is to say, then, that parents are best suited to pursue the best interests of children?

The best answer to this question is to consider the possible alternatives, all of which appear to be worse.<sup>25</sup> The more telling problem with the “best interests of the child standard” is that the best interests of a child do not admit of an objective answer. How does one define “best interests”? The answer depends very much, it seems, on a particular view of the good life. Secular parents (or state authorities), for example, may define the best interests of a child in a very different manner than deeply religious parents. This fact obviously cuts to the heart of the conflict in the *Yoder* and *Mozert* cases. But we need not view this only as an issue of religious difference to see it as a problem. People may differ drastically on their interpretation of best interests in purely philosophical terms. Given plural conceptions of the good life, there will be no readily identifiable consensus about the best interests of the child in all cases.

In light of this fact, one response is to suggest that parents are ideally situated not to realize the best interests of their children, for that is an inevitably contestable standard, but rather to meet the basic developmental needs of their children, the content of which appears to admit of a more objective answer. The basic developmental needs of the child include shelter, food, protection, and, not least, nurture, affection, and love. These the parents surely are in the best position to provide, at least when compared to the state and the children themselves. The difficulty for parents, however, is that when the needs of children are reduced to such an elementary and unobjectionable level, they do not yield any corresponding interest in control over educational provision. Whereas the “best interest” standard clearly implicates some parental interest in having a say in or perhaps even directing the educational environment of children, the lesser “basic developmental need”

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<sup>25</sup> There are some plausible alternatives, of course, most famously the communal child-rearing described in Plato’s *Republic* or, more recently, the communal parenting on kibbutzim. But such possibilities are highly unlikely ever to be implemented on a wide scale in modern society.

standard has no such implication. Shelter, food, protection, and love are responsibilities of a child's primary care-giver; not, or at least not to a large degree, of a child's teacher. An interesting dynamic emerges. The greater substance one packs into the notion of a child's needs and interests, the greater claim one has to influence the education of the child but the less likely that there will be objective agreement about what these needs and interests are. Conversely, the less substance one packs into the notion of a child's needs and interests, the more likely one will be able to secure objective agreement about them, but only at the cost of failing to justify an interest in educational provision.<sup>26</sup>

Despite these difficulties, it remains clear that parents have substantial interests in the education of their children. To acknowledge that the best interests standard is contestable is of course not to obviate parental interests. Even when there is violent disagreement about what constitutes the best interests of the child, the very fact of disagreement does not void the parental interest. To the contrary, we can conclude one of two things. Either the best interest standard should not be used when making decisions about educational authority, in which case the parents' claims must rest heavily on the weight of their expressive, self-regarding interests.<sup>27</sup> Or, to the extent that the best interest standard is employed, we cannot interpret "best interests" only from the perspective of the parents. When conflicts about the education of children arise, parents cannot wield a trump card based solely on their own understanding of their child's best interests. Thus, even before we have considered the state's interests and the child's interests, we can conclude that while parents clearly have substantial interests in the education of their children, it appears

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<sup>26</sup> In a defense of the decision in *Yoder*, Shelley Burt has argued that parental authority over their children's education can be justified not in the religious free exercise claims of the parents, nor in the satisfaction of parental conceptions of the good life. Instead, Burt argues that parents are best situated to meet the "developmental needs" of their children. Burt defines "developmental needs" as including emotional, physical, and cognitive needs, as well as moral, spiritual, and cultural needs. With the addition of these latter three, however, Burt sets a standard that is contestable, which in turn undermines, on my view, her claim that parents are entitled to state deference in determining the educational environment of their children (Burt, "In Defense of *Yoder*").

<sup>27</sup> This approach is taken, for example, by Jon Elster in *Solomonic Judgments: Studies in the Limitations of Rationality* (Cambridge: Cambridge University Press, 1989), 134ff.

highly unlikely that they will be so weighty as to justify a claim that parents should command complete authority over the education of their children.

### *State's Interests in Education*

Like parents, the state also has very strong interests in the education of children. And also like parents, these interests are twofold. First, the state has an interest in providing children a civic education such that they are familiar with and able to participate in the political structures of society. Second, the state has an interest in performing a backstop role to the parents in assuring that children receive a basic education sufficient to allow them to become adults capable of independent functioning. Both of these interests serve to justify some role for the state in exercising educational authority over its youngest citizens.

The civic interest of the state in providing and regulating education for children is familiar, and in American legal doctrine, well-established. Even in the *Yoder* case, for example, the Court acknowledged that the state possesses a fundamental interest in educating for citizenship: “There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. Providing public schools ranks at the very apex of the function of a State.”<sup>28</sup> In its landmark *Brown v. Board of Education* decision the Court opined “Today, education is perhaps the most important function of state and local governments.”<sup>29</sup>

While the state may possess an interest in education for citizenship, the scope of civic education is a matter of intense debate. In recent years, political theorists have interpreted the demands of civic education in very different ways. On the more demanding end of the spectrum, some argue that the state must teach children not only basic literacy but knowledge of public policy issues, the conclusions of contemporary science, a foundation in

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<sup>28</sup> *Wisconsin v. Yoder*, 406 U.S. 205 at 213.

<sup>29</sup> *Brown v. Board of Education* (1954) 347 U.S. 483 at XXX.

world and national history, the structure and operation of federal, state, and local government, and a broad palette of critical thinking and empathy skills necessary to facilitate democratic deliberation amidst a multiplicity of competing interests and among diverse races, religions, and worldviews.<sup>30</sup> Others indicate that the state's civic interest in education lies more generally in assuring that children will have the opportunity and capacity to participate in public institutions and will come to possess a number of political virtues, such as tolerance, civility, and a sense of fairness.<sup>31</sup> And on the less demanding side of the spectrum, some argue that civic requirements are more minimal, encompassing the teaching of tolerance and, as one theorist puts it, "social rationality."<sup>32</sup>

My point here, however, is not to argue exactly how wide or narrow the scope of civic education should be. Like the best interests of the child standard, the demands of civic education are contestable. And to be sure, the degree of state authority over education may vary with respect to how broad these demands are. I cannot settle the debate here. My point is simply *that* the state has legitimate interests in educational authority based on providing children with the capacities to become able citizens.

