Officials' Obligations to Children: The Perfectionist Response to Liberals and Libertarians, or Why Adult Rights are Not Trumps Over the State Duty to Ensure Each Child's Education

Steve Sheppard
OFFICIALS’ OBLIGATIONS TO CHILDREN: THE PERFECTIONIST RESPONSE TO LIBERALS AND LIBERTARIANS, OR WHY ADULT RIGHTS ARE NOT TRUMPS OVER THE STATE DUTY TO ENSURE EACH CHILD’S EDUCATION

Steve Sheppard

2005 Mich. St. L. Rev. 809

Table of Contents

I. The Welfare of the Child as the End of the Argument, Not as the Means ........................................... 812

II. Legal Perfectionism: The Obligation of the Official to Promote the Good for Children, Regardless of What the Liberals, Conservatives, and Libertarians Say ........ 816

III. Preferring Affirmative Models of the Perfectionist Good, Especially When the Good Is Promoted for Children ................................................................. 825

IV. The Balance Between the Parent and the Perfectionist State: Why Officials May Promote the Basic Interests of the Child ................................................................. 829

V. How to Identify Basic Interests: Test Cases for Education ............................................................... 830

VI. Applying the Test Case at Home: Does the United States Ensure the Basic Interest of Education? ........ 832

VII. Perfectionist Musings: Why the State Officials Ought to Promote the Basic Interests of Education .... 840

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.¹

Justice McReynolds wrote these words for the U.S. Supreme Court in 1925, finding the First Amendment balances the authority of the state with

* Associate Professor, University of Arkansas School of Law. My thanks to Kevin Saunders for his thoughtful kindness, to Dean Blackburn and Professor Catherine Dwyer for their hospitality, and to the Michigan State Law Review for their helpful assistance during this symposium.

that of the parent over the teaching of a child.\textsuperscript{2} As the law has evolved in the eight decades since, this balance has leaned ever more toward parental freedom from state interference in the mental and social development of children. Yet even as the balance has tilted toward the parent, the state retains a duty to assist in preparing each child for the obligations of adulthood.\textsuperscript{3}

Weighing the responsibilities in the two trays of this balance is hard. Onto one tray go American ideals of individual autonomy, respect for family, and a belief that every parent ought to provide to a child unique insights that arise from religion and experience. That tray also carries a fear of state power and thought control, whether described as values of individuality or pluralism or values of limited government and the respect of privacy. It is heavily-weighted with arguments for limits on the state and license for the parent.

The other tray in the balance is less noticeable in contemporary rhetoric. American talk in the early years of the twenty-first century is increasingly freighted with the language of rights and state-bashing. Yet on that tray are the ideals of civic community—the common denominators of civic values of tolerance and of shared history and identity. Also on that tray are the tools of social skills and trades, the assurance of knowledge needed for employment, and self-actualization.

The state and the parent are not the only forces that influence children. There are, of course, the agents of commerce and culture, which vie with parents for a child’s attention. We must recognize not only that the ability of a parent to fulfill the duty to “recognize and prepare” a child for the obligations of adulthood, but also that the ability of the state to ensure the rights of its citizens must either co-opt or compete with all of these influences, or surrender to them. How, then, are parents to fulfill this duty, and what is the state’s obligation when they do not or cannot? Where, in the end, do the pans of the balance rest?

\textsuperscript{2} See \textit{id.} at 534-35. \textit{Pierce} did not, of course, first establish individual rights against the requirements of state education. That line was crossed two years earlier in \textit{Meyer v. Nebraska}, 262 U.S. 390 (1923), and \textit{Bartels v. Iowa}, 262 U.S. 404 (1923), in which a teacher’s right to teach the German language was recognized as an aspect of the Fourteenth Amendment. \textit{Pierce} extended \textit{Meyer}’s and \textit{Bartels}’ logic to parental interests and school interests under the First Amendment. Tying the bundle together, a teacher’s right to instruct languages was recognized as a First Amendment right in \textit{Farrington v. Tokushige}, 273 U.S. 284 (1927). Interestingly, all of these opinions were by Justice James C. McReynolds, who is rarely thought of as a juggernaut of progressive opinion-writing. See \textit{Bernard Schwartz}, \textit{A Book of Legal Lists: The Best and the Worst in American Law} 34-36 (1997).

\textsuperscript{3} “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.” \textit{Wisconsin v. Yoder}, 406 U.S. 205, 213 (1972).
These are important and solemn questions, which may be why they are so often captured in peripheral issues. An observer of American culture in 2004, observing the deployment of American federal institutions to assist parents in preparing their children for adulthood, might conclude that the greatest challenge facing American children was Janet Jackson’s right breast.4

The arguments over the pervasive sexualization of television broadcast content are a sub-set among a host of political, legal, and popular arguments over the morality of the public in the United States. In Janet Jackson’s case, as in many of these arguments, a slurry of agendas competed: some of them the commercial development of new and lucrative markets, some of them the political rousing of the rabble to be used for other ends, but nearly all claiming to speak for the children.5 Certainly, some in the throng were parents with genuine grievances, parents who had no desire to explain to their child why that lady wore such funny jewelry. More, though, appeared to be holding children aloft as banners in their personal fights, not for what would truly harm children, but for what they object to in the public sphere because it offends them personally.

There are, clearly, important debates about the moral climate and culture in America. Children are a powerful icon supporting the rhetoric for all sides of those debates: what influences one or another outcome will have on children, how those children will be altered, for good or ill, and what differences there will be among adults who grow from children altered in these ways. These questions are more than raw data; they are the tropes of political debate that can mask nearly every agenda affecting public discourse.

---

4. During the CBS network broadcast of the 2004 Super Bowl, popular music performer Justin Timberlake opened the bustier of performer Janet Jackson, exposing her breast, on which was a large, light-catching nipple-guard. See In re Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, 19 F.C.C.R. 19,230 (2004). According to the Federal Communications Commission (FCC), the agency received an “unprecedented number of complaints” that the incident and the music performed prior to it were indecent. Id. The FCC held hearings and levied a fine of $550,000, representing a $7,000 fine for every station owned by CBS’s parent company, Viacom. See id. Not content with the level of the fine, Congress soon after took up debate on legislation that would increase such fines to as much as $3,000,000 per incident. See Broadcast Decency Enforcement Act of 2004 (Amendment 3235 to the National Defense Authorization Act for Fiscal Year 2005) 150 CONG. REC. S6980-82 (June 17, 2004); Broadcast Decency Enforcement Act of 2005, 151 CONG. REC. H653-H664 (Feb. 16, 2005). Arguments over the bill compared it as a “real value to American families” to a limitation on free speech and democracy. Frank Ahrens, House Raises Penalties for Airing Indecency, WASH. POST, Feb. 17, 2005, at E1.

5. Complaints in recent and pending proceedings before the FCC may be found at http://www.fcc.gov/eb/broadcast/Plead.html (last visited Feb. 20, 2005).

In this symposium, all of the debates are not covered, only those that affect children and the rights of free expression considered under the First Amendment. Within that broad rubric, though, are many debates which are important both in themselves and as bellwethers of the broader storm of issues. In common among them are claims by one side that some law is required in the interests of children, and on the other that the law will violate rights protected under the First Amendment. We are not, I take it, considering arguments that would allow physical harm to the child to protect an adult’s rights. For instance, we are not considering seriously the arguments under the Free Exercise Clause that a minor child may be denied support or medical treatment because of a parent’s religion. Thus, what is at issue here are laws requiring or forbidding the exposure of children to ideas and values.

In other words, the claims are that the laws ought to either expose children to or shelter them from certain ideas or values. At face value, in the Janet Jackson case, the argument is that the law ought to shelter children from such images, or from the information that people wave (or have waved) such parts of their bodies in public. The counter-argument would be that, because freedom of expression allows such information to be presented to the world, either it must be appropriate for children to view it or, alternatively, that it is appropriate for adults to view it and too difficult to keep it from children.

However, there are other arguments in the Janet Jackson case, arguments that are less persuasive but more likely to inspire their proponents into the fray. Some adults are offended by seeing a woman’s bare breast in public. Some companies can make a lot of money by having it waved around. These arguments are rarely made directly but are likely to be cloaked in the more public-spirited claims and counterclaims about children.

If we are to comprehensively examine the legal and social environment that we ought to create for children, we might begin by evaluating the rhetoric about children’s interests. A preliminary task is to separate authentic arguments made on behalf of children from the many claims of promoting children’s interests that mask alternate agendas. It might seem obvious that

---

6. There are, to be sure, those who argue that even the physical welfare of the child is subordinate to the parent’s religious views regarding the best manner to promote that welfare. This argument is an extreme variant on some considered here, but it is otherwise beyond the scope of the present discussion. In general, the physical well-being of the child is always paramount to religious claims, and the state has the duty to protect children from neglect on religious grounds. See, e.g., People v. Rippberger, 283 Cal. Rptr. 111 (Ct. App. 1991).
one can reject arguments where the asserted reason for demanding some policy or law is child welfare but which is actually a sham for advancing the interest of a parent, a corporation, or a government. Such a rejection echoes the moral treatment required by the great ethical theorist Immanuel Kant, that one of the fundamental notions of morality is to treat each person as an end and not as a means.\textsuperscript{7} Besides the moral caution such arguments raise, there is also a sense in which such arguments deceive others and are likely to distort considerations of the child’s real interests.

