

## WHO SHOULD CONTROL CHILDREN'S EDUCATION?: PARENTS, CHILDREN, AND THE STATE

By  
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Disputes surrounding public education repeatedly take center stage in American life. Public schooling serves as such a hotbed for controversy because of the deeply held and often conflicting interests and demands of parents, students, and the states and local communities who run public schools. To name only a few recent disputes, this summer, the Miami-Dade County School Board banned a children's book about life in Cuba after a Cuban-American parent complained that the book depicted Cuba in too positive a light.<sup>1</sup> A federal district court later ordered the book returned to the shelves until the case goes to trial.<sup>2</sup> This summer also saw the culmination of a contentious school board campaign in Kansas, in which a new majority on the state school board was elected on a platform to eliminate previously passed curriculum standards inspired by the theory of intelligent design.<sup>3</sup> This was not the first such go-round on the issue in Kansas: In 2000, after a creationist school board removed any mention of evolution from the state science

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<sup>1</sup> See Terry Aguayo, *Miami-Dade School Board Bans Cuba Book*, N.Y. TIMES, June 16, 2006, at A24.

<sup>2</sup> See *ACLU of Florida, Inc. v. Miami-Dade County School Board*, 2006 U.S. Dist. LEXIS 50502 (2006); see also Terry Aguayo, *National Briefing South: Florida: Judge Blocks Ban On Children's Book*, N.Y. TIMES, July 25, 2006) at A16.

<sup>3</sup> See *The Evolution of Kansas*, N.Y. TIMES, Aug. 3, 2006, at A20; Lawrence Krauss, *How to Make Sure Children are Scientifically Illiterate*, N.Y. TIMES, Aug. 15, 2006, at F3.

curriculum, the public outcry led to the election of a majority that reinstated evolution in the curriculum; this majority was ousted in 2004 by a board that passed standards associated with intelligent design.<sup>4</sup> A similar oscillation is taking place in other states: Last February, the Ohio Board of Education reversed its requirement that high school biology classes critically analyze evolution.<sup>5</sup> This reversal followed a federal district court's ruling striking down the intelligent design curricula passed in Dover, Pennsylvania. During this time, as well, a number of cases have been making their way through the courts in which parents assert that school funding violates state constitutional guarantees to provide students with a sound basic education that prepares them to participate in society.<sup>6</sup>

So who, ultimately, should control students' education in public schools? And, in the event of disagreement about what this task entails and how it should be accomplished, whose views should trump? I argue here that in a liberal democracy, it is inevitable that there will be conflicts among parents, children, and the state's interests with respect to education. Given the legitimacy of claims by the community to have a say in how its future citizens should be educated; the equally legitimate claims of parents to have a say in how their own children should be educated; the need for children to develop the autonomy that liberalism demands; and the needs of the polity to ensure that children come to possess the civic virtues necessary to perpetuate a healthy liberal democracy, none of these interests can be allowed completely to dominate education in public

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<sup>4</sup> *Id.*

<sup>5</sup> See Ralph Blumenthal, *In Kansas, Evolution's Backers Are Mounting a Counterattack*, N.Y. TIMES, July 29, 2006) at A1.

<sup>6</sup> See, e.g., *Leandro v. State of North Carolina*, 346 N.C. 336 (1997), *later proceeding sub. nom. Hoke County Bd. of Educ. v. State*, 358 N.C. 605 (2004); *Lake View School District, No. 25 v. Huckabee*, 2005 Ark. LEXIS 773 (2005); *Brigham v. State of Vermont*, 2005 VT 105, 889 A.2d 715 (2005).

schools. Instead, a vigorous liberal democracy must develop a framework for education that gives all of these interests some accommodation. Moreover, a nuanced analysis of the legitimate interests at stake can minimize these conflicts and best accommodate the legitimate interests at stake. In this article, I seek to lay the groundwork for such an approach.

I focus here specifically on controversies involving civic education in public schools, because this is the subject of many of the most hard-fought conflicts surrounding public education.<sup>7</sup> The issue of children’s civic education is a particularly thorny one for a liberal democracy like the United States. As democratic theorists have long recognized, preparing children for democratic citizenship is an important and demanding responsibility.<sup>8</sup> The collective self-rule required of democracy means that, among other things, citizens must be committed to political equality, to listening to other points of view, to resolving issues through deliberation rather than force, and to the rule of law.

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<sup>7</sup> See, e.g., *Brown v. Hot, Sexy and Safer Productions*, 68 F.3d 525 (1st Cir. 1995); *Immediato v. Rye Neck School Dist.*, 73 F.3d 454 (2d Cir. 1996); *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003).

<sup>8</sup> Even Joseph Schumpeter, who presented a fairly unambitious account of democracy, argued that its success depends on “the human material of politics – the people who man the party machines, are elected to serve in parliament, rise to cabinet office – . . . be[ing] of sufficiently high quality.” JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 289-90 (1950). He added that politically relevant players in society must be willing and able to exercise “democratic self-control,” in which politicians abide by applicable laws, avoid miscarriages of justice, and support the integrity of the legislature and voters allow leaders to rule; all concerned, moreover, must have “a large measure of tolerance for different opinions” and must have the patience to allow others to sound their views. *Id.*

The Supreme Court has also recognized that the continued survival of a democracy depends on producing new generations of rational, capable citizens. “[E]ducation is perhaps the most important function of state and local government. . . . It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.” *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

These qualities do not simply arise in citizens spontaneously, but require nurture.<sup>9</sup> To add to the complexity of the issue, however, the United States is not merely a democracy, it is a *liberal* democracy, whose commitment to majoritarian rule is tempered by the understanding that some personal rights and liberties should not be subject to the majority's preferences.<sup>10</sup> The deliberate promotion of the qualities that make for good citizens therefore stands in tension with the great weight that liberalism places on respecting citizens' own views of the good life, including how to rear their children.

Furthermore, insofar as the state uses public education to promote particular virtues, it raises liberalism's suspicion of state despotism. As John Stuart Mill wrote in opposing public education,

That the whole or any large part of the education of the people should be in State hands, I go as far as any one in deprecating. All that has been said of the importance of individuality of character, and diversity in opinions and modes of conduct, involves, as of the same unspeakable importance, diversity of education. A general State education is a mere contrivance for moulding people to be exactly like one another . . . [I]t establishes a despotism over the mind.<sup>11</sup>

A century and a half after Mill wrote, there is little debate about the legitimacy of public education, itself, but a vigorous dispute remains regarding the appropriate scope of the

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<sup>9</sup> “[Public] education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self government in the community and the nation.” *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 681 (quoting C. BEARD and M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

<sup>10</sup> I use the term “liberalism” throughout this article to refer to the Anglo-American line of political thought stretching from John Locke through John Stuart Mill and on to such contemporary thinkers as John Rawls, whose work focuses on the importance of liberty, self-government, and equal rights for citizens. This use of the term is therefore broader than the use of the term “liberal” in common parlance to refer to those who hold political beliefs at the opposite end of the political spectrum from conservatives. Under my use of the term, both thinkers such as John Rawls, who might qualify as a liberal under common usage, and Robert Nozick, who might be considered a political conservative, are “liberals.”

<sup>11</sup> JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* 130 (1991).

education that public schools and the state can require of its young citizens, particularly over the objection of their parents.

In this article, I address this dispute. My primary project is theoretical: I seek to illuminate the contradictory goods and interests at stake in civic education, and to set out a theoretical framework that resolves these tensions in a matter most consistent with the ideals that underlie the liberal democratic project. Because courts have been so integrally involved in the resolution of these issues as a result of constitutional challenges, however, I also seek to translate this framework into constitutional doctrine. This discussion consists of four parts. In Part I, I set out the basic framework of the problem by considering several disputes over civic education that have arisen in recent years. I argue that these cases are so difficult for liberal democratic theory because of the conflicting claims to authority that are inherent in a liberal democracy. In this form of government, the majority, parents, and children themselves all have legitimate (and potentially conflicting) claims to have particular goods furthered with respect to civic education. In Part II, I argue that leading theories of civic education founder because they fail to attend to the full range of legitimate claims. Part III demonstrates that a more nuanced analysis of these claims to authority ameliorates some of the tensions among them. I then offer an alternative approach that seeks to better balance these varying claims to authority, and the goods that they support. Finally, Part IV argues that the theoretical approach I set out in Part III, although certainly not mandated by current constitutional doctrine, can be incorporated into current constitutional frameworks to assess challenges to civic education programs.

## I. Recent Civic Education Conflicts

Battles regarding civic education have turned in recent years over the issue of whether the state can educate children in public schools over their parents', and sometimes their own, objections. Two well-known cases, *Wisconsin v. Yoder*,<sup>12</sup> and *Mozert v. Hawkins County Board of Education*,<sup>13</sup> have become touchstones in this debate. In addition, several more recent cases demonstrate the complexity of the issues raised. I describe them here not to analyze the legal analysis that courts engage in, but because these cases provide factual scenarios that help to explore the normative complexity of civic education in a liberal democracy.

In the first of the cases that have served as flashpoints for this discussion, *Yoder*, Amish parents challenged a state law requiring that children attend high school until age sixteen. The parents contended that requiring their older children to attend school with non-Amish students violated their right to free exercise of religion both by teaching them information that would undercut the Amish's simple way of life, and by exposing their children to worldly attitudes that contradicted Amish religious beliefs.<sup>14</sup> Essentially, the parents argued that their children's exposure to education beyond that needed to run a simple farm, as well as exposure to the way non-Amish children lived, would lead to a worldliness among the students that threatened the continued existence of the community,

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<sup>12</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>13</sup> *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

<sup>14</sup> Amish parents disagreed with the high school's emphasis on "intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students." They contended that these values contradicted the Amish beliefs in "informal learning-through-doing; a life of goodness, rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, the contemporary worldly society." *Yoder*, 406 U.S. at 211.

as well as the parents' and children's religious health.<sup>15</sup> In response, the state of Wisconsin argued both that the educational requirement was necessary to prepare the children to participate effectively in our liberal democratic system,<sup>16</sup> and that this education was necessary to prepare the children to be self-sufficient participants in society.<sup>17</sup>

In the other civic education case that has reached iconic status, *Mozert*, plaintiffs, born-again Christian parents of children attending Hawkins County, Tennessee public schools, were less successful in their free exercise challenge to the school system's use of a particular series of basic reading texts, the Holt, Rinehart & Winston readers. Sounding a note similar to the parents in *Yoder*, the *Mozert* plaintiffs objected to the readers on the ground that they exposed their children to cultures, values, and ways of life that were prohibited by their fundamentalist faith. For example, the parents found objectionable a story depicting a young boy enjoying cooking, and a story about the religious and social

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<sup>15</sup> The Amish objected to formal high school education "not only because it place[d] Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it [took] them away from their community, physically and emotionally, during the crucial and formative adolescent period of life." *Id.* at 211. Amish teenagers are expected to begin learning and espousing the attitudes and values befitting their role as adults in the Amish community. Parents argued that exposing them to contradictory values jeopardized the future of the Amish community as a whole. *Id.*

<sup>16</sup> In defense of its requirement, the state argued that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." *Id.* at 221.

<sup>17</sup> *Id.* at 205.

Ultimately, the United States Supreme Court sided with the parents. It held that the state's interest in preparing children to participate in our open political system did not rise to the compelling level necessary to justify interference with the parents' religious beliefs. According to the Court, because the children were being prepared for life in a separate agrarian community rather than in modern society, they did not need the more complex understandings of society and government that other children might need. "It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith." *Id.* at 222.

practices of an Indian settlement in New Mexico. They contended that these and other portions of the readers prompted their children to think that ways of life and values other than those their parents supported could be acceptable – a view incompatible with their fundamentalist beliefs.<sup>18</sup>

In addition to *Yoder* and *Mozert*, more recent cases demonstrate the varied range of clashes among parents, students, and schools that continue to emerge on this issue. For example, in *Brown v. Hot, Sexy and Safer Productions*,<sup>19</sup> parents and students of Chelmsford High School in Massachusetts objected to students being required to attend a school-wide assembly that featured an AIDS awareness program for students. The plaintiffs alleged that in the course of the 90-minute presentation, the owner of a private company hired by the school to perform AIDS education presented sexually explicit monologues and participated in sexually suggestive skits with several students chosen from the audience. The plaintiffs asserted that the presenter not only joked with students about premarital sexual activity (including encouraging one male student to display his “orgasm face” to the crowd), she also discussed approvingly oral sex, masturbation, homosexual sexual activity, and condom use. In doing so, the parents contended, the school educated children about sex in a manner that both violated the parents’ deeply-held religious beliefs and interfered with their parental prerogatives. The students,

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<sup>18</sup> The *Mozert* district court held that the compulsory use of the textbooks violated the plaintiffs' free exercise of religion, and ordered the school to permit the students to "opt-out" of the school's reading program. *Mozert*, 647 F. Supp. 1194, 1203 (E.D. Tenn. 1986). On appeal, however, the Sixth Circuit reversed the district court's ruling and held that the school system's compulsory use of the textbooks did not unconstitutionally burden the plaintiffs' free exercise of religion. Backing off from the *Yoder* court's deferential view of parents' interests, the *Mozert* court held that so long as students were not compelled to affirm or disaffirm any particular religious belief or practice, mere exposure to religiously objectionable material did not burden their free exercise rights. *Mozert*, 827 F.2d 1058 (6<sup>th</sup> Cir. 1987).