Beyond providing an education for citizenship, the state also has an interest in education because it must perform a backstop role to parents in ensuring that children receive some basic minimum of schooling such that they can develop into adults who are capable of independent functioning. By "independent functioning" I do not mean to imply anything about individualism or detachment from parental or communal relationships. I mean it in the innocuous sense that, because parents will die and no longer be able to provide for and support them, except in exceptional circumstances all children need to grow into adults who possess a baseline set of social, emotional, and intellectual competencies that enable them to navigate and participate in the familiar social and economic institutions of

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<sup>30</sup> See, for example, Arneson and Shapiro, "Democratic Autonomy and Religious Freedom," 376ff.

<sup>31</sup> See, for example, John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 194-200; Stephen Macedo, *Liberal Virtues* (Oxford: Clarendon Press, 1990); and Macedo, "Liberal Civic Education," pp. 486ff.

<sup>32</sup> Galston, "Two Concepts of Liberalism," 525, 528.

society. I have in mind here things like the need to acquire reading skills and basic mathematical literacy so that as an adult they can do things as mundane as read street signs and as important as fill out a job application. In modern society, educational attainment and academic achievement have become increasingly important to independent functioning. We would rightly consider a child unfairly deprived if he or she were denied the opportunity to be educated. While compulsory attendance laws arose in part to ensure that children received a civic education and to complement child labor restrictions, it is no exaggeration to claim that today educational attainment is essential simply to becoming an independent adult who is able to find a place in the workforce.<sup>33</sup> These educational outcomes, it should be emphasized, are different from the exercise of citizenship, having to do not with the capacity for participation in political arenas and mechanisms but with the capacity to lead a life amidst the main social and economic institutions of society.

Now while educational attainment may be necessary to acquiring the competencies conducive to independent functioning as an adult, we cannot conclude from this fact that the state must control and regulate all educational provision. On the contrary, since parents almost always share this interest in educational attainment and also wish for their children to develop into independent adults in the sense indicated above, and since parents are better situated than the state to know their children's particular learning needs and capacities, the state properly exercises authority over the aspects of education necessary to becoming an independent adult in a backstop role. Pursuant to this task, the state provides and regulates publicly-funded schools for those parents who wish to send their children to them. It also legislates that children shall attend schools until a specified age. But since the education necessary for developing into independent adulthood can be satisfied by a wide variety of curricula, pedagogies, and environments -- any number of educational arrangements could lead to the desired outcome -- parents should have on this matter wide discretion to choose

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<sup>33</sup> Evidence of the importance of educational attainment can be seen in the booming rates of high school attendance and graduation in only the past fifty years. In 1960, 41% of adults possessed a high school degree; in 1998, 82% did (*Statistical Abstract of the United States 1998* (Washington, D.C.: U.S. Census Bureau, 1998).

or influence the form and content of the education which they believe best suits their children. When parents impede the development of these baseline competencies, through intentional or unintentional abuse or neglect, then the state should intervene.

The state thus possesses two distinct interests in the education of children: first, that children receive a civic education; and second, that children develop into adults capable of independent functioning. On this analysis, the parents and the state share the second interest but not necessarily the first. State interests most often clash with parents' interests where civic education is concerned.<sup>34</sup> Parents and the state may clash, for example, on their respective interpretation of what civic education requires, or in some cases parents may reject aspects of civic education altogether. As the *Yoder* and *Mozert* cases show, conflicts between parents and the state with respect to how children should be educated to become citizens are by no means uncommon.

Such conflicts lead to a set of very difficult questions. Should the state's interest in developing citizenship trump parents' interests in education when parents do not share the state's civic goals for their children? Can the state sometimes tolerate, if the stability of the state is not threatened, parents who will not provide an education that develops requisite citizenship capacities? Must children attend public schools in order for civic education to be most effective? What are the empirical findings on effective civic education?<sup>35</sup> At the very least, the clashing of parents' interests and state's interests leads to questions about how such interests might best be balanced, how such usually overlapping but occasionally

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<sup>34</sup> It is tempting to think that when clashes occur between parents and the state with respect to ensuring the development of children into independent adults, it is because the state is acting in its backstop role, intervening in the face of negligent or abusive parents. But the reverse is far more likely. Parents often allege that the state is negligent or abusive in providing schools of such low quality that their children are effectively disabled from acquiring the necessary competencies to becoming an independent adult in society. It is not only the state that seeks to hold parents responsible for helping to develop their children into healthy adults; parents also seek to hold the state responsible for providing good schools in the service of the same goal.

<sup>35</sup> On this latter question, the available empirical evidence seems to indicate that Catholic schools, for example, can be very successful, perhaps more successful than public schools, in developing citizenship. See Anthony Bryk, *Catholic Schools and the Common Good* (Cambridge, MA: Harvard University Press, 1993).

competing interests may yield a just distribution of educational authority. But to seek an answer is as yet premature; we have yet to consider the independent interests of children.

### *Child's Interests in Education*

I consider this much to be uncontroversial: both parents and the state have clear interests in education that lead to legitimate claims to exert authority over educational provision. Typically, American social and legal institutions consider these to be the only interests at stake.<sup>36</sup> But as the subjects of the educational process, children have independent interests in education as well. As with parents and the state, I shall claim that these interests are twofold. First, children have an interest in developing adults capable of independent functioning, in the sense indicated above. Second, children have an interest in becoming autonomous, at least to a minimal degree.

Two prefatory comments. First, though the content of these interests may overlap with those of either the parents or the state, they are nevertheless *independent* interests. In certain circumstances, these independent interests may place them in conflict with their parents or with the state. Children's interests in education potentially conflict with their parents' interests when, for example, parents seek through the educational environment (and elsewhere) to satisfy an expressive interest in molding their children into certain persons without regard to the will of the children themselves. Think for example of the parent who wishes to make a martyr of his or her child; or in a less extreme example, of the parent who forces a child to quit, against his or her will, all forms of educational activity except those which forward the parent's expressive interest in raising, say, a virtuoso pianist. Children's interests in education may conflict with the state's interests in cases, for example, like *Tinker v. Des Moines Independent Community School District*, where the right of students to express themselves politically in schools clashed with the power of the state to control the

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<sup>36</sup> As many commentators have noted, United States courts have rarely recognized independent interests, much less rights, of children. (See, among others, Hillary Rodham, "Children Under the Law," *Harvard Educational Review*, Vol. 43, No. 4, 1973: 1-28.)

educational environment of the school.<sup>37</sup> Because of the possibility of conflict, it is important to identify children's interests as distinct and not subsume them under those of their parents or of the state.

