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CHILD'S PLAY: A SIMPLE CONSTITUTIONAL ROUTE TO REGULATION OF HOME SCHOOLS

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According to the most recent national survey (2012) by the National Center for Education Statistics, over 1.7 million school-aged children in the United States are homeschooled.[1] States take varying approaches to the regulation of homeschooling,[2] and some regulatory regimes are surprisingly unsettled, with new social realities outstripping the law.[3] Furthermore, there is no clarity on the consti-

[1] *See* U.S. Dep't of Educ., *Parent and Family Involvement in Education, from the National Household Education Surveys Program of 2012*, NATIONAL CENTER FOR EDUCATION STATISTICS, *available at* http://nces.ed.gov/pubs2013/2013028/tables/table_07.asp (last visited Aug. 23, 2014).

[2] *Compare* N.Y. Educ. Law § 3204(2) (requiring homeschooled children to be given an education "at least substantially equivalent" to the education given similarly situated children in the state system) *with* Alaska Stat. § 14.30.010(b)(12) (exempting homeschooling parents from compulsory attendance laws without further comment).

[3] As late as 2008 it was unclear whether California parents could legally homeschool without teaching credentials. *See* Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571 (Cal. Ct. App. 2008); Andrea Longbottom, Rude Awakening, 24 HOME SCH. CT. REP., May-June 2008, *available at* http://www.hslda.org/courtreport/v24n3/V24N301.asp; *see also* Paul A. Alarcon,

tutional limits (whether state or federal) of the states' power to regulate homeschooling. That is to say, it is not clear the extent to which states can or must regulate homeschooling.[4]

This state of regulatory and constitutional ambiguity has provoked significant concern among commentators. As homeschoolers grow in numbers and influence, they make more audible (and more absolute) rights-claims.[5] And as the religious and culturally traditionalist tenor of much homeschooling becomes more apparent, observers worry that the practice will harm children intellectually and emotionally, and that it may erode the tolerant, critical, and egalitarian ethos of our liberal political order. The critics demand more, stricter regulation, and they demand it now.[6]

Recognizing and Regulating Home Schooling in California: Balancing Parental and State Interests in Education, 13 CHAP. L. REV. 391 (2010) (proposing a legislative scheme to fill the void of standards and guidelines for homeschooling).

[4] For a fuller discussion of the constitutional obscurities that bedevil constitutional thinking about homeschooling, and in particular the "hybrid-rights" problem posed by *Wisconsin v. Yoder*, 406 U.S. 205 (1972), see generally Timothy Brandon Waddell, *Bringing It All Back Home: Establishing a Coherent Constitutional Framework for the Re-Regulation of Homeschooling*, 63 VAND. L. REV. 541 (2010).

[5] *See, e.g.*, *id.* at 572 ("Homeschooling parents regularly argue, both in courts and legislatures, that homeschooling regulations violate either their due process rights to direct the education of their children or a combination of that right with their free exercise rights."). The website of the Home Schooling Legal Defense Association (HSLDA) grandly announces its mission "to preserve and advance the fundamental, God-given, constitutional right of parents and others legally responsible for their children to direct their education." *See* HSLDA Mission Statement, HOME SCH. LEGAL DEF. ASS'N, http://www.hslda.org/about/mission.asp.

[6] Catherine J. Ross, *Fundamentalist Challenges to Core Democratic Values: Exit and Homeschooling*, 18 WM. & MARY BILL RTS. J. 991 (2010) (demanding, in the name of "pluralist democracy", that states impose far more stringent controls over homeschooling than currently exist); Terri Dobbins Baxter, *Private Oppression: How Laws that Protect Privacy Can Lead to Oppression*, 58 U. KAN. L. REV. 415, 454-57 (2010) (identifying underregulation of homeschooling as an important example of laws that protect privacy at the expense of the vulnerable); Kimberly Yuracko, *Education off the Grid: Constitutional Constrains on Homeschooling*, 96 CALIF. L. REV. 123 (2008) [hereinafter Yuracko] (expressing concern that overly permissive homeschooling laws may, by liberating Christian fundamentalists, result in under-education of all children as well as systematic educational disadvantage to girls).

Ironically, some of the academic alarm may be based more on preconceptions and profound ideological hostility than on any demonstrated fact. For example, it appears that quotations expressing belief in traditional gender roles represent the only kind of evidence suggesting that Christian homeschoolers tend to undereducate girls.[7] Nevertheless, the critics' concerns are readily understandable and touch on matters of great importance to our political life.

This paper suggests pro-regulatory legal and rhetorical strategies that resist the urge of some commentators to base regulatory proposals on theories of state obligation rather than state interest.

In Part I, I warn advocates of regulation away from a blind alley. It is unwise to base regulation of homeschooling on any theory of state obligation.[8] In the context of homeschooling, all arguments for regulation based on state obligation will entail recognizing rights or interests in children sharply distinct from, and potentially adverse to, the rights or interests of their parents, and discreetly cast the state in the parental role. Through critical analysis of work by Kimberly Yuracko, a leading advocate of regulation, I show how such a sharp distinction tends to generate (i) conceptual difficulties, (ii) difficulties of application, and (iii) political blowback.

