

The Boundaries of Parental Authority: A Response to Rob Reich of Stanford University

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From August 30 to September 2, 2001, the American Political Science Association held its annual meeting in San Francisco, California. Rob Reich, of the Department of Political Science at Stanford University, presented a paper at this meeting which has captured the attention of many home schooling families, including members of the Home School Legal Defense Association (HSLDA). Several members of HSLDA have asked for our opinion of this paper. This report has been prepared to satisfy these inquiries. It is not intended to be a point by point refutation of the paper, but is rather a brief examination of the major themes explored, and some of HSLDA's major criticisms and concerns.¹ Reich's position should not be taken lightly. It is illustrative of many of the challenges home educators are facing as their numbers increase. Moreover, if Reich's views were adopted by the courts, home education as we know it today would simply cease to legally exist.

Mr. Reich's paper was entitled *Testing the Boundaries of Parental Authority Over Education: The Case of Homeschooling*.² The paper is a precursor to a book by Reich to be entitled *Bridging Liberalism and Multiculturalism in Education*, which the University of Chicago Press is anticipated to publish in 2002.³ In his paper, Reich traces the rise of home education, the interests in education held by the government, the parent, and the child, and sets forth his suggestions for balancing these interests. These suggestions lead Reich to conclude that "while the state should not ban homeschooling it must nevertheless regulate its practice with vigilance."⁴ He then briefly offers a few suggestions for how a state should regulate home education, and some of the difficulties the state may encounter.

Reich's proposed regulations include "periodic assessments that would measure their success in examining and reflecting upon diverse worldviews."⁵ These regulations are in furtherance of Reich's view that:

Children are owed as a matter of justice the capacity to choose to lead lives—adopt values and beliefs, pursue an occupation, endorse new traditions—that are different from those of their parents. Because the child cannot him or herself ensure the acquisition of such capacities and the parents may be opposed to such acquisition, the state must ensure it for them. The state must guarantee that children are educated for minimal autonomy.⁶

A brief review of the constitutional basis for home education will lead one to quickly understand the serious implications of Reich's theories. It has long been recognized by Americans, legal scholars, and the Supreme Court that the original intent of the drafters of the Constitution of the United States was to protect many rights which are not expressly set forth in the founding documents. It has also long been held by Americans and the Supreme Court, and rightfully so, that the right of parents to direct the upbringing of their children is a fundamental right.⁷ In fact, this basic understanding of the role of parents long predates the founding of the United States.

Nevertheless, no right is absolute. In that regard, the American legal system has created a method by which the limits of fundamental rights are tested. It is said by the Courts examining constitutional challenges to government law and regulation that the fundamental right at issue may not be infringed upon unless the government can show a compelling interest in doing so, and, if there is such an interest, it then infringes in the least restrictive manner. In such cases, the court must balance the "interests" of the state against the "interests" of the individual asserting a right. For example, in the case of the First Amendment right to free speech, the government has a compelling interest to maintain public safety and order and can therefore prohibit the wrongful shouting of "fire" in a crowded theatre, even though this infringes a person's right to free speech.⁸

As noted before, the regulation of home education by the government is limited by the fact that parents have a fundamental right to direct the upbringing of their children which is protected by the Constitution. Accordingly, unless the state can show some compelling interest in regulating the parent's involvement in education, the parent's views are heeded. So, it becomes critical to understand what the state's interest in education is.

Fortunately for home schoolers, this issue was addressed decades ago, and reaffirmed on occasion since. It is well understood from a legal perspective that the government's *compelling* interest in education is limited. It has been held numerous times that the government's interest in education is basically only of two varieties: civic and economic.⁹ The first involves the government's interest in seeing that a child is prepared for citizenship. In other words, will he have capability to vote? The economic interest addresses the state's desire to see that citizens will be able to provide for themselves and not become a burden. So, for example, when a state attempts to impose a requirement that all home educators have teaching degrees, the state must show that this requirement is essential in achieving its interest in education—that is, good citizenship, economic success, etc. To rebut the government, the home educator merely needs to show that home educators without teaching degrees are raising children who are competent, functional. Such a showing renders the government's proposed regulation as unnecessary to achieve the government's compelling interest.

There has been considerable debate about whether the government's interest in education should be extended. So far, thankfully, the courts have been reluctant to do so.¹⁰ Not even the most liberal of judges have taken the initiative to override centuries of respect for the institution of the family and the parental interest in raising children.¹¹

It is at this point that we can begin to see the implications, indeed danger, of Reich's ideas for home education. For Reich, while recognizing that there can be debate on the topic, essentially

concedes that the state's interest in education does not lend itself to regulating home education. It is not Reich's contention that parental rights should be overridden because the state's compelling interest in education is not being fulfilled. Reich rather sets forth the argument that children have their own interests in education, which are different from both the parent's and the state's. It is this interest, the child's, which in Reich's view justifies limiting parental rights.

