

**EDUCATION, SCHOOLING, AND CHILDREN'S RIGHTS:
THE COMPLEXITY OF HOMESCHOOLING**

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ABSTRACT. By blurring the distinction between formal school and education writ large, homeschooling both highlights and complicates the tensions among the interests of parents, children, and the state. In this essay, Robert Kunzman argues for a modest version of children's educational rights, at least in a legal sense that the state has the duty and authority to enforce. At the same time, however, it is important to retain a principled distinction between schooling and education — not only to protect children's basic educational rights, but also to prevent the state from overreaching into the private realm of the home and family.

I never let schooling interfere with my education.
— Mark Twain

When twelve-year old Rebecca Lee gets home from school, she practices the piano for thirty minutes. Later, while at the grocery store, she helps her dad figure out which of the competing brands offers a better deal. At dinner that evening, her family discusses politics and the news of the day. All of these activities are educational in nature — particular knowledge is being applied and certain skills are being practiced. But we would not call them school; that is what Rebecca does between the hours of 8 a.m. and 3 p.m. on weekdays.

Across town, twelve-year-old Jeff Wilkins follows a similar routine. But Jeff is homeschooled, and his mother records each of these same activities as part of his curricula — fine arts, math, and social studies. Like many homeschoolers, the Wilkins view their homeschooling as an endeavor that extends beyond traditional schooling boundaries of time, place, and subject areas; the whole of life provides educational opportunities, and oftentimes in more authentic and powerful contexts than what traditional schooling has to offer.

For all children, not just homeschoolers, there is obviously more to education than institutional schooling. Some learning experiences occur within other organizations, such as churches, Girl Scouts, or Little League baseball. Others types of education take place in far less formal settings, such as shopping excursions or dinner table conversations. It is no exaggeration to say that the whole of life can be educative for those attentive to its lessons. But since “education” as a term is so easily read as “schooling,” I will use the phrase Life as Education (LaE) to denote this broader universe of learning experiences.

Parents naturally see much of what they do in raising their children as central to LaE. In fact, it is fair to say that most active and engaged parents, particularly in their children's younger years, are the primary choosers and shapers of LaE. They instill values, monitor behavior, authorize play dates, and provide learning materials, books, and games. As time goes on, they may increasingly delegate many facets of LaE, choosing to send their children to school, sports leagues,

summer camps, and the like, but parents retain a central role in LaE — legally, if not in practice — until their children reach adulthood.

So if LaE is a major task of parenting, why is homeschooling's frequently blurred line between LaE and formal schooling of particular importance? To begin with, homeschooling is an increasingly significant educational phenomenon in its own right. Between 1999 and 2007, homeschoolers in the United States increased by an estimated 74 percent — twelve times the rate of public school growth — and now likely number more than two million altogether.¹ I have spent the past eight years researching the phenomenon of homeschooling, talking with families about their educational purposes and observing them in their day-to-day practices. While it may not appear so from the outside, homeschoolers are a diverse bunch, running the gamut of culture, ideology, and practice. But they are also an intriguing example of where the political far left and far right intersect; the common thread that ties most homeschoolers together — whether twenty-first century hippies or Tea Party supporters — is the conviction that parents should be able to shape the education of their children, and the government should have little or no say about it.

Where does this conviction come from? As noted previously, much of LaE occurs well beyond the contours of formal schooling and is embedded in the domain of child rearing — long recognized as the responsibility and privilege of parents, and upon which the state cannot intrude (absent evidence of neglect or abuse). In homeschooling, however, LaE and schooling are often deeply interwoven. So if homeschooling is seen as simply part of parenting, it becomes clear why many parents who homeschool view regulations as unjustifiable intrusions into their sacred domain.

This belief that the state should have no authority to regulate schooling runs counter to liberal democratic theory. At the same time, however, liberal theorists generally acknowledge the primacy of parental authority in the domains of child rearing and LaE. So the distinction between formal schooling (subject to state regulation) and LaE (the realm overseen by parents) matters very much for liberal democratic theory. When schooling blends into LaE, both the theoretical distinctions and policy implications become especially complicated. In what follows, I argue that such a context requires a more restrained vision of the state's role in schooling than liberal theorists typically recommend, and a recognition that many educational interests of children and the state should not be granted the status of legal rights.

1. Michael Planty et al., *The Condition of Education 2009* (Washington, D.C.: National Center for Education Statistics, Institute of Education Sciences, U.S. Department of Education, 2009). The NCES data estimated a total of 1.5 million homeschoolers in 2007. Given the typical reluctance of homeschoolers to respond to government surveys, and the five years since these data were collected, the current total almost certainly tops two million.

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It is worth noting at the outset that this question of the boundaries between schooling and LaE holds implications that extend far beyond the homeschooling phenomenon — which, despite its meteoric growth, likely involves less than 5 percent of the school-age population. As cyberschooling and other alternative education models continue to proliferate, however, the learning process for young people may bear little resemblance to institutional schooling of the twentieth century, and the practical distinctions between LaE and schooling will blur for more and more families. What that means for the provision and oversight of those educational experiences merits serious philosophical and policy consideration.