Practically though, merely sorting arguments in which the child’s interest is distinct from the interests of others is often very hard. The underlying argument for the adult interest is usually too deeply intertwined with the cover argument about the child’s benefit. How, for instance, can one separate the child’s interest from the parent’s interest in a parent’s demand to raise the child in the parent’s religious tradition? There is an allure to segregating sham arguments from authentic arguments over the welfare of children, but such arguments are complex, combining interests from which such a segregation is unlikely to be generally useful. We are therefore likely to fail to sort out all of the arguments in which children are the means for advancing an underlying agenda from those in which the welfare of children is the true end of the argument.

One measure of the authenticity of a specific argument is the likelihood it promotes no other interests but the child’s. When a corporation advertising on Channel One argues that it is in the child’s interest to see educational programming in schools, an observer is entitled to discount the argument according to the independent motives of the speaker.\textsuperscript{8} It remains difficult, though, to distinguish the authentic voice between parent and child. For example, when a seventh-grade son and his father seek to exempt the son from health education on religious grounds,\textsuperscript{9} the son may have a sincere religious belief, which, regardless of his learning it from his father, is now his own.

\textsuperscript{7} “So act as to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as means only.” \textit{Immanuel Kant, Fundamental Principles of the Metaphysic of Morals} 58 (Thomas K. Abbott, trans., Prometheus Books 1987).

\textsuperscript{8} Channel One is a commercial television feed given to schools free and subsidized by advertisements. \textit{See} Channel One, http://www.channelone.com (last visited Mar. 19, 2005). It claims to reach 12,000 middle, junior, and high schools in the U.S., or over 8 million students daily. \textit{See id.} A visit to its website suggested primary sponsors at that time were Wrigley gum and Neutrogena skin care products. \textit{See id.}

\textsuperscript{9} \textit{See, e.g.,} Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003) (asserting a free exercise burden upon both father and seventh-grade son by the son’s requirement to attend public-school health education class, even though the son was not required to attend classes on sex and AIDS).
Further, the father’s belief that he is religiously obliged to be the sole source of his son’s knowledge may be perfectly sincere.

Of course, we are not limited to the descriptions of interests made by those who are engaged in a particular debate. While we have an obligation to take seriously and fairly the issues raised, we may use objective tools to fairly evaluate and restate the interests at issue.\(^\text{10}\)

In the case of the nature of a child’s education, one tool by which one might sort arguments would be to reject, presumptively, all arguments that commence from models of negative influence on children.\(^\text{11}\) That is to say, we might expect that arguments to keep a child in some forms of ignorance are more suspect than arguments to promote some forms of awareness.

Presently, negative models are our stock-in-trade. They drive our ideas and notions of child protection, of obscenity, and as my colleague Mark Kende demonstrates in this symposium, the algorithms of Internet filters.\(^\text{12}\) Yet because negative models, at best, can demonstrate what the child ought not know or believe, they do not lead to a comprehensible ideal of the intellectual development of a child. The negative models we have are independent of one another, and at least in regard to speech and ideas, for most people, unprioritized, leading to a concentration on negative models that may not be as harmful to the child as other negative influences.

The skewed priority of negative models is particularly apparent in the great effort to create and maintain legal barriers between children and depictions of sex, when at the same time children are exposed to near-revelentless depictions of violence.\(^\text{13}\) The arguments to keep children from exposure to sex fascinate Americans in a way that arguments to keep children

\(^{10}\) This is objective evaluation in the senses of fair and disinterested scrutiny, not in the sense of attempting to define some ultimate objective sense in which one is right or good. The exploration in this article is based on reason in the political realm, not the metaphysical. For those who prefer to fight over the moral reality of their beliefs, see JEREMY WALDRON, The Irrelevance of Objectivity, in JEREMY WALDRON, LAW AND DISAGREEMENT 164-87 (2001).

\(^{11}\) To be clear, this is not to say that all negative models of a child would presumably be inauthentic. Negative models that would keep a child from hunger, violence, or fear are fundamental means of expressing important goals that, obviously, are authentically in the interests of the child. True, these goals can be expressed in affirmative rhetoric, such as the models of a child with constant access to good nutrition, safety, and comfort. But the fundamental and uncontroversial nature of these interests suggests that neither the negative nor the positive model is likely to be asserted in an inauthentic attempt to promote an ulterior agenda. The nature of the interests in the ideas to which a child is exposed are not so uncontroversial.

\(^{12}\) See Mark S. Kende, Filtering Out Children: The First Amendment and Internet Porn in the U.S. Supreme Court, 2005 MICH. ST. L. REV. 843

\(^{13}\) This problem is addressed best in KEVIN W. SAUNDERS, VIOLENCE AS OBSCENITY: LIMITING THE MEDIA’S FIRST AMENDMENT PROTECTION (1996).
from violence apparently do not. Parents who would not allow a twelve-year-old to watch a movie depicting a nude adult think nothing of allowing the child to see movies with graphic murders.14 Such comparisons are usually the product of unthinking observation, which turn on a structure of purely negative models of the child: For many parents, the model “a child should not be exposed to sex” is a higher-value model than “a child should not be exposed to violence.”

I believe that a healthier debate, in which authentic arguments over the welfare of the child would be best presented, is one in which we presume that the best arguments about children’s proper knowledge and values should commence from affirmative arguments of what a child ought to know. In cultural iconography, it is the difference between arguing for appropriate role models versus arguing against inappropriate models.

Affirmative arguments are more likely, as a practical matter, to treat the child as the end of the argument, rather than the means to promote another agenda. Affirmative arguments are less likely to be sham claims of the interests of the child asserted in support of an underlying and independent agenda. It is, of course, possible to promote other agendas through affirmative role models. Yet the requirement to articulate the aspects of an appropriate model expose the proponent to criticism more easily than the mere rejection of another might do. In other words, to reject an idea as “indecent” is simply easier and less rigorous than to support an idea as “decent.” One can ask why an idea is decent and expect an articulable and debatable answer, an expectation less likely to be fulfilled for a claim of indecency.15

Preferring affirmative arguments for the knowledge or values of the child over arguments based on isolation from images or ideas, is not merely a step in the improvement of political rhetoric. It is also a means for locating the argument in a clearer rationale for state regulation. It is an argument according to which lawmakers can discern the rationale at stake in making and enforcing laws.

Seen in this light, there is a framework for further evaluation. The literature of legal perfectionism provides a method for evaluating laws that

---

14. I take this impression from an interview conducted with Mr. Mike Earls, the owner of Take 2 video outlets in Fayetteville, Arkansas. See Community Standards for Obscenity Round Table Discussion (Fayetteville, Ark. Cnty. Access Television broadcast July 24, 2005). His impression strikes me as being common across the United States.

15. Complaints, for instance, to the FCC in the Janet Jackson incident needed merely to describe the offending broadcast and then to assert that the broadcast content was offensive or indecent to the complainant, and that the complainant believes that the content is offensive or indecent by the standards in the complainant’s community. See In re Complaints, supra note 4. See also 47 C.F.R §73.3999 (2005) (barring radio and television stations from the broadcast of obscene or indecent matter). As of 2005, no similar rule bars the broadcast of violent matter.
promote “the good,” whether it is a notion of the good that is manifest in the life of an adult or in the life of a child.

II. LEGAL PERFECTIONISM: THE OBLIGATION OF THE OFFICIAL TO PROMOTE THE GOOD FOR CHILDREN, REGARDLESS OF WHAT THE LIBERALS, CONSERVATIVES, AND LIBERTARIANS SAY

“Perfectionism” is a term in the philosophy of law that describes a doctrine for the justification of law, as well as a theory by which laws may be criticized in the light of that doctrine. According to the doctrine of perfectionism, it is appropriate for laws to be created and enforced for the purpose of promoting the good in the lives of citizens.16 It follows that one duty allocated among all officials is to create and enforce laws for that purpose.17

As conceived in this doctrine, perfectionism does not entail any one conception of the good. Officials are to debate and define them. It is clear that, over time, some officials will enact conceptions that are dangerous and wrong-headed, and, at other times, will enact conceptions that are beneficial and wise. The debate over the good is ongoing. Even ideas whole-heartedly accepted today and enshrined by law, such as the good of freedom from slavery, must sometimes be argued and defended by the people who cherish such ideas.

A full-throated defense of the doctrine of legal perfectionism is beyond the scope of this article. Although the arguments against it are robust, and some of them are popular at the moment, this paper will only offer a brief rendition of each and a short argument for its rejection, at least as it would ostensibly apply to children.

There are counter-perfectionist positions within liberal, conservative, and libertarian positions, all of which, at first blush, appear to share a common

---

16. Stated more particularly,

17. The idea of the officials’ duty to promote this morality is developed further in STEVE SHEPPARD, THE MORAL OBLIGATIONS OF LEGAL OFFICIALS (forthcoming 2006).
thread in claiming that the state’s promotion of any one model of the good would be impermissible as a limit on the freedom of citizens.

The liberal argument is that the state has an obligation to remain neutral on competing views of the good. If one person chooses to devote a life to pushpin and another to ecology, both are equally valid to them, and the state has no business interfering.18

The modern archetype of the liberal position is that of the neo-Kantian John Rawls, whose view is autonomy of the individual in a limited society (and thus the state) that does not interfere with individual choices, except to the degree necessary to ensure that each person has the degree of freedom consonant with the exercise of freedom by every other person.19 Rawls does

---

18. The illustration comes from VINIT HAKSAR, EQUALITY, LIBERTY AND PERFECTIONISM (1979). Haksar, of course, draws from Bentham’s famous argument for utility being based on the pleasure an activity provides its participants:

Prejudice apart, the game of push-pin is of equal value with the arts and sciences of music and poetry. If the game of push-pin furnish more pleasure, it is more valuable than either. . . . If poetry and music deserve to be preferred before a game of push-pin, it must be because they are calculated to gratify those individuals who are most difficult to be pleased.