In Part II, I propose a theory of state interest as a conceptually and pragmatically superior alternative to theories of state obligation. I assume for argument's sake that the right to homeschooling is a fundamental right guaranteed by the federal constitution, such that any laws regulating it must survive strict scrutiny—that is, they

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[7] *See* Dick M. Carpenter II, *Mom Likes You Best: Do Homeschool Parents Discriminate Against Their Daughters?*, 7 U. ST. THOMAS J.L. & PUB. POL'Y 24 (2012) (analyzing test and survey data on student performance and concluding that homeschooled children manifest no significant differences by gender).

[8] In other words, advocates of regulation should not flirt with the notion of a constitutional 'lower limit' on the state's power to regulate.

must be narrowly tailored to serve a compelling state interest.[9] I then identify three compelling state interests and indicate some of the laws and rules affecting homeschoolers that such interests might justify. In proposing this theory and these applications, I do not invite advocates of regulation to abandon whatever objections they might have to the theory that homeschooling is a fundamental right. I only try to persuade them that they can, by a strategy of restraint, gain many of their most important objectives with relatively little political friction.

PART I

I. YURACKO'S ARGUMENTS FOR AGGRESSIVE REGULATION OF HOMESCHOOLING

Perhaps the most ambitious and thorough attempt to find state or federal constitutional directives to regulate homeschooling is Kimberly Yuracko's "Education off the Grid." Unfortunately, Yuracko's major arguments demonstrate conceptual and practical weaknesses that necessarily afflict all arguments for regulation of homeschools based on state obligation. I argue that such arguments, if (accurately) perceived as a conceptual divorcing of parent from child and covert substitution of the state for the parent, are particularly likely to meet with outrage and resistance.

Yuracko proposes two alternative paths to the conclusion that homeschooling parents are functionally state actors who should be bound by the state's own constitutional obligation to provide a minimal level of education to their children. The first path is the "public function" doctrine, and the second is the "delegation" doctrine.[10] Since these constitutional parental duties correspond to constitutional rights in children, Yuracko considers and rejects the sugges-

[9] This approach may be characterized as an attempt to fix not the lower limit of state regulation, but the lowest possible upper limit of state regulation.

[10] Yuracko, *supra* note 6, at 142-51.

tion that the children may, through their parents, waive these rights.[11]

Yuracko also argues that the Equal Protection Clause prohibits states from tolerating severely sexist patterns of education within individual families. In some cases, parents who give all their children an otherwise adequate education may nonetheless be required to improve their daughters' education to make it more comparable to their sons'.[12]

These arguments are discussed and critiqued in turn.

PUBLIC FUNCTION DOCTRINE

Yuracko neatly summarizes the public function doctrine as follows:

> "When…private actors exercise monopolistic control over a traditionally public function, courts treat the private actor as if it were the state for the purposes of constitutional challenge. The private actor then becomes subject to the same federal and state constitutional obligations that bind the state in its performance of the public function."[13]

At first blush, Yuracko admits, this doctrine appears not to apply to any form of private education. Although education is now arguably among the central functions of the state, it has never been

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[11] Yuracko, *supra* note 6, at 151-55.

[12] Yuracko, *supra* note 6, at 156-73.

[13] Yuracko, *supra* note 6, at 143-44. *See also* Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974) ("We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State."). The classic application of the doctrine, which Yuracko briefly discusses, is *Marsh v. Alabama*, 326 U.S. 501 (1946) (enforcing the right to free speech under the U.S. Constitution against a corporation that attempted to regulate speech occurring on its private property).

the exclusive domain of the state—indeed, public education is in historical terms something of a late arrival.[14]

Yuracko solves this problem by adducing the rationale behind the public function doctrine. The chief reason for constitutional limits and regulations on state power is the fact that states monopolize certain key functions. Those who object to how the state treats them generally cannot protect their interests by exiting the relationship—hence the need for an array of rights, standards, and procedural norms to prevent state neglect, abuse, and injustice. Now, when private actors assume a role that was formerly a state monopoly,

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[14] *See* Yuracko, *supra* note 6, at 145. Until the late nineteenth and early twentieth centuries that saw the advent of compulsory public education laws, there was little dispute that, except in odd cases, a child's biological parents were the best advocates for the child's interests. Underlying the widely shared perception that parents are the people with the most obvious responsibility for the education of a child is the belief, articulated by Thomas Aquinas, that parents have "a natural right to educate" their children in accordance with the values, resources and ambitions of the family. When state compulsory education laws first began to be enforced, several states established constitutional amendments designed to restrict parental control over education. *See* AMY GUTMANN, DEMOCRATIC EDUCATION (1987), *cited in* MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 3-9 (4th ed. 2002). However, in the twentieth century, Aquinas' natural law view resurfaced, repackaged by modern courts as an individual liberty interest possessed by parents to be free from state interference in the direction of their children's education. The Supreme Court first protected parental authority over education in 1923, in the case *Meyer v. Nebraska*, holding that the Due Process Clause of the Fourteenth Amendment provided protection of the right of parents to "establish a home and bring up children" and "to control the education of their own." 262 U.S. 390, 401 (1923). *Meyer* was followed by the pivotal decision in *Pierce v. Society of Sisters*, in which the Supreme Court struck down an Oregon statute that enforced criminal penalties against parents of private school children for failure to comply with state compulsory education laws. 268 U.S. 510 (1925). In permitting private schools that met minimal adequacy requirements to satisfy compulsory education laws, the Court guaranteed the "liberty of parents and guardians to direct the upbringing and education of children" under substantive due process. The *Pierce* Court further affirmed the overlapping authorities of parents and the state in making decisions regarding the upbringing of children, explaining: "[t]the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