SCHOOLING VERSUS EDUCATION: THE LEGAL TERRAIN

Before venturing into more normative territory, it is helpful to understand what the law says about the distinction between schooling and LaE, and to consider the implications for the relative authority of parents, children, and the state.² While the Supreme Court has never ruled on a case focused directly on homeschooling, two high court decisions have shaped the legal terrain for almost a century: *Meyer v. Nebraska*, decided in 1923, and *Pierce v. Society of Sisters*, decided in 1925. Both firmly established parents' right to direct the education of their children, while at the same time making clear that the state has the right to regulate schooling.

In *Meyer*, the Court identified the fundamental right of parents to "establish a home and bring up children," calling it "a private realm of family life which the state cannot enter," but also noted "the power of the State to compel attendance at some school and to make reasonable regulations for all schools."³ (The state may also "prescribe a curriculum" for public schools, but this implies that a similar prescriptiveness for nonpublic school curricula is beyond the state's authority.)

Two years later, the *Pierce* decision cited *Meyer* when it struck down an Oregon law intended to dismantle the parochial school system by requiring all children to attend public school. The Court's conclusion: the state does not have the power to "standardize its children by forcing them to accept instruction from public teachers only." In a phrase often used by homeschool advocates, the Court acknowledged that "the child is not the mere creature of the state" and that parents have the right to "direct the education of children by selecting reputable teachers and places." But *Pierce* also asserted that "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," and to require "studies plainly essential to good citizenship."⁴

Drawing on a right to privacy found in the Fourteenth Amendment, *Meyer* and *Pierce* made clear that parents have a fundamental liberty interest to raise their children largely as they see fit (the broader notion of LaE), including electing

2. This essay examines the American legal context only.

3. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

4. *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

not to send them to public school.⁵ But these two Supreme Court decisions also specify that the state has a more active regulatory role to play in the narrower realm of children's schooling, whether such schooling is public or not. In short, the American legal system uses the distinction between schooling and LaE to delineate the respective authority of parents and the state when it comes to protecting children's educational interests.

Accordingly, this distinction between schooling and LaE is pivotal in the analysis of the relative educational rights and interests of parents, children, and the state. Because the Supreme Court has recognized that shaping LaE for their children is a fundamental right of parents, the state has regulatory authority over schooling as a separate, narrower category of education. If the Court were someday to conclude that homeschooling is inextricably woven into the fabric of LaE, then homeschooling would arguably be part of that fundamental right and thus not subject to regulations (just as parenting is not).

The majority consensus among legal scholars is that while parents have a fundamental right to raise their children and choose their children's form of schooling, a specific constitutional right to homeschool does not exist. With few exceptions, lower courts have not identified a Fourteenth Amendment right to homeschool.⁶ This view is not without its critics, however, and it is far from obvious what the Supreme Court would decide were it to rule directly on such a question in the future.

On the surface, it seems clear that *Meyer* and *Pierce* intended to uphold the distinction between schooling and LaE. But one particular sentence in *Meyer* reveals just how much things have changed in American society since that decision: "Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto." In other words, the 1923 Supreme Court could not conceive of an adequate form of education beyond institutional schooling. In this respect, they echoed the sentiment of broader American society during this time, which had come to see formal, institutional schooling as a symbol (and means) of progress and prosperity. As historian Milton Gaither notes, "Most Americans by the early twentieth century had fully embraced the notion that children should learn in schools." With the professionalization of education at its zenith, teachers and administrators were seen as possessors of an expertise inaccessible to parents and other laypeople. Schools, whether public or Catholic, were in fact expanding their roles to include functions traditionally served by families.⁷

5. Subsequent Supreme Court cases, including *Prince v. Massachusetts* 321 U.S. 158 (1944) and *Roe v. Wade* 410 U.S. 113 (1973), have reconfirmed this fundamental parental right.

6. See Milton Gaither, *Homeschool: An American History* (New York: Palgrave Macmillan, 2008), 176–179. As Gaither explains, proponents of homeschooling have also presented a First Amendment freedom of religion argument for a fundamental right to homeschool, but these cases have been almost entirely unsuccessful in the lower courts.

7. *Ibid.*, 81. See also David Tyack and Elisabeth Hansot, *Managers of Virtue: Public School Leadership in America, 1820–1980* (New York: Basic Books, 1982).

Over the past hundred years, however, this confidence in the efficacy and centrality of conventional — especially public — schooling has waned considerably. School choice advocates have tremendous influence on public policy discourse, and private foundations increasingly bankroll alternative approaches to education. Beyond the explosive growth in homeschooling, we are seeing distance education begin to reshape the notion of schooling as defined by time and place. Even within the public school universe, one study predicts that half of all high school courses will be available online by 2019.⁸ Simply put, the “grammar of schooling”⁹ may have indeed begun to change in ways that will call into question the practical and legal distinction between schooling and LaE.