<sup>19</sup> *Brown v. Hot, Sexy and Safer Productions*, 68 F.3d 525 (1st Cir. 1995).

meanwhile, asserted that their compelled attendance deprived them of their privacy rights and their rights to an education free from sexual harassment.<sup>20</sup>

In *Immediato v. Rye Neck School District*,<sup>21</sup> a high school student and his parents contested the district's mandatory community service program. The parents asserted that the program, which required students to complete 40 hours of community service work to earn their diplomas, interfered with their prerogative to raise their child with the ethics that they chose to impart to him. In contrast to the other cases discussed, the parents did not raise a claim of religious freedom. Instead, they objected to the school requiring their child to participate on due process grounds, contending that it infringed on their right to direct his upbringing and education. The student asserted, among other claims, that the program infringed on his liberty interests.<sup>22</sup>

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<sup>20</sup> The students asserted that the sexually explicit program "humiliated and intimidated" them, and contended that in the weeks after the assembly, many of their peers "displayed overtly sexual behavior" which increased their harassment. *Id.* at 529. The First Circuit, in denying the plaintiffs' claims, held that while the parents' religious freedom prevented the state from foreclosing them from choosing a different path of education for their children than public schools, this freedom does not encompass "a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children." *Id.* at 534. In the Court's words:

If all parents had a fundamentally constitutional right to dictate individually what the schools teach their children, the school would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents . . . do not encompass a broad-based right to restrict the flow of information in the public schools.

*Id.* at 535.

<sup>21</sup> *Immediato v. Rye Neck School Dist.*, 73 F.3d 454 (2d Cir. 1996).

<sup>22</sup> *Id.* at 461-62. In reviewing the case, the Second Circuit applied only a rational basis level of scrutiny because the parents' and student's objection to the program was not based on religion. It then found that the school district easily passed that test. In the Court's words:

The state's interest in education extends to teaching students the values and habits of good citizenship, and introducing them to their social responsibilities as citizens. . . . [T]he mandatory community service program rationally furthers this state objective. The District reasonably concluded that the mandatory community service program would expose students to the needs of their communities and to the various ways in which a

Finally, in the last of these newer cases, *Leebaert v. Harrington*,<sup>23</sup> the father of a seventh-grader attending a Fairfield, Connecticut public school challenged a state regulation requiring his son to attend health education classes at a public school that included information on health, character, citizenship, family planning, human sexuality, AIDS awareness, and social aspects of family life. The school permitted parents to excuse their children from the six classes involving family-life instruction and AIDS education, but not the other sessions of the health program. The father argued that it was his Fourteenth Amendment right for his son “to be home schooled regarding health, morals, ethical and personal behavior.”<sup>24</sup>

In all these cases, parents, and sometimes students themselves, opposed school programs that, from the state’s perspective, furthered important interests. Some programs were intended to develop the civic virtues the state believed necessary for liberal democracy. Many, as well, were intended to serve what the state believed to be

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democratic system of volunteerism can respond to those needs. In doing so, the program helps students recognize their place in their communities, and, ideally, inspires them to introspection regarding their larger role in our political system.

The Fourth Circuit ruled similarly in a comparable case in the same year. In *Herndon by Herndon v. Chapel Hill-Carrboro City Bd. Of Educ.*, 89 F.3d 174 (1996), North Carolina parents challenged the district’s program requiring students to perform 50 hours of community service in grades 9-12 in order to graduate. The Fourth Circuit affirmed the district court’s grant of summary judgment to the school system, holding that the program passed rational basis review because it was rationally related to a legitimate state interest.

<sup>23</sup> *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003).

<sup>24</sup> *Id.* at 136. On appeal, the *Leebaert* plaintiff conceded that the challenged curriculum would pass rational basis review since the program would be a rational way of furthering the health and welfare of children. He contended, however, that strict scrutiny was appropriate, both because the case concerned a parent’s fundamental right to control their child’s upbringing, and because the curriculum implicated his free exercise rights. The Court rejected the father’s claim that parents had a fundamental right to dictate public school curricula on the ground that recognizing such a right “would make it difficult or impossible for any public school authority to administer school curricula responsive to the overall educational needs of the community and its children.” *Id.* at 141.

children's interests – for example to teach them to be autonomous, and to be able to support themselves in society. From the parents' perspective, however, this education conflicted with deeply-held beliefs, often religiously based, about how to raise their children.<sup>25</sup> From the children's perspective, moreover, this education sometimes forced them to consider views with which they disagreed.

The objection that parents had to the challenged programs in many of these cases, including in *Yoder* and *Mozert*, was less that students would learn particular substantive information with which the parents disagreed than that the simple fact of their exposure to other ways of life would teach children that a number of ways of life are acceptable – a view that the fundamentalist parents in these cases opposed.<sup>26</sup> For example, in *Yoder* the parents feared that their children's exposure to non-Amish children and to other sets of beliefs might cause the children to believe that they could choose ways of life different from the Amish community in which they had been raised. While belief in the value of individuals being able to choose their own path in life is a hallmark of liberalism, it is deeply opposed to the beliefs of the Amish community. By the same token, the *Yoder* parents and the state disagreed about whether it was in the children's interest to learn to become a self-supporting member of society. The state believed it was; the parents believed it was not. Likewise, in *Mozert*, the parents were concerned that exposing children to religious practices from other religions and to different ways of life might teach their children that other religions and ways of life were equally worthy of respect.<sup>27</sup>

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<sup>25</sup> See Nomi Stolzenburg, *He Drew a Circle That Shut Me Out: Assimilation, Indoctrination, and the Perils of a Liberal Education*, 106 HARV. L. REV. 581 (1993).

<sup>26</sup> See *id.*

<sup>27</sup> In *Mozert*, two parents testified that they objected to the readers because they contained passages “that expose[d] their children to other forms of religion and to the feelings, attitudes, and values of other students

While the view that religions should be treated as equally worthy of respect, at least as a political matter, is a virtue in liberalism, that view deeply conflicted with the plaintiff-parents' religion.

The question then arises: how much authority should the state have to educate students for civic ends over their parents', and sometimes students' own, objections? And, to turn the question around, should parents have veto power over the state's attempts to teach liberal democratic virtues and other lessons the state believes are important to their children? What are the limits of the state's authority in this area? Despite extensive discussion of this issue in political and legal theory,<sup>28</sup> the answers to these questions presented in political and legal theory have thus far not been adequate.

## II. Existing Theories of the Proper Scope of Civic Education

The question of the proper line of demarcation between the state's and parents' authority over children's education has attracted significant scholarly attention.<sup>29</sup> The resulting conversation, however, has produced considerably more dissension than

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that contradict[ed] the plaintiffs' religious views without a statement that the other views [were] incorrect and that the plaintiffs' views [were] the correct ones. *Mozert.*, 827 F.2d at 1065.

<sup>28</sup> See e.g., BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 18, 169 (1969); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978); WILLIAM GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* (1991); AMY GUTMANN, *DEMOCRATIC EDUCATION* (1999); LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1991); STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* (2000); STEPHEN MACEDO, *LIBERAL VIRTUES* 278 (1990); LINDA MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* (2005); ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974); JOHN RAWLS, *POLITICAL LIBERALISM* (1983); JOHN RAWLS, *A THEORY OF JUSTICE* (1972); JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1950); THOMAS SPRAGENS, *CIVIC LIBERALISM: REFLECTIONS ON OUR DEMOCRATIC IDEALS* (1999); JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* (1991); Emily Buss, *Allocating Developmental Control Between Parent, Child, and the State*, 2004 U. CHI. LEGAL F. 27; Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996); Tyll van Geel, *Education and the Constitution: Shaping Each Other and Next Century: Citizenship Education and the Free Exercise of Religion*, 34 AKRON L. REV. 293 (2000).

<sup>29</sup> See authorities cited *supra* note 28.

agreement. In this section, I consider the discussions on civic education by four prominent theorists: Bruce Ackerman, Stephen Gilles, Amy Gutmann, and William Galston. Each of their analyses, I argue, focuses on too narrow a spectrum of the range of interests to which a liberal democracy must attend, and ignores other important interests that are also entitled to significant attention. Because of these theories' limited scope, all of them fail to work out a satisfactory balance among these important interests.

A. *Bruce Ackerman: Emphasis on Children's Autonomy*

The renaissance of liberal political theory in the United States that began in the 1970s with the publication of John Rawls' *A Theory of Justice* assumed that a distinctive feature of the liberal state is its neutrality among individuals' conceptions of the good life.<sup>30</sup> The liberal state, in this view, is a limited state whose purpose is to preserve as much autonomy of citizens as possible so that they can live out their own vision of the good life. In his now classic work, *Social Justice in the Liberal State* (1980), Bruce Ackerman argued that this precept of state neutrality means that a liberal theory of education precludes both parents and the state from inculcating in children "an uncritical acceptance of any conception of the good life."<sup>31</sup> According to Ackerman, "We have no right to look upon future citizens as if we were master gardeners who can tell the difference between a pernicious weed and a beautiful flower."<sup>32</sup> Instead, it is the role of liberal education to "provide children with a sense of the very different lives that could be

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<sup>30</sup> See JOHN RAWLS, *A THEORY OF JUSTICE* (1972); BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978); ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); John Rawls, *Justice as Fairness: Political Not Metaphysical* 14 *PHIL. & PUB. AFF.* 223 (1985).

<sup>31</sup> ACKERMAN, *supra* note 30, at 163.

<sup>32</sup> *Id.* at 139.

theirs – so that, as they approach maturity, they have the cultural materials available to build lives equal to their evolving conceptions of the good.”<sup>33</sup>

In his approach, Ackerman accorded parents broad rights to control the cultural diversity to which younger children are exposed during primary education on the ground that children need significant cultural coherence in order to locate their own place in the world.<sup>34</sup> Parents’ authority to control diversity, however, recedes as a child grows older and can tolerate greater challenges to parental ideas.<sup>35</sup> As children progress through secondary school, both society and their parents should therefore expose them to more diverse cultural materials to ensure that, as they approach adulthood, they have the raw materials to define who they want to be.<sup>36</sup>

Ackerman’s broad affirmation of children’s autonomy is appealing in many ways. Liberalism’s respect for each individual’s autonomy certainly means that children need to be given the resources and education that allow them the capacity for self-determination. Yet Ackerman’s view that this should be the extent of a child’s character education ultimately gives far too much weight to this value as against other values. Importantly, Ackerman gives no weight to the polity’s interest in insuring that citizens develop other civic virtues besides autonomy that are necessary to function in a liberal democracy. Yet many of the virtues essential to a flourishing democracy, such as a belief in the political

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 141.

<sup>35</sup> See also Emily Buss, *Allocating Developmental Control Between Parent, Child, and the State*, 2004 U. CHI. LEGAL F. 27. Although Buss makes a slightly different argument for the balancing of control between parents and the state, she nonetheless echoes Ackerman’s argument that control over the child’s education should be gradually ceded to the child as the child matures.

<sup>36</sup> *Id.* at 159.

equality of all citizens, are virtues specific to democracies, rather than the obvious choices that children would arrive at if left to their own devices.<sup>37</sup> Because of this, Ackerman's view that the state should merely present options of different ways of life to children makes his version of liberalism unlikely to produce the committed, responsible citizens needed for a liberal democracy to function well. Instead, the array of choices presented to children is far more likely to produce a society that would justify Stephen Macedo's likening of liberal culture to Californian culture – in which people constantly try on new lifestyles and principles without buying wholeheartedly into any of them (besides that of personal freedom).<sup>38</sup>

Further, in giving paramount weight to children's autonomy, Ackerman ignores parents' deeply-held interests in passing on to children their own vision of the good life. As Stephen Gilles argues, raising children is central to the life plan of many adults. Part and parcel of raising children is imparting one's own vision of the good life to them. While this interest would seem to merit at least some weight, Ackerman dismisses it as illegitimate. Similarly, he discounts the interests of the democracy in ensuring that the majority can pass on its way of life and its view of the good life to the next generation.

In summary, Ackerman certainly gets it right when he focuses on the importance of developing children's capacity for autonomy. A liberal democracy that respects citizens' choices because it believes that these choices reflect a capacity for individual and collective determination must indeed seek to assure that its young citizens develop

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<sup>37</sup> See GALSTON, *supra* note 28, at 244-46.