they presumptively do so as monopolists themselves—therefore all the reasons to regulate state action equally justify regulating private actors. Parents, Yuracko concludes, are just a subspecies of private monopolist.[15] They have nearly complete control over their children, manifestly including their children's educational opportunities. Parental exercise of their educational monopoly is properly regulated to ensure basic standards, including when parents instruct their children themselves.

DELEGATION DOCTRINE

The public function doctrine requires application of constitutional norms to private action that it is relevantly *analogous* to state action. The delegation doctrine, by contrast, requires application of constitutional norms to private action that is in substance *attributable* to the state. That is, the delegation doctrine treats certain private actors as the agents or delegates of the state with respect to activities that constitute public functions.[16]

In this vein, Yuracko argues that when the state permits homeschooling it is delegating to parents its duty of providing education

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[15] Yuracko, *supra* note 6, at 145-46 ("[I]n the absence of state regulation, homeschooling parents do exercise precisely the kind of monopolistic control over education with which the public function doctrine is concerned. Homeschooling parents make all the decisions about what educational materials and messages their children will be exposed to. Moreover, particularly for young children, there are no exit options.").

[16] The classic case (one of several Yuracko discusses by way of illustration) applying this doctrine is *Smith v. Allwright*, 321 U.S. 649 (1944), one of the so-called "white primary" cases. In *Allwright*, the Supreme Court found that the racially discriminatory practices of the Democratic Party of Texas, a private organization, were attributable to the State of Texas, and as such were violations of the Fourteenth, Fifteenth, and Seventeenth Amendments. Texas had allowed the Democratic primary to become an integral part of the process of electing public officials. Black Texans were excluded from voting in the primary, and therefore suffered a serious diminishment of their civil rights. Whatever rights the Democratic Party might have had to practice racial exclusion, the State of Texas could not constitutionally permit the Democratic Party to, in substance, administer public elections in a discriminatory way.

to the children affected.[17] Therefore, the state is answerable for the parents' acts, and so either cannot delegate or must have the power to regulate the delegates. A particularly important case for Yuracko is *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964). In *Griffin*, the respondent school district tried to avoid desegregation by closing its schools and subsidizing the operation of all-white schools run by private parties. The Supreme Court found that this was delegation of a state function and thus made the state answerable for acts of private discrimination. For Yuracko, *Griffin* demonstrates that states cannot avoid any of their constitutional duties, including the duty to provide a minimal level of education, by delegating to private actors, including parents. Therefore, if states deliver education through homeschooling parents, they must ensure that that education is constitutionally adequate.[18]

WAIVER ISSUE

Yuracko anticipates the objection that, no matter how strong the state's obligation to provide a minimal level of education (and, therefore, no matter how strong the obligation of homeschooling parents—the state's putative analogs or agents with respect to education), the right to such an education can always be waived. Since parents ordinarily speak and act for their children, to recognize a right to waive an adequate education would mean homeschooling parents could waive the educational duties that bind them. Parents would in effect have no educational duties at all—or in any case none derived from any source of public law.[19]

Yuracko answers that some rights cannot be waived, and that the right to minimal education should be among them. The crux of

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[17] Yuracko, *supra* note 6, at 146-51.

[18] Yuracko, *supra* note 6, at 151 ("Both the public function and delegation analyses, then, strongly suggest that homeschooling parents should be bound by states' own constitutional obligations with respect to education.").

[19] Yuracko, *supra* note 6, at 151-52.

her argument is that when one major purpose of a right is "to serve … social functions [broader than protecting individual interests], such as establishing a particular structure of government or reinforcing foundational social norms,"[20] it is inappropriate to make the right waivable. Universal standards in education promote general civic health and stability, as well as economic prosperity. Therefore, Yuracko concludes that it is not appropriate to allow parents to waive the right to a minimal education on their children's behalf.[21]

EQUAL PROTECTION DOCTRINE

The famously puzzling Supreme Court decision in *Shelley v. Kraemer*[22] established the principle that states can violate the Equal Protection Clause when they somehow enforce, authorize, or recognize private discriminatory preferences.