Second, the fact that children are needy and dependent justifies a certain amount of parental and state paternalism with respect to educational provision, and also often necessitates that persons other than the child be able to represent his or her interests. Acknowledging the fact that children have independent interests in education does not mean that children are best suited to supervise the promotion of these interests; nor does it mean that they are able, especially at young ages, even to articulate them. But the problem of children's neediness and dependence, and the problem of who shall represent children's interests, does not invalidate the interests. It merely points to the need for debate about when paternalism over children is no longer justified and when, developmentally, children might capably represent themselves, especially in cases where interests conflict.

Turning then to delineating the child's interests in education, the first interest should seem obvious: a child has an interest in education because education is necessary to developing into an adult capable of independent functioning. Again, I do not mean to imply anything potentially controversial about independent functioning. A child rightly expects to develop a set of competencies that make it possible for him or her to navigate and participate in the main social and economic institutions of society. The state and presumably the child's parents wish for this too. Except in the most unusual circumstances -- where for example a child is severely disabled or mentally handicapped and cannot be expected to become capable of independent functioning, or when parents abuse or neglect their children in obvious and uncontroversial ways -- all three parties, parent, state, and child, would seem to share this interest.

It is the second interest of children -- becoming autonomous -- that may seem controversial. The value of or need to lead an autonomous life, some have argued, is open to

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<sup>37</sup> 393 U.S. 503 (1969).

debate, and liberal states are said to overstep their bounds when they consciously seek to foster autonomy in all of their citizens. William Galston, for example, argues that liberalism properly values diversity over autonomy and that the state should permit wide, though not unlimited, tolerance of parents who do not wish to lead autonomous lives nor want their children to lead autonomous lives.<sup>38</sup> In a similar vein, John Rawls argues that because strong conceptions of autonomy ultimately describe comprehensive modes of life -- lives, for example, permeated by heightened self-scrutiny -- a liberal state can only legitimately foster autonomy in political life.<sup>39</sup>

I want to defend a minimal conception of autonomy.<sup>40</sup> When I say that a child has an interest in becoming minimally autonomous, I understand autonomy to mean something close to the etymological meaning of the word: self-governance. Minimally autonomous persons possess the capacity to develop and pursue their own interests and are able, if they so choose, to participate ably as equal citizens in democratic deliberation about the exercise of political power. This definition is not so minimal, I am sure, that it will convince all skeptics of autonomy to accept it. But neither does it does approach the robust conceptions of autonomy rejected by these same critics. The achievement of minimal autonomy, for example, does not require a Socratic “commitment to sustained rational examination of self, others, and social practices,” as Galston puts it.<sup>41</sup> Nor does it demand that a person lead “a mode of life and reflection that critically examines our deepest ends and ideals,” as Rawls puts it.<sup>42</sup> Nor even does it demand what many have read into Justice William Douglas’s

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<sup>38</sup> Galston writes, for example, “Autonomy is one possible mode of existence in liberal societies -- one among many others; its practice must be respected and safeguarded; but the devotees of autonomy must recognize the need for respectful coexistence with individuals and groups that do not give autonomy pride of place” (Galston, “Two Concepts of Liberalism,” 525).

<sup>39</sup> Rawls writes, “The liberalisms of Kant and Mill may lead to requirements designed to foster the values of autonomy and individuality as ideals to govern much if not all of life. But political liberalism has a different aim and requires far less” (Rawls, *Political Liberalism*, 199; see also p. xlv).

<sup>40</sup> I argue elsewhere for a somewhat more robust understanding of autonomy, in *Liberalism, Multiculturalism, and Education*, forthcoming from University of Chicago Press.

<sup>41</sup> Galston, “Two Concepts of Liberalism,” 521.

<sup>42</sup> Rawls, *Political Liberalism*, xlv.

noted dissent in the *Yoder* case: that children be “masters of their own destiny,” able to chart their own path in life from a wide array of options.<sup>43</sup>

The achievement of minimal autonomy construed as self-governance requires far less. It refers simply to the capacity of the child to develop into an independent adult who can seek and promote his or her own interests, as he or she understands them, and who can participate, if he or she chooses, in political dialogue with others. This conception requires, to be sure, significant development of one’s rational capacities, an ability to articulate and defend one’s political positions, and a willingness to treat civilly those with whom one disagrees. But nothing in this conception implies that children must lead Socratic lives of sustained critical reflection or that they be weaned away from the lives of their parents in order for them to choose a way of life for themselves to be considered minimally autonomous. A person need not subject his or her interests to Socratic critical scrutiny on a regular basis; a person need not have the widest possible array of life choices.

I submit that children have an interest in becoming minimally autonomous, defined in this restricted fashion. Why is this so? On my view, there are two reasons, one rooted in the terrain of one’s private or personal life and one rooted in the terrain of one’s public or civic life.

Children have a private interest in becoming minimally autonomous because the achievement of a minimal degree of autonomy precludes the possibility that they will be, in Eamonn Callan’s words, “ethically servile.”<sup>44</sup> Servility is a condition that implies a dutiful slavishness or submissiveness to others, an unwillingness or incapacity to make decisions or judgments for oneself. It signals an unquestioning subordination of one’s own will to the ethical ideals of another person or persons. Servility is likely to be rooted in one’s disposition such that the availability of new information or alternate possibilities can fail to

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<sup>43</sup> *Wisconsin v. Yoder* 406 U.S. 205 at 245. For theorists who support the notion that autonomy involves maximizing options, see Elster, *Solomonic Judgments*, 137; Joel Feinberg, “The Child’s Right to an Open Future,” in *Whose Child? Children’s Rights, Parental Authority, and State Power*, ed. William Aiken and Hugh LaFollette (Totowa, NJ: Littlefield, Adams, 1980): 134-5.

<sup>44</sup> Callan, *Creating Citizens*, 152.

leave any impression or shake one's habit of deference. But because children are not the property of their parents or of the state, because they possess human dignity as independent beings, they ought not be educated so as to be made servile to their caretakers. Neither parents nor the state can justly attempt to imprint indelibly upon a child a set of values and beliefs, as if it were an inheritance one should never be able to question, as if the child must always defer and be obedient. To do so would in effect render the child servile. In developing through education a basic capacity for critical deliberation, in exposing a child to and engaging a child with diverse values and beliefs, a child learns to think for him or herself enough to surpass the threshold of ethical servility. Understood in this way, the degree of autonomy necessary to escape ethical servility is minimal. Rare is the existence of a servile child.