<sup>38</sup> See MACEDO, *supra* note 28, at 278. Stephen Gilles writes that "ordinary experience suggests that many (if not most) children, if raised in accord with Ackerman's plan, would choose a life of easy, immediate, undisciplined self-gratification, rather than a life of responsibility, hard work, and discipline." Gilles argues that "Ackerman's education may foster persons who are slaves to their own appetites, rather than self-governing moral individuals." Gilles, *supra* note 28, at 951.

this capacity. Yet Ackerman is wrong that children's autonomy circumscribes the legitimate boundaries of civic education. In a liberal democracy, parents have some legitimate (although certainly not an absolute) interest in raising children who will follow their way of life, culture, and traditions.<sup>39</sup> Likewise, the state has a legitimate interest in encouraging children to adopt the values of the democracy and civic virtues that will enhance the health of the polity.<sup>40</sup>

B. *Stephen Gilles: A Parentalist Manifesto*

If Ackerman's vision veers too heavily in the direction of children's autonomy, Stephen Gilles' project veers too heavily in the direction of their parents' autonomy. In a 1996 University of Chicago Law Review article, Gilles vigorously defends parents' rights to pass on their way of life to their children, and opposes civic education over parents' objections.<sup>41</sup> Gilles rests his contention that parents should have veto power over children's civic education on two basic arguments. First, given the lack of liberal consensus on what constitutes the good life and, consequently, the good education, and the absence of any standards to decide these issues authoritatively, Gilles contends that

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<sup>39</sup> Cf. Gilles, *supra* note 28, at 948-49 ("Believers in quite diverse ways of life (secular as well as religious) are alike in thinking that their children should be brought up to believe in their way of life, so that they will learn its full meaning and rewards, and thus adhere to it as adults. Ackerman treats acting on this sort of educational judgment as illiberal in principle. His brand of liberalism requires a commitment to the view that the child's freedom to choose must trump the values of the child's educators, whoever they prove to be.").

<sup>40</sup> See *Pierce v. Society of Sisters*, 268 U.S. at 534 (the state "unquestionably has the power to reasonably regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of a proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.").

<sup>41</sup> Gilles, *supra* note 28, at 938 (1996).

decision-making authority is properly vested in parents, who are “more likely to pursue the child’s best interest as they define it.”<sup>42</sup>

Second, Gilles disputes the notion that the state has a paramount interest in controlling the education of children.<sup>43</sup> As against the state’s interest, he contends,

individuals have an even more fundamental interest in nurturing their children and in being nurtured by their parents. Contemporary liberal theory tends to assume not only that citizenship comes first, and individuality second, but also that – even within the realm of individuality – marriage, family, and child rearing are merely one prominent set of pursuits. These assumptions invert the priorities by which most reasonable people live. For the overwhelming majority, the loving relationships we share with our spouses, our children, our siblings, and the parents who educated us are at the heart of our individual conceptions of the good life.<sup>44</sup>

According to Gilles, the human flourishing of both parents and children depends on parental nurturing and education; parental control over the values children are taught is essential to that enterprise.

On the basis of these two rationales, Gilles argues that parents’ views regarding their children’s schooling must be respected so long as they are reasonable, in the sense that they “acknowledge the importance of normal human development, embrace civic toleration and respect for law, and acquiesce in our basic constitutional arrangements.”<sup>45</sup>

As Gilles recognizes, this gives parents very broad authority over their children’s education: “Because few parents in our society will choose to educate their children in ways that fail to satisfy these standards, states will only rarely be able to justify

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<sup>42</sup> *Id.* at 940.

<sup>43</sup> Gilles asserts that “individuals have an even more fundamental interest in nurturing their children and in being nurtured by their parents.” *Id.* at 941.

<sup>44</sup> *Id.* at 940-41.

<sup>45</sup> *Id.* at 939. Gilles contends that “the state acts illegitimately when it promotes some reasonable conceptions of the good at the expense of others by mandating the values children must be taught in school.” Gilles, *supra* note 29 at 939.

overriding parents' educational authority."<sup>46</sup> Based on this framework of analysis, Gilles argues that the parents in both *Yoder* and *Mozert* properly had the right to decide their children's educational fate. In *Yoder*, Gilles contends, requiring children to go to public school beyond the eighth grade exceeds the societal consensus of the civic education required to support the polity. Because of this, he argues, parents properly had the right to choose the education for children past that grade that was appropriate to their lives in the Amish community. In *Mozert*, Gilles asserts, the state's effort to teach respect for other ways of life also exceeds the liberal consensus on this issue and hence should not have been imposed over their parents' objection.

Gilles' account, in contrast to Ackerman's that was written a generation before, recognizes the validity of a number of important different interests, including the state's interest in instilling civic virtues as well as children's interest in autonomy. Based on the formalistic structure of his argument, however, Gilles winds up giving parental interests almost complete weight as against the other important interests that he identifies.<sup>47</sup> That there are no definitive standards for sorting out what constitutes good civic character, though, does not mean that the polity's interest in such character should be ignored, or that there are not better and worse arguments to be made with respect to civic character, any more than the recognition that there are no definitive standards for art should lead art museums to empty out their galleries. Insofar as citizens' need for civic virtues is taken seriously, the question Gilles should be asking is not "who has the best incentives to

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<sup>46</sup> *Id.* at 939-40. In fact, Gilles asserts that "[l]iberal statecraft should not merely tolerate parental education: it should encourage and rely on that self-sacrificing, self-fulfilling work by respecting parents' educational choices unless they unreasonably deprive children of the essential prerequisites for adult life and liberal citizenship." *Id.* at 941.

<sup>47</sup> *Id.* at 940.

further the child's best interests?" but instead "who has the best incentives to further the polity's interest in developing civic virtue in children?" In answering this latter question, parents are disadvantaged compared to the state precisely because they are likely to be focused on their child's individual interests rather than the polity's long-term interests.

This is not to argue, of course, that the child's best interests should not be considered, but rather to recognize that the difficult enterprise of maintaining a vigorous liberal democracy requires that more than only the interests of children as individuals be considered. And this means that sometimes an expansive reading of individual interests – both parents' and children's – needs to be constrained to take into account the needs of the polity. Gilles' argument – that contemporary liberalism should take parents' private interests in rearing their children more seriously than citizenship interests – therefore misses a critical point. The point is that citizens must give up some portion of their autonomy to secure the very freedom to raise their children that Gilles lauds, since without citizens' acquiring civic virtues liberal democracy will founder.

And while Gilles is certainly correct that complete consensus regarding the civic virtues required for a healthy liberal democracy will never be possible, and that the finer points of these virtues will always be debatable, he also overstates the extent of this debate. In contrast to the difficulty of knowing what a good life should be, the inquiry regarding what skills and traits are needed to support a liberal democracy is considerably more directed. As William Galston counsels, "If sufficiently rigorous criteria are employed, we are of course forced to conclude that we 'know' nothing. If, however, we adopt criteria appropriate to the subject matter, it turns out that we know a fair amount

about what promotes our . . . collective wellbeing.”<sup>48</sup> In this regard, it is clear that a vigorous liberal democracy requires that children understand that deep differences in beliefs exist among citizens of the polity, come to learn to respect others’ rights, and to listen carefully to others’ opinions. Children must learn to adopt a position of liberal humility in which they recognize that, even if they believe they are right about particular comprehensive views,<sup>49</sup> they cannot prove this and should not seek to foist these views on others, and that politics should be more than a free-for-all in which the majority attempts to wield the coercive power of the state to defend its own contested vision of morality on others. Finally, children must learn to support fundamental liberal institutions such as the separation of church and state. While there is room for reasonable debate over the precise boundaries of some of these skills and virtues, there is at least considerable agreement around their core.

Not only does Gilles’ proposal fail to assure that such civic virtues will be taught, it also gives little weight to safeguarding children’s autonomy. It is somewhat ironic that Gilles relies so firmly on autonomy in his defense of parental rights but would deny the preconditions of autonomy to their children, since he defers to parental views that their children should not be exposed to other ways of life or systems of thought or values. The bar of acceding to “normal human development” that Gilles requires parents to clear is so low that it would allow parents to deny their children the knowledge that they have basic choices about how to live their lives. Liberalism’s respect for diverse ways of life is tied

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<sup>48</sup> See GALSTON, *supra* note 28, at 11.

<sup>49</sup> I adopt John Rawls’ terminology here. Rawls uses the term “comprehensive” to refer to conceptions of the good life that are more wide-ranging than doctrines confined to the political realm. JOHN RAWLS, *POLITICAL LIBERALISM* 29 n.31 (1983). Rawls believed that liberal doctrine was unnecessarily oppressive if it imposed a comprehensive rather than political vision of the good life.

directly to the importance that it places on respect for an individual's self-determination. In placing so few safeguards on ensuring children's right to self-determination, and so much power in parents' hands to deprive children of opportunities necessary to achieve it, Gilles' violates these fundamental liberal precepts.

C. *Amy Gutmann: The Interests of the Democracy*

In contrast to Gilles, Amy Gutmann presents a theory of civic education that places the lion's share of authority to resolve controversies over public education with the majority in a democracy.<sup>50</sup> Gutmann argues that approaches like Gilles's, which give parents the power to decide what children learn in public schools, are unsatisfactory because they fail to recognize that children are not only members of their family, but they are also members of the polity. The polity, too, has a strong interest in the qualities and capacities of its future citizens. This means, Gutmann sensibly argues, that "the educational authority of parents and of polities has to be partial to be justified."<sup>51</sup> Gutmann therefore proposes a power-sharing agreement in which parents educate their children about their own conceptions of the good life at home; meanwhile, the democratic state has the task of educating students in accordance with its own principles at school.<sup>52</sup> Gutmann contends that the shared educational authority that she advocates "supports the core value of democracy: conscious social reproduction in its most inclusive form."<sup>53</sup>

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<sup>50</sup> See AMY GUTMANN, *supra* note 28.

<sup>51</sup> *Id.* at 30.

<sup>52</sup> *Id.* at 42-43.

<sup>53</sup> *Id.* at 42.

Gutmann grounds the moral justification for public control of children’s education on the moral claims of deliberative democracy. She argues that “[t]he most justifiable way of making mutually binding decisions in a representative democracy – including decisions not to deliberate about some matters – is by deliberative decision making, where the decision makers are accountable to the people who are most affected by their decisions.”<sup>54</sup> In determining the content of the public education that children will receive, Gutmann counsels, “[t]he policies that result from our democratic deliberations will not always be the right ones, but they will be more enlightened – by the values and concerns of the many communities that constitute a democracy.”<sup>55</sup>

This does not mean, for Gutmann, that the simple will of the majority should guide a democracy’s decisions regarding the substantive content of education. To the contrary, Gutmann argues that the same democratic principles that give moral weight to the deliberative decisions of the polity also “commit[] it to assuring children an education that makes those freedoms both possible and meaningful in the future.”<sup>56</sup> Put another way, “[d]eliberative decision making and accountability presuppose a citizenry whose education prepares them to deliberate, and to evaluate the results of the deliberations of their representatives. A primary aim of publicly mandated schooling is therefore to cultivate the skills and virtues of deliberation.”<sup>57</sup>

Gutmann argues that this deliberative mission not only gives schools a positive program to effectuate, it also constrains democratic authority in two specific ways. First,

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<sup>54</sup> *Id.* at xiii.

<sup>55</sup> *Id.* at 11.

<sup>56</sup> *Id.* at 30.

<sup>57</sup> *Id.* at xiii.

education must conform to the principle of *nonrepression* – that is, it may not exclude deliberation regarding any particular rational ideas. Second, it must conform to the principle of *nondiscrimination* – meaning that neither parents nor a democracy may adopt practices that would keep some children or groups of children from developing the skills necessary to participate in democratic deliberation. Under this scheme, communities are allowed to shape their children’s world, but they may not exercise this authority in ways that deprive these children of the same right to participate in deliberations about their collective fate at a later time.

For Gutmann, this means that in the *Mozert* case, the parents’ challenge to the school’s exposing their children to the readers was appropriately denied on the ground that the challenged readers were within the school system’s prerogative of educating children for character while they are at school. The fact that some parents opposed the content of these readers based on deeply-held religious beliefs should not serve as a ground for exempting the children or abandoning the curriculum. “The right to free exercise of religion does not entail the right of parents to near-exclusive or comprehensive authority over their children’s schooling.”<sup>58</sup> While fundamentalists have a right to teach their children their religious beliefs at home, parents do not have a right to withdraw their children from the school’s chosen curriculum unless the education violates the principles of nonrepression or nondiscrimination. Otherwise, “democratic institutions are denied their legitimate role in shaping the character of citizens.”<sup>59</sup> In Gutmann’s view, this means that civic education can permissibly exceed what scholars

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<sup>58</sup> *Id.* at 298.

<sup>59</sup> Amy Gutmann, *Undemocratic Education*, in *LIBERALISM AND THE MORAL LIFE* 43 (1989).

such as Galston refer to as the “civic minimum” necessary to ensure that a democracy runs smoothly.<sup>60</sup>

Gutmann’s argument has continued to be the most eloquent and important defense of the democratic interests at stake in public education, in the form of the polity’s right to shape the education of its young citizens, since it was first published in 1987. And it is not only democratic interests, as measured by the deliberated will of the majority, that is served by her theory: Gutmann’s emphasis on the necessary preconditions to the exercise of that will, in the form of ensuring that children develop the qualities and skills that enable them to make deliberative decisions about their individual and collective lives, ensures that children develop what are sometimes called “civic virtues.” Further, when these qualities and skills are paired with Gutmann’s democratic principles of nondiscrimination and nonrepression, her theory both promotes and safeguards children’s autonomy – thereby incorporating the traditional liberal concerns reflected in Ackerman’s work – into a larger normative whole.