After a survey of the many alternative readings of *Shelley*, Yuracko determines that the most plausible interpretation is that "[s]tate authorization of private discriminatory conduct is only unconstitutional when that conduct implicates important third party interests in social or economic participation."[23] Adequate education, Yuracko finds, is clearly critical to full social and economic participation.[24] Furthermore, it is a "positional" good—the value of one's education depends in large part on how it compares to the education of others.[25] Therefore, severe educational discrimination against any class of people presumptively impedes the social and economic participation of that class of people.[26]

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[20] Yuracko, *supra* note 6, at 153.
[21] Yuracko, *supra* note 6, at 154-55.
[22] *See* Shelley v. Kraemer, 334 U.S. 1 (1948) (holding it unconstitutional, under the Equal Protection Clause, for courts to enforce racially discriminatory housing covenants).
[23] Yuracko, *supra* note 6, at 166.
[24] Yuracko, *supra* note 6, at 166.
[25] Yuracko, *supra* note 6, at 166.
[26] *See* Yuracko, *supra* note 6, at 167.

Yuracko sees troubling evidence that many homeschooling families believe that girls should be given a different, and inferior, education from boys.[27] If a state authorizes the educational practices of families engaging in severe educational discrimination (including families practicing homeschooling) pursuant to such an ideology, that state violates the Equal Protection Clause. Every girl is owed an education at least roughly equal to that of her brother.[28]

2. CRITIQUE OF YURACKO'S ARGUMENT

Yuracko's thesis is vulnerable at nearly every point.

PROBLEMS WITH PUBLIC FUNCTION ARGUMENT

Yuracko believes the public function doctrine should apply to parents because they enjoy a monopoly with respect to their children's educational opportunities. The fact of monopoly is sufficient to justify the kinds of protective rules that apply, at least in liberal regimes, to state actors.

But it is misleading to describe parents as "monopolists" with respect to their children. The word "monopoly" implies an arm's-length, or even adversarial, relationship of power between the monopolist and his captive.[29] Such relations may indeed demand care-

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[27] Yuracko, *supra* note 6, at 156 ("A review of popular Christian homeschooling curricula, books and websites reveals an ideology of female subservience and rigid gender role differentiation . . . . Not surprisingly, this ideology of constraint also has something to say about girls' education. In *So Much More*, for example, a book written by two homeschooled sisters and currently popular in the Christian homeschool community, the authors argued that college is dangerous for young women because it diverts them from their God-ordained role as helpmeets for their fathers and husbands.").

[28] Yuracko, *supra* note 6, at 171-72.

[29] The term "captive" does not exaggerate Yuracko's depiction. She blandly compares homeschooling parents with prison guards. *Id.* at 151 n.137 ("The delegation of power to private prisons is monopolistic in this same regard. With respect to individual prisoners, private prisons exercise complete control over their punishment and rehabilitation.").

ful maintenance of rules of fairness that empower each party to defend its interests against the other, or substantive norms that protect the less powerful party from predation. But this is not the typical relation between children and their parents. More intuitive and illuminating descriptions are "guardianship" and "representation." According to such conceptions, parents are presumed to better understand and cherish their children's interests than the children themselves, and are therefore properly made the trustees of their children's legal personalities. To a very significant extent, in the eyes of the law and society, parents *are* their children.[30] A heavy burden of persuasion should rest with those who claim that, in a particular case, parents are best viewed as presumptively self-interested possessors of power over their children. Yuracko has not met this burden. Why shouldn't we say here that because parents represent their children, those children have precisely as much educational choice as their parents do?

There is nothing odd or problematic about Yuracko's evident desire to constrain parents. Parents may make any number of choices with respect to their children that society appropriately refuses to tolerate for good and sufficient reasons. The law often vindicates the individual interests of children, and the interests of society, but it does so by use of concepts such as abuse, neglect, and (as I will discuss) compelling state interests. Furthermore, the law regulates parental functions at least as comparable to the central functions of the state as is education. For example, courts sometimes recognize heightened duties in parents to guard the health and safety of chil-

[30] One traditional consequence of this conception was the recognition of partial parental immunity against tort actions for harm to their minor children. *See, e.g.*, Matarese v. Matarese, 131 A. 198, 199 (R.I. 1925) (rejecting minor child's tort action against her father for injuries arising from auto accident).

dren.[31] Yuracko's awkward introduction of *constitutional* norms is an unnecessary overreach.

And such a move will be resisted because of its threatening suggestion that discretionary parental direction of minor children is no longer to be presumed the natural and positive default. The status of "parent" is thus fundamentally threatened. Yuracko insists that parents are only to be treated as state actors to the extent that they monopolize the public function of education—parental control in multiple other areas does not necessarily come under the government of constitutional norms.[32] But as Yuracko's own discussion shows, the point of the public function doctrine is to control actors who basically cannot be trusted with their power over others. The key move of Yuracko's argument is not the claim that education is a public function, but that parental control is basically a species of monopoly, *i.e.* a relation of power, not representation. To accept that characterization is to expose parental control to an indefinite variety of challenges—and skeptics of regulation well know it. Defenders of parental prerogatives, within and without the homeschooling movement, are already on high alert.[33]

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[31] *See generally* Vincent R. Johnson & Claire G. Hardgrove, *The Tort Duty of Parents to Protect Minor Children*, 51 VILL. L. REV. 311 (2006).