It is worth pointing out that if homeschooling were ever deemed a fundamental right free from state regulation, this would not mean that the state would have no means of protecting the educational interests of children. Rather, much like the current approach to child welfare, it would shift the burden of proof from parents to the state. As I mentioned earlier, many homeschool advocates argue that the educational realm should be understood as simply part of the broader framework of parental rights and responsibilities. But parental rights, like any set of rights, are not unlimited. In matters of children's basic welfare and the role of social service agencies, for example, parents have the right to raise their children as they see fit, and the state may not intervene unless compelling evidence exists that children are being abused or neglected. The burden of proof, so to speak, is on the state — parents are not required to submit yearly “child welfare progress reports.” In the same way, homeschoolers often contend, parents' rights to direct their child's education should be infringed upon only if there is evidence to suspect that they are neglecting this responsibility.¹⁰

While most homeschoolers would likely embrace such a legal shift, there may in fact be good reason for them to be wary of eliminating the distinction between schooling and LaE. If the legal pendulum ever swung back toward greater state control over children's education, the lack of a clear distinction might also open up the broader realm of parenting to greater state involvement. It may very well be in parents' long-term privacy interests to maintain the distinction between LaE and schooling, as long as the latter is modestly regulated in the homeschooling context, keeping the realm of parenting more clearly off limits from state control.

But even assuming the distinction between schooling and LaE continues to exist as a legal framework, the peculiar nature of the homeschool context raises

8. Clayton M. Christensen and Michael B. Horn, “How Do We Transform Our Schools?” *Education Next* 8, no. 3 (2008): 12–19.

9. David Tyack and Larry Cuban, *Tinkering Toward Utopia: A Century of Public School Reform* (Cambridge, Massachusetts: Harvard University Press, 1995), 85ff.

10. For a relatively recent debate over the burden of proof argument in homeschooling regulation, see Perry L. Glanzer, “Rethinking the Boundaries and Burdens of Parental Authority over Education: A Response to Rob Reich's Case Study of Homeschooling,” *Educational Theory* 58, no. 1 (2008): 1–16; and Rob Reich, “On Regulating Homeschooling: A Reply to Glanzer,” *Educational Theory* 58, no. 1 (2008): 17–23.

complex questions about how to identify and protect the relative rights and interests of children, parents, and the state. In order to develop a framework of rights that might do so, we must look beyond the current legal terrain and consider the normative dimensions of the question as well.

EDUCATIONAL INTERESTS, EDUCATIONAL RIGHTS

My primary contention is that each of these stakeholders — parents, children, and the state — has multiple, vital interests in the educational process, but that not all of these interests merit the status of unyielding legal rights.¹¹ I want to suggest that at least two criteria need to be met for such interests to qualify as legal rights, enforceable by the power of the state.

The first criterion is *clarity*: is there sufficient clarity on the specific contours of that interest and what it means to have it met? As I will argue, several important interests (gaining basic academic skills, learning to think for oneself, developing virtues of democratic citizenship) are generally acknowledged and affirmed as central to the educational process; nevertheless, some of these interests generate such widely differing yet reasonable interpretations that their codification into law cannot be adequately justified, particularly when they risk infringing on clearly established legal rights such as child rearing.

Some might object that the clarity criterion appears to reduce the identification of legal rights to some sort of popular vote, which runs counter to the idea of rights serving as a bulwark against majority tyranny. It is certainly true that rights cannot simply be a function of popular sentiment; at the same time, however, we should recognize that rights do not descend fully articulated from the heavens. Rather, they are asserted and acknowledged through an iterative process of dialogical reasoning. If widespread reasonable disagreement exists on the specific contours of a prospective right, this does not necessarily mean that such a right lacks merit, but it should make us especially wary of transforming such an interest into a nonnegotiable claim backed by the power of the state. Furthermore, if clarity cannot be reached about a measurable threshold for fulfilling such an interest, the state lacks the precision necessary to codify it into law.

The second criterion necessary for an interest to merit the status of a legal right is *capacity*: can the state actually enforce the fulfillment of such an interest if it is not being met? The state, as Harry Brighouse puts it, is the “guarantor of last resort” for children’s educational rights;¹² but the state cannot guarantee something that it is incapable of fulfilling, whether for lack of clarity about the

11. As I explain in a subsequent section of the essay, however, many of these interests should be considered moral rights. My tripartite framing of interests, while differing significantly in some of its conclusions, draws from Rob Reich, “Testing the Boundaries of Parental Authority over Education: The Case of Homeschooling,” in *Moral and Political Education: Nomos XLIII*, ed. Stephen Macedo and Yael Tamir (New York: New York University Press, 2002).

12. Harry Brighouse, “What Rights (if Any) Do Children Have?” in *The Moral and Political Status of Children*, ed. David Archard and Colin M. Macleod (Oxford: Oxford University Press, 2002), 34.

contours of the interest or what constitutes its fulfillment, or simply because it is beyond the state's ability to secure.