Despite these considerable accomplishments, however, Gutmann’s theory fails to give adequate weight to one important set of interests: those of parents in transmitting their ways of life to their children. Gutmann contends that public education does not need to be limited to protect this parental interest because parents still have the opportunity to pass along their ways of life through their contact with their children at home. Yet the broad scope that she accords the state to educate within public schools would allow parents little area immune from contestation by the state. Take, for

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<sup>60</sup> See, e.g., GUTMANN, , *supra* note 28, at 303 (“Having granted that publicly subsidized and publicly mandated schools should serve civic purposes, civic minimalists lack good reasons for insisting that the civic purposes of schooling be minimal.”).

example, Gutmann’s discussion of sex education in schools. Gutmann acknowledges the thorniness of this issue but argues that, ultimately, democratic deliberation and decisionmaking should determine whether the subject should be taught. She would therefore accept the conservative position of avoid teaching sex education, or the liberal position that all children should be taught sex education even over the objection of their parents, so long as the determination arrived at was democratically sanctioned.<sup>61</sup> She argues, however, that although any such decision reached through democratic processes should legitimately be implemented, either such decision would be unwise policy. Failing to teach sex education, she argues, will not, as conservatives believe, restore the sanctity of sex; while, contrary to liberal beliefs, mandatory sex education would also be unwise because it is as “offensive to parents who believe in the sanctity of sex as mandatory prayer is to parents who do not believe in God.”<sup>62</sup> As a result, such policies could “lead conservative parents to flee the public schools.” Taking this into account, Gutmann argues that a wiser policy would allow schools to offer such programs but allow parents to exempt their children from such courses.<sup>63</sup>

I discuss *infra* at Part III my view of how conflicts between parents and the state with respect to sex education should be resolved. For now, let me simply point out that Gutmann’s approach in itself establishes no real limits on the state’s authority to educate students in the face of parents’ objections. Instead, Gutmann suggests that teaching sex education would be unwise as a prudential matter, since conservative parents might

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<sup>61</sup> *Id.* at 109.

<sup>62</sup> *Id.* at 110.

<sup>63</sup> *Id.*

otherwise leave the schools. In doing so, while her approach adequately reflects the ideals of democracy, it less adequately incorporates liberal ideals that parents should be able to pass on their values to children. There are other issues that might also cause conservative parents to leave the schools – for example, teaching evolution in schools. Should schools therefore allow parents to pull their children out of classes in which evolution is taught? Most of us – I would suspect including Gutmann – would disagree with this result. The reason we likely find evolution to be a less sympathetic case for allowing parents to opt out is not because we think that parents are less likely to pull their children out of schools, but because we think that there are some subjects on which schools should defer to parent’s wishes, and others on which they should not. Yet Gutmann’s relying on her prudential rationale does not help us think through how these lines should be drawn.

Gutmann also uses prudential reasons to reach a result that accords with liberal principles when she considers the issue of whether schools should teach children religious standards. She argues that it would be unwise for schools to teach such religious standards because “secular standards constitute a better basis upon which to build a common education for citizenship than any set of sectarian religious beliefs – better because secular standards are both a fairer and a firmer basis for peacefully reconciling our differences.”<sup>64</sup> Although Gutmann’s conclusion ultimately accords with liberalism’s reluctance to have the state teach comprehensive visions of the good life, her rationale would presumably permit such lessons if inculcating children with religious ideas would serve a firmer basis for reconciling citizens’ differences. Yet even if it could

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<sup>64</sup> GUTMANN, *supra* note 28, at 103.

be shown that the government could settle differences better through teaching children particular religious concepts, surely that would still violate our notions that it is the function of parents, rather than the state, to teach children religion. Thus, although Gutmann reaches conclusions that ultimately accord with liberal intuitions, this should not obscure the fact that her theory contains no principled limitations on schools' education of students in ways that deeply violate these intuitions.

In sum, Gutmann's theory does not pay sufficient attention to how to integrate the liberal ideals that, along with democratic ideals, are fundamental to our political system. Since significant tensions exist between democracy and liberalism – the former focusing on group decisionmaking, the latter focusing on individual rights – Gutmann's valuing one and ignoring the other in her theory of civic education makes for inadequate reconciliation of the principles guiding liberal democracy. We generally assume that under a liberal democratic form of government some issues and decisions should remain immune from direct government intervention, even the relatively gentle persuasion of education. Gutmann, however, doesn't help us to think through the location of these limits. Neither does she give sufficient weight to our intuition that, at least in many areas, we have some greater interest in passing our beliefs along to our own children than we do generally as a polity in determining the course of the next generation. Gutmann's answer that our children should submit to civic education because we, as citizens, have had the opportunity to participate in the democratic process seems less than satisfactory.

#### *D. William Galston - Civic Liberalism*

Last but not least, I turn to William Galston's proposal for civic education. In contrast to the theorists I have discussed thus far, Galston specifically seeks to balance

the competing interests at stake in civic education. He correctly notes that “the most poignant problem raised by liberal civic education is the clash between the content of that education and the desire of parents to pass on their way of life to their children.”<sup>65</sup>

According to Galston, liberal polities can legitimately require their citizens to accede to a “basic civic education” that gives them “the beliefs and habits that support the polity and enable individuals to function competently in public affairs.”<sup>66</sup> In Galston’s view, this means that even if it conflicts with parents’ basic beliefs, the state may require children to participate in civic education that seeks to inculcate, among other civic virtues, “the disposition to respect the rights of others, the capacity to evaluate the talents, character, and performance of public officials, and the ability to moderate public desires in the face of public limits.”<sup>67</sup>

However, in order to give parents’ liberty interests their due in our liberal system, Galston argues that the state may legitimately go no further than providing the basic education that this “civic minimalist” standard requires.<sup>68</sup> In Galston’s words:

The state may act *in loco parentis* to overcome family-based obstacles to normal development. And it may use public instrumentalities, including the system of education, to promote the attainment by all children of the basic requisites of citizenship. These are legitimate intrusive powers. But they are limited by their own inner logic. In a liberal state, interventions that cannot be justified on this basis cannot be justified at all. That is how liberal democracies must draw the line between parental and public authority over the education of children . . . .<sup>69</sup>

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<sup>65</sup> GALSTON, *supra* note 28, at 252.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 246.

<sup>68</sup> *Id.* at 252.

<sup>69</sup> *Id.* at 254-55.

In contrast to the more ambitious goals that Gutmann supports of teaching children to deliberate about different ways of life, in Galston's view, the fact that the United States is a representative democracy rather than a participatory democracy limits the acceptable scope of civic education because it requires less of citizens to function competently in the political system.<sup>70</sup> Specifically, Galston argues that a representative democracy does not require citizens to engage in rational deliberation; therefore the state may not legitimately develop children's ability to think about ways of life apart from their own. In Galston's words, "liberal freedom entails the right to live unexamined as well as examined lives – a right the effective exercise of which may require parental bulwarks against the corrosive influence of modernist skepticism."<sup>71</sup>

By the same token, Galston's views on the manner in which civic education should be performed are influenced by the elementary level of understanding and participation he contends are required in a representative democracy. He asserts that teaching children to support liberal democracy cannot be accomplished through teaching them rational inquiry since liberalism takes sides on disputed issues such as equality, freedom, and human good that are not definitively settled from a philosophical point of view. Instead, civic education should be taught on a more simplistic level in which loyalty to the realm is inculcated, not through a warts-and-all description of American history, but through a "nobler moralizing history: a pantheon of heroes who confer legitimacy on central institutions."<sup>72</sup> In Galston's view, "[i]t is unrealistic to believe that

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<sup>70</sup> *Id.* at 246-48.

<sup>71</sup> *Id.* at 254.

<sup>72</sup> *Id.* at 244.

more than a few adult citizens of liberal societies will ever move beyond the kind of civic commitment engendered by such a pedagogy.”<sup>73</sup>

On these grounds, Galston disputes Gutmann’s argument that the Amish parents in *Yoder* should have been required to send their children to high school in order to expose them to other ways of life, and to teach them to deliberate about their collective lives. In Galston’s words,

In a liberal-democratic polity, to be sure, the fact of social diversity means that the willingness to coexist peacefully with ways of life very different from one’s own is essential. Furthermore, the need for public evaluation of leaders and policies means that the state has an interest in developing citizens with at least the minimal conditions of reasonable public judgment. But neither of these civic requirements entails a need for public authority to take an interest in how children think about different ways of life. . . . In short, the civic standpoint does not warrant the state’s conclusion that the state must (or may) structure public education to foster in children skeptical reflection on ways of life inherited from parents or local communities.<sup>74</sup>

In my view, Galston gets the task right when he seeks to carve out a workable balance between the civic and liberal interests in determining the permissible breadth of civic education (although I would also include democratic interests, as well). Yet he still does not arrive at a workable accommodation among them in several respects. First, in deferring so much to the diverse beliefs held by citizens, Galston defines citizens’ necessary competencies too narrowly to support a vigorous liberal democracy, even a representative one. The education that Galston prescribes for future citizens therefore risks forfeiting the check on government power that a healthy democracy demands. A vigorous representative democracy requires that representatives be constrained at least to some significant extent by the interests of the people, rather than be dictated by the will

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 253.

of only some small portion of the population. While this doesn't require that each citizen be able to act independently as a watchdog against government corruption or overreaching, it at least requires that some significant portion of the population be able to weigh and heed the claims of the press and others who act as watchdogs. Galston's willingness to allow future citizens to learn little about politics, to leave their own beliefs about the world unexamined and their critical faculties unhoned, and, indeed, his advocating that the state teach support for the realm in an uncritical manner, run the risk of producing citizens who are too easily led by the government, and too quick to believe inadequate justifications and explanations.

Galston's theory also does not contain the safeguards necessary to insure the preservation of individual rights and the commitment to allowing diversity that a liberal polity legitimately demands. In this regard, Galston aims too low when he allows the state only to require that children learn to coexist peacefully with others. The fact of the matter is that more is required to maintain the principles of a vigorous liberal democracy than the simple fact of peaceful coexistence in the most basic of senses. As John Rawls argues, political liberalism depends on state power being used only for reasons that can be publicly justified by resort to reasons that those from a broad array of comprehensive philosophies can accept.<sup>75</sup> This "public reason" rests on the public ideals and principles that have been developed in the context of liberal democratic institutions, and that have assumed the role of a public morality. The use of state power to further comprehensive agendas that cannot be adequately justified based on public reason is illegitimate.

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<sup>75</sup> JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

On this view, Galston's requiring only that students learn peaceful coexistence is not sufficient. The political events of the past few years regarding same-sex marriage show that even when certain sectors of society – in this instance the religious right – learn to coexist peacefully with others in the sense that they can agree not to deprive them of their citizenship, this does not stop repeated efforts to deny them, for reasons justified only by their own comprehensive philosophies, the same civil privileges that are accorded to others.<sup>76</sup> A commitment to coexist peacefully in some very narrow sense, then, is not enough to fulfill liberalism's commitment that state power will not be exercised to pursue ends that cannot be justified by public reason. Further, despite Galston's stated support for teaching children to coexist peacefully, by allowing parents to overrule schools' decisions to expose children to diversity Galston would deny children the tools to understand what peaceful coexistence in a society marked by

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<sup>76</sup> See, e.g., David Kirkpatrick, *A Religious Push Against Gay Unions*, N.Y. TIMES, Apr. 23, 2006, at A12 (“About 50 prominent religious leaders, including seven Roman Catholic cardinals and about a half-dozen archbishops, have signed a petition in support of a constitutional amendment blocking same-sex marriage. Organizers of the petition said it was in part an effort to revive the groundswell of opposition to same-sex marriage that helped bring many conservative voters to the polls in some pivotal states in 2004. The signers include many influential evangelical Protestants, a few rabbis and an official of the Church of Jesus Christ of Latter-day Saints.”); Johnny Mason, *Debate Over Same-Sex Unions Becomes ‘Moral Struggle’*, HARTFORD COURANT, Feb. 27, 2003, at B3 (noting an advertisement against same-sex marriage in which 200 ministers names appeared and quoting Reverend Wayne Carter, one of the petitioners, as saying his view on same-sex marriage is “a moral and ethical stance based on the teachings of God.”); Elaine Gale, *Same-Sex Marriage Ban Galvanizes, Polarizes Churches*, L.A. TIMES, Feb. 28, 2000, at B8 (describing the debate over Proposition 22, an initiative to ban gay marriage in the 2000 election, and quoting senior pastor Kenton Beshore, one of many religious leaders urging their congregants to vote in support of the proposition, as saying, “In the Bible, God defines marriage and limits it to a man and a woman...I say, ‘Here’s one you get to vote on that’s biblical.’”).