Children also have a civic interest in becoming minimally autonomous because the achievement of a minimal degree of autonomy is necessary to participate ably in shared political decisionmaking, if a citizen opts for such participation. Liberal states guarantee the equality of citizens under the law and the right to participate, as equals, in decisionmaking about the use of state power. As I indicated earlier, the scope of what citizenship entails is a matter of great debate. But on any view of able citizenship, a citizen must be able, it seems to me, to participate in political institutions, which in turn requires a respect for others as political equals, the ability to forward and defend one's own political values and beliefs, and a willingness to consider sympathetically the reasoned arguments of other citizens. These capacities require that one be able to make political choices from an array of possibilities, and to reason about these choices. The capacity for such behavior involves, to be sure, the exercise of at least some degree of autonomy.

In addition, the political autonomy of citizens is necessary to the very legitimacy of the state.<sup>45</sup> For the exercise of the state's power to be legitimate, citizens must freely

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<sup>45</sup> Rawls provides a much more detailed argument about the importance of political autonomy in *Political Liberalism*. See esp. 77-8, 199-200.

consent to the principles of justice on which the state is founded.<sup>46</sup> Consent cannot be coerced; it must be the product of a person's own deliberation. On any reasonable understanding of informed deliberation, we have to acknowledge that people must possess certain critical thinking and reflective skills that are tantamount to minimal autonomy.

Therefore, because in a liberal state all citizens possess the right to participate in civic affairs, because the state seeks to gain the consent of each citizen for its legitimacy, and because such participation and consent requires the achievement of minimal autonomy, I conclude that children have a civic interest in receiving an education that fosters minimal autonomy. And when we combine this civic justification of autonomy with the personal grounds for cultivating autonomy, the interest of children in becoming minimally autonomous is substantial and independent, and must therefore be counted in any decision calculus when determining the balance of authority over children's education.

### *Implications of the Trilogy of Interests*

What can we conclude from this general survey of the interests of the parents, the state, and the child in education? In almost all cases, each party shares the goal of educating children to become independently functioning adults. Indeed, many view the primary function of education to be the provision of capabilities, competencies, encouragement of talents, and fostering of scholastic achievement so as to allow children to develop into adults who will be able to function on their own in society -- able, that is, to secure work, care for themselves, and seek and develop their own interests. In fact, a harmony among parents, the state, and child may in practice very often extend across all interests. The parents' self-regarding interests may coincide with the state's interest in developing the capacity for children to exercise the rights of citizenship; the child's interest in becoming minimally autonomous may coincide with the parents' expressive interests and the state's interest in citizenship.

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<sup>46</sup> For the importance of autonomy to liberal legitimacy, see Harry Brighouse, "Civic Education and Liberal Legitimacy," *Ethics* 108 (1998): 727-53.

But this harmony of shared interests is not inevitable. As we have seen, the interest of the state in fostering citizenship may not be shared by the parents. Similarly, a child's interest in becoming minimally autonomous, for both the private reason of surpassing ethical servility and the civic reason of making possible free consent to the principles of justice of the state, and more broadly, of participating in shared political decisionmaking, may not be shared by parents or by the state. At this point, some may object that while the state and the child do have these conflicting interests, only parents possess actual *rights* with respect to their children's education. This is a matter of some controversy.<sup>47</sup> But rather than taking a side here, my claim is that, even assuming parental interests rise to the level of rights, in addition to whatever rights parents have over their children's education, the respective interests of the state and the child remain. The state may take steps to promote certain civic virtues in children, and children should develop the capacities of minimal autonomy that entitle them, especially as adolescents, to a proto-right to self-governance. These two claims hold if parental rights are vindicated. They also hold, *a fortiori*, if there are no parental rights.

Put simply, no one set of parents', state's, or child's interests can trump the others and justify sole authority for any party over educational provision. Neither parents, nor the state, nor children themselves should unilaterally and without a countervailing balance direct and control the educational environment of children. Given the triad of interest-holders and the significance of their respective interests, a theory of educational authority that claimed only the interests of one party mattered could potentially establish a kind of parental

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<sup>47</sup> In *Pierce v. Society of Sisters*, for example, the Court established the principle that a law compelling parents to send their children to public schools "interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control" (*Pierce v. Society of Sisters*, 268 U.S. 510 (1925) at XXX). Similarly, in *Yoder* the Court opined, "[T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. 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" (*Wisconsin v. Yoder*, 406 U.S. 205 at 232). On the other hand, Yael Tamir has argued that there can be no right to educate, only a right to be educated (Yael Tamir, "Whose Education is it Anyway?" *Journal of Philosophy of Education*, Vol. 24, No. 7, 1990: 161-170). See also James Dwyer's argument about "Why Parents' Rights are Wrong" (Dwyer, 62-101).

despotism, state authoritarianism, or child despotism. Any defensible theory of educational authority will strike some balance among the three parties.

How should the balance of educational authority be struck? This seems to me a question that it is impossible to answer theoretically.<sup>48</sup> There is ample room for democratic decisionmaking about the proper distribution of educational authority, and many institutional arrangements of schooling, along with a variety of governance structures, are likely to be able to meet the interests of all three parties and to be consistent with the requirements of justice. What we can do from the level of theory is examine the limits of such authority. And as promised, I want now to redirect our attention to the phenomenon of homeschooling in order to consider in the next section whether homeschooling -- the educational arrangement which in both theory and practice tilts most heavily in the direction of parental interests and authority -- permits the realization of both the state's and the child's interests in education. If under a scheme of complete parental authority the interests of the state and the child in education can be met, then homeschooling should be a legitimate educational practice, and we will have justified parental control of significant weight and scope. But if not, then not.

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<sup>48</sup> I'd endorse Bertrand Russell's observation that, "The question of home versus school is difficult to argue in the abstract. If ideal homes are contrasted with actual schools, the balance tips one way; if ideal schools are contrasted with actual homes, the balance tips the other way. I have no doubt in my mind that the ideal school is better than the ideal home, at any rate the ideal urban home, because it allows more light and air, more freedom of movement, and more companionship of contemporaries. But it by no means follows that the actual school will be better than the actual home" (*Education and the Social Order* (London: Unwin Books, 1967), p. 41).