[32] Yuracko, *supra* note 6, at 146 n.113 ("The argument is not … that homeschooling parents, or parents more generally, should be treated as state actors for all purposes because of the totalistic control they exercise over their children. Rather, the argument is narrower and doctrinally grounded, namely that because of homeschooling parents' total control over their children's education, they are appropriately treated as state actors with regard to that particular function.").

[33] *See, e.g.*, Melissa Moschella, *Legal Kidnapping*, NAT'L REV. (Feb. 28, 2014, 4:00am), http://www.nationalreview.com/article/372087/legal-kidnapping-melissa-moschella (describing the alleged attempt by public-school officials, social workers, and a school-endorsed gay youth organization to—by a combination of indoctrination and suspension of parental custody—pry a Massachusetts child away from "his faith and his family," and urging all states to pass laws forbidding schools from referring troubled children to outside organizations without parental permission).

PROBLEMS WITH DELEGATION ARGUMENT

Yuracko makes no sufficient showing that the delegation doctrine, or its application in *Griffin*, is of any relevance in the homeschooling context.

The fundamental problem is that there is no reason to see homeschooling parents as the delegates of the state. In *Griffin*, the state of Virginia sponsored all-white private schools specifically as its substitute in an area from which the state had just withdrawn its own operations. The private schools were, in a readily appreciable sense, *the* public education provided in Prince William County. By contrast, it is hard to see how any state can be described as discharging its duty to provide an adequate education *by means of* home schools at all, let alone in the *exclusive* manner that would justify seeing homeschooling parents as the state's delegates. Rather, in every county in every state the children who happen to be homeschooled are eligible to attend public schools, equivalent state-subsidized private schools, or both. It would seem that every state has fully, and on equal terms, discharged its duty to these children by guaranteeing their eligibility.

The only answer to this reasoning is to suppose that children, so long as they have parents, cannot have meaningful access to goods and services that they aren't actually enjoying. And this is indeed the substance of Yuracko's reasoning—yet again parents are described as monopolists with respect to education.[34] Thus a state can only fulfill its educational obligations by directly delivering the educational goods or by treating parents as their delegates and regulating them accordingly.

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[34] Yuracko, *supra* note 6, at 150 ("[T]he state has delegated homeschooling parents the power to control completely (at least certain) third parties' access to the public good of education. With respect to their own children, homeschooling parents have control over a public good that is . . . monopolistic and absolute . . . .").

And, yet again, the strong countervailing consideration is that parents are presumed to represent children. They are presumed to be the best-informed and most appropriately motivated candidates to choose and deliberate on behalf of their children, not external limits on their supposed autonomy.

PROBLEMS WITH WAIVER ARGUMENT

It is in her discussion of the waiver objection that Yuracko, after many pages of disregard, directly faces the fact that parents ordinarily represent their children. She observes, without much ado, that if the right to minimal education were waivable, parents would naturally be the agents actually deciding whether to waive or not.[35] Abruptly, as the clock strikes midnight, monopolist and captive are transformed back into parent and child—analytically intertwined beyond any presently useful distinction.

So far, so good. But Yuracko then introduces, and relies on, a questionable conceptual assumption. She takes for granted that to say a legal right or benefit is non-waivable does, or may, entail that it creates what is in substance a duty in the person possessing it. Thus, to say children cannot waive a basic education is to say that they can be *compelled to acquire it*, with the many affirmative and often burdensome actions that acquisition implies. It is to say that children have the duty to acquire an education.[36]

But Yuracko's assumption seems false. At least in general, to say that A cannot waive his right is to say that there is a corresponding duty in B (or some set of Bs) that the state will always acknowledge and enforce upon A's claim. No prior declaration or

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[35] Yuracko, *supra* note 6, at 52 ("As a practical matter, the waiver that is relevant here is not children's, but that of parents acting on their behalf. Young children have neither the cognitive ability nor the legal authority to make important decisions. Parents are expected to speak for and on behalf of their children.") (footnotes omitted).

[36] Yuracko, *supra* note 6, at 155.

contract on A's part can change the state's protocol when faced with A's claim. But the absence of waiver does not impose any affirmative course of conduct on A. For example, employees covered by Title VII of the Civil Rights Act of 1964 always have the right to file discrimination claims with the EEOC, notwithstanding any contrary agreements entered into with the employer.[37] This seems like a central case of a "non-waivable right." But non-waivability has never been held to impose on employees, even in case of egregious cases, anything like a legal duty of reporting discrimination. For whatever reasons of their own, employees can always choose to live with the legal wrong of employment discrimination.

One may plausibly imagine slight analytic differences when the non-waivability of basic education is described as a "benefit" rather than a right. Intuitively, a non-waivable benefit is something one is constrained to receive. But even there, one assumes the reception to be basically passive. Otherwise, one would say that there were two distinct things—a benefit and a related duty—at issue. In any case, Yuracko gives no example of either rights or benefits immediately creating affirmative responsibilities in their holders.