This is not to contend that religious leaders should never enter the political fray, or that religious motivations are illegitimate in politics. As Stephen Macedo argues, religious motivations can and often legitimately do motivate believers to participate in the political realm. In Stephen Macedo's words, “There may be a variety of ways, indeed, in which religious speech can *support* political liberalism by clarifying the depth of one's commitment to liberal principles and the political authority of public reasons. The crux of the matter is not speech at all, but the legitimate grounds of coercion. When deciding how we are going to direct coercive political powers on matters over which citizens have serious moral disagreements, we should seek and articulate adequate public reasons that we can share with our reasonable fellow citizens. If we recognize additional religious reasons and offer these to coreligionists that is surely permissible.” Macedo, *supra* note 28, at 172-73.

profound differences really means. It is easy to make students understand coexisting peacefully with those who have similar beliefs; the challenge of liberal democracy is coexisting with others with very different beliefs. Without this type of exposure, lessons about peaceful coexistence mean little.

More than that, Galston's narrow vision for civic education, far from the recipe to appease different groups that Galston perceives it to be, is a recipe for civic disharmony. A polity composed of citizens untrained to deliberate rationally about collective concerns yields a polity likely to devolve into partisan bickering rather than reasoned attempts to bridge differences and to find a common path that those from diverse walks of life can choose together. Further, citizens who cannot rationally deliberate about their common future and who have not been made to confront what the later John Rawls called the "fact of pluralism"<sup>77</sup> are likely to choose leaders whose beliefs not only match their own, but who see no difficulty with imposing these beliefs on others. Such a polity cannot safeguard the autonomy and protection of individual rights and liberty that a liberal polity must guarantee its citizens.

This is not to deny that significant attention should be paid to the extent to which requiring particular types of civic education alienates particular societal groups. Yet, as Galston recognizes, there is a delicate balance to be struck between attempting to accommodate as many viewpoints as possible and furthering the core commitments of liberal democracy. Galston's fundamental impulse, in seeking to promote diverse sets of beliefs as well as the moral backbone that strong, committed belief systems can promote, tilts him too far toward accommodation. For Galston,

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<sup>77</sup> JOHN RAWLS, *The Idea of an Overlapping Consensus*, in COLLECTED PAPERS 424-25 (Samuel Freeman ed., 1999).

the greatest threat to children in modern liberal societies is not that they will believe in something too deeply, but that they will believe in nothing very deeply at all. Even to achieve the kind of free self-reflection that many liberals prize, it is better to begin by believing something. Rational deliberation among ways of life is far more meaningful if (and I am tempted to say *only* if) the stakes are meaningful, that is, if the deliberator has strong convictions against which competing claims can be weighed. The role of parents in fostering such convictions should be welcomed not feared.<sup>78</sup>

At base for Galston, a moral culture of strong individual beliefs is necessary in a good liberal democratic system; the capacity for strong and informed political participation is less important.

The exact contours of the line of demarcation between the prerogatives of the state and the rights of individual citizens in a liberal system cannot be determined as if it were an abstract math problem, unaffected by the particular political context and community at issue. Where exactly the line should be drawn instead depends in some large part on the characteristics of the particular polity at issue – including such considerations as how diverse the populace is, how polarized it is in its beliefs, and how likely citizens are to learn important civic virtues without the assistance of the state. Measured in light of current conditions, Galston in my view gets this balance terribly wrong. The events of the past few years have shown us that the contemporary threat to liberal democracy in the United States is not that citizens will believe too little, but rather that an uninformed and illiberal citizenry will erode individual rights and fail to call the undemocratic impulses of the government to account. Indeed, the events of the past few years represent in many respects the unhappy realization of Galston's straitened vision of civic education.

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<sup>78</sup> GALSTON, *supra* note 28, at 255.

Our citizenry's risk is not in their absence of strong beliefs. Rather, their weakness from the point of view of liberal democracy is that these strong beliefs have little to do with support for liberal democratic principles and institutions, including the separation of church and state, a free press, and the rule of law – all of which are on increasingly shaky foundations of citizens' support. At a time in which only about half of America's high school students think newspapers should be allowed to publish freely without government approval of their stories, and a third say the free speech guarantees of the First Amendment go "too far", this is no mere academic debate.<sup>79</sup> And at a time in which the great majority of citizens are more religious than in other industrialized countries, higher percentages believe that religious leaders should assume a strong political role than in other countries, and a number of these leaders advocate positions based on illiberal grounds,<sup>80</sup> the strength of this liberal democracy does not depend on strengthening citizens' comprehensive commitments, but on strengthening their commitment to liberal democratic principles.<sup>81</sup> Further, at a time in which citizens lack

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<sup>79</sup> A recent study by the John S. and James L. Knight Foundation's High School Initiative, found startlingly little support for, and even less appreciation of, basic First Amendment guarantees. See THE JOHN S. AND JAMES L. KNIGHT FOUNDATION, *FUTURE OF THE FIRST AMENDMENT: KEY FINDINGS* (2005), available at [http://firstamendment.jideas.org/downloads/future\\_ch1.pdf](http://firstamendment.jideas.org/downloads/future_ch1.pdf) (last visited March 17, 2006). The study found that nearly three-quarters of high school students said either that they don't know how they feel about the First Amendment, or that they take it for granted. *Id.* at 5. Students lack knowledge about fundamental aspects of the First Amendment: seventy-five percent believe that flag burning is illegal; almost half believe that the government can restrict indecent material on the Internet. *Id.* at 7. See also Bob Herbert, Editorial, *Our Battered Constitution*, N.Y. TIMES, Feb. 4, 2005, at A19 (summarizing results of Knight Foundation's High School Initiative).

<sup>80</sup> See *supra* note 58.

<sup>81</sup> A recent survey across several nations found that nearly all U.S. respondents said faith is important to them, a far higher percentage than in other countries. Only 2 percent of Americans said they do not believe in God. Almost 40 percent said religious leaders should try to sway policymakers, notably higher than in other countries. Will Lester, *Religion More Key in U.S., Poll Finds*, OCREGISTER.COM (June 7, 2005), available at [http://ocregister.com/ocr/2005/06/07/sections/nation\\_world/nation\\_world/article\\_549497.php](http://ocregister.com/ocr/2005/06/07/sections/nation_world/nation_world/article_549497.php) (last visited May 1, 2006).

basic knowledge on major policy issues,<sup>82</sup> being able to think critically and evaluate evidence and arguments are crucial skills necessary for the perpetuation of a democracy that truly serves the interests of its people.

Galston is certainly right that we should seek to guard against the risk of becoming a nation of citizens with few morals and fewer ideals. We must also, however, guard against becoming a nation in which few have the interest or capacity to actively engage in public affairs and to help determine collectively the future of the polity. In the United States, where belief in God and association with organized religion is higher than in any other industrialized country,<sup>83</sup> but in which voting participation and voter's knowledge is extremely low, the risk of disinterest and inability to engage competently in public affairs seems significantly higher than the risk of having few strong comprehensive views. While Galston seeks to mediate between an inclusive liberalism that can support strong moral views and a liberalism that ensures a vigorous democratic polity, the elements of his theory ultimately risk the vibrant liberal democracy for which he strives.

### **III. Reconciling the Interests at Stake**

But if these theories regarding the proper scope of civic education fail to balance adequately the range of important interests at stake in civic education, what is the alternative? In this section, I develop an approach to civic education that, I argue, reaches a better accommodation among the complex values at stake in a liberal

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<sup>82</sup> See Paul Krugman, *Reign of Error*, N. Y. TIMES, July 28, 2006, at A 29 (discussing recent Harris Poll, in which 50% of Americans incorrectly answered that Iraq possessed weapons of mass destruction at the time the U.S. invaded; meanwhile, 64 percent still believe that Saddam had strong links with Al Qaeda).

<sup>83</sup> See *supra* note 81.

democracy than do those I have discussed. To do this, in the first part of this section, I begin by scrutinizing the varied range of interests legitimately entitled to consideration in a liberal democracy. A nuanced consideration of these interests, I argue, helps to ameliorate some of what seems, at first glance, to be tension among them.<sup>84</sup> I then offer an approach that seeks an accommodation among these more-refined interests in a manner that offers parents', childrens', and the community's interests due respect, but that also ensures that future citizens have the education to ensure the continuation of a vigorous liberal democracy.

In formulating this approach, I build on the work of a number of liberal theorists, including John Rawls, himself,<sup>85</sup> as well as recent liberal revisionists including Thomas Spragens and Stephen Macedo.<sup>86</sup> These liberal revisionists recognize that a liberal democracy cannot flourish without paying close attention to ensuring the conditions necessary for its survival, including that its citizens have the necessary civic virtues.<sup>87</sup> The problem then becomes how to balance the civic education necessary for a flourishing liberal democracy against liberal and democratic goods and principles.

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<sup>84</sup> In making this argument, I am following in the footsteps of Thomas Spragens, *supra* note 28, who argues that a more nuanced conception of the goods at stake in liberal democratic theory generally permits a richer notion of liberalism capable of encompassing a broader range of goods; *see also* MACEDO, *supra* note 28.

<sup>85</sup> *See* JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

<sup>86</sup> *See* WILLIAM GALSTON, *supra* note 28; STEPHEN MACEDO, *supra* note 28; STEPHEN MACEDO, *LIBERAL VIRTUES* (1990); THOMAS SPRAGENS, *supra* note 28.

<sup>87</sup> *See* WILLIAM GALSTON, *supra* note 28, at 244-46; STEPHEN MACEDO, *supra* note 28, at 278; THOMAS SPRAGENS, *supra* note 28, at 126-30.

### *A. Liberal Democratic Goods and Justifications*

The issues raised by civic education are so difficult because they implicate fault lines among important interests that go clear to the core of a liberal democracy. One way to map out these tensions conceptually is to think of the relevant values as occupying the space of a triangle in which each corner represents a different, legitimate source of authority in a liberal democracy: liberal, democratic, and civic. In this schematization, the liberal corner prioritizes those goods relating to individual rights and self-determination that have been given pride of place in the liberal tradition. The democratic corner, by contrast, focuses on the moral legitimacy of majoritarian self-rule. In this corner, the will of the people is entitled to weight in children's education because it legitimately governs the polity of which these children are members. Finally, the third corner recognizes the civic virtues that are required by citizens to perform the difficult task of self-government in a liberal democracy. Insofar as we consider liberal democracy a morally worthy form of government, supporting the qualities necessary to perpetuate it is justifiable whether or not these qualities would be justified independently by liberal values or the will of the democratic majority.<sup>88</sup>

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<sup>88</sup> No doubt there is significant overlap between these civic virtues of the third corner of the triangle and qualities that would be supported by the other corners. For example, the development of children's autonomy, which would be supported by the liberal corner, would also be supported as a civic virtue important in a liberal democracy. Nevertheless, other civic virtues, such as respect for democratic procedures, that might not be justified in other corners (assuming, for example, that the majority did not agree to teaching such respect), are justified independently here.

I do not want to make great claims for the congruence of these three categories:<sup>89</sup> obviously their status varies greatly – both the liberal and civic corners emphasize particular goods and virtues, while the democratic corner contains no definitive content, but instead gives justification to whatever the body of citizens decide. With that said, each corner marks a legitimate source of justification in a liberal democracy to which attention must be paid with respect to civic education. It is the tensions among the goods and interests associated with each of these corners that make the issue of civic education such a difficult one. I discuss each corner in turn.

### *Liberal goods*

Considering the liberal corner first, given the primacy of liberalism in the American world-view,<sup>90</sup> it is unsurprising that liberal goods are most often discussed with reference to civic education. In particular, it is the good of autonomy, traditionally accorded pride of place in liberal theory, on which theoretical discussions of civic education generally focus. Specifically, this good of autonomy is generally framed in terms of parents' liberty interest to raise their children in accordance with their own religious beliefs and views of the good life. Conceived in this light, liberalism's respect

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<sup>89</sup> There are a number of shortcomings to mapping the debate on civic education in this way. Some qualities, such as children being able to make informed decisions about different ways of life, potentially fall into both the liberal (based on furthering the autonomy of children) and civic (based on the polity's functioning better when citizens are able to deliberate) corners of the triangle. In addition, it could be argued that liberalism itself both should and historically did incorporate the values associated with a strong civic realm. See WILLIAM GALSTON, *supra* note 28; STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY, *supra* note 28; THOMAS SPRAGENS, *supra* note 28. With that said, it seems to me that conceptualizing the issue of civic education in terms of these three distinct areas helps to highlight the tension among and within these different areas – tensions that are too often glossed over in discussions of civic education.

<sup>90</sup> See, e.g., LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1991).

for autonomy calls, as Stephen Gilles argues for broad parental authority over children's education.