A number of recent arguments answer the balancing question very differently. For a view that gives predominant weight to children's interests and wholly cancels parental interests, see Dwyer, *Religious Schools v. Children's Rights*. Dwyer argues that religious and private schools should be heavily regulated because without such regulation they frequently cause harm to children. For a view that divides educational authority between parents and the state, see Shapiro, *Democratic Justice*, "Governing Children," 64-109. Shapiro argues that parents should be responsible for the education of children for their best interests, as the parents understand them, and that the state should be responsible for the education of children for their basic interests, which include security, nutrition, health, and citizenship. In the event of conflicts, the state's basic interests trump the parents' assertion of best interests. And for a view that gives almost exclusive authority to parents, see Stephen Gilles, "On Educating Children: A Parentalist Manifesto," 63 *University of Chicago Law Review* 937 (1996): 937-1034. Gilles argues that "...the deference we extend to parental educational choices should approach (though not necessarily equal) the deference we give to the self-regarding choices of adult individuals" (p. 939). In addition, Amy Gutmann's recently reissued *Democratic Education* addresses this question of educational authority directly, arguing that such authority "must be shared among parents, citizens, and professional educators..." (*Democratic Education* (Princeton: Princeton University Press, 1999), 42).

### III. Homeschooling and Interests in Education

The question, therefore, under consideration is: *When parental authority over the educational environment of their children is complete, as in homeschooling, can the state's and the child's interests in education be met?*

The answer to the question is clearly yes. Parents who homeschool their children, apart from any state regulation or authority, can realize the state's and the child's interests in education. In fact, some evidence suggests that in some circumstances, parents who homeschool their children may be better at achieving the state's and the child's educational interests than public or private schools. In a news article on homeschooling in California, one child appears to suggest that the reason she wishes to be homeschooled is because the development of her autonomy is threatened in campus-based school settings. Speaking of her former school, she reported: "I didn't want to be there. All the kids are just like sheep, and they don't have any independence."<sup>49</sup> The coercive power of peer pressure may in some cases be too much for children to resist. Moreover, recent studies of homeschooled children show that they often outperform their public and private school counterparts in scholastic achievement.<sup>50</sup> It appears possible, therefore, that with respect to the child's interest in developing autonomy and to the shared interest in academic achievement, homeschools can sometimes be more effective than traditional campus-based schools.

There is also a very practical reason that homeschooling should be a legitimate and important educational alternative. Some children, in particular those with severe or rare physical or mental disabilities, may have such specific learning needs or require such a tailored learning environment that public or private schools simply cannot accommodate them.<sup>51</sup> In this circumstance, justice and practicality require that the state permit parents to

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<sup>49</sup> Hull, "Homeschooling's High-Tech Wave," A20. Hull quotes another student who says, "School isn't about learning. It's about writing 'Metallica' on your notebook and wearing the right clothes and trying to be popular" (p. A1).

<sup>50</sup> Rudner, "Scholastic Achievement and Demographic Characteristics of Home School Students in 1998."

<sup>51</sup> The 1997 Individuals with Disabilities Education Act mandates that the state provide appropriate services for even the most disabled students. These services are to be provide in "the least restrictive setting,"

teach such children at home. Beyond the problem of severely disabled or impaired students, some families live in such rural or sparsely populated regions that the nearest school, public or private, may be many miles away. It may be cost-ineffective to build a public school for a small number of families living a great distance from other public schools or to provide public transportation to far-off schools. Instead, the state may find that permitting, or indeed facilitating, the homeschooling such children is simply the only option available.

On account of the fact that homeschools can feasibly realize the state's and the child's interests in education, and because homeschooling may in some circumstances be the only practical educational option, it would be unjust for the state to ban homeschooling. Educating children at home under the direction and authority of their parents must be a permissible form of schooling.

However, homeschools can also fail to realize the state's and the child's interests in education. Because some homeschools promote the autonomy of children and some conduce to high academic achievement does not imply that all do so. That they sometimes succeed or are sometimes practically necessary does not imply that the state should grant educational authority to parents whenever they express a desire to homeschool. On my account, parental authority must end when its exercise compromises the development of their children into adults capable of independent functioning or when it disables or retards the development of minimal autonomy in children. This marks the outer boundary of parental authority over education.

Parents compromise the development of their children into adulthood when they are negligent or abusive, preventing children from becoming independent, self-sufficient beings who can participate in the main social and economic institutions of society. One imagines cases of malnourishment, physical or mental abuse, or sheer neglect. In such circumstances, the intervention of the state on behalf of children is not controversial. The state acts in its

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which is often judged to be the school rather than the home. But because as a matter of purely practical constraint every school district cannot provide a complete panoply of all special education services, parents of children with rare or severe disabilities, and who have sufficient skills and/or resources, sometimes prefer to educate in the home.

backstop role. If parental authority over education does not conduce to the self-sufficiency and independence of their children, the state must step in and ensure such outcomes.

The problem with homeschooling and parental authority over education arises not out of conflicts over whether children should become independent adults. Few people wish to defend the authority of parents who plainly care too little. The problem arises over parents who, as it were, care too much in seeking to prevent the development of autonomy in their children. I mean to suggest that parents who wish to control the socialization of their children so completely as to instill inerrant beliefs in their own worldview or unquestioning obedience to their own or others' authority are motivated often by a fervent care for, not neglect of their children. Even when defined minimally, some parents may object to the idea that their children should receive an education that promotes their critical thinking and capacities for reflection on their own and others' ends. Being minimally autonomous, I claimed, was in the interest of the child for personal and civic reasons. The fact that autonomy is necessary for citizenship makes education for autonomy an interest of the state as well. Thus, when parents reject the facilitation of autonomy in their children, they find themselves in conflict with both the interests of the child and of the state.

We must therefore ask the question, what does it take, educationally, to become autonomous? Under what circumstances might homeschooling environments disable or retard the development of autonomy? We might imagine that the question admits of an empirical answer. Given a definition of minimal autonomy, some test or evaluation might be concocted to measure its development. The test could then be administered to homeschooled children. Were they not to achieve to some determined threshold, state intervention would be justified.