JEREMY BENTHAM, The Rationale of Reward, in 2 THE WORKS OF JEREMY BENTHAM 189, 253-54 (Bowring ed., William Tait 1843) (1825). Push-pin, incidentally, was a game known at least from Elizabethan times, something between modern American marbles and pick-up-sticks, in which children pushed or tossed pins, winning them by crossing an opponent’s pin. See T. F. THESELTON DYER, FOLK-LORE OF SHAKESPEARE 415 (N.Y., Harper & Brothers 1884). It was referred to as an illustration of childish games by both Shakespeare and, though more as a metaphor of adult repartee, by Swift. See WILLIAM SHAKESPEARE, LOVE’S LABOUR LOST act 4, sc. 3; JONATHAN SWIFT, Polite Conversation in Three Dialogues, 11 THE PROSE WORKS OF JONATHAN SWIFT, D.D. 233 (Temple Scott ed., AMS Press 1971) (1907).

Of course, utilitarianism does not entail neutrality, and J.S. Mill accepted the bulk of Bentham’s argument for legal utility, while rejecting neutrality in assessing the bases for happiness. See, JOHN STUART MILL, UTILITARIANISM (Longmans, Green, and Co., 1901) (1861).

The concept of neutrality is more thoroughly developed by its contemporary proponents. See, e.g., BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 10 (1980); RONALD DWORIN, A MATTER OF PRINCIPLE 222 (1985).

19. See JOHN RAWLS, POLITICAL LIBERALISM (1995). Rawls’ view is the most interesting regarding perfectionism, as he specifically pits his view of liberal neutrality, excepting certain basic ideas in a thin “theory of the good” from all other potentially idiosyncratic notions of the good, against a caricatured ideal of perfectionism. See id. at 292-95. Although he claims his theory of the just social order is superior to a more moderate form of perfectionism, he never really says how or why, nor does he account for the perfectionist aspect of his own theory. See Steve Sheppard, The Perfectionisms of John Rawls, 11 CAN. J.L. & JURIS. 383 (1998).

Of course, as with each of these terms, “liberalism” stands for a cluster of competing ideas. All that seems to link many views of liberalism is a trust in rationality to establish the standards for personal freedom, at which point it stands for little different than does conservatism. For
not, however, deal prominently with the problem of the freedom of the child or attempt to define the degree of independence of the interests of children from their parents. 20 Even so, while arguing that his theory’s requirement is less comprehensive than Mill’s, he ultimately requires more for a child’s minimum education than Mill did, arguing that the child not only must be prepared for self-sufficiency, but also taught the legal allowances of political liberalism. 21

the purpose of this discussion, the most important liberal argument regarding education, based on a framework independent of Rawls’, is Rousseau’s famous depiction of the best education as minimizing book-learning to prevent the corruption of youth, which in turn prevents the corruption of civil society. See Jean-Jacques Rousseau, Emile ou de l’Éducation, reprinted in Emile or, On Education (Allan Bloom trans., Basic Books 1979) (1762). For the continuing influence of Rousseau’s idea, see John E.M. Darling, Child-Centered Education and Its Critics (1993).

20. See Rawls, supra note 19, at 199-200, Rawls’ failure to develop these theories, or his failure to provide a sufficient obligation to teach children the values of his liberal state, have been the basis for criticism by feminist theorists. See, e.g., Susan Moller Okin, Political Liberalism, Justice, and Gender, 105 ETHICS 23, 23-43 (1994); S.A. Lloyd, Situating a Feminist Criticism of John Rawls’s Political Liberalism, 28 LOY. L.A. L. REV. 1319 (1995).

21. In his last restatement of his theory, Rawls elaborates the limits of comprehensive liberalism and distinguishes them from political liberalism, as they apply to the education of children. Yet, the breadth of education required may fairly be read to be more extensive than that required by Mill, at least in his essay on liberalism to which Rawls compares himself. His discussion is worth considering in full:

The liberalisms of Kant and Mill may lead to requirements designed to foster the values of autonomy and individuality as ideals to govern much if not all of life. But political liberalism has a different aim and requires far less. It will ask that children’s education include such things as knowledge of their constitutional and civic rights, so that, for example, they know that liberty of conscience exists in their society and that apostasy is not a legal crime, all this to ensure that their continued religious membership when they come of age is not based simply on ignorance of their basic rights or fear of punishment for offenses that are only considered offenses within their religious sect. Their education should also prepare them to be fully cooperating members of society and enable them to be self-supporting; it should also encourage the political virtues so that they want to honor the fair terms of social cooperation in their relations with the rest of society.

John Rawls, Justice as Fairness: A Restatement 156 (Erin Kelly ed., 2001). Compare, however, this list to the more restrictive list of skills or values that Mill would require, quoted in supra note 18, at 10-17.

While Rawls objects that his theory would not educate children in “a comprehensive liberal conception,” he does allow that, at least for some children, educating them in the political conception may in fact lead to educating them in a comprehensive conception. To an extent, Rawls admits that his theory does not forbid some congruence with preferring some forms of life over others, only that such a preference, when made for grounds other than those of political liberalism, is no longer politically liberal. Rawls, supra note 21, at 156-57.
This article cannot go far down the Rawlsian road, and for now it will assert only that Rawls’ glancing rejection of a more robust theory of liberal education is untenable. Unless individuals have a personal commitment to his enterprise of tolerance and social justice, it is highly unlikely that a state that governs them, or that a society that comprises them, will have such a commitment. Rawls wants to have his cake and eat it too. Whatever the theory, for the liberal enterprise ever to be implemented requires a personal commitment to liberal ideals. As Mill understood, and Rawls nearly agrees, this commitment is likely to be founded in education.  

One broad statement of the conservative view is that the state is inherently limited in its power by its historical and constitutional functions, which are limited from interfering in personal choices, for a variety of reasons. Chief among these is the promotion of the greatest degree of self-reliance and rational autonomy, although different theorists would also promote other values, such as commerce or virtue. Conservatism is a family of often warring doctrines, and one might broadly divide conservatives into classical liberals and traditional conservatives.

Classical liberals, some of whom are libertarians, embrace a form of neutrality not unlike that of liberal neutrality. The leading case for the classical-liberal form of conservatism is probably Robert Nozick’s, who argues for the neutrality of the “night watchman state,” which leaves to individuals the power to decide how to allocate their resources and their choice of the good. Yet, the classical-liberal argument requires individuals to be capable of exercising autonomous choice, which in turn requires some preparation to make such choices. The classical-liberal view refuses to allow the state a role in making such choices, trusting the competition among competing providers of education to lead to the best results. Indeed, even

22. One of the best extended defenses of a robust agenda for the education of civic responsibility, that respects pluralism and at least some forms of liberal neutrality, is in EAMONN CALLAN, CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY (1997). Even so, the gold standard for balancing the need to ensure at least a minimal content of civic education with a principled argument for a more robust education of the skills and virtues of democratic deliberation is AMY GUTMANN, DEMOCRATIC EDUCATION (2d ed. 1999).

23. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 272 (1974). There is a wonderful irony in that Nozick’s argument for autonomy was centered in a long-standing tradition of libertarian and anarchic writing. See, e.g., WILLIAM GODWIN, AN ENQUIRY CONCERNING POLITICAL JUSTICE AND ITS INFLUENCE ON MODERN MORALS AND HAPPINESS (Viking Press 1993) (1793).

24. See Nozick, supra note 23, at 242. “In some way it must be ensured that [children] are informed of the range of alternatives in the world.” Id.

25. See JOHN GRAY, HAYEK ON LIBERTY 77-78 (1998). Of course, the forms that are best may be various and competing, and in this sense, the best promoted by Hayek, Nozick, and Gray is quite different from any perfectionist best. Still, a core value of the best education
radical libertarian critiques of public education would not do away with a required regime of education but would instead substitute radicalizing forms for the present curriculum that supports nationalism, employer subservience, and conformity. Thus, although classical liberalism and its more radical alternatives would minimize the state’s role in education, the literature central to these fields still accepts some form of education as essential, and some content as best.

It might seem that the traditional conservative shares this neutrality, given the recurring conservative fear of “big government.” This is not necessarily so. Traditional conservatism is openly anti-neutral, embracing a view of the person based on a naturalist conception of humanity, which can be promoted as a form of the good by the state. The leading cases for the traditional conservative view are, from a naturalist perspective, John Finnis’s, and from a political perspective, Michael Oakeshott’s. A nice synthesis of these approaches is given by the popular conservative writer George F. Will, who believes that conservatism seeks an equilibrium between politics and the natural aspects of humankind.