Yet, although autonomy is generally cited as a reason to accord parents' broad control of children's education, does not, on further reflection, dictate this policy outcome. As Bruce Ackerman's work makes clear,<sup>91</sup> parents are not the only ones whose autonomy interests are at stake: Children too, have autonomy interests implicated in civic education relating to their developing their ability to choose their own life paths. Furthermore, in the context of civic education, children's interest in acquiring the capacity for autonomy may conflict with parents' exercise of autonomy. This is the case when parents' views of the good life, as they did in *Yoder* and *Mozert*, favor preventing children from developing the capacity to think and make life decisions for themselves.<sup>92</sup> In such cases, while the parents' autonomy interests would favor a confined role for the state, the children's autonomy interests would instead favor state involvement to insure that children develop the capacity to choose their own course in life.

Three specific propositions relating to autonomy's application to children emerge from considering how this value can be reconciled with the other values in the liberal-democratic pantheon when it comes to civic education. First, children must be provided with the resources necessary to achieve at least a basic level of autonomy, in the sense that they become capable of making basic decisions about the conduct of their own lives. The fundamental importance that liberal democracy attaches to self-determination would be meaningless in the absence of children achieving at least the level of capacity for

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<sup>91</sup> See ACKERMAN *supra* note 30.

<sup>92</sup> LINDA McCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* (2005).

autonomy at which they possess sufficient information and skills to live on their own in the world. It is true, as William Galston points out, that liberalism's respect for the life plans of others means that unexamined life plans need to be respected as much as plans that are arrived at rationally. However, this does not lead to parents being able to deprive children of developing the *capacity* for self-determination. The concept of moral personhood on which liberal democracy rests does not allow one person to serve simply as a pawn to satisfy another person's life plan, even when the other person is a parent. This interest in acquiring the basic skills needed to develop a life plan is so fundamental to liberalism's respect for individuals that it may not be sacrificed to other interests.

Second, as Thomas Spragens points out,<sup>93</sup> autonomy is not a good that a liberal democracy properly seeks to maximize. We value autonomy as an intrinsic element in a fully human life, yet a life spent pursuing as much autonomy as possible would be destructive because it would erase our ties with others and our situatedness. Instead, autonomy is better conceptualized as a good for which there exists some optimal level. Over and this optimal level, more autonomy is not necessarily better.

Third, and finally, as Bruce Ackerman recognizes, children's capacity for developing and exercising autonomy increases as they grow toward adulthood. We would therefore expect a toddler to have far less of a capacity for autonomy than a teenager. Thus, insofar as a liberal democracy has the obligation to ensure the development of its young citizens' capacity for autonomy, the state's obligation to expand that capacity requires more for older children than younger children.

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<sup>93</sup> See SPRAGENS, *supra* note 28, at 127.

Turning from children’s autonomy interests to those of their parents, a nuanced account of parents’ legitimate interest in passing on their way of life to their children should also recognize several different propositions. First, this interest can never be given absolute sway: parents’ complete control of children’s education is abhorrent to the notion at the heart of liberalism that individuals must be, on some basic level, capable of self-determination. Second, parents’ interest in passing along their ways of life is strongest when it comes to what John Rawls called “comprehensive” conceptions of the good life – those beliefs that are part of an all-encompassing conception of the good life. In contrast, parents’ interests are weaker when it comes to passing along political virtues, which liberalism has historically treated as at least partly the job of the public domain. Third, and finally, parents’ legitimate interests in determining their children’s education diminish to some extent as their children approach maturity and become more of their own persons capable of exercising autonomy, as well as closer to assuming their own place as citizens in the polity.

### *Democratic goods*

But we are not only a liberal polity, we are also a democracy. The claim to legitimacy of collective self-rule therefore provides an alternative source of justification through which the issue of civic education must be analyzed. We give decisions of a democracy moral weight because all citizens have a voice in the collective affairs of the group.<sup>94</sup> The determinations of a democracy therefore are an independent source of

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<sup>94</sup> See AMY GUTMANN, *supra* note *supra* note 28, at 11 (stating that the benefit of a democracy is that it makes a “virtue out of our inevitable disagreement,” and positing that “the policies that result from democratic deliberations . . . will be more enlightened by the values and concerns of the many communities that constitute a democracy”).

moral justification apart from the liberal tradition. And the fact that children are not only members of their families but also citizens of the polity means that the polity, like their families, has a legitimate claim to direct their education.<sup>95</sup> Focusing on the moral authority of democracy therefore militates in favor of the state having broad authority regarding children's education, although it does not, in contrast to the liberal corner, suggest any particular content of that education.

The legitimate scope of the democratic interests at stake have not been theorized to the same extent that the liberal interests have; this is because, as Sheldon Wolin writes of Rawls' work, our tradition has tended to demote democracy to the subaltern position relative to liberalism.<sup>96</sup> Yet we can discern several things about democracy's position relative to liberalism that help to define its role. First, if children truly are to be considered as members of the political community as well as the family, the political community should have some say over children's education. Second, the polity's interest should increase as children mature and prepare to enter the political community.

Third, and finally, a democracy's legitimate interest in children's education in a liberal system may not extend, in John Rawls' terminology, to teaching a "comprehensive" account of the truth, in other words, a complete account of truth as a whole. As Rawls points out, our world is characterized by a deep diversity of religious and philosophical views. For some, truth and the good life are defined by the Bible's dictates and fundamentalist Christian ideals. For others, they are defined by a comprehensive liberal account that sees freedom as the highest goods. What's more, we

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<sup>95</sup> *See id.*

<sup>96</sup> *See Sheldon Wolin, The Liberal/Democratic Divide: On Rawls's Political Liberalism, 24 POLITICAL THEORY, Feb. 1996, at 97.*

have no mutually accessible standards by which these different comprehensive views can be adjudicated.

Yet as Rawls argues, in conditions of deep diversity, government is still justifiable when it is grounded on reasons that those from differing comprehensive philosophies can accept – what Rawls calls “public reason.” This mode of justification, in Stephen Macedo’s words, “would put aside the many religious and philosophical questions about which people have long differed and instead attempt to justify the most basic matters of justice on grounds widely acceptable to reasonable people – and not only to those who share our particular view of the truth.”<sup>97</sup> The government, in this view, has not business teaching comprehensive doctrines, but must confine itself to those doctrines that can be justified based on this “overlapping consensus.” On this reasoning, schools can teach doctrines supported by scientific evidence, for example, but not those supported only by the Bible. And while schools may teach children civil and political virtues, they may not teach them comprehensive virtues for this same reason<sup>98</sup> Thus schools can teach children that political autonomy is a noble virtue, but not that the exercise of autonomy in their religious lives is the same.

### *Civic virtues*

Finally, in the last corner of the triangle are civic virtues – those virtues that citizens must possess if the polity is to function well. While traditionally liberal theorists paid little attention to the virtues needed for a liberal democracy to thrive, this lack of attention has been redressed in recent years. Liberal theory’s renewed focus on civic

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<sup>97</sup> See MACEDO, *supra* note 28, at 168.

<sup>98</sup> See JEAN JACQUES ROUSSEAU, 4 THE SOCIAL CONTRACT (H. Tozer trans., 3d ed. 1948).

republicanism has acted as an important corrective on liberal theory, as preeminent liberal theorists have increasingly recognized the importance to a well-functioning liberal democracy of its citizenry possessing civic virtues.<sup>99</sup> They have differed with one another, however, regarding both the content of civic virtues and the extent to which the state may promote them when they interfere with citizens' autonomy.

What can we say about how civic virtues should be conceptualized in a normative theory that seeks to combine these virtues with other, competing goods and interests? One thing that should be clear is that, insofar as a liberal democratic government is conceived as preferable to other possible government forms, both because it allows individuals a considerable amount of individual freedom as well as the freedom to collectively determine their future, it must be able to perpetuate itself.<sup>100</sup> Accordingly, both citizens and democracy itself must properly surrender at least the amount of liberty necessary to ensure the continuation of the polity. This means that parents and the state must sacrifice at least the amount of control over children needed to instill enough civic virtue in the next generation so that it can continue. Over and above this level, however, how civic virtues should be combined with other goods is much less clear.

### B. *Reconciling the Goods and Interests*

So where does this leave us in terms of delineating a framework for assessing the legitimacy of civic education programs? To begin with, I have identified two hard and fast obligations that must be satisfied with respect to civic education before other

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<sup>99</sup> See, e.g., GALSTON, *supra* note 89; Amy Gutmann, *Undemocratic Education*, in LIBERALISM AND THE MORAL LIFE (1989); SPRAGENS, *supra* note 89; STEPHEN MACEDO, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls*, 105(3) ETHICS 487 (1995).

<sup>100</sup> See GALSTON, *supra* note 89.

interests are considered. First, children must be provided with the education necessary to achieve at least a basic level of autonomy, regardless of what the majority prefers or their parents desire. Without this, liberal democracy's fundamental respect for individual dignity and self-determination means nothing. Second, children must be encouraged to develop sufficient civic virtues necessary to perpetuate a liberal democracy. This means that parents must yield to civic education programs necessary to achieve these qualities, even when they conflict with parents' fundamental beliefs. Furthermore, the state has the responsibility to provide this basic education even over parents' objections.

Over and above these two basic prerequisites, political liberalism gives us two more limits on civic education. Schools must confine their education to lessons that can be justified by public reason, as opposed to comprehensive rationales. Further, they must confine the scope of their teaching to political doctrines rather than comprehensive doctrines. Regardless of what the majority of a democracy desires with respect to children's acculturation, this is, after all, a *liberal* democracy, which must therefore reserve a wide swath of freedom from the state. Moreover, even with regard to teaching political virtues, the state's power should not be used in the delicate area of shaping citizens' preferences and characters without significant reasons for doing so, particularly in a manner opposed to parents' comprehensive beliefs.

The remaining interests can best be accommodated, taking a leaf from Bruce Ackerman,<sup>101</sup> by adopting a framework in which parents have declining, and the democracy has ascending, authority to educate students as they get older. Both the interest that Ackerman calls attention to – the child's interest in personal integrity – and

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<sup>101</sup> ACKERMAN, *supra* note 30, at 142-43.

the strong link between child and family in a child's early years, suggest that although a democracy may institute the civic education necessary for a healthy liberal democratic polity, it should not go further than nurturing such important values and virtues during the child's primary education. At this time, parents' influence over their children and their interest in inculcating their children into their way of life are sufficient to outweigh any other interest of a democracy in stamping its imprimatur on its youngest citizens. This limit of civic minimalism also has the virtue of likely requiring the teaching of tenets that are less offensive to parents (although certainly some parents will still disagree), at a time when children are less likely to be able to sort out conflicts between their parents' views and the views they learn at school. For example, at this stage, while teaching children generally to respect others and exposing them to basic differences of religion is appropriate, the state should refrain at this age from going further than this. Exposing young children to significant differences in the content of these beliefs (as opposed to some basic differences in traditions or culture) would be inappropriate with young children. At younger ages, schools should seek to limit the messages they convey to those central to the success of a liberal polity.

This does not mean, however, that the state should always be confined to Galston's "civic minimalism," in which the state can use civic education only to develop basic virtues necessary for the polity to function well. Instead, the importance of a healthy democratic polity that balances the value of a vibrant civic realm against the value of individual liberty, as well as the recognition that children are not only members of their families but also of the larger society, should give the state at least somewhat more leeway with respect to children's education. This is particularly true as children get

older and more capable of understanding different viewpoints as well as of making sense of the difference between parents' and schools' views. At this point, children are also coming closer to becoming their own citizens in the democracy. And the weight assigned parents' interest in inculcating their way of life should decrease as children grow older. For these reasons, a civic liberal democracy should have more freedom to move beyond civic minimalism and to institute a wider sphere of democratic civic education as children mature. Thus, as students move beyond the lower grades, the state may acquaint students with lessons that are substantially related to the polity's ways of life beyond those strictly necessary for the liberal democratic polity to perpetuate itself.

In contrast to the civic minimalist position appropriate when children are younger, this might be called the "civic medium" position. Under it, in deciding what civic education older children should receive, the democracy should focus on those values at stake in the civic/liberal/democratic triangle, but should pay careful attention to those liberal values that traditionally have served as a check on the power of democracy. Because of the weight that must be paid to these liberal virtues, including individual autonomy and diversity, the state should never adopt a "civic maximalist" position with regard to civic education of the type that Gutmann would allow. Further, because of the increasing autonomy and intellectual capacity of older children, the civic education provided to them is appropriately taught with more complexity; in teaching more controversial proposals, a school should present the issues in a way that allows students themselves to work through the issues. This means that schools can go appreciably further in communicating virtues and values to students in high school than they might when students are younger. For example, while purely private morality should never be

taught in public schools, a school might seek to convey to older students information about birth control, sexuality, and disease prevention, in order to foster legitimate public goals, even if such material would not be appropriate for younger children. Education regarding the morality of particular sexual practices, however, such as premarital sex, masturbation, and birth control, must be left to parents.