Reich sees the interest of the child as being twofold. First, "a child has an interest in education because education is necessary to developing into an adult capable of independent functioning."¹² While setting forth this interest, it appears that Reich sees it as largely duplicating what are already addressed by the state and parental interests in education. Reich does "not mean to imply anything potentially controversial about independent functioning."¹³ It is in the second interest of children in education, as seen by Reich, that the controversy is made clear.

For Reich, children have a fundamental interest in "becoming autonomous."¹⁴ This refers "to the capacity of the child to develop into an independent adult who can seek and promote his or her own interests, as he or she understands them, and who can participate, if he or she chooses, in political dialog with others."¹⁵ This interest comes from his perception that children should be shielded from "an unquestioning subordination of one's own will to the ethical ideals of another person or persons."¹⁶ In Reich's view, "Neither parents nor the state can justly attempt to imprint indelibly upon a child a set of values and beliefs, as if it were an inheritance one should never be able to question, as if the child must always defer and be obedient. To do so would in effect render the child servile."¹⁷

The insertion of the supposed interest of children to be autonomous into the balancing of parental and state interests leads to interesting conclusions. Reich provides the following:

I submit that even in a minimal construal of autonomy, it must be the function of the school setting to expose children to and engage children with values and beliefs other than those of their parents. [citation omitted] To achieve minimal autonomy requires that a child know that there are ways of life other than that into which he or she has been born. Minimal autonomy requires, especially for its civic importance, that a child be able to examine his or her own political values and beliefs, and those of others, with a critical eye. It requires that the child be able to think independently. If this is all true, then, at a bare minimum, the structure of schooling cannot simply replicate in every particularity the values and beliefs of a child's home.¹⁸

To ensure the children's interest, "[t]he state must therefore ensure that all children, regardless of the environment in which they are schooled, receive an education that exposes them to and engages them with values and beliefs other than those they find at home."¹⁹ Moreover, "[b]ecause children are a politically inert group, regulations in their interest must be defended by other organizations, such as the Children's Defense Fund, which typically have less at stake in home schooling, or by state officials, who are of course responsible for a much broader children's agenda than guarding against home schooling abuses."²⁰

At first glance, Reich's arguments appear persuasive. We cannot deny that children have significant rights which the state protects. For instance, children may not be abused, neglected, or abandoned. In fact, the entire juvenile justice system is predicated on the fact that children have unique interests, that children have special concerns. All of this begs the question, "why don't children have an interest in education?" And if they do, could Reich be right? As Reich points out, children are not the property of their parents to do with whatever they desire.

But the subject is more complex than what Reich is setting forth. First and foremost, children are not adults. Children are people, yet children, by their very nature, are in a class of their own. When children are involved, society, and the law, duly note their special status. Accordingly, some human rights are afforded children, and some are not. Generally, this reflects the fact that children cannot fend for themselves and lack the capacity to form certain judgments. In examining what rights children enjoy, and what rights they do not, a helpful distinction may be drawn between rights of children to protection and rights of children to choice.²¹

Rights of protection involve the right to life, freedom from bodily harm, etc. All people, by being people, are entitled to some liberty in their person. Children are no exception. In children, rights of protection take the form of protection from abuse, abandonment, etc.

Rights of choice are legal rights that permit persons to make "affirmative choices of binding consequence. Rights of choice includes such rights as voting, marrying, exercising religious preference, and choosing whether to seek education."²² These rights, however, are not extended to all. Our law has always recognized that to exercise these rights, a person must have capacity. This is why contracts with children are unenforceable. This is why children may not vote, or marry without permission. These are adult rights and children are not adults. It is in the consideration of rights of choice that Reich's arguments begin to lose their persuasion.

Consider a child's right to autonomy as posited by Reich. Can it really be said that children are owed, "as a matter of justice," the capacity to lead lives different than their parents? Most parents would quickly concur that children do not have, nor should they have, the right to dictate when they go to bed, what they watch on television, what magazines they read, whether they do their chores, or whether they obey their parents. To recognize a child's right to choice would lead to the child's doom. Yes, the law protects children. But the law cannot change children into adults simply by giving them the choices of adults. The law cannot give them something which, being children, they do not have by nature the ability to exercise.

The right to autonomy, to view the world as you want to, is only properly enjoyed by adults. While prudent parenting includes efforts to inform and help children understand the world about them, responsible parenting also demands that children be taught right from wrong, in a word—truth.

A major problem Reich's theory does not directly address is that all teaching has at its base a worldview, a philosophy of life. Even so-called neutrality betrays an underlying worldview of relativism. Accordingly, by definition, reality, or whatever label one puts on it, every child is being taught a worldview by someone. There really is no such thing as neutrality in education. Putting it in Reich's language, even if a child had a right to autonomy in education, it could

never be exercised. The state, in enforcing the child's interest, will by necessity become an advocate of some worldview. While there might be some danger in allowing parents to convey worldviews to children, history will attest that having the state indoctrinate children has much larger consequences.