[N]ature has political claims and that nurturing has a political role. Nature’s political claims rise from this fact: The idea of human nature involves the idea of essential

---

\[26\] See, e.g., JOEL SPRING, A PRIMER OF LIBERTARIAN EDUCATION (1998).


\[28\] Such forms of conservatism, more akin to Amitai Etzioni’s communitarianism, are compatible with some forms of perfectionism, and some are rather unappealing to many contemporary readers, such Lord Devlin’s. See PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (Oxford Univ. Press 1996). The difference is that perfectionism does not limit the debate of the good to any ideas that were embraced by a culture in the past. Perfectionism can embrace arguments both that a given notion of the good is false, and that, even if a notion of the good is correct it would be improvident of the state to attempt to promote it and do other damage more severe. See H.L.A. HART, LAW, LIBERTY, AND MORALITY (1972).

\[29\] See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980). No doubt Finnis would be troubled by the label of conservatism, as he is justly skeptical of all such “unstable and parasitic academic categories.” John Finnis, On the Incoherence of Legal Positivism, 75 NOTRE DAME L. REV. 1597, 1597 (2000). Even so, if one defines conservatism to include those theories that recognize and promote a concept of the person based on natural understandings of basic goods, one has to include his theory within conservatism. I am not, of course, the first to call Finnis a conservative. See, e.g., Stephen Macedo, Homosexuality and the Conservative Mind, 84 GEO. L.J. 261 (1995).

\[30\] MICHAEL OAKESHOTT, ON HUMAN CONDUCT (1991). Oakeshott’s concept of civic association, which he describes as “moral and not instrumental,” is considered in On the Civil Condition, which is the second essay. Id. at 108.
human qualities or virtues that are conducive to excellence. And the task of political nurturing takes its bearings from that idea of excellence.\textsuperscript{31}

This equilibrium requires the identification of the moral and the natural good, and it requires education to prepare individuals to pursue their lives accordingly. Oakeshott particularly recognizes moral education, particularly in higher education, as a precondition of proper civic associations.\textsuperscript{32} It would appear that Finnis does too.\textsuperscript{33}

Such a naturalist conception of the person, and of the good, allows for at least some laws to be justified on perfectionist grounds, although it does not follow that all laws that might promote naturalist goods are justified by naturalism or perfectionism. Coercive laws are much more difficult to justify for most naturalists,\textsuperscript{34} and perfectionism requires not only that the naturalist good be comprehensible but also that it be able to be efficaciously pursued by law without offending more significant legal or constitutional doctrines. Still, naturalism would justify some perfectionist laws, and it is likely that laws requiring children to learn basic goods would be justified.

I would not suggest that all liberals, conservatives, or libertarians accept some notion of perfectionism toward children.\textsuperscript{35} I merely hope to show in this brief review that the general arguments of legal theory that generally would restrict the state from perfectionism do not apply to a basic education of

\begin{itemize}
  \item \textsuperscript{31} George F. Will, \textit{supra} note 27, at 46.
  \item \textsuperscript{33} Finnis’s theory implies that a role for both the state and society may be essential, as he put it in another context, “to educate children and young people in virtue and to discourage their vices.” John Finnis, \textit{Liberalism and Natural Law Theory}, 45 MERCER L. REV. 687, 697 (1994). Although, as Jeremy Waldron has made quite evident, his theory can embrace opposing means of achieving it, at least as an aspect of Finnis’s view of distributive justice. \textit{See Jeremy Waldron, Lex Satis Justa, 75 NOTRE DAME L. REV.} 1829, 1842-44 (2000).
  \item \textsuperscript{34} \textit{See} Finnis, \textit{Liberalism, supra} note 33, at 687.
  \item \textsuperscript{35} Indeed, John Rawls would argue that his limits on education prove that he has at most an incidental perfectionist aspect to politically liberal education, and any reader is free to read the degree that argument truly differs from a notion of a politically chosen, but nonetheless robust, idea of the good to be promoted for each child. \textit{See supra} notes 19-21 and accompanying text.
\end{itemize}
children to at least equip them to engage in civic life. This general review would also suggest that, whether or not one is persuaded to accept a perfectionist justification for law generally, a distinct question arises in considering the perfectionist law as applied to benefit children. The implication of the writings of the most keenly anti-perfectionist legal theorists does not appear to answer that question in a way to bar the state from at least some forms of laws that promote the good for children.

Whether or not one accepts this conclusion as appropriate in itself or owing to its compatibility with otherwise anti-perfectionist theory, it would seem that at least a prima facie case can be establish that some forms of perfectionist arguments may justify the promotion of some forms of the good in a child.\footnote{36} The application of this idea to criticize laws, or a particular law, is possible through the theory of legal perfectionism:

(1) Particular form of life X is good.\footnote{37}

(2) We know that this is so for reasons that can be communicated between individuals.

(3) X can be efficaciously encouraged through the operation of a particular law.

(4) The means employed by this law are compatible with other elements of the legal system that are of equal or greater concern to lawmakers as the form of life in question.\footnote{38}

\footnote{36} One might reformulate the general doctrine of perfectionism with these modifications:

(1) Some forms of life and development are better for a child than others.

(2) It is possible to judge some of the conditions that constitute what is good in this life and development.

(3) The law can assist in making the lives of children good and promoting better forms of development.

(4) Neither individual lawmakers nor the institutions of law are morally excluded from attempting to make or enforce laws that fulfill such a role for children.

Claim (3) of the doctrine is not being given the detail of argument it deserves here, although to some degree it resonates with the arguments of Ian Shapiro discussed below. \textit{See infra} Part IV. For the present purposes, I might recommend the lucid arguments to underpin the obligations of both parents and other adults (as well as the state) to assist children in Gregory A. Loken, \textit{Gratitude and the Map of Moral Duties Toward Children,} 31 \textit{Artz. S}t. L.J. 1121 (1999).

\footnote{37} There is nothing inherent in legal perfectionism that requires the theory to be framed in an affirmative manner. It could be as easily formulated from the doctrine by rejecting form of life X, for reasons that are articulable, with available law that might discourage it, that can be enacted without conflicting with higher values in the legal system. It is put in the affirmative here both for convenience and compatibility with the argument made \textit{infra} Part III.

\footnote{38} Higher values might include values that compete directly with the means chosen for implementing the good for the child. Thus, it is quite possible that a higher value of respecting a parent’s religious exercise may be argued to impose an obligation to require a child to be
The forms of life include forms of both action and thought, or engaging in actions and projects as well as ideas and values. In the case of a child, the good forms of life may be defined by the development of the child, so that the educative nature of a child’s development may limit the benefit of certain actions or thoughts at one age that would be less limited at a later age.39

A defining aspect of a perfectionist approach is that it is only coincidentally paternal. In other words, the good of the child is pursued because it is the best thing to do, not merely because it is in the interest of the child.40 The good is promoted for the benefit of both the individual and all others, because each person interacts with one another, and the failure of one person to perceive the good will cause hardships on others.

This form of perfectionism is akin to Robert George’s idea in current legal theory: moral ecology. Moral ecology is a nice shorthand term for the sets of norms in a community that are the public consequences of private and public actions, from which every person in the community learns what is compelled to accept that religion when it conflicts with a state-recognized ideal of the good, such as that children are taught tolerance for other religions. This problem is explored in greater detail below, but is raised here to demonstrate the contentious nature of the analysis. The resolution is not dependent on the theoretical structure but on the manner by which officials engage in these ideas. An official must choose which value will trump.

39. This is not to suggest that childhood necessarily requires a thin version of morality or a limited concept of responsibility. Certainly, the antecedents of current American culture exposed children to mature situations and obligations at a younger age. See COLIN HEYWOOD, A HISTORY OF CHILDHOOD: CHILDREN AND CHILDHOOD IN THE WEST FROM MEDIEVAL TO MODERN TIMES (2001); HUGH CUNNINGHAM, CHILDREN AND CHILDHOOD IN WESTERN SOCIETY SINCE 1500 (1995). For the idea that the notion of a naive and protected childhood has been limited predominately to the white middle class in America, see STEVEN MINTZ, HUCK’S RAFT: A HISTORY OF AMERICAN CHILDHOOD (2004).

40. The great liberal utilitarian theorist John Stuart Mill argued that “one of the most sacred duties of the parents” was not only to prepare a child to perform self-regarding duties but other-regarding duties as well: “to give to that being an education fitting him to perform his part well in life towards others and towards himself.” JOHN STUART MILL, ON LIBERTY 189 (N.Y., J.B. Alden, 1885) (1859). Indeed, Mill was highly critical of English law, which then allowed parents license in how or whether to educate a child, to the peril not only of the child but also of society.

But while this is unanimously declared to be the father’s duty, scarcely anybody, in this country, will bear to hear of obliging him to perform it. Instead of his being required to make any exertion or sacrifice for securing education to his child, it is left to his choice to accept it or not when it is provided gratis! It still remains unrecognized, that to bring a child into existence without a fair prospect of being able, not only to provide food for its body, but instruction and training for its mind, is a moral crime, both against the unfortunate offspring and against society; and that if the parent does not fulfil this obligation, the State ought to see it fulfilled, at the charge, as far as possible, of the parent.

Id. at 176.
accepted as moral in that community. Moral ecology is, in essence, the basis of the common sense of a society, the shared understanding of what is to be done in any given situation. George develops his theory to justify laws that develop healthy, rational, and moral rules in a community’s ecology, and yet this notion provides a potentially useful tool in considering the collective view as it affects an individual’s view of the good, whether seen as its promotion or the rejection of its converse.


42. Seen in this way, moral ecology echoes an aspect of Burkean conservatism, nicely described as “social knowledge” by the conservative writer Roger Scruton in describing the obstacle to a single agenda of reform by the likes of Rousseau. By social knowledge, I mean the kind of knowledge embodied in the common law, in parliamentary procedures, in manners, costume, social convention, and, also, in morality. Such knowledge arises “by an invisible hand” from the open-ended business of society, from problems that have been confronted and solved, from agreements that have been perpetuated by custom, from conventions that coordinate our otherwise conflicting passions, and from the unending process of negotiation and compromise whereby we quieten the dogs of war. Roger Scruton, Rousseau & the Origins of Liberalism, 17 NEW CRITERION 5 (1998).