Here one might object that this framing of rights veers inappropriately toward empirical considerations; if a moral right exists, the objection goes, the state is simply obligated to fulfill that right. But my contention is that our evaluation of what interests merit legal status should be both normative *and* empirical. Asserting a host of legal rights for which the state is fundamentally unable to serve as guarantor ultimately cheapens the idea of legal rights as a whole. Likewise, to assert a legal right without considering its practical implications and potential for infringement on other rights and interests overlooks the often far-reaching and unforeseen impact of state intervention, particularly in the private realm of the family.

A final point before turning to an analysis of specific educational interests: plenty of profound moral rights do not merit legal status, but their lack of legal force should not imply that they are of lesser value than legal rights. Put another way, not everything of vital importance can be effectively guaranteed by law. As a prime example of this, consider a clear-cut, obvious child's interest: growing up in a loving and supportive family. Few would dispute such a profound interest, and most would likely identify it as a moral right (that is, parents have a moral obligation to love and support their children). But what would it mean to assert this as a legal right? We accept the idea of a child's legal right to live in a home free from physical abuse — we have relatively strong clarity on what constitutes abuse, and objective ways to assess it — but it is beyond the capacity of the state to define "loving and supportive," much less to specify a legal line at which we would consider parents a failure in this regard. In fact, an effort by the state to codify and measure such a moral right would almost certainly create more problems than it would solve.¹³

PARENTS' INTERESTS

Parents clearly have a vital interest in directing the upbringing and LaE of their children, and liberal theorists generally echo the perspective of the courts in acknowledging this as a legal right.¹⁴ In the homeschooling context, this right would be most fully experienced as a complete absence of state regulation (essentially the current situation in nearly a quarter of U.S. states, where parents are — at

13. As Martin Guggenheim, lawyer and longtime child advocate, has argued, the state is not well positioned to make decisions such as these, and such an approach can actually work against children's interests. See Martin Guggenheim, *What's Wrong with Children's Rights* (Cambridge, Massachusetts: Harvard University Press, 2005).

14. See, for example, Reich, "Testing the Boundaries"; and Eamonn Callan, *Creating Citizens: Political Education and Liberal Democracy* (Oxford: Oxford University Press, 1997). Legal theorists typically concur: see, for example, David A.J. Richards, "The Individual, the Family, and the Constitution: A Jurisprudential Perspective," *New York University Law Review* 55 (1980): 1–62; Peggy Cooper Davis, "Contested Images of Family Values: The Role of the State," *Harvard Law Review* 107, no. 6 (1994): 1348–1373; and Kenneth L. Karst, "The Freedom of Intimate Association," *Yale Law Journal* 89, no. 4 (1980): 624–692.

most — simply required to notify officials of their intent to homeschool).¹⁵ Parents' interests in the educational process meet the conditions of clarity (parents control the shape of their children's education) and capacity (the state can protect these rights by not imposing regulations). The relevant question for liberal theory regarding parents' rights is not *whether*, but *how much* — and the answer to this depends upon how we view the status of children's and the state's interests.

CHILDREN'S INTERESTS

What are the central educational interests of children? The most obvious and least controversial of these is that children need to develop the academic knowledge and skills necessary to become economically self-sufficient adults.¹⁶ Certainly disagreement exists about how broad and deep such skills and knowledge need to be for all students (consider, for example, the endless debates about academic standards and test-score cutoffs), but few people dispute the importance of at least basic literacy and numeracy for all children. Clarity, then, exists for children's interest in developing basic academic skills.¹⁷

The state's capacity to oversee and regulate basic academic skills is more complicated in the homeschooling context, however. Consider my introductory example of the Wilkins family: Since their schooling and LaE are so intertwined, what parts of their curricula does the state have authority over? Must Mrs. Wilkins maintain records that delineate when basic skills are taught, regardless of whether this happens in a more formal schooling context or in LaE, such as their trips to the supermarket? Such an approach to state regulation, focused on tracking curricular "inputs" (for example, activities X_1 and X_2 from curriculum X were done on this date), ultimately tells us nothing about children's actual learning and thus does little to verify that their educational right to master basic skills is being met. Instead, states should have authority over learning "outputs" through basic skills testing. In this way, too, we sidestep the challenge of distinguishing between the endeavors of schooling and LaE — the state is simply verifying these basic skills have been learned, regardless of where, when, or how.¹⁸

15. As noted earlier, even then educational neglect can be investigated by the state under child welfare statutes, with states bearing the burden of proof.

16. Parents and the state also have obvious interests at stake in children's eventual self-sufficiency as adults.

17. There is obviously far more to a good education than just these basic skills protected as legal rights, but a good education comes in many shapes, depending upon the needs and goals of the learner. Ultimately, the details vary in ways that prevent standardization and codification.