The creation of such a test may be desirable, but it seems highly unlikely. The empirical measurement of autonomy, especially in children, seems to me an exceptionally difficult and probably quixotic quest. I wish to approach the question somewhat more

abstractly. What structural aspects of the educational environment might promote or retard autonomy? What features of schooling are essential to fostering autonomy?

Meira Levinson suggests a bold answer:

...it is difficult for children to achieve autonomy solely within the bounds of their families and home communities -- or even within the bounds of schools whose norms are constituted by those from the child's home community. If we take the requirements of autonomy seriously, we see the need for a place separate from the environment in which children are raised...<sup>52</sup>

Levinson argues, in other words, that children must attend institutional schools in order to achieve autonomy. In her view, "even the most well-intentioned and resource-laden parents" cannot accomplish what a school can with respect to fostering the development of autonomy.<sup>53</sup> On these grounds, Levinson would presumably rule out homeschooling as an educational alternative. But as I have argued, banning homeschooling would be wrong. Levinson underestimates the capacities and indeed intention of some parents to provide an education for autonomy within a homeschool setting.

If education for autonomy does not require the banning of homeschooling in all cases, what then does it require? Recall the two reasons that children have an interest in becoming minimally autonomous. The first was to surpass ethical servility; the second was to enable the exercise of citizenship and make possible the legitimacy of the state. Now the degree of autonomy necessary to avoid servility is relatively minimal; small degrees of autonomy militate against servility. The degree of autonomy necessary to enable the exercise of citizenship is greater, but hard to define precisely and also dependent on one's definition of citizenship. I suggested earlier that any reasonable definition of citizenship would include the ability to forward and defend one's own political values and beliefs and to be able to consider the reasoned arguments of others. What, we may now ask, are the structural aspects of schooling that are essential to achieving autonomy to this requisite degree?

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<sup>52</sup> Levinson, *The Demands of Liberal Education*, 58.

<sup>53</sup> *Ibid.*, 61.

I submit that even in a minimal construal of autonomy, it must be the function of the school setting to expose children to and engage children with values and beliefs other than those of their parents.<sup>54</sup> To achieve minimal autonomy requires that a child know that there are ways of life other than that into which he or she has been born. Minimal autonomy requires, especially for its civic importance, that a child be able to examine his or her own political values and beliefs, and those of others, with a critical eye. It requires that the child be able to think independently. If this is all true, then at a bare minimum, the structure of schooling cannot simply replicate in every particularity the values and beliefs of a child's home.

Clearly, not all homeschooling arrangements are troublesome in this regard. As an empirical matter, for instance, it is more likely that *some* approaches to teaching only the Bible will better engage students intellectually with diverse values and different ways of life than a banquet-like presentation of cultural ornamentation that currently passes for multicultural education in some public schools. But if there is any educational environment that might potentially be able to replicate the values and beliefs of a child's home, homeschooling is it. In homeschools, parents are able, after all, to control not only the curriculum but also the social environment of their child. Parents can severely limit social interaction and thereby curtail the opportunities that their child will have to encounter other children from different backgrounds.<sup>55</sup> These informal opportunities to engage with difference are likely just as effective in facilitating the development of autonomy as the formal curriculum. Moreover, empirical evidence strongly suggests that the majority of homeschooling parents are motivated by a desire to control the moral and spiritual upbringing of their children. Some of these parents are eager to prevent their children from

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<sup>54</sup> Both Levinson and Callan reach similar conclusions. Callan writes, for example, "The essential demand is that schooling properly involves at some stage sympathetic and critical engagement with beliefs and ways of life at odds with the culture of the family or religious or ethnic group into which the child is born" (*Creating Citizens*, 133).

<sup>55</sup> For a sympathetic and illuminating account of one Christian homeschooling family whose motivation was, in the author's words, to "encapsulate themselves in a culture of their own making" and to provide "a parallel world" apart from the popular, secular society, see Margaret Talbot, "A Mighty Fortress," *The New York Times Magazine*, February 27, 2000, 40.

being exposed to anything contrary to the moral and spiritual values they wish their children to learn.

To be sure, exposing children to and engaging children with diverse values and beliefs is potentially threatening to some parents. As bell hooks has written of her own childhood:

School was the place of ecstasy -- pleasure and danger. To be changed by ideas was pure pleasure. But to learn ideas that ran counter to values and beliefs learned at home was to place oneself at risk, to enter the danger zone. Home was the place where I was forced to conform to someone else's image of who and what I should be. School was the place where I could forget that self and, through ideas, reinvent myself.<sup>56</sup>

But in the interest of children, these are risks that must be accepted, for parents cannot be entitled as a matter of justice to ensure that their child grows up to become exactly the kind of person they want him or her to be. To prevent the risk is to ask that the child become ethically servile to the parent.

The state must therefore ensure that all children, regardless of the environment in which they are schooled, receive an education that exposes them to and engages them with values and beliefs other than those they find at home. It does not require that children engage *always* with values and beliefs that conflict with those of the home, nor does it require that children receive maximal exposure in order to provide them with maximal options in life. A helpful illustration of this difference is provided by Justice White in his concurring opinion in *Yoder*. Noting that while many Amish children may desire to continue living a rural existence within the Amish order, White wrote memorably that:

Others, however, may wish to become nuclear physicists, ballet dancers, computer programmers, or historians, and for these occupations formal training will be necessary. . . . A State has a legitimate interest not only in seeking to develop the latent talents of its children but also in seeking to prepare them for the life style that they may later choose, or at least to provide them with an option other than the life they have led in the past.<sup>57</sup>

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<sup>56</sup> bell hooks, *Teaching to Transgress* (New York: Routledge, 1994), 3.

<sup>57</sup> *Wisconsin v. Yoder*, 406 U.S. 205 at 240.

The achievement of minimal autonomy does not demand that a child be capable of pursuing any life path imaginable. No one can be guaranteed the right to a future so open that he or she may choose any occupation or endorse any possible value or belief; neither the state nor parents owe it to children as a matter of justice to make it possible that they can choose lives of absolutely any sort. It is instead Justice White's final clause that I wish to highlight: children must achieve the minimal degree of autonomy necessary to provide them with options other than that into which they have been born; they must have an effective right of exit. Children are owed as a matter of justice the capacity to choose to lead lives -- to adopt values and beliefs, pursue an occupation, endorse new traditions -- that are different from those of their parents. Because the child cannot him or herself ensure the acquisition of such capacities and the parents may be opposed to such acquisition, the state must ensure it for them. The state must guarantee that children are educated for minimal autonomy. Thus, on this analysis, the state must not forbid homeschooling but regulate it so as to ensure that the interests of the state and the child are met. I discuss the mechanisms and content of such regulations in the final section.