43. George’s theory is built on the Thomist foundations developed by John Finnis. “[P]olitical authority legitimately extends even to the regulation, within limits, ‘of friendships, marriage, families, and religious associations, as well as all the many organizations and associations which, like the state itself, have only an instrumental common good.” Robert George, The Concept of Public Morality, supra note 41, at 29 (quoting John Finnis, Is Natural Law Theory Compatible with Limited Government?, in ROBERT P. GEORGE, NATURAL LAW, LIBERALISM, AND MORALITY 5 (1996)). The only limit of this extent is state obligation to secure the social conditions of the well-being both for individuals and for their communities. Finnis would limit the state from regulating private and secret relations, a limit George rejects. See id. Obviously, George’s approach has much in common with Amitai Etzioni’s communitarianism, although it is oddly uncommon for the literature critiquing legal moralism or legal perfectionism to consider the interplay with Etzioni’s communitarian writings, although Selzink is more often encountered in such venues. For exceptions, see Linda C. McClain, Tolerance, Autonomy, and Governmental Promotion of Good Lives: Beyond “Empty” Tolerance to Tolerance as Respect, 59 OHIO ST. L.J. 19 (1998), and WILL KYMMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION (1990).
III. Preferring Affirmative Models of the Perfectionist Good, Especially When the Good Is Promoted for Children

The perfectionist models so far developed tend to allow either a negative or an affirmative model of the good that could be the basis for the justification of laws and for the adoption of particular laws. Moral ecology, too, can be framed by what is promoted or what is forbidden in a given society, and this would seem at first to also be true for children.

Indeed, faced with competing visions of what is good and right, several modern philosophers have counseled that it is more appropriate, or at least easier, for philosophers and officials to pursue injustice than to promote justice. More utopian writers continue to argue for a model of justice.

These arguments for the good or the right generally suffer somewhat when one alters the degree of abstraction. When considering whether it is right for a child to learn, or it is right for a child to remain illiterate, there is little dissension. When the argument is made more concrete, such as whether it is right for a child to learn to desire a toy by brand, controversy is more likely.

The questions posed by the doctrine of legal perfectionism are at a very practical level. “What is good” here requires that the answer be one in which ideas or actions affecting a child’s life be determined by laws that must be sufficiently specific in their edict that a person would understand what is

44. Both Finnis and Raz, however, have presented theories that suggest a preference for affirmative rather than negative approaches to perfectionist rules. See Finnis, Liberalism, supra note 33; Joseph Raz, The Morality of Freedom (1986). Both advance their arguments for affirmative rules on the basis of protecting freedom, rather than on these more instrumental bases for determining the good and implementing it.

45. Most recently, this idea is associated with Stuart Hampshire. His pluralist model of justice recognizes that competing moral visions of the best society lead to nearly hopeless conflicts, which can only be resolved by looking for areas of common agreement, which are more likely to be found in the institutions that lead through deliberation with respect to all sides of an argument to agreement, and these institutions are most likely to agree on claims to rid society of great ills. See, e.g., Stuart Hampshire, Justice is Conflict (1999); Stuart Hampshire, Public and Private Morality (1978). The idea that a sense of injustice is more valuable than a model of justice to create a just legal system is central also to the work of Edmund Cahn. See Edmund Cahn, The Sense of Injustice (1949). Related to these uses of injustice is my own view that many decisions of legal officials are best made by discounting the most unjust outcomes first, allowing then a decision to accept the least unjust outcome. See Steve Sheppard, The Moral Obligations of Legal Officials (forthcoming 2007). None of these three theories suggests that there are not models of the good or the right, only that in choosing among them or in implementing them, circumstances affecting the choice may require selection by criteria or injustice or avoiding the least wrong or least bad result.

46. See, e.g., Rawls, Restatement, supra note 21.
required. The understanding must be of the actions demanded or forbidden in order for the law to be effective, and also that the moral notion promoted by the demand be discernable in order for the perfectionist basis of the law to be achieved.\(^47\) This is a level of rhetoric that is much less abstract; by necessity it must deal with specific bases for making decisions regarding not just education but specific aspects of curricula, not just values but specific actions that lead to individual values.

At this level of political rhetoric, certain notions of what is good for a child could still be described or promoted either by a negative or by an affirmative description, and while either will be controversial, as considered above, it seems likely as an empirical claim that the affirmative description has a higher likelihood of authenticity.\(^48\) Preferring affirmative claims to negative claims has other benefits as well.

For example, consider the effect of American children becoming greedier for toys, clothes, and other goods on the basis of brands, learning to argue with parents while preschoolers for particular expensive purchases, and desiring certain goods at increasingly younger ages.\(^49\) There is, of course, an initial debate over the nature of the good related to this desire, and there are models of arguments both affirmative and negative on both sides of the debate.

The commercial side might argue negatively that it is wrong for children to be deprived of the consumer goods of their choice. The corresponding affirmative claim might be that it is better for a child to become an active consumer as early as possible, promoting an engaged development of consumerism, and that this will allow the child to express a choice for the goods and clothes the child wishes to be provided.\(^50\)

---

47. For the idea that legal perfectionism requires the clear articulation of the moral notions that the state seeks to encourage in its citizens, see Sheppard, supra note 16.

48. See supra text accompanying notes 44-47.

49. The marketing of products to infants, particularly through educational media, is studied in a growing literature on the commercialized child. See, e.g., JULIET B. SCHOR, BORN TO BUY: THE COMMERCIALIZED CHILD AND THE NEW CONSUMER CULTURE (2004); ALEX MOLNAR, GIVING KIDS THE BUSINESS: THE COMMERCIALIZATION OF AMERICA’S SCHOOLS (1996). For recent illustrations of the broader argument that schools are simply training grounds for capitalist roles, see DERON BOYLES, AMERICAN EDUCATION AND CORPORATIONS: THE FREE MARKET GOES TO SCHOOL (2000).

50. While not supported precisely by such arguments, the commercialization of children is surely a process deliberately provoked by corporate marketing toward children. See, e.g., GENE DEL VECCHIO, CREATING EVER-COOL: A MARKETER’S GUIDE TO A KID’S HEART (1997); MARTIN LINDSTROM & PATRICIA B. SEYBOLD, BRANDCHILD: REMARKABLE INSIGHTS INTO THE MINDS OF TODAY’S GLOBAL KIDS AND THEIR RELATIONSHIP WITH BRANDS (2003). Particularly, see ANNE SUTHERLAND & BETH THOMPSON, KIDFLUENCE: THE MARKETER’S GUIDE TO UNDERSTANDING AND REACHING GENERATION Y–KIDS, TWEENS AND TEENS (2003). Not
The counter-commercial argument could claim negatively that it is wrong to subject children to early commercialization, when they lack the tools of informed choice against their own personal view of themselves. The affirmative counter-commercial argument, thus, is that it is better for the child to remain commercially naïve—to play and grow with the tools adults provide at a pace set by the children’s interaction with their physical and social environment rather than by marketing.51

I will skip the traditional four-square grid to compare these approaches, leaving the reader to consider whether there is more or less in the arguments for either side, phrased in either mode. While I personally think that marketing to children and aging them prematurely is wrong, I think the reason it is wrong is not as much because of the marketing, as because it interferes with the affirmative good of the child’s independent development of preferences and aesthetics.

I also think that someone arguing in the negative mode for both the commercial and noncommercial arguments is less likely to be treating the child as an end but more likely to be treating the child merely as a means: in the commercial argument as a means of selling more goods, and in the counter-commercial argument as a means of restricting interference with adults. It is equally likely that a sham underlies the affirmative commercial argument, when it is made, but such arguments appear to me to be more rare.52

Comparing the affirmative models, I would argue, is not only preferable but so much to be preferred that officials should be required to debate arguments framed in such modes of rhetoric. They are more likely to be judged on their merits rather than by balance against actions that would be rejected by negative models that include their conduct. Affirmative claims are more easily compared and sorted by priority.53

51. Arguments both negative and positive in this vein are raised in SUSAN LINN, CONSUMING KIDS: THE HOSTILE TAKEOVER OF CHILDHOOD (2004), and SCHOR, supra note 49.

52. Indeed, arguing to prefer an affirmative approach to the commercial position may make such shams harder to detect. Frankly, I am not sure what to make of this possibility, although I suspect with no evidence that it is likely that sham arguments will be made more often in the negative.

53. For example, Professor Frank Ravitch has kindly reminded me in discussions during
more readily implemented. If successful, they are more capable of institutional commitments that are flexible in the light of new understandings of competing models. Most importantly, it is more likely to be clearly articulated in a manner that makes clear what moral requirement or other ideal of the good is at stake—what it is that the child ought to be held to do. Such an articulation both allows a clearer debate and increases the likelihood that the child—not the adult—will be the real object of the law, and that the idea of the good enshrined in the law will be comprehensible to those bound to obey it.54

Beyond debate, affirmative arguments are more prone to agreement than are negative arguments. A fine example of this is the agreement between Marjorie Heins and Professor Bradley Greenberg in their comments at this symposium. They agree that affirmative media teaching, while hard to achieve, is a useful corrective to the influence of commercial television.55 This agreement contrasts nicely with their general disagreements over value of negative models of childhood exposure to violence and other ideas, from which Greenberg favors a degree of censorship and Heins does not.56

In the case of children particularly, there is an additional basis for preferring affirmative models of the good when framing social and legal norms. The fact that a child is developing and will, in that process, experiment with the forbidden suggests that a focus upon the forbidden, rather than an emphasis on the affirmed, will be less successful. Yet, I think, most compellingly, affirmative reasons leave less room for aggrandizing arguments that are not genuinely made in the interests of the child.