18. For a fuller analysis of why a broader requirement for all children of academic skills and content (such as typical state standards frameworks) is unreasonable, as well as an examination of procedural issues (including the question of what happens if homeschoolers fail basic skill tests), see Robert Kunzman, "Understanding Homeschooling: A Better Approach to Regulation," *Theory and Research in Education* 7, no. 3 (2009): 311–330. One approach to homeschooling that especially complicates state oversight is "unschooling," whereby children pursue their own learning interests, often with no formal curricula at all. Traditional distinctions between schooling and LaE disappear entirely; unschooling pushes us to focus even more on ultimate learning outcomes, rather than the route taken along the way.

The other, far more controversial candidate for children's basic educational interests is the development of personal autonomy. In colloquial terms, autonomy can be said to involve thinking and acting for oneself, but liberal theorists differ widely on what exactly this means, not to mention what it would look like. Some emphasize the ability to shape one's life course from an array of choices, which raises questions about what it means to freely choose. Other accounts emphasize careful reflection on one's beliefs and values, ultimately revising or affirming those core convictions.¹⁹

Other theorists, still operating within the liberal democratic tradition, question an approach that privileges autonomy over other values.²⁰ In a recent critique of compulsory autonomy-promoting schooling, Anders Schinkel describes many liberal accounts of autonomy as biased toward intellectual or cognitive analysis and unduly focused on one's beliefs and values. The average person, he argues, is not self-critical enough to clear the autonomy bar that these liberal theorists establish. Schinkel points to empirical evidence that calls into question just how self-creating we can be, and advocates instead for a more circumscribed version of autonomy as self-control.²¹

It is beyond the scope of this essay to fully encapsulate liberal disagreements over the nature of personal autonomy, much less to develop or defend a particular conception. Instead, I point to these various objections and critiques in order to underscore the significant disagreement that exists among liberal philosophers, to say nothing of theorists outside the liberal tradition. Schinkel's conception of autonomy would mesh quite easily with the views of most of the conservative Christian homeschool parents I spoke with during my research, who consistently voiced the sentiment that they want their children to grow into adults who can think for themselves.²² How such a goal informed their homeschooling practices, however, was often quite different than the vision of so-called autonomy liberals. Widespread recognition exists regarding the importance of teaching children to

19. See, for example, Joel Feinberg, "A Child's Right to an Open Future," in *Whose Child? Parental Rights, Parental Authority and State Power*, ed. William Aiken and Hugh LaFollette (Totowa, New Jersey: Littlefield, Adams, 1980), 124–153; John Christman, "Autonomy and Personal History," *Canadian Journal of Philosophy* 21, no. 1 (1991): 1–24; Harry Frankfurt, *The Importance of What We Care About* (Cambridge: Cambridge University Press, 1987); and Meira Levinson, *The Demands of a Liberal Education* (Oxford: Oxford University Press, 1999).

20. See, for example, Isaiah Berlin, *Four Essays on Liberty* (London: Oxford University Press, 1969); and William Galston, *Liberal Pluralism: The Implications of Pluralism for Political Theory and Practice* (Cambridge: Cambridge University Press, 2002).

21. Anders Schinkel, "Compulsory Autonomy-Promoting Education," *Educational Theory* 60, no. 1 (2010): 97–116. The basic autonomy that Schinkel advocates stops well short even of the notion of "minimal autonomy" forwarded by Rob Reich, which retains the emphasis on cognitive self-reflection on one's beliefs that Schinkel criticizes. See Rob Reich, *Bridging Liberalism and Multiculturalism in American Education* (Chicago: University of Chicago, 2002). For a focused critique of Reich's arguments for requiring homeschoolers to pursue minimalist autonomy, see Glanzer, "Rethinking the Boundaries and Burdens of Parental Authority over Education."

22. See Robert Kunzman, *Write These Laws on Your Children: Inside the World of Conservative Christian Homeschooling* (Boston, Massachusetts: Beacon Press, 2009).

learn to think for themselves; however, we fall well short of the clarity necessary to extend this important interest (in the abstract) into a legal right.

Further complicating the bid for autonomy development as an educational right is the inability to measure children's autonomy in any reliable, standardized way, whether in the formal schooling context or LaE more broadly. Even theorists who argue for a more expansive version of personal autonomy offer little in terms of how such autonomy could be objectively and reliably measured for millions of schoolchildren. Simply put, how do we know when a child has reflected, in a sufficiently critical way, on the version of the good life in which he or she was raised — or conversely, swam so exclusively in the ethical water of his or her upbringing that the child is incapable of such a feat? (Assuming, of course, that we agree that this exercise of critical reflection constitutes a vital feature of the autonomous life.)