Where in this analysis, one might ask, can or should children themselves exercise authority over their own education? Do their independent interests in education yield a claim to controlling their own education? More specifically, should children have a say in whether or not they are homeschooled? This is a difficult question, for while very young children clearly are incapable of exercising educational authority it is nevertheless true that older children are capable of making informed and reasonable choices about their education. If children were to decide unilaterally, a six-year-old might elect to attend a private school or homeschool (or no school at all), rather than a public school. But the preference of such a young child cannot be decisive, else children would not need guardians at all. But if a fifteen-year-old were to decide that he or she wanted to attend a public school rather than be homeschooled (or rather than a private school), the preference should weigh much more heavily, if not be entirely decisive.

A recent case in Virginia raises the question of what the state should do when older children wish to attend public school and their parents wish to homeschool them.<sup>58</sup> Jennifer Sengpiehl had been homeschooled for many years when in her teenage years she began to ask her parents to permit her to attend the local public school. Her parents refused and continued to educate her at home, at which point Jennifer's behavior began to deteriorate. In an attempt to teach her a lesson about obedience, her parents called the police after she had vandalized her bedroom and brandished a knife at her father. The involvement of the police led to a juvenile court date, where unexpectedly the judge ruled that Jennifer should attend a public school. Because the court records of juveniles are sealed, it is impossible to know the details in order to make an informed judgment in Jennifer's case about how continued homeschooling or public schooling would or would not meet the parents', the state's, and the child's interests in education. But the question remains: should we accept as just the prevailing legal presumption that parental preferences about schooling are determinative, absent a showing of negligence or abuse?

On my view, parental preferences should not be determinative. If the state has reason to believe that the child's future achievement of minimal autonomy will be compromised by an education conducted solely under the direction of parents in the home, or when the child is older and expresses a thoughtful desire himself or herself not to be homeschooled, there is an exceptionally strong case for the state to intervene and end the homeschooling arrangement. Determining when the preferences of children should be given due weight in such conflicts is admittedly a difficult matter, highly dependent on each particular case. Clearly, the age of the child will make a large difference. The older the child, the more likely that the child's preferences will be autonomous and therefore worthy of respect. The younger the child, the less likely the preferences are autonomous and therefore the less weight such preferences should be given. In either case, I believe the state

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<sup>58</sup> Mark Walsh, "Court Sends Girl to Public School Against Parents' Wishes," *Education Week*, November 25, 1998; Maria Glod, "An Education in the Courts; Couple Fights Order on Teen's Schooling," *The Washington Post*, November 7, 1998, B1.

should provide a forum where children's educational preferences should be heard and duly considered when they are contrary to the preferences of the parents. For this reason, when resolving conflicts about authority over the education of a child, the decision calculus ought not be limited, as it traditionally has been limited, to the petitions of the parent and the state, but ought also to include the independent voice of the child. And even in cases when children are too young and cannot articulate or represent their own interests in education or their preferences of an educational environment, when the state believes that the interest of the child in becoming minimally autonomous is threatened, intervention is justified. Contrary to much current practice in the United States, the state must therefore regulate and monitor homeschooling, and enforce its regulations.

#### **IV. Conclusion: Regulating Homeschooling**

It is worth exploring briefly the kinds of regulations the state might promulgate and some likely problems with such regulations. Over the past decade, as I noted in the first section, the regulations on homeschooling have eased dramatically and, where they exist, are often unenforced. Whereas some states once forbade homeschooling, its practice is now legal everywhere, with actual regulations varying significantly from state to state. Such regulations have included requirements that parents be certified teachers or have a college degree, that parents submit a curricular plan to local educational authorities for review, that parents administer standardized tests to their children in order to gauge their academic progress, that school officials make periodic visits to homeschools to evaluate the educational progress of children, that parents keep attendance records and meet a minimum number of days in school or hours spent learning, and/or that parents submit regular reports to local educational authorities. The fact that regulations have diminished and in some cases disappeared, and the increasing prevalence of wholly unregulated homeschools, is cause for concern. The state must indeed regulate homeschools in order to assure that its and the child's interests in education are met.

What regulations are most appropriate to this task? Regulations are properly a matter of democratic politics, not deduction from theory, but at a bare minimum, I imagine the following will be necessary. First, the state must require that any homeschooling parents register their homeschools with local educational authorities, who in turn should be required to collect this information and report it to the state. Such action will allow states to collect more accurate data on homeschooling, help make decisions about how to distribute resources for homeschoolers, and enable simplified communication between school leaders and homeschooling parents. At the moment, since many parents have never notified districts of their homeschooling intentions and arrangements, states have few means to regulate such parents. By requiring registration with local officials, the state can more effectively distinguish between truants and homeschooled children. Second, the burden of proof that homeschools will satisfy the state's and the child's interest in education must rest with the parents who express the desire to homeschool. Parents must demonstrate to relevant education officials that their particular homeschooling arrangements are up to determined educational standards. Aligning the burden with parents is important, because if the homeschooling arrangements were presumed to be satisfactory unless the state were to show otherwise, the state would have to resort to difficult and intrusive means to make such a case. Especially in light of the number of homeschooled students today, school officials cannot be expected personally or closely to monitor the activities of all homeschools. Third, because the state must ensure that the school environment provides exposure to and engagement with values and beliefs other than those of a child's parents, the state should require parents to use curricula that provide such exposure and engagement. I imagine that parents could satisfy such a regulation in a variety of ways: they could submit their curriculum for review to local school officials, they could choose curricular materials from a state-approved list, they could allow their children to take periodic assessments that would measure their success in examining and reflecting upon diverse worldviews. Surely other methods are possible. And fourth, the state should require homeschooled children to take

annual standardized tests to measure academic progress. If a child repeatedly fails to make academic progress relative to his or her peers in public or private schools, the state should intervene and compel school attendance.