54. The perfectionist requirement that the law make clear the moral notions that the state seeks to encourage in its citizens is discussed in note 43 supra. This argument is even stronger in the case of rules affecting the moral understanding, or any form of the good in children. The structure of rules or other subordinate norms necessary to implement a way of life for a child are almost always directed to those who are responsible for a child’s development, rather than to the child directly.


56. See Heins, supra note 55; Greenberg & Rosaen, supra note 55.
What is so good for the child to know or to value that the law should require it? The literature over the interest of children is large and growing, but its general consensus is that all decisions regarding children must be based on their best interest. As usually formulated, this is a narrow question of whether a parent can provide economic security.

There is a broader concept of the best interests of the child, one that is closer to the comprehensiveness of an affirmative model of the best child. It is the concept of interest developed by Ian Shapiro, a political scientist, which incorporates a notion of basic interest with the idea of best interests. The basic interests are those that are in common among all children, a list Shapiro recognizes as highly controversial, but that he believes can be ascertained by resort to a process like John Rawls’ political justice, which seeks consensus on political and not metaphysical grounds. His ideal of the basic interests of the child to be assured by the state is that each child should develop the “capacities required to function adequately and responsibly in the prevailing economic, technological, and institutional system.”

Shapiro has argued for a model of power sharing between the state and the parent which is quite compelling. He adopts John Locke’s idea of a parent as the fiduciary of a child, rather than its owner, and balances a state interest within a concept of co-fiduciaries. In Shapiro’s model, the state is the primary guarantor of the basic interests of each child, while the parent is the primary guarantor of the best interests of each child. The parents remain responsible for identifying and developing the best interests, “the full development of every . . . child’s potential.”

Shapiro is confident that identifying the best interests is a pluralist enterprise, but he argues that identifying basic interests is not pluralist, because that identification is inherently objective, a product of reason and democratic appraisal. Leaving parents to be custodians of best interests is
both efficient, in leaving the greater cost to individuals, and wise, by leaving specific choices to the adults who know and love the child best.\(^{64}\)

A practical difficulty emerges here for Shapiro’s approach. Although the process of identifying basic interests may be non-pluralist because it is rational, that assertion hardly counters the many people who disagree while claiming rational bases for their position.\(^{65}\) This problem is confounded by the very nature of the disagreements considered so far in this article, in which the clash is between views, at least some of which are based on faith in religion.

In sorting through such disagreements, the democratic enterprise is at least a potential solace.\(^{66}\) In that process, certain forms of religious argument are limited in the manner in which they are employed, if not in arguing for a result by citizens, at least in reaching a result by officials.\(^{67}\) There are many tools to employ in identifying the basic interests of children, including discussion and debate in a democratic framework, but also looking to tools that cross social boundaries that are in themselves the product of prior debate. This last approach is particularly interesting if we are to take Shapiro’s belief, that basic rights are objective, to mean that they can be universally recognized, or understood without being framed in a particular culture.\(^{68}\)

V. HOW TO IDENTIFY BASIC INTERESTS: TEST CASES FOR EDUCATION

One tool for identifying basic interests is to determine those interests that are considered among many cultures to be necessary for the good of the child. An example is Article 29 of the Convention on the Rights of the Child:

1. States Parties agree that the education of the child shall be directed to:

\[\text{Article 29 of the Convention on the Rights of the Child}\]

64. See id. at 85-86.
65. See HAMPSHIRE, JUSTICE IS CONFLICT, supra note 45.
66. Indeed, the democratic enterprise is particularly well-suited for arbitrating such disagreement through the legislative process. See JEREMY WALDRON, LAW AND DISAGREEMENT (2001); JEREMY WALDRON, THE DIGNITY OF LEGISLATION (1999).
67. This result in the United States is in part derived from the interplay between the Establishment and Free Exercise Clauses. It is also the principle or moral obligation that results from debate from religious ground not accessible to others not sharing a similar belief. See KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988); KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1994); Kent Greenawalt, Religion and American Political Judgments, 36 Wake Forest L. Rev. 401 (2001).
68. At least one limit suggests that Shapiro’s view of objective basic rights is more contingent than universal: time. His objective view must be one that can be formed in the present. It is a rational enterprise, inevitably contingent on the limits of rational conclusion that can be supported in a given human society. Thus, arguments for the goods of slavery or of the destruction of monsters would presumably now be rejected as objectively not rational, or not politically acceptable on objective grounds, even if at one time people who were considered rational accepted such arguments.
(a) The development of the child’s personality, talents and mental and physical abilities to their fullest potential;
(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
(c) The development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
(e) The development of respect for the natural environment. 69

If we were to apply that standard, then we ought to argue for an affirmative model for a standard of educational attainment that should be promoted by the state. There are controversies inherent in all. Values such as nonviolence can be attacked as counter-productive for tomorrow’s soldiers or corporate managers. Ideas such as promoting a scientific basis for public health may be attacked as contrary to religion or proper rearing of a moral, abstinent child. One manner for reducing such conflicts is to narrow the scope of the idea or value asserted as part of the basic values.

Let us take the example of education as presented in Article 29 as a test case, and then select further examples in a sufficiently narrow scope, to assess the utility of particular ideas or values inherent in the example. In other words, let us consider two examples of minimally controversial forms of the data and values every child ought to learn pursuant to Article 29.

As an example of such a datum, let me suggest an idea that would surely fall within the scope of Article 29(a), the germ theory of disease. 70 As an example of such a value, let me suggest one from Article 29(d), the importance of tolerance and nonviolent engagement with competing ideas. The officials of a perfectionist state might well determine that it is good that

---


70. Granted, this label for the microbial origins of many diseases is antiquated, but it is still widely recognized. For an accessible new history on Louis Pasteur, Robert Koch, Joseph Lister, and company, see JOHN WALLER, THE DISCOVERY OF THE GERm: TWENTY YEARS THAT TRANSFORMED THE WAY WE THINK ABOUT DISEASE (2003).
every child learn the germ theory. Also, perfectionist officials might
determine that is good that every child be taught the value of tolerance. At
this level of specificity, the idea of education is affirmatively presented,
subject to debate, and subject to ready implementation. Both examples
suggest the feasibility, and (I should hope) the desirability of the state’s
promotion of the good of education in these specifics.

VI. APPLYING THE TEST CASE AT HOME: DOES THE UNITED STATES
ENSURE THE BASIC INTEREST OF EDUCATION?

Interestingly, the United States does not really assure that all its children
will be educated to know the germ theory or tolerance. What makes this of
special interest is that there is no essential difference between the idea or the
value in their lack of security in the education of every American child. The
laws of the United States do not require all of its children to be educated to
any specific standard.

As we generally perceive the law regulating families and children, the
state is in the role of social insurer. The state sets thresholds for support and
education that a child must receive and for the threat or harm that a child may
not suffer. So long as the parent exceeds neither limit the state will not
usually intervene in their raising of a child.

Indeed, the Federal Constitution can be invoked as the source of a
parent’s right to be free from such interference. As Martha Minow has
proclaimed, a parent has a unique constitutional right “to control another
person.” The First Amendment’s rights of free speech and free association,
the right of privacy, the Ninth Amendment, are all planks in an important
bulwark against the state’s intrusion into the sanctity of the hearth. Construed
in the cases and legislation following Pierce, the First Amendment has
actually left a sizeable portion of American students isolated from any
required education of basic interests.

Three decades ago, the balance between parents and state established in
Pierce was developed further by the U.S. Supreme Court, tipping farther
toward the parents, recognizing a right of Amish parents to keep their children
from any education at all after the eighth grade. Twelve years ago, the

71. It is not essential here to determine whether the child might be taught competing
ideas; for the moment we can test the theory with successful education of these two.
72. See Martha Minow, Pluralisms, 21 CONN. L. REV. 965, 969 (1989) (stating that
parental control of children is “the nearly universal exception from self-determination under the
Constitution”).
73. Martha Minow, Developments in the Law–The Constitution and the Family, 93
Harv. L. Rev. 1156, 1353 (1980).
74. See Yoder, 406 U.S. at 234-35. Meyer, Pierce, and Yoder are analyzed in Kevin W.
Michigan Supreme Court tipped the balance further, holding that any parents who engage in home-schooling for religious reasons are exempt from all state teacher certification requirements.75

In each of these cases, the courts were confronted with a specific circumstance but in common among them all was whether a regulation, created by the state to ensure that all its children received a particular aspect of a common education, conflicted with the claim of a parent. In Meyer, the Nebraska statute requiring English instruction interfered with a teacher’s right to teach a child German.76 In Pierce, Oregon’s requirement to attend public school interfered with a parent’s right to send a child to Catholic schools (and the school’s right to teach children).77 In Yoder, the Supreme Court ruled that the Wisconsin law that children attend school until age sixteen interfered with the Amish Mennonite parent’s right to raise children after the eighth grade in the traditional crafts and religion, safe from corruption by the world outside the Amish community.

In each case, the complaining parents or schools were part of long-established communities, with goals that were compatible in some degree with a majority ethic of American ideals. Yet, the resulting scope of this constitutional exemption from educational standards on religious grounds encompasses a host of alternatives that do not, and these alternatives are increasingly likely to be manifest in some children’s lives.