Granting choice rights to children, and having the state enforce them, is especially problematic for worldviews arising out of religion. Many religions, and especially Christianity, necessitate the teaching of truth. Not, "This is my truth," but "True truth." There is no room for relativism. There is no way that the child can be merely exposed to all worldviews. While Christian parenting can involve exposure to other worldviews, Christian parenting cannot allow for a neutral presentation. Christian parents cannot say to the child: "This is true for me, it may not be true for you." The best Christian parents can do is say, "This is true, and you must come to terms with your response to this truth."

In at least one way, Reich anticipates this objection. He notes that:

[T]he problem arises when the secular state authority is exercised over the rearing of children. Conflict between the state and religious parents on this score may be endemic and inevitable. On my view, even given the deep importance of religious freedom, the state cannot relinquish its regulatory role in education in cases where parents invoke their religious beliefs as a bulwark against secular authority.²³

One of the reasons why home education has exploded as a movement is that the public schools no longer teach truth as truth. The court has so hemmed in the role of public education that secular humanism and relativism have become the only underlying philosophies that survive constitutional scrutiny. To a certain degree, Reich's ideas have met with success, as evidenced by the number of children in public education. While this is acceptable to many Americans, and in particular the so-called intellectual elite, it is simply unacceptable to many others.

We must ask ourselves at this point, "why is Reich so afraid of home education?" We are a small segment of society. If we are really afraid that children are suffering from a lack of autonomy in education, why not focus upon the much larger populations of children who really will suffer a lack of autonomy, even as adults. By any definition, children who grow up illiterate, unable to do basic math, and lack even the capacity as adults to exercise choice rights are far less autonomous than home educated children who have received an education based on the world view of their parents. Home schoolers represent little more than 2% of school aged students. Why focus on them? If it is children we care about, we should focus on those kids who are not being given even the most rudimentary of education in America's failing public schools. If Reich really cares, perhaps he should initially focus on those children trapped in educational failure.

The real root of the problem home education presents to Reich is that home educators have removed themselves from America's educational system and its underlying values. Their children are beyond the reach of the elite and the predominate worldview of relativism or secular humanism. As home schooling continues to grow and prosper, this will become increasingly troublesome to the educational establishment. But more than being beyond the intellectual elite, the children of home educators are largely beyond the reach of the state. It will take novel legal

theories to break this constitutional protection. And it is here that Reich's theories are most concerning, indeed dangerous.

What Reich is doing, intentional or not, is setting an academic framework by which an activist judge might rule in favor of heavy restrictions on home education, while at the same time avoiding the obvious assault on precedent and the Constitution. By extending what are in essence adult rights of choice to children, and declaring children to have an interest in education separate from the state's and separate from their parent's, Reich provides the opportunity to take away freedoms which Americans, indeed humans in general, have deemed fundamental for thousands of years.

¹ Like most organizations of size, one can find a variety of opinions at HSLDA. The views expressed in this paper are generally held by the majority of the attorneys at HSLDA.

² Reich, Rob, *Testing the Boundaries of Parental Authority over Education: The Case of Homeschooling*. Paper prepared for delivery at the 2001 Annual Meeting of the American Political Science Association, San Francisco, California, August 30–September 2, 2001.

³ *Id.* at 2.

⁴ *Id.* at 6.

⁵ *Id.* at 36.

⁶ *Id.* at 33.

⁷ *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁸ The compelling interest test applied by the courts actually involves several steps. First, it must be demonstrated that there is actually a burden on a protected right. If so, the state must then show that its law or regulation is necessary to accomplish a compelling governmental interest, and that its law or regulation is the least restrictive means of achieving the compelling interest. See *Yoder*, 406 U.S. at 215–219.

⁹ *Yoder*, 406 U.S. at 213.

¹⁰ Reich himself notes that “As many commentators have noted, United States courts have rarely recognized independent interests, much less rights, of children.” Reich, at 19, note 36.

¹¹ It should be noted, however, that the courts have expanded other government interests which infringe on the interests of family. This is, perhaps, most noticeable in the demise of the family interest in abortion disputes.

¹² Reich, at 20.

¹³ Reich, at 20.

¹⁴ Reich, at 21.

¹⁵ Reich, at 22.

¹⁶ Reich, at 23.

¹⁷ Reich, at 23.

¹⁸ Reich, at 31.

¹⁹ Reich, at 32.

²⁰ Reich, at 37.

²¹ John Whitehead, *Parents' Rights*, p. 127 (Crossway 1985).

²² Id.

²³ Reich, at 37.