Under this proposal, some parents' efforts to pass along their beliefs and ways of life will be disadvantaged by their children's exposure to other ways of life, to lessons of political tolerance of groups disapproved of by their parents, or by teaching children to reason about their future. As Stephen Macedo argues, however, the promise of liberal democracy is that it will not prohibit citizens from holding or communicating a wide variety of beliefs, including illiberal and undemocratic beliefs. It does not promise, however, that all such beliefs will be given a level playing field by the state, in the sense that the state will forgo furthering its legitimate objectives to avoid disadvantaging these beliefs.<sup>102</sup>

### *C. Difficult Issues: Sex Education*

One particularly difficult issue on which parents', children's, and the state's interests sometimes clash concerns the issue of sex education. Issues surrounding sexual conduct are central to the religious beliefs and the comprehensive philosophies of many citizens, who regard passing on these views to the children as central to their parental prerogatives. Should schools avoid teaching sex education for this reason? Or should schools allow an opt-out mechanism for those students whose parents object, as Amy Gutmann suggests?

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<sup>102</sup> MACEDO, *supra* note 28, at 219.

In my view, the answer is “no” to both of these questions, at least insofar as it involved teaching children the basic risks associated with sexual activity, as well as the basic facts of birth control. Despite the integral role that sexual prohibitions play in the religious and comprehensive philosophies of many parents, sex education is central to young citizens’ capacity for autonomy. As I argued before, schools have a responsibility to provide children the education needed to develop their capacity for autonomy that the state cannot waive, even if parents object. Schools’ obligation to develop students’ basic capacity for autonomy includes ensuring that they have the basic knowledge to understand and control their reproductive capacities. While this knowledge is important to youths of both sexes, it is particularly important to young women, whose life prospects are, even more than men, irrevocably altered by the birth of a child.

The federal government’s current emphasis on abstinence only sex education, funded in the welfare reform package, does not meet the state’s responsibility in this regard.<sup>103</sup> As Linda McClain argues, an overwhelming amount of evidence suggests that abstinence-only education does not provide minors the information they need to protect their reproductive health. In fact, the Union of Concerned Scientists cited the government’s support of abstinence-only education as an example of “distorting scientific knowledge on reproductive health issues.”<sup>104</sup> It could be argued, of course, that

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<sup>103</sup> See Personal Responsibility and Work Opportunity Act of 1996, 42 U.S.C. § 701 *et seq.* (approving funding for sex education programs that “abstinence from sexual activity outside marriage is the expected standard for all school age children.”).

<sup>104</sup> MCCLAIN, *supra* note 28, at 178-99.

educating youths about contraception will increase teen sexual activity. As Linda McClain argues, however, reliable studies have not borne this out.<sup>105</sup>

Several caveats accompany the school's obligation to teach sex education, however. Most important, this does not mean that schools have any business offering comprehensive views regarding sexual conduct to students. They have no business suggesting to children, for example, that premarital sexual conduct or masturbation is an appropriate part of growing up. Comprehensive issues such as the propriety and morality of sexual conduct are for parents, not schools. And schools' building children's capacity for sexual autonomy does not mean that students must or will choose to exercise that capacity. Students may view particular religious strictures as barring their sexual conduct and therefore see themselves as not having the choice to exercise their capacity. Finally, the fact that schools have the obligation to develop this capacity does not mean that parents may not forbid their children from exercising this capacity when they are minors: Parents are completely within their rights to deny their children the *opportunity* to exercise their reproductive capacities while their children are minors. Yet the state must still ensure that students have at least the *capacity* to control their reproductive future and health.

#### D. *Revisiting Challenged School Programs*

How do the requirements challenged in *Yoder*, *Mozert*, and the cases that followed them fare under the approach that I advocate here? In *Yoder*, in my framework,

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<sup>105</sup> See *id.* at 184; see also *Broadsheet: 65 Pregnant Teens = One Canceled Abstinence Only Program*, SALON, Aug. 17, 2006 (available online at <http://www.salon.com/mwt/broadsheet/2006/08/17/Ohio/index.html>) (Canton, Ohio School Board adds sex education to its abstinence-only curriculum after discovering that 65 of 490 high school girls – 13% of Timken High School's female population – were pregnant.)

the Court reached the wrong conclusion. The contested mandate that children stay in high school until age sixteen sought to prepare them to participate effectively in the liberal democratic system, as well as to be self-sufficient participants in society. Both of these interests are substantially related to the success of a liberal polity, and are political rather than comprehensive virtues. The parents' arguments that their children didn't need to participate effectively in the larger political system or society, since Amish society remained aloof from these larger systems, are unavailing in this framework. The state has the obligation to ensure that children achieve a basic capacity to make their own life decisions and to participate in society. The children may later decide not to exercise this capacity; but an adult cannot make this decision for them.

The fact that the requirement applies to older children also weighs in the state's favor. In this context, the fact that older children are more cognizant of differences and different ways of life supports, rather than detracts (as the *Yoder* parents would have it), from the law's permissibility. These children are capable of more complex understanding of differences and of greater autonomy than young children; both of these capabilities lessen parents' legitimate realm of control over their children. Further, the challenged requirement occurs at the period in which the state's interests in children's civic education is at its highest since the children at issue will soon be voting citizens entrusted with shaping the future of the polity.

In fact, the relationship between school attendance and the health of the polity should be justifiable even under a civic minimalist rationale, which I have argued is a higher standard that the state should have to meet for older children. Citizens who have little understanding of diversity because they have had little exposure to it, and indeed,

little understanding of ways of life apart from their own, are ill-equipped to elect representatives charged with forging a common path among citizens. The fact that the Amish plaintiffs did not choose that their children take any kind of active place in the polity does not give these parents the right to exempt these children from these requirements. To deprive children of the basic tools needed to participate in society beyond the role that their parents have chosen for them violates both the absolute requirement that children should be able to develop the basic preconditions for autonomy and the state's responsibility to ensure that children have the capacity to become responsible citizens who are up to the difficult task of collective self-government. This makes the *Yoder* situation an easy case: the requirement that children attend school until age sixteen should be upheld.

*Mozert*,<sup>106</sup> the case that challenged the series of readers used in primary school, is a harder case under my framework. The contested Holt readers used in the first to eighth grades in the Hawkins County School System were part of a comprehensive “critical reading program.” which sought to integrate the ideas and themes from the textbooks into other areas of study. As defined by the Court, “critical reading requires the development of higher order cognitive skills that that enable students to evaluate the material they read, to contrast the ideas presented, and to understand complex characters that appear in the reading material.”<sup>107</sup> Under my framework, because the children involved were younger students, the school needed to establish that it had an important state interest to justify exposing children to civic education that violates their parents’ strongly held

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<sup>106</sup> *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1060 (6<sup>th</sup> Cir. 1987).

<sup>107</sup> *Id.* at 1060.

beliefs. Here, parents objected in some large part to their children's being exposed in a non-derogatory way to cultures, values, and ways of life that their fundamentalist faith prohibited.

The exposure of students to the fact of other religions and other ways of life is certainly an important part of training students for life in a diverse liberal democracy. As I argued before in responding to William Galston,<sup>108</sup> students can only understand what peaceful coexistence in a society marked by profound differences really means if they are exposed on at least some level to these profound differences. This does not mean that the state may advocate any particular comprehensive way of life. The simple depiction of different ways of life in a non-derogatory manner, however, does not constitute such advocacy. This is the case even if it may have, as the parents feared, some negative effect on fundamentalist beliefs.<sup>109</sup> This conclusion holds, however, only assuming that the readers exposed students to the basic outlines of the differences in culture and religious practices, rather than dwelt on substantive differences in religious beliefs. Such a more detailed discussion of different religions may be appropriate for older children (assuming, of course, that is not accompanied by messages about the correctness of any of these religions), but not younger children, since it cannot be justified by the requirement of civic minimalism.

*Brown v. Hot, Sexy, and Safer Productions*, by contrast, is a relatively easy case for finding the program presented at the school assembly to be illegitimate. While the

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<sup>108</sup> See *supra* at pp. 30-36.

<sup>109</sup> As I argued earlier, based on the fine work of Stephen Macedo, the state has an obligation not to advocate any particular comprehensive vision of the good life; it need not withdraw from defending its legitimate civil interests to ensure that comprehensive beliefs have an even playing field. See *supra* at p. 49; see also STEPHEN MACEDO, *supra* note 28, at 291.

state has an interest in communicating information to students about AIDS and alternatives to unprotected sex (given the link between children's sexual behavior and the state's legitimate public health goals), the way in which the message was conveyed to students, including asking a student to demonstrate his "orgasm face," also strongly conveyed a message of approval of premarital sex. The state has no business teaching such a comprehensive belief. The fact that the education was directed at older students therefore does not save this program. The challenged program fails.

The community service requirement challenged in *Immediato* falls at the opposite end of the spectrum. Teaching its future citizens the importance of civic contributions falls squarely into the basic virtues necessary for a liberal democracy, premised on self-rule, to function well. As the school board argued, requiring students to perform community service "would expose students to the needs of their communities and to the various ways in which a democratic system of volunteerism can respond to those needs."<sup>110</sup> Furthermore, it "helps students recognize their place in their communities and ideally, inspires them to introspection regarding their larger role in our political system."<sup>111</sup> This requirement would be permissible under the civic minimalist standard applicable to younger children, and would therefore certainly be acceptable under the more lenient standard to justify educational programs for older children.

This leaves only the health education classes challenged in *Leebaert*,<sup>112</sup> which included information on human growth and development, disease prevention, community and consumer health, physical, mental and emotional health, including youth suicide

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<sup>110</sup> *Immediato v. Rye Neck School District*, 73 F.3d 454, 462 (2<sup>nd</sup> Cir. 1996)

<sup>111</sup> *Id.* at 462.

<sup>112</sup> *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003).

prevention, substance abuse prevention, safety, and accident prevention.<sup>113</sup> Under my analysis, the father’s basic position, that “God has empowered human beings with the right to bring their children up with correct moral principles in dealing with the issues taught in this course,”<sup>114</sup> fails. While parents certainly have the authority to teach their children moral principles relating to these subjects at home, the state also has a parallel authority to teach these issues at school. In doing so, the state may not teach children a morality that rests on religion for its authority, but it can teach a morality derived from public reason akin to the golden rule.

The one slightly grey area with respect to the program challenged in *Leebaert* concerned the age of the children involved – seventh grade. These students therefore fall between the primary graders, for whom civic education must be justified based on civic minimalism, and the high schoolers, for whom a lesser test is required. Given the strong relationship between the health of citizens and the success of the polity, though, even if this end doesn’t quite meet the requirement of civic minimalism, it comes close. It therefore, on balance, should be allowed for students past the elementary grades.

#### **IV. Constitutional Doctrine**

The approach to civic education that I have developed so far can be summarized as follows: The state must, whatever else it does, ensure that children both (a) develop the capacity for a threshold level of autonomy that, if they exercised it, would allow them to make important decisions on their own; and (b) develop sufficient civic virtues necessary to perpetuate a liberal democracy. In addition, the state must confine civic

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<sup>113</sup> *Id.* The program also included a family life education program that included units on family life and family planning, but allowed students to waive participation in that program. *Id.* at 135-36.

<sup>114</sup> *Id.* at 138.

education to teaching political rather than comprehensive doctrines, and must justify its actions based on public reason rather than comprehensive rationales. Finally, the legitimate scope of civic education increases as children grow older. For younger children, the state may go no further than perpetuate a healthy liberal democracy – what William Galston refers to as “civic minimalism.”<sup>115</sup> As children mature, however, the state may provide a wider scope of lessons: those that have a substantial relationship to its health or character, even if they are not integrally tied to the polity’s functioning well.

I have arrived at this framework through an approach that considers the ideals that underlie liberal democracy, rather than through any sort of constitutional interpretation. This methodology therefore gives me no claim that this framework is supported – much less compelled – as a matter of existing constitutional law. Nevertheless, although my project centers on theory rather than law, in this last section I want to at least briefly sketch out how this approach might be translated into constitutional doctrine. My purpose in this section is to argue that current constitutional law can indeed be interpreted to comport with this approach.

Courts have traditionally analyzed challenges to educational programs under two different constitutional provisions: the due process clause, based on parents’ liberty interest in raising their children; and the free exercise clause, based on the claim that the state has violated parents’ (and sometimes students’) rights to exercise their religion. Free exercise clause challenges used to receive a higher level of scrutiny because of the special protection that the Constitution provides to religion, although since the Supreme

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<sup>115</sup> Although, as I noted earlier, I would be inclined to read what is necessary to perpetuate the polity and core liberal democratic values more broadly than other scholars. *See supra* at pp. 30-36.

Court's 1990 decision in *Employment Division v. Smith*,<sup>116</sup> the standard of scrutiny applied to claims involving religion is less clear.<sup>117</sup> Because the theoretical approach I have laid out so far treats objections to school programs to the same level of scrutiny regardless of whether the objections are rooted in religion or parenting philosophy, harmonizing legal doctrine with my theory requires that both types of constitutional challenges result in similar outcomes. While this is certainly not compelled by current doctrine, neither is it inconsistent with it. I discuss each cause of action in turn.