Today, roughly ten percent of American children receive private education, and roughly two percent are home-schooled.78 While the overwhelming majority of these schools and home-schooling parents are superb in preparing their charges, the effect of the protections of these


76 See Meyer, 262 U.S. at 403.

77 See Pierce, 268 U.S. at 534-35.

The reduction in regulation of home-schooling families is a goal for many in the home-schooling movement, particularly the Home School Legal Defense Association, which led the fight in the DeJonge case.\textsuperscript{79} \textsc{Christopher J. Klicka}, \textit{Home School Legal Defense Ass’n, Home Schooling in the United States: A Legal Analysis} (2000).

Ten states allow parents complete autonomy; there is not even a state requirement for parents to initiate any contact with state school officials to notify them of a child being home-schooled.\textsuperscript{80} Fourteen states have minimal regulation, requiring parents only to notify state officials of the child being home-schooled.\textsuperscript{81} Sixteen states have moderate regulation, requiring parents to notify school officials of children being home-schooled, and to provide officials with test scores or other professional evaluations of the child’s progress.\textsuperscript{82}

Just thirteen states have involved regulation requiring official evaluation of each child not in public, or regulated private, schools.\textsuperscript{83} These states require parents to send notification, achievement test scores, or professional evaluation, plus other requirements ensuring some exposure to a standard curriculum.\textsuperscript{84}

Given the scope of the isolation now likely, we must consider the dangers both to children and to others posed by its more eccentric manifestations.\textsuperscript{85} There are defenders of the idea of allowing parents to isolate their children from state-set basic interests.\textsuperscript{86} While not considering the problem directly, David Herring, former dean of the law school of the University of Pittsburgh, has developed the idea of the family as an essential

\textsuperscript{79} The reduction in regulation of home-schooling families is a goal for many in the home-schooling movement, particularly the Home School Legal Defense Association, which led the fight in the DeJonge case. \textsc{Christopher J. Klicka}, \textit{Home School Legal Defense Ass’n, Home Schooling in the United States: A Legal Analysis} (2000).


\textsuperscript{81} These states include Alabama, Arizona, California, Delaware, District of Columbia, Kansas, Mississippi, Montana, Nebraska, Nevada, New Mexico, Wisconsin, and Wyoming. See id.

\textsuperscript{82} These states include Arkansas, Colorado, Florida, Georgia, Hawaii, Iowa, Kentucky, Louisiana, Maryland, New Hampshire, North Carolina, Oregon, Ohio, South Carolina, South Dakota, Tennessee, and Virginia. See id.

\textsuperscript{83} These states include Maine, Massachusetts, Minnesota, Pennsylvania, Oklahoma, New York, Rhode Island, North Dakota, Utah, Vermont, Texas, Washington, and West Virginia. See id.

\textsuperscript{84} See id.

\textsuperscript{85} One danger that has long been known is that there is a correlation between isolation of families from their communities and child abuse. See Judith G. McMullen, \textit{Privacy, Family Autonomy, and the Maltreated Child}, 75 MARQ. L. REV. 569, 589-92 (1992).

\textsuperscript{86} Not the least, of course, are the advocates for the Home School Legal Defense Association.
structure to promote social pluralism through diverse power structures to its logical extreme. 87 He defends a model of associational tolerance in the family, in which the mere existence of families contrary to the general norm provides a model of associational tolerance by officials, which is an object lesson of some value. 88

Although his model is not unlimited–Herring writes approvingly of state interference with a parent when the child is physically at risk–he remains convinced that the family must be given greater tools to defend its political integrity against a therapeutic state, which has argued for children’s rights as a basis for intruding in the parent-child relationship. 89 This intrusion, he argues, has weakened the ability of the family to act as a public institution, a balance against state power. 89

Broad views of pluralism such as Dean Herring’s include the possibility that parents will choose to reject the specific notions of germ theory and tolerance. Indeed, it is not at all hard to imagine a private school or home-schooling parent who does not teach the values of tolerance. For that matter, the largest reason for parents’ home-schooling is to teach values and religion. 91 Many parents turn to home schools for religious reasons, and it is a popular choice for evangelical Protestants. 92

Although many religious home-schooling parents no doubt teach the germ theory well and thoroughly, there is no reason to believe that every home-schooled child will learn it. 93 The germ theory of disease is not in the

88. See id. at 7-33.
89. See id. at 20-33.
90. Id. at 36-38, 160-61.
91. Thirty percent of home-schooling parents cite the instruction of religion or moral values as their primary reason for home-schooling their children. See Princiotta, supra note 78. This was second only to a general concern over the “environment” of public schools. See id.
93. This is not a completely hypothetical example. For example, a mother, who lost custody of her children owing to mental illness and neglect, also claimed that her children did “‘not need to be taught the A-B-C’s or the 1-2-3’s because they will only need things that are revealed to her, [being the mother,] as being needed in due time by her understanding of God’s word.’” In re Ephraim L., 862 A.2d 196, 198 (R.I. 2004). The policy being promoted here is merely one of exposure to knowledge of microbial bases for disease, without the more invasive claims arising in the related problem of parents and children refusing vaccinations on religious grounds, yet at least some of these refusals suggest the strength of religious rejections to the idea. See McCarthy v. Ozark Sch. Dist., 359 F.3d 1029 (8th Cir. 2004) (finding religious objections to Hepatitis-B vaccination requirement for public school to be mooted by incorporation into statutory exception).
Bible, although the divine instigation of plagues is. Whether or not we like to think of it, the work of Louis Pasteur and Joseph Lister are less likely to be taught by a fundamentalist parent than the theory that illness is the work of demons, or that faith is the basis of health.

While state regulation of private schools is generally more scrupulous about curriculum, no standard exists that would encompass tolerance, and indeed it is not hard to imagine schools or parents being ideologically opposed to the tolerance of alternative viewpoints. The white-flight academies of northern cities and the American South were hardly centers for teaching tolerance of progressive views. Indeed, although the growing movement of private schools for Islamic students is scrupulous in integrating Western science and American civics, including traditional Muslim values of tolerance, there is no reason to expect that every Wahabbi school would teach tolerance of Christianity. Indeed, there is no reason to believe that Christian schools or parents would teach tolerance of Islam.

As some now read the First Amendment, a parent is fully empowered to control a child’s thoughts, including whether the child ever learns of bacteria or toleration. This power amounts to a form of intellectual slavery, allowed because of a religious justification.

94. See, e.g., Lev. 13:3, 5, 30; 1 Kings 8:37. The angel of death is impliedly in Egypt at Ex. 11:4, 5, 12:29, 30. The angel of death, of course, is important in various religious traditions with contemporary significance, known as mal’akh ha-mavet in rabbinic tradition, Izra’il to Sufis, and Azra’il to Sunnis and Shia.

95. See, e.g., Mt. 12:22-24. The preference for healing by faith rather than through medicine is most often associated with the writings of Mary Baker Eddy. See MARY BAKER EDDY, SCIENCE AND HEALTH WITH KEY TO THE SCRIPTURES (Christian Science Bd. ofDirs. 1994) (1875).

96. Although there has been some controversy over the degree to which desegregation led to urban white-flight nationwide, there is no doubt that in the South, as in some Northern cities, new private segregated schools were created for the purpose of teaching white students leaving the public schools. Compare Reynolds Farley, Toni Richards & Clarence Wurdock, School Desegregation and White Flight: An Investigation of Competing Models and Their Discrepent Findings, 53 SOC. OF EDUC. 123 (1980), with Kenneth T. Andrews, Movement-Countermovement Dynamics and the Emergence of New Institutions: The Case of “White Flight” Schools in Mississippi, 80 SOC. FORCES 911 (2002). There has been little academic study of the curriculum of those schools, but I can state with confidence as a child in Mississippi in the 1970s, few academies were known for tolerance of progressive views regarding race.


99. I am grateful to wordsmith Christine Sheppard for this phrase.
Despite the statutory allowance of such an extreme result in so many states, this reading of the First Amendment is extreme and unnecessary.\(^{100}\) There are three bases in the First Amendment for rejecting this form of intellectual slavery: (1) the inherent limit of the parent’s religious exercise when it interferes with a compelling state interest promoted by narrow means, (2) the right of the child to speech, and (3) the barrier on state establishment of the church.

The U.S. Supreme Court’s current jurisprudence does not suggest that the parent’s religious and speech rights to control the development of the child would trump these interests. Indeed, although it is unconstitutional for a law to specifically ban a religious rite,\(^{101}\) since \textit{Yoder}, the Court in \textit{Smith} declared that states may promote legitimate interests that incidentally burden the exercise of religion.\(^{102}\)

\(^{100}\) “[P]arents simply do not have a constitutional right to control each and every aspect of their children’s education and oust the state’s authority over that subject.” Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 699 (10th Cir. 1998). \textit{See also} State v. DeLaBruere, 577 A.2d 254 (Vt. 1990) (holding that reasonable regulation of a home-school does not infringe a parent’s rights).


\(^{102}\) “[O]ur cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” \textit{Church of the Lukumi}, 508 U.S. at 531 (citing Employment Div., Dep’t of Human Res. Ore. v. Smith, 494 U.S. 872 (1990)). As Justice Scalia wrote in \textit{Smith}, religious belief does not excuse an individual from general laws.

We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in \textit{Minersville School Dist. Bd. of Ed. v. Gobitis}, 310 U. S. 586, 594-595 (1940): “Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted).” We first had occasion to assert that principle in \textit{Reynolds v. United States}, 98 U. S. 145 (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. “Laws,” we said, “are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the
The degree to which the state may burden religious interests remains highly contested, and the new standard upholding neutral laws of general application that incidentally burden religious practice may not survive forever. If the Smith rule were to fall, the prior rule applied in Yoder and

land, and in effect to permit every citizen to become a law unto himself.” Id. at 166-167.

Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a “valid and neutral law of general applicability on the ground that the law prescribes (or prescribes) conduct that his religion prescribes (or proscribes).” United States v. Lee, 455 U.S. 252, 263 n. 3 (1982) (STEVENS, J., concurring in judgment); see Minersville School Dist. Bd. of Ed. v. Gobitis, . . . [310 U.S. 586] at 595 (collecting cases). Smith, 494 U.S. at 878-79. Justice O’Connor was unmoved by this recitation of precedent.

The Court attempts to support its narrow reading of the [Establishment] Clause by claiming that “[w]e have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.” Ante, at 878-879. But as the Court later notes, as it must, in cases such as Cantwell and Yoder we have in fact interpreted the Free Exercise Clause to forbid application of a generally applicable prohibition to religiously motivated conduct. Indeed, in Yoder we expressley [sic] rejected the interpretation the Court now adopts:

“ . . . to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability . . . .”

Id. at 895-96 (O’Connor, J., concurring) (citation omitted).

There is considerable support, though, for the Smith approach. See, e.g., Richard F. Duncan, Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement, 3 U. PA. J. CONST. L. 850 (2001). The most compelling argument to the contrary seems to me to be Philip Hamburger’s but powerful essay against balancing free exercise rights against governmental interests. See Philip Hamburger, More is Less, 90 VA. L. REV. 835 (2004). Still, even Hamburger’s argument for unconditional free exercise is an argument to protect its exercise through belief, worship, and professions or sentiments, both from direct interference and discriminatory laws. This form of exercise was unconditional precisely because it was defined short of all acts that would intrude into the civic domain. It is not clear that a requirement that a child be taught certain ideas and values as a civic obligation, as long as the child otherwise may worship, believe, or think in other ways, interferes with such exercise.

For the moment, Smith remains good law, despite hostility from some on the Court and from the Congress. The Religious Freedom Restoration Act, which would have required the courts to protect religious practices against state burdens that are not based on compelling state interests achieved though the least burdensome means, was found unconstitutional, and a zoning barrier to a church enlargement was upheld, under the Smith standard. See City of Boerne v. Flores, 521 U.S. 507 (1997).

While the Court did not directly reaffirm the Smith test in its most recent establishment case, the seven-two majority reached a result more consonant with it than with the pre-Smith cases. See Locke v. Davey, 540 U.S. 712, 725 (2004).
before could still be met if the state obligation in issue is a compelling interest, pursued by the least burdensome means. No Supreme Court case has yet been brought against a regulation of home-schools and private schools that require assurance that a student is being exposed to a required curriculum.

Granted, in 1972, the *Yoder* Court held that the state’s interest in education after the eighth grade was trumped by a religious parent’s interest in isolating the child from outside influence. Yet the *Yoder* case did not overturn the state’s power to set a standards for education, only a requirement to attend a public high school. Under *Yoder*’s compelling interest requirement, a state’s interest in ensuring a student’s knowledge of certain facts and values would be a sufficient interest that it could be promoted over the objection of a religious parent or school, so long as it was promoted by the least burdensome means that are available and sufficient. So, even under *Yoder*’s repudiated high standard for the protection of a parent’s interest, the First Amendment does not bar a state from requiring specific aspects of education for all its children, whether home-schooled or in private schools.

The State’s interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here. We need not venture further into this difficult area in order to uphold the Promise Scholarship Program as currently operated by the State of Washington.

Id. at 725.

104. See id. at 219.

105. See id. at 208. See particularly note 3, in which the state in that case rejected an offer by the community of parents to establish an educational system that would meet state requirements. See id. at 208 n.3. The problem in *Yoder* was not the content of the education but, as in *Pierce*, whether the state could defend a monopoly on its provision.


107. Of course, the First Amendment would bar a state from requiring religious education or the affirmative rejection of the idea of religion, a point that, taken to an extreme, is the basis for much of the hue and cry in the debates over “intelligent design.” Compare *Francis J. Beckwith, Law, Darwinism, and Public Education: The Establishment Clause and the Challenge of Intelligent Design* (2003) (arguing for intelligent design and its constitutionality), with *Niall Shanks, God, the Devil, and Darwin: A Critique of Intelligent Design Theory* (2004). The argument is chronicled in *Barbara Carroll Forrest & Paul R. Gross, Creationism’s Trojan Horse: The Wedge of Intelligent Design* (2004).
While the First Amendment creates no bar to educational standards requiring knowledge of germ theory or the value of tolerance, neither does it create a duty for officials to create them. Such a duty requires a theory of laws that would incorporate such a duty, whether upon the state or upon the officials. To be meaningful in practice, any theory supporting a duty by the state per se amounts to a corporate duty of its officials.

VII. PERFECTIONIST MUSINGS: WHY THE STATE OFFICIALS OUGHT TO PROMOTE THE BASIC INTERESTS OF EDUCATION

A perfectionist theory of laws allows an affirmative model of the good for each child that promotes education, including the specificity needed to encompass specific facts and values. Returning to the four requirements of perfectionist theory, it is essential to discern a good for the child, distinct from the parent, in education.

In this case, as in every case of identifying the good, it is controversial. One formulation, echoing and underpinning the content given in Article 29 above, is Durkheim’s ideal of moral education, which would surely justify a requirement to teach the current understanding of the microbial basis for disease:

It is in our public schools that the majority of our children are being formed. These schools must be the guardians par excellence of our national character. They are the heart of our general education system. We must, therefore, focus our attention on them, and consequently on moral education as it is understood and practiced in them and as it should be understood and practiced. As a matter of fact, I am quite sure that if we bring to our discussion of these questions just a modicum of the scientific attitude, it will not be hard to treat them without arousing passions and without giving offense to legitimate feelings. . . .

There are of course many things—in fact, an infinity of things—of which we are still ignorant. Durkheim, a Frenchman, may not be persuasive to the modern American policymaker.

For those not moved by the argument of the French intellectual Durkheim, let us turn to an Islamic thinker, Kalhil Gibran, who placed a new poem in the mouth of the prophet, one dealing with children in a manner that stands nicely against my hypothetical of a potential Wahabbi school

108. See supra Part II.
encouraging a parent’s intellectual slavery of a child to prevent the teaching of tolerance.

And a woman who held a babe against her bosom said, “Speak to us of Children.”
And he said:
Your children are not your children.  
They are the sons and daughters of Life’s longing for itself.  
They come through you but not from you,  
And though they are with you yet they belong not to you.  
You may give them your love but not your thoughts,  
For they have their own thoughts.  
You may house their bodies but not their souls,  
For their souls dwell in the house of tomorrow,  
which you cannot visit, not even in your dreams.  
You may strive to be like them,  
but seek not to make them like you.  
For life goes not backward nor tarries with yesterday.110

Durkheim’s model of the French public school is not at issue here, but his model of the public role of education is, and at this point one sees the separateness of the child from the parent at the heart of Gibran’s understanding. A private school or a parent might likely be better than a public school system in instilling not only specific knowledge but the values of Durkheim’s moral education in a given child. To consider the problem of American home-schooling is not to revisit Pierce or even Yoder. It is, for Gibran, to protect the child’s soul.

Considering how that concept could be manifest in laws allows numerous possible approaches. Applying such concepts with specificity to our test cases, there is ample room to argue that state officials may adopt standards for education of all children to ensure that they are educated on a variety of specific ideas and values, including the germ theory and tolerance.

Again, the last step is contentious, but I think more easily answered in favor of the adoption of the law promoting the good of education of specific facts and values, adopted through a real debate in a democratic institution. No interests in the parent, whether arising from religion or other beliefs, ought to be of equal or greater concern to lawmakers than the child’s education.

There is no conflict with a constitutional argument for the parent’s free exercise of religion. The parent has no rights greater than the obligation of the state to ensure the basic interests of the child. Indeed, no parent should be free to keep a child from ideas that a parent does not like but that a state recognizes as basic for the child, and for the polity, for the child to learn. The parent has the right to say that the state is wrong, or the idea is wrong, and to

teach alternative ideas, but this is not the same as keeping the child from an understanding of the idea itself.

The parent has no right to keep the child in intellectual slavery, and the religious reasons a parent might try to assert to support such a right are beside the point. “God wants my child to be stupid” cannot be an argument credited in the law. The basis in God is not the problem with that argument, the resulting stupid child is the problem.

There are, of course those who revere the First Amendment or fear the state so that they would reject such perfectionist notions, trusting the people to attend to their own interests more than they trust the state. Certainly, we should be cautious of accepting state views of the “good child.” We have, for example, the illustrations offered in this symposium by Marjorie Heins of once-accepted standards of the good child, that if adopted by a punctilious state would have boys’ privates wired and belled.\textsuperscript{111}

In this, I suggest we apply Ian Shapiro’s standards of basic interests toward a perfectionist model of the good child,\textsuperscript{112} and I believe we would find a useful controversy for the democratic culture over what those interests are. In the balance of whom we should allow to set the standards for children, I too trust the people more than the state, but I don’t trust every one of them.

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{111}]
See Marjorie Heins, \textit{Do We Need Censorship to Protect Youth?}, 2005 Mich. St. L. Rev. 795.
\item[\textsuperscript{112}]
See Shapiro, supra note 58.
\end{enumerate}
\end{footnotesize}