This is not a semantic quibble. My objection highlights the implausibility of Yuracko's reasoning on this point. She has attempted, by the indirection of "non-waivability," nothing less than transformation of a burden on the state into a burden on the citizen. This attempt is understandable, but it runs up against the traditional reluctance of liberal legal thought to lightly infer affirmative duties. This reluctance is especially great when the authority given is a constitutional provision plainly directed at the government.[38]

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[37] *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[38] This does not mean that a state's constitutional duty cannot help to *justify* the state's decision to compel citizens. Clearly, it can. Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("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.") My claim is rather that a state's duty cannot in itself mandate such compulsion, and still less can it directly saddle citizens with a duty.

None of this is to say that there are not good and sufficient reasons for compelling basic education. On the contrary, I believe such reasons do exist. The problem is that neither the state education clauses nor any other source of public law Yuracko adduces authorize compulsion. Analysis of the waiver issue demonstrates the basic reason Yuracko comes up short in her quest for meaningful constitutional limits on homeschooling: Existing public law dealing with education only establishes a *state* duty to *children*, and *therefore to their parents*. To hold parents to this selfsame duty is to invite all the confusions and absurdities of enforcing a person's supposed duties to himself.

PROBLEMS WITH EQUAL PROTECTION ARGUMENT

There may be viable counterarguments against Yuracko's interpretation of *Shelley*, and against her claim that homeschooling involves sufficient state action to trigger *Shelley* analysis. But the problems of application and enforcement are so clear and decisive that I will accept her theoretical premises for argument's sake.

The supposed constitutional mandate is to roughly equalize, within families containing at least one girl and one boy, the education that girls and boys receive. Supposing such a scheme workable, it would create a tax on the education of boys. It would mean, for example, that A can only teach his son astrophysics on the condition that he teach his daughter the same, regardless of the daughter's preferences. Yuracko would thus read the Equal Protection Clause as disincentivizing private, peaceful, domestic, informal communications and interactions of great value to individuals and society. This consequence is not clearly desirable or consonant with the traditional respect given privacy and autonomy in family life.[39]

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[39] *Id.* at 232 ("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 be-

It would be resisted with the greatest energy, including by many families with no interest in homeschooling.[40]

But such a scheme is probably not workable at all. Standards are difficult to fix and to apply fairly to individual cases, and deviation is difficult to detect and practically impossible to prove. First there is the threshold problem of determining, in some stylized typical case, what counts as a severe educational discrepancy. Then, if there is to be any show of justice to parents or serious consideration of children's interests, the regulator must decide how to test and weigh claims that educational differences are due to differences in children's age, aptitudes, achievements, or preferences, or to some shift over time in the family's goals, ideals, or resources. The regulator must also be certain that the decision to educate some children differently than others is not a rational and defensible husbanding of scarce resources, aiming at the greater good of the family. In sum, the regulator must play at being a supervisory parent.

Even if the regulator can fix abstract standards that aren't plainly irrational, how will it be proven that the boys in a given family are being better-educated than the girls? A family, especially a homeschooling family, can simply fail to produce any evidence of the contraband learning. If there are tests, the boys can be coached

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yond debate as an enduring American tradition."); *see also* Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.").

[40] For example, according to a 2010 Zogby poll, more than 90% of self-described "Liberals" agreed with the proposition that "in general parents have the constitutional right to make decisions for their children without governmental interference so long as there is no proof of abuse or neglect." Zogby Interactive Survey of Likely Voters, PARENTAL RIGHTS.ORG 1 (Aug. 30, 2010), http://www.parentalrights.org/vertical/sites/%7BC49108C5-0630-467E-9B9B-B1FA31A72320%7D/uploads/%7B2FA73C63-5E58-4644-88A9-6B3D69D6B263%7D.PDF. Note that the question did not ask subjects whether they *endorsed* this supposed constitutional right. Furthermore, only 33% of Liberals (by contrast with 81% of Conservatives) favored a constitutional amendment explicitly enshrining this supposed right. *Id.* at 12. Nevertheless, popular understandings of constitutional rights arguably provide a rough index to cherished popular values.

to underperform on them. Even if the boys do not underperform, the small sample size even in a large family makes statistical inferences of discriminatory educational inputs highly unreliable and therefore unfair as a basis of such consequential findings.

Finally, even if the scheme somehow worked, it would be a disappointment. After all, perhaps the most important discrimination is likely to occur at the level of tertiary education—that is, just about the age when most children legally separate from their parents and become fully answerable for their own choices. Boys may be systematically sent to college while girls remain at home, and there is nothing the Equal Protection Clause, even on Yuracko's generous reading, can do about it. In fact, this deficiency is ironic, since the only clear evidence Yuracko presents of a fundamentalist homeschooler tendency to differentially educate girls consists of statements discouraging women from going to college.[41]

In addition to being difficult to apply and likely futile, to invoke the Equal Protection Clause against families is likely to generate great hostility. Of course any state oversight of intimate family choices can only be experienced as arrogant and intrusive. But what is likely to rankle even more than concrete experience of regulation is, yet again, the fundamental supposition that parents are not to be seen as their children's rightful representatives with regard to education. Rather, they are simply agents capable of "private discrimination" that may so adversely affect some nondescript "third party," a person fundamentally foreign to them, that the state must curb it. Such a conception is unintuitive and unappealing, and is very likely to be seen as a tactic for aggrandizing public power.