This short list of regulations is tentative and provisional, for I am unsure about the most effective way to craft regulations pursuant to meeting the state's and the child's interest. It is far easier to point out the problems with regulating homeschooling. Foremost among these is that religiously motivated homeschooling parents may simply reject the very notion of submitting to a secular authority over matters concerning the upbringing of their children. It is not that deeply religious parents refuse to acknowledge the power of the state generally, for such a position in a liberal democracy would be clearly untenable. Rather, the problem arises when secular state authority is exercised over the rearing of children. Conflict between the state and religious parents on this score may be endemic and inevitable. On my view, even given the deep importance of religious freedom, the state cannot relinquish its regulatory role in education in cases where parents invoke their religious beliefs as a bulwark against secular authority.

Another problem with regulation is that the supposed beneficiaries of educational regulation – children – are not politically organized and are therefore incapable of advocating for their own interests in the policy and legislative arenas. In contrast, homeschooling parents in recent years have been exceptionally powerful lobbyists for their interests at the grassroots, state, and federal level.<sup>59</sup> Following the lead of the Christian Coalition, homeschool parents have banded together into networks of advocacy organizations, and they are able to flood representatives' offices with phone calls and mail on short notice in order to urge or kill the passage of specific bills. In the face of such organized advocacy, the lack of any comparable lobbying effort on behalf of children's interests means that homeschool groups representing parental interests will likely continue

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<sup>59</sup> According to a recent news article, Pennsylvania Congressman Bill Goodling, who chairs the House Committee on Education and the Workforce, has called homeschoolers “the most effective education lobby on Capitol Hill” (Daniel Golden, “Home Schoolers Learn How to Gain Clout Inside the Beltway,” *The Wall Street Journal*, April 24, 2000, A1).

to lessen and erase regulations. The problem, it must be stressed, goes beyond the recent political efficacy of homeschool parent groups; it appears to be built-in to the political process of enacting regulations. Because children are a politically inert group, regulations in their interest must be defended by other organizations, such as the Children's Defense Fund, which typically have less at stake in homeschooling, or by state officials, who are of course responsible for a much broader children's agenda than guarding against homeschooling abuses. Thus, successful regulatory action is likely to be stimulated only when the homeschool parent lobby loses its power and/or comparably powerful children's advocacy groups decide to press specifically for homeschooling oversight.

A third problem with regulating homeschooling is what Cass Sunstein labels the overregulation - underregulation paradox.<sup>60</sup> The idea is that aggressive statutory controls designed to maintain strict compliance often result in practice in under-enforcement or minimal regulations. When regulations are many and elaborate, they often require significant spending, time, and human resources in order to enforce them. I can imagine this paradox at work in homeschooling regulations quite easily. Given the numbers of homeschoolers, local school authorities need to devote their time and energy to tracking parents and children who have opted out of the public school system. To the already harried educators, spending significant time or devoting significant resources to tracking homeschools may seem wasteful. After all, by removing their children from public schools, parents in effect reduce the public system's funding. Moreover, the very idea of making periodic home visits or meeting with parents to assess curricular materials and monitor educational progress can be unappealing. Being a truant officer or homeschool monitor is surely among the more thankless jobs in society.

The overregulation - underregulation paradox can be mitigated by placing the burden of proof on parents to demonstrate that homeschools will meet the educational

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<sup>60</sup> Cass Sunstein, "Paradoxes of the Regulatory State" in *Free Markets and Social Justice* (Oxford: Oxford University Press, 1997): 271-297.

interests of the state and the child. But it does not remove it entirely. It appears, therefore, sensible to keep regulations strict but minimal and as non-intrusive as possible.

In the past few years, another and very different regulatory problem has arisen. Some parents who homeschool their children wish to avail themselves and their children of the resources of the local public school -- extracurricular activities and sports teams, the library, computers, and internet facilities, guidance from schoolteachers on curricular matters, and in some cases select academic offerings.<sup>61</sup> Most state laws currently make it difficult for parents to claim such resources as a right; homeschoolers are assumed to have exited the public school system and thereby foregone the resources it has to offer. As the number of homeschooled children continue to grow, this is likely to become a new frontier in homeschool legal battles. Some school districts have adopted a conciliatory approach and have set up offices to provide curricular and pedagogical resources for homeschooling families, and to facilitate connections with school activities. But the administrative burdens placed on public school teachers and administrators to allow homeschool parents selectively to choose the resources that the public school has to offer are undoubtedly large, and they distract needed attention from the regular students in the classroom. It is possible that technological advances will mitigate these burdens by permitting wholly new ways of providing and distributing information. At least one district has set up what it calls a “virtual charter school”, where it offers homeschooling families via the internet the guidance of public school teachers, standardized testing, career counseling, real-time chats with teachers and students, and the purchasing power of the district.<sup>62</sup> The avowed purpose of the virtual charter school is to lure families that had deserted public schools to re-connect with public education.

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<sup>61</sup> Comment, “The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools,” *North Carolina Law Review*, Vol. 74 (1996): 1913-1977; Patricia Lines, “When Home Schoolers Go to School: A Partnership Between Families and Schools,” *The Peabody Journal of Education* Vol. 75, Nos. 1&2: 159-186.

<sup>62</sup> Rebecca Weiner, “Kansas Educators Turn to the Web to Create a Unique ‘Virtual’ School,” *The New York Times*, August 16, 2000 (accessed via the web, <http://www.nytimes.com/library/tech/yr/mo/cyber/education/16education.html>)

Though some might worry that continued development on this front heralds an era of education where the public school is essentially a provider of a menu of services and activities from which parents choose what they want, the new technology also can serve to connect people back with the campus-based school in different ways.<sup>63</sup> There are a host of open questions about the consequences of homeschool-public school partnerships, but to the extent that bringing children back within a campus-based school environment conduces to meeting the interests of the state and the child in education – especially to the extent that it brings children into social and intellectual contact with other children of diverse backgrounds – such partnerships should not be summarily dismissed or discouraged. In fact, finding ways to draw homeschooling families back to the public school system seems to me a necessary complement to the passage of effective regulations.

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<sup>63</sup> Paul Hill, for example, believes that as more and more people homeschool, most homeschooling families will form networks that will come to resemble regular schools (“Home Schooling and the Future of Public Education,” *The Peabody Journal of Education* Vol. 75, Nos. 1&2: 20-31.