A recent judicial decision exemplifies such indeterminacy, and the concerns that legal judgments about children's autonomy rightfully provoke. In 2011 the New Hampshire Supreme Court affirmed a lower court decision that ten-year-old Amanda Kurowski, homeschooled since first grade, should be required to enroll in public school. Her parents, who share joint decision-making responsibility for Amanda, disagreed about whether homeschooling is the best educational choice for her.²³ Consider the lower court's reasoning: "The counselor found Amanda to lack some youthful characteristics. She appeared to reflect her mother's rigidity on questions of faith." While it is not clear what forms this rigidity took (other than Amanda's apparent attempts to proselytize the counselor), this observation should give us serious pause about the court's capacity to evaluate Amanda's autonomy. How alarmed should we — and more to the point, a court of law — be about religious dogmatism in a ten-year-old? How many ten-year-olds hold a nuanced view of their religious commitments anyway? And what if her rigid beliefs were about environmentalism or politics — would the court have been so concerned? Establishing autonomy development as a legal right would invariably put judges and other public officials in the position of making such determinations, a role fraught with the likelihood of misinterpretation and ideological missteps.²⁴

It is worth noting that if we were ever able to settle on a suitably modest conception of autonomy and devise a standardized measure for it, I suspect we would find most homeschoolers no less lacking in basic autonomy than the typical

23. The only reason that the state was involved in such a question was because this was a custody case. Under homeschooling regulations in New Hampshire (and everywhere else in the United States), the state would otherwise have no cause for intervention.

24. State of New Hampshire, Judicial Branch, 603 868 6156, Belknap, 5s Laconia Family Division, In the Matter of Martin Kurowski and Brenda (Kurowski) Voydatch, No. 2006-M-669, Decree on Pending Motions, 4. Like the quest for a sufficiently loving family, arguments for a demanding form of autonomy might better be construed as disputes over what is *best* for children, rather than focused on basic interests that enjoy widespread consensus. A focus on basic interests, Martin Guggenheim warns, "only ensures greater intervention" by the state "to oversee and control families" (*What's Wrong with Children's Rights*, 247).

public school student. Most homeschoolers, I would contend, are not sequestered from the outside world in a way that prevents them from recognizing the existence of other ways of life, and at least some of these (perhaps especially in the media) are presented in an attractive light. Even in the conservative Christian homeschool families I observed — where obedience to authority figures was stressed and the acceptance of traditional social roles was implicit — the children still managed to speak their minds and push against many of the boundaries their parents had established, often in the context of LaE more broadly.²⁵ It may very well be that the incidence of what Eamonn Callan calls “ethical servility” is no more common among homeschoolers than it is among other children, and at least some empirical research points in that direction. As Callan and others note, the typical American high school — with its abundant peer pressure and culture of materialism and consumption — is hardly an ideal environment for cultivating autonomy. Such an empirical point seems quite relevant when we contemplate the state’s capacity to serve as guarantor of a legal right to autonomy.²⁶

THE STATE’S INTERESTS

In addition to its obligation to protect the rights of parents and children, the state has educational interests of its own, in particular the development of citizens who are willing and able to participate in a democracy. As with autonomy, liberal theorists affirm this value in principle, but offer widely differing prescriptions for what it would actually look like in practice (assuming they provide any curricular specifics at all). Some advocate a civic education aimed at inculcating patriotic virtues, while others emphasize critical reflection or the cultivation of public reason. Calls by some liberal theorists for rigorous civic preparation whereby students meet “stringent cognitive demands” requiring autonomy and “deliberative excellence” are seen by others as “visionary verging on utopian.”²⁷

As noted earlier, the Supreme Court affirmed in *Pierce* that the state has the authority to require “studies plainly essential to good citizenship.” If we were to set the bar low enough, perhaps we could reach consensus among theorists about

25. See Kunzman, *Write These Laws on Your Children*. There are homeschool settings where it seems even this basic autonomy is curtailed; we have self-reports from adults who felt this way and now rail against homeschooling — but their passionate critique itself makes clear that they managed to develop an autonomous perspective nonetheless.

26. See Callan, *Creating Citizens*, 152ff; and Murray Milner Jr., *Freaks, Geeks, and Cool Kids: American Teenagers, Schools, and the Culture of Consumption* (New York: Routledge, 2006). A review of empirical research comparing the development of personal autonomy in children from strongly collectivist cultures to its development in those from individualistic Western societies, for instance, found little difference between them. See Charles C. Helwig, “The Development of Personal Autonomy Throughout Cultures,” *Cognitive Development* 21, no. 4 (2006): 458–473.

27. Galston offers this criticism of Callan’s position specifically. See William A. Galston, “Signs of Progress: The Debate over Civic Education,” *Theory and Research in Education* 4, no. 3 (2006): 333; and Eamonn Callan, “Galston’s Dilemmas and Wisconsin v. Yoder,” *Theory and Research in Education* 4, no. 3 (2006): 265. For more on this general issue, see William Galston, *Liberal Purposes: Goods, Virtues and Diversity in the Liberal State* (Cambridge: Cambridge University Press, 1991); and Amy Gutmann, *Democratic Education* (Princeton, New Jersey: Princeton University Press, 1987).

a common core of factual knowledge: a basic grasp of government structures, processes, and our rights and responsibilities as citizens. And we could probably construct an assessment that would ascertain whether students had committed such knowledge to memory. But few liberal theorists would consider such an emphasis as the vital heart of civic education, and it seems likely that such a universal testing regime would ultimately detract from more complex — and arguably more important — aspects of “good citizenship.”