PART II

I have argued that to treat parents as state actors with respect to their educational function is to embrace a principle of doubtful the-

[41] Yuracko, *supra* note 6, at 157 n.165.

oretical validity that will be resisted as a potential font of state oversight that threatens to remake the parent-child relationship and disrupt the traditional balance between the parents and the state.

There is a simpler approach to regulating homeschooling that also makes more legal and political sense. Compelling state interests can, if pursued in an appropriately limited way, override any individual right.[42] Why not try to determine, before all else, whether there are compelling state interests that might justify compulsion with respect to education?[43] I have identified three such interests, and I believe they are together enough to justify significant state oversight of homeschooling. These interests are (i) gathering of educational information, (ii) civic instruction, and (iii) civic skills.

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[42] *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

[43] It remains unclear how the Supreme Court would classify any supposed right to homeschool, but there is a large body of favorable precedent to encourage those who consider it a fundamental right, protected by strict scrutiny. *See* Santosky v. Kramer, 455 U.S. 745, 753 (1982) (stating that the rights of parents to make decisions concerning the care, custody, and management of their children are fundamental rights); *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (including the due process right of parental autonomy in the upbringing of children as among "the associational rights [the Supreme Court] has ranked as 'of basic importance in our society' sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.") (citation omitted); Troxel v. Granville, 530 U.S. 57, 66 (2000) ("In light of . . . extensive precedent, it cannot now be doubted that Due Process clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."). Despite this, some courts have denied that limitations of parental control in specifically educational decisions merits strict scrutiny. *See, e.g.*, Parker v. Hurley, 514 F.3d 87, 102-03 (1st Cir. 2008). *But see* Gruenke v. Seip, 225 F.3d 290, 305 (3d Cir. 2000) ("It is not unforeseeable . . . that a school's policies might come into conflict with the fundamental right of parents to raise and nurture their child. But when such collisions occur, the primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a compelling interest.").

INFORMATION GATHERING

This is the most easily justified and probably most compelling state interest of the three.[44] At a minimum, homeschoolers can be made to tell the state that they are homeschooling, loosely sketch their methods and content, and have their children take periodic diagnostic tests to roughly confirm representations about content and to monitor educational progress. The state has a compelling interest in having at least a rough assessment of their human resources so they can craft intelligent policy.

Politically, these measures should be fairly persuasive. Regulators can stress with sincerity that homeschoolers should be enthusiastic about these information-gathering policies. They put the state in the position to assemble and analyze data that might be of use to the homeschooling movement, and might after all persuade the state that homeschooling should be, if anything, further encouraged.

Most of the resistance to information-gathering might stem from the fear that it represents the thin end of the wedge of comprehensive regulation, or even prohibition. Accordingly, advocates looking to minimize resistance should limit their arguments as strictly as possible to the state's hard-to-challenge interest in knowing the basic facts.

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[44] I have found no precedent explicitly identifying a generalized state interest, compelling or otherwise, in gathering information. Nonetheless, rudimentary information-gathering is so fundamental to successful exercise of the state's police power that it is very reasonable to suppose that a court would consider the interest compelling, particularly when tied to an identifiable constitutional duty. Barbier v. Connolly, 113 U.S. 27, 359 (1884) (describing the state's unquestioned power to "prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."). In addition, the existence of such an interest may be found in the occasional conduct of state censuses. Finally, there is the fact that individual rights of privacy, in the criminal context, appear to be mere qualifications of the state's assumedly plenary power of investigation.

CIVIC INSTRUCTION

The state has a compelling interest in nurturing a citizenry that is economically independent of the state, equipped to participate in a range of wealth-producing economic relationships, competent to gather and analyze basic information relevant to the leading public problems of the day, and competent to give reasoned judgments social and political effect. And the Supreme Court has consistently considered the right of parents to direct and control the education of their children to be a defeasible right that must be balanced with the State's "parens patriae" interest in the upbringing of children to be good citizens who will contribute to the common welfare.[45]

All this amounts to what I call civic instruction. The details are up for debate, but I will take for granted that, under modern conditions, civic instruction involves (at least) (i) high literacy, (ii) high numeracy, (iii) sound basic knowledge of federal and state political institutions, and (iv) sound basic knowledge of federal and state history. This being so, the state may require that children who do not pass certain age-graduated tests in such basic areas receive public or accredited private instruction in them until they have passed.

These requirements would meet with resistance, as many government requirements do. But this outcome-based approach is in some respects far more modest than the widespread laws making formal instruction of a certain standard compulsory. Indeed, if such a scheme of benchmarks were successful, *i.e.* if homeschooled chil-

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[45] *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681-85 (1986) (upholding ability of schools to prohibit lewd speech); Runyon v. McCrary, 427 U.S. 160, 178 (1976) ("The Court has repeatedly stressed that . . . [parents] have no constitutional right to provide their children with private school education unfettered by reasonable government regulation."); Wisconsin v. Yoder, 406 U.S. 205, 213 ("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."); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) ("No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils . . . .").

dren consistently met the benchmarks without outside intervention, advocates of homeschooling and "unschooling" might begin to demand it as a replacement for the now-traditional scheme of compulsory attendance.

CIVIC SKILLS

Closely related to the state's interest in civic instruction is its interest in citizens with civic skills. The United States is a highly diverse society marked by strongly egalitarian laws. For peaceful and productive coexistence, individuals need the ability to interact with others in a context of equality. This only requires a certain capacity for tolerance and an ability to play by the egalitarian rules that mark much of American political and economic life. That is to say, the state has a compelling interest not in citizens with "democratic values," but with civic skills. It is important that these skills be learned early, so as to be ingrained by the time young people enter society as independent actors. Children, in brief, cannot grow up isolated.

To ensure this outcome, states have the prerogative to prescribe a mandatory amount of time participating in accredited extracurricular group activities, provided that they permit all parents to satisfy the requirement free of charge at their local public school. For example, music, athletic, and arts instruction in public schools could be held after the end of the school day, and be open to all children within the district, whether or not enrolled in the public school. This policy would naturally tend to quiet objections from parents—whether they homeschool or send their children to private school—who resent paying for resources they do not enjoy. Even if these open programs were supported by their own tax or dedicated fund, public school families would benefit from greater financial buy-in from other families, gaining superior extracurricular resources and freeing cash for curricular resources.

This policy would receive pushback from parents who value the right to exclude children from certain associates as part of their right to direct their children's upbringing. But there are effective

ways to craft, and truthful ways to explain, such policies that might minimize opposition.

For one thing, the state may generously accredit activities that homeschooling families can participate in by cooperation with families or other organizations in strong philosophical sympathy with them.[46] The key goal of the policy, after all, is not to expose children to the full cross-section of American society but to give them practice in moving beyond the extreme intimacy and basic uniformity of outlook and interest that tend to mark family life. That is, the main goal is to accustom children to getting along with relative strangers, with their relatively distinct interests and more insistent claim to areas of autonomy, immunity, and voice. My recommendation assumes that, except in the rarest and sickest of subcultures (Jonestown, perhaps) the very first step outside the family is a dramatically "civilizing" act.

It is also worth noting that homeschooling parents are increasingly demanding access to the resources of the public schools.[47] This is evidence that some homeschooling parents (perhaps a great majority), do not categorically reject interaction with outsiders. What is necessary is a policy that is not burdensome in time commitment, stresses volume over intensity of interaction, does not require submitting children to intellectual instruction, does not formally target homeschooling parents,[48] and includes the "carrot" of rights that many homeschoolers want.

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[46] Such generosity appropriately gives scope to parents' primary authority, recognized in *Yoder*, to inculcate "moral standards, religious beliefs, and elements of good citizenship." 406 U.S. at 233.

[47] *See generally* William Grob, *Access Denied: Prohibiting Homeschooled Students from Participating in Public-School Athletics and Activities*, 16 GA. ST. U. L. REV. 823 (2000) (describing the litigation generated by homeschooler claims to public-school resources, particularly athletic programs).

[48] My proposal is that the rule apply to all parents, but that there be speedy and unobtrusive methods for certifying compliance when children are enrolled in a public or private school.

Another consideration that might soften resistance is that this policy collaterally promotes the distinct compelling state interest in the basic wellbeing, and especially the physical integrity, of its citizens. The policy encourages regular contact between children and mandatory reporters[49] of child abuse and potential Good Samaritans. Such light, informal public surveillance of children, to the extent that it works, tends to prove more intrusive measures unnecessary, and perhaps constitutionally unjustifiable. Thus the net effect of the policy may well be to reinforce the norm of familial privacy.

In view of the foregoing, I contend, opponents of my proposal who do not openly defend their intent to isolate their children would find themselves short of audible arguments.

CONCLUSION

Many American jurisdictions have left homeschooling largely or entirely unregulated. Critics of the status quo deserve a serious hearing, and some of their proposals probably deserve to be implemented. But it is neither necessary nor constructive for those critics to base proposed regulation on theories of state obligation. As I have shown, such theories are generally implausible and tend explicitly or implicitly to presume an adversarial or arm's-length relation between parent and child. Rather, homeschooling critics should invoke the altogether conventional principle (and one easy to operationalize in our constitutional jurisprudence) that the state can limit even the most cherished liberties if it has an adequate reason and uses proportionate means. I have indicated the conceptual framework on which this path to regulation should proceed. Nonetheless,

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[49] Mandatory reporters are those professionals and public agents legally obligated to report evidence of abuse. *See* Children's Bureau, U.S. Dep't of Health & Hum. Servs., *Mandatory Reporters of Child Abuse and Neglect*, Child Welfare Information Gateway (2014), https://www.childwelfare.gov/pubPDFs/manda.pdf#page=1&view=Professionals Required to Report.

the field remains wide open for substantive policy debate, jurisdiction by jurisdiction, on the appropriate limits of homeschooling.