Another relevant question regarding the state’s interest in the development of capable citizens is whether schooling is the best context for such growth. Some theorists — both within and outside the liberal tradition — argue that other civic contexts and affiliations (religious institutions, community organizations, and the like) are more effective sites for developing the skills and virtues of democratic citizenship, and their arguments are buttressed by empirical research.²⁸ Perhaps not surprisingly, LaE can provide richer, more authentic settings for civic development than most schooling experiences. Yet these contexts are clearly beyond the regulatory purview of the state.²⁹

Consider another challenge to the state’s capacity to serve as guarantor for the development of virtuous citizens. To claim that, through the process of formal schooling, the state needs to ensure that all individuals are prepared to exercise the rights and responsibilities of citizenship is to claim that the state *needs* to do what it seems clear it *has not* done (in its public schools) and perhaps *cannot* do (to the extent that the formal schooling context is inherently limited in its capacities).³⁰ While few would dispute the need for such citizens, our desire that students learn the virtues of democratic citizenship should nonetheless be tempered by William Galston’s observation that “liberal democratic governments may be limited in their ability to pursue objectives that their citizens may regard as desirable.”³¹

In other cases, the price of intervention by an overly prescriptive or controlling state may not be worth the cost to other rights and freedoms. Justice James

28. Paul Weithman, *Religion and the Obligations of Citizenship* (New York: Cambridge University Press, 2002); Robert D. Putnam and David E. Campbell, *American Grace: How Religion Divides and Unites Us* (New York: Simon and Schuster, 2010), 443–492; and Christian Smith and David Sikkink, “Is Private School Privatizing?” *First Things: A Monthly Journal of Religion and Public Life* 92 (1999): 16–20.

29. Consider another way in which the blurred boundary between schooling and LaE can complicate matters. According to *Pierce*, the state has the authority to insist that “nothing be taught which is manifestly inimical to the public welfare.” This authority exists only in the schooling endeavor, however, not in the broader LaE context of child rearing. A child absorbing an attitude of racial supremacy when he or she returns home from school each day is problematic enough; in homeschooling, the state would simply not be able to prevent such lessons from being woven into a curriculum that would meet state approval, were such regulations in place.

30. In the 2006 National Assessment of Educational Progress (NAEP) civics assessment, for example, only 27 percent of high school seniors scored at or above “proficient.” See U.S. Department of Education, *The Nation’s Report Card: Civics* (Washington, D.C.: National Center for Education Statistics, 2007), <http://nces.ed.gov/nationsreportcard/pubs/main2006/2007476.asp>.

31. Galston, “Signs of Progress,” 332.

McReynolds offered such a caution in the *Meyer* decision, noting that Plato's desire to "submerge the individual and develop ideal citizens" by removing children from their parents so the Spartan state could raise them in a standardized manner would hardly merit public or Constitutional support in American society.

In summary, most educational interests, as important as they are, should not have the status of legal rights. As a society, we aspire to develop informed, virtuous citizens who can think for themselves — but it's the fine print, so to speak, that should give us pause as we consider what it would mean to use the power of the state to enforce any singular vision of the autonomous person or good citizen.

We should be particularly cautious in our assertion of children's educational rights beyond the generally undisputed need for basic skills, not only because reasonable conceptions of personal autonomy and civic virtue vary so widely, and not only because the state lacks the capacity to measure and enforce these interests. As I have suggested, there is also the question of trade-offs, of competing rights and interests. Assume, for instance, that we were to gain consensus that a very modest form of autonomy as self-control is necessary for human flourishing. If a little autonomy allows us to lead "good" lives, shouldn't the state enforce an autonomy-intensive education that steers us toward "better" lives? Schinkel frames the trade-off from the opposite direction: "Is *enhancement* of flourishing enough to override the presumption against such drastic state intervention if without it we can still speak of flourishing, albeit on a somewhat lower level?"³²

Consider the possible trade-off from a parent's perspective. Imagine we had developed a pill, to be administered in weekly doses, that would gradually transform children into the kind of fully autonomous, virtuous citizens advocated by the most prescriptive of liberal theorists. The side effect of the pill, however, is that it makes some children allergic to their parents, ultimately limiting their interactions and straining their relationships. Would we be willing to endorse such a pharmo-educational regimen, to ensure these educational interests of children and the state — even at the possible price of other vital interests of both children and their parents? Those who believe that good lives can be, and quite often are, led without making such a trade-off will quite reasonably reject it.³³

MORAL RIGHTS: FRAMING OUR IDEALS

So if we should stop short of designating education for civic virtue and personal autonomy as legal rights, might they at least merit the status of moral rights? A variety of distinctions between moral and legal rights can be drawn, but the difference relevant to my argument here is that the latter are backed by the power of the state. What value does a moral right hold if it lacks the legal force of state power behind it? Sometimes an interest will be identified as a moral right in the

32. Schinkel, "Compulsory Autonomy-Promoting Education," 108.

33. A far less imaginative consideration of the trade-offs involved in heightened state regulation of schooling might involve the argument — forwarded by many homeschoolers — that an educational experience tailored to the needs of the individual child, free from the pendulum of educational fads and policies warped by political and economic interests, qualifies as a profound educational interest as well.

hope of convincing others it deserves legal status as well, but that is obviously not what I would advocate here. It may be useful, however, to assert a moral right as a way of identifying an important social vision to which we should aspire, even while acknowledging that value pluralism should restrain us from imposing a detailed prescription of how to do so.

With this in mind, consider the matter of civic education. In *Pierce*, Justice McReynolds confirmed the state's legal right to require citizenship education, but in *Meyer* he reminded us of the dangers of an overly prescriptive state in this regard. We might even have general consensus on the value of a robust civic education, one that extends beyond intellectual content to include participatory skills and deliberative dispositions, and view it as a moral obligation that parents and the state should fulfill on behalf of children. At the same time, we can acknowledge that this learning might best occur in LaE rather than formal schooling, and that the various "good citizens" it produces may vary widely in political belief and temperament. Accordingly, the communication of such a robust and particular civic vision should be one of persuasion rather than compulsion.³⁴

In the same way, identifying children's interest in becoming autonomous as a moral right — while acknowledging the existence of reasonable disagreement about autonomy's full contours — encourages an ongoing conversation about its importance and the dangers of a society in which the development of autonomy is neglected or dismissed as insignificant. Asserting that children have a moral right to develop into capable and conscientious citizens who can think for themselves, while admitting that there is ample, reasonable disagreement about the details of such a goal, underscores our recognition as a society that these ideals are important and worth debating. Identifying these educational interests as moral rights also enables us to grant them increasing importance as children age and develop, a calculus less available to legal rights.³⁵

At its essence, our challenge is to protect the interests and rights of parents, children, and the state without drawing the circle so tightly that reasonable disagreement about what constitutes an acceptable (rather than ideal) education is not honored. In the homeschooling context, where the state's interests in schooling and the parents' domain of LaE can blend beyond distinction, this challenge may be at its greatest.

THE FUTURE OF SCHOOLING AND CHILDREN'S RIGHTS

For the past century and a half, schooling has been what happened at school, typically between the hours of 8 a.m. and 3 p.m. As perhaps the ultimate in

34. Such methodological modesty seems warranted even for public school contexts. As Jason Scorza notes, the Lockean distinction between compelling belief and using state power to present systematic arguments is not particularly sharp, especially when the arguments are presented to a captive audience in compulsory civic education. Jason A. Scorza, "Facing Up to Civic Pluralism: A Friendly Critique of Galston," *Theory and Research in Education* 4, no. 3 (2006): 291–311.

35. Elizabeth S. Scott, "The Legal Construction of Childhood," in *A Century of Juvenile Justice*, ed. Margaret K. Rosenheim, Franklin E. Zimring, David S. Tannenhau, and Bernadine Dohrn (Chicago: University of Chicago Press, 2002), 113–141.

educational privatization, homeschooling blurs these distinctions of time and place, and many homeschoolers rightfully contend that their schooling is woven into LaE, the fabric of their day-to-day lives. In this essay I have considered what rights children should have regarding their schooling, and have suggested that the distinction between LaE and its schooling subset is worth retaining, as it helps protect children's right to basic literacy and numeracy while making the limits of state power clear.

I have also argued that it makes little sense to identify something as a legal right if we cannot also specify what it would look like to have that right met, either because there is reasonable disagreement about essential criteria or an inability to measure whether those criteria have been fulfilled. Such a project becomes even more problematic when it threatens to infringe upon other (often clearer) interests. Claiming that children have a legal right to develop into a certain kind of person, with particular virtues, presents just that sort of dilemma.

Some readers may conclude that the best way through this thicket is to mandate a traditional form of schooling, structurally distinct from LaE, for all children (in essence outlawing homeschooling). But these horses have already left the barn, and not simply in the form of homeschooling. Some countries have outlawed the practice, but they nonetheless cannot shield the traditional model of schooling from other types of dramatic transformation. Cyberschooling appears to be an unstoppable trend, if for nothing but economic reasons. As school choice offerings expand, and cyberschooling options grow at an astonishing rate, the line between public and private, formal schooling and LaE, will continue to blur and the complexity of protecting educational interests will grow.³⁶ What "counts" as formal education — and what authority the state should have over it — is a question whose relevance will only increase as educational choices proliferate.

36. See Terry M. Moe and John E. Chubb, *Liberating Learning: Technology, Politics, and the Future of American Education* (San Francisco: Jossey-Bass, 2009); and Patricia Burch, *Hidden Markets: The New Education Privatization* (New York: Routledge, 2009).

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