#### *Substantive due process analysis*

The two earliest cases that explicate the boundaries of parental authority over children's education, *Meyer v. Nebraska*,<sup>118</sup> and *Pierce v. Society of Sisters*,<sup>119</sup> establish the framework for analyzing the legitimacy of public school incursions on parents' liberty interests. In *Meyer*, the Court struck down a state law forbidding instruction in certain foreign languages, in part because it interfered with the right of parents to procure such instruction for their children.<sup>120</sup> In reaching this conclusion, the Court stated:

While this Court has not attempted to define with exactness the liberty [guaranteed by the due process clause of the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to

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<sup>116</sup> 494 U.S. 872 (1990).

<sup>117</sup> See *infra* at pp. 64-66.

<sup>118</sup> 262 U.S. 390 (1923).

<sup>119</sup> 268 U.S. 510 (1925).

<sup>120</sup> *Meyer*, 262 U.S. at 400.

worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>121</sup>

Two years later, the Court in *Pierce* struck down a state statute requiring public school attendance, which therefore precluded attendance at parochial schools, because it "unreasonably interfered with the liberty of parents or guardians to direct the upbringing and education of children under their control."<sup>122</sup>

The theoretical approach that I set out in Part III calls for something approximating an intermediate level of scrutiny (ranging from higher when children are younger, to lower when they mature). Can the *Meyer/Pierce* standard comport with this level of scrutiny? While some language in these opinions may appear to suggest that the Court applied a scrutiny akin to contemporary rational basis scrutiny, this is actually not as clear as it may at first seem. Both *Meyer* and *Pierce* were decided before the development of the Court's modern demarcation of levels of scrutiny in substantive due process law.<sup>123</sup> The *Meyer* and *Pierce* opinions certainly make it clear that the *Meyer* and *Pierce* Court applied a more deferential standard than the current strict scrutiny test. In its words, "the established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to

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<sup>121</sup> *Id.* at 399.

<sup>122</sup> 268 U.S. at 534-35.

<sup>123</sup> *Brown v. Hot, Sexy, and Safer Productions*, 68 F.3d at 533; *see also Blackwelder v. Safnauer*, 689 F. Supp. 106, 136 (N.D. N.Y. 1988) (The degree of judicial scrutiny to be applied to a governmental action that interferes with the privacy interests recognized in *Pierce* and *Meyer*. . . is not clear to this court").

effect."<sup>124</sup> And, indeed, because of this language, a number of courts have applied a deferential standard of rational basis review.<sup>125</sup>

Yet a closer look at the analysis in the *Meyer* and *Pierce* cases makes it clear that the Court applied a higher level of scrutiny than the contemporary, deferential rational basis standard. In *Meyer*, the Court suggests that the challenged legislation prohibiting teaching of foreign languages in Nebraska to students who had not passed the eighth grade, served “a desirable end” insofar as it was designed to promote civic development through establishing a common culture. It held however that the means adopted – the prohibition of language training – “exceed the limitations upon the power of the State . . . . No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed.”<sup>126</sup> The Court’s analysis therefore demonstrates that it imposed a reasonability standard with real teeth, in which the Court carefully weighed the interest of the state as a concrete matter (rather than simply as an interest taken as an abstract matter) in the specific circumstances against the harm caused by the method selected by the state to further the interest.

Similarly, in *Pierce v. Society of Sisters*, the Supreme Court struck down an Oregon statute requiring parents to send children between the ages of eight and

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<sup>124</sup> *Meyer*, 262 U.S. at 399-400; *see also Pierce*, 268 U.S. at 535.

<sup>125</sup> *See, e.g.*, *Null v. Board of Education*, 815 F. Supp. 937, 939 (parental liberty interest is a “general liberty interest subject to reasonable state regulation”); *Hanson v. Cushman*, 490 F. Supp. 109, 112 (W.D. Mich. 1980) (parental liberty interest subject to reasonableness review rather than “compelling interest analysis”); *Jernigan v. State*, 412 So.2d 1242, 1246 (Ala. Crim. App. 1982) (applying deferential reasonableness review).

<sup>126</sup> *Meyer*, 262 U.S. at 403.

sixteen to public school. In doing so, again, the Court did not dispute that the state had an interest in assuring that students received an adequate education that included “studies plainly essential to good citizenship.”<sup>127</sup> Again, however, the Court subjected the means adopted to further this interest to a relatively searching scrutiny, holding that the interest did not justify the means chosen of “standardiz[ing] its children by forcing them to accept instruction from public teachers only.”<sup>128</sup> Instead, in assessing the reasonability of the means chosen, the Court factored in the interest of the child’s parents, who “have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>129</sup>

The murkiness surrounding the level of review in the parental rights cases in combination with the Supreme Courts’ recognition in these cases and elsewhere of the important interests of parents in raising their children as they see fit,<sup>130</sup> justify courts’ imposition of a rational basis standard that has real teeth, which would comport with the theoretical approach I advocate. To do so, courts should conduct a searching, rather than superficial, scrutiny of whether the state’s interest is reasonable, and it should deem unreasonable state programs that harm parents’ interests without an important reason for doing so.<sup>131</sup> In this regard, a factor to which the court should accord significant weight in assessing the

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<sup>127</sup> *Pierce*, 268 U.S. at 534.

<sup>128</sup> *Id.* at 535.

<sup>129</sup> *Id.*

<sup>130</sup> See *Troxel v. Granville*, 530 U.S. 57 (2000); *Pierce*, 268 U.S. at 535 (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.”).

<sup>131</sup> See Tyll van Geel, *Education and the Constitution: Shaping Each Other and Next Century: Citizenship Education and the Free Exercise of Religion*, 34 *Akron L. Rev.* 293 (2000).

reasonability of the means chosen is the age of the children to whom the challenged educational requirement is directed. Given the importance of the parental relationship to younger children, and their difficulty integrating vastly disparate belief systems at younger ages, it is unreasonable for the state to do more than what is necessary to teach core liberal democratic values at an early age. As children mature, however, it is reasonable for the state to present a broader array of lessons. Thus, for example, it is appropriate for children in primary grades to be aware of the fact of different religions and rudimentary differences in religious practices. To acquaint them with detailed accounts of the differences in beliefs, themselves, however, should be deemed unreasonable. In high school, however, it would be more legitimate to acquaint students with differences in belief systems.

Moving past the basic level of scrutiny, there are several features of the *Meyer/Pierce* approach that are an easy fit with my theoretical framework. I have argued that the state must seek to enable children to develop a basic level of autonomy and the civic virtues necessary in a liberal democracy. These state goals are clearly sufficiently important for judges to uphold under the scrutiny adopted in *Meyer* and *Pierce*. In addition, the *Meyer/Pierce* test comports easily with my approach's limitation of civic education to teaching political virtues rather than comprehensive virtues, and its view that the state must justify its actions based on political rather than comprehensive rationales. These theoretical limits jibe well with the *Meyer/Pierce* test requirement that the state's purpose be "within the competency of the state to effect." All that is needed to translate political theory to legal doctrine here is to interpret comprehensive purposes and

viewpoints as excluded from the state's legitimate realm of competence. Thus, teaching children about sex education for the public purpose of preventing pregnancy should pass constitutional muster; however, teaching children that sex is better left until marriage because premarital sex is immoral should not: private morality is not within the competence of the state.

*Free exercise clause analysis*

The Supreme Court first set out the constitutional framework for challenges to school programs based on religion in *Wisconsin v. Yoder*.<sup>132</sup> According to the Court, the special constitutional protection granted to free exercise of religion entitled this set of parental claims to heightened scrutiny: “[W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a ‘reasonable relation to some purpose within the competency of the state’ is required to sustain the validity of the State’s requirement under the First Amendment.”<sup>133</sup> For a state program that violates parents’ religion to withstand challenge, there must be “a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.”<sup>134</sup> According to the *Yoder* court, the burden on the state is high: “the essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”<sup>135</sup> Put another way, parents’ rights to direct their children’s

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<sup>132</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>133</sup> *Id.* at 234.

<sup>134</sup> *Id.* at 214.

<sup>135</sup> *Id.* at 215.

education trump even legitimate purposes of the state unless “harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.”<sup>136</sup> Furthermore, even if the state demonstrates a compelling purpose, it must still show that the means chosen are essential to achieving, or at least the least restrictive means of achieving that purpose.<sup>137</sup>

Courts’ application of such a heightened standard to parents’ claim that school practices violates their religious rights has been complicated, however, by the Supreme Court’s 1990 decision in *Employment Division v. Smith*.<sup>138</sup> In that case, the Court created a categorical rule that the rational basis standard should be applied to all free exercise claims challenging neutral, generally applicable laws that merely had incidental negative effects on religion. The Court reasoned that although the free exercise clause seeks to prevent government hostility against religious practices, it “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 proscribes (or prescribes) conduct that his religion prescribes (or proscribes.)’”<sup>139</sup> In doing so, however, the Court somewhat cryptically distinguished what it called a “hybrid situation,” which would except from rational basis review challenges in which the free exercise clause is asserted “in conjunction with other

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<sup>136</sup> *Id.* at 230.

<sup>137</sup> *Id.* at 226 (noting that compulsory school attendance for an extra year was not imperative in order to enable Amish children to “participate effectively and intelligently in our democratic process). See *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 447 (1988); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987).

<sup>138</sup> 494 U.S. 872 (1990).

<sup>139</sup> *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

constitutional protections.”<sup>140</sup> On the basis of this hybrid-rights theory, the Court distinguished cases such as *Yoder*, stating that they could still trigger heightened scrutiny on the ground that they involved both parental and free exercise rights.

Since *Smith*, courts have been struggling to make sense of the hybrid-rights language and exception.<sup>141</sup> While it is clear that rational basis scrutiny generally applies in most free exercise cases, the scope of any hybrid rights exception that remains, and whether any such exception should be subjected to intermediate scrutiny or strict scrutiny

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<sup>140</sup> *Id.* at 881.

<sup>141</sup> In Justice Souter’s words in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993),

The rule *Smith* announced . . . was decidedly untypical of the cases involving the same type of [formally neutral, generally applicable] law. Because *Smith* left those prior cases standing, we are left with a free-exercise jurisprudence in tension with itself, a tension that should be addressed, and that may legitimately be addressed, by reexamining the *Smith* rule in the next case that would turn upon its application. . . . In sum, it seems to me difficult to escape the conclusion that, whatever *Smith*’s virtues, they do not include a comfortable fit with settled law.

*Id.* at 564 (Souter, J., concurring). Justice Souter continued,

*Smith* presents not the usual question of whether to follow a constitutional rule, but the question of which constitutional rule to follow, for *Smith* refrained from overruling prior free exercise cases that contain a free-exercise rule fundamentally at odds with the rule *Smith* declared. . . . The result is an intolerable tension in free-exercise law which may be resolved . . . in a case in which the tension is presented and its resolution pivotal. . . . Neutral, generally applicable laws, drafted as they are from the perspective of the non-adherent, have the unavoidable potential of putting the believer to a choice between God and government. Our cases now present competing answers to the question when government, while pursuing secular ends, may compel disobedience to what one believes religion commands.

*Id.* at 574, 577; *see also* *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692, 703 (9th Cir. 1999)(“The Supreme Court has been somewhat less than precise with regard to the nature of hybrid rights. . . . Perhaps not surprisingly in view of the Supreme Court’s rather cryptic explanations, the courts of appeal[] have struggled to decipher *Smith*’s hybrid-rights formula and have reached divergent conclusions as to exactly what constitutes a hybrid-rights claim.”), *rehearing granted, opinion withdrawn by*, 192 F.3d 1208, 1999 WL 965613 (1999); *Miller v. Reed*, 176 F.3d 1202, 1207-1208 (9th Cir. 1999)(relying upon *Thomas*); *Swanson v. Guthrie Independent School District No. I-L*, 135 F.3d 694, 699 (10th Cir. 1998)(“It is difficult to delineate the exact contours of the hybrid-rights theory discussed in *Smith*”).

is unclear.<sup>142</sup> Lower federal courts have split on these issue. Some have refused to recognize the hybrid-rights exception where parents contest school requirements based on both religion and parental liberty rights.<sup>143</sup> Some have subjected these claims to an unspecified level of scrutiny.<sup>144</sup> And others have continued to apply a compelling interest test.<sup>145</sup>

As I have argued *supra*, with respect to substantive due process claims,<sup>146</sup> application of rational basis scrutiny can be harmonized with my theory, so long as courts use a rational basis standard that has real teeth. Yet even strict scrutiny can be interpreted in a manner consistent with my approach, so long as courts interpret the requirement of a “compelling” state interest to include educational goals that are important to a flourishing liberal democratic polity, rather than only those that are absolutely necessary for the perpetuation of a liberal polity. This view of the scope of interests that can be deemed “compelling” comports overwhelmingly with the way this requirement has been interpreted by courts.<sup>147</sup> The statement by the *Yoder* Court – which represented the

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<sup>142</sup> See Heather Good, *The Forgotten Child of Our Constitution: The Parental Free Exercise Right to Direct the Education and Religious Upbringing of Children*, 54 EMORY L. J. 641, 657 (2005).

<sup>143</sup> See, e.g., *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003).

<sup>144</sup> See, e.g., *Barrow v. Greenville Indep. School Distr.*, 332 F.3d 844 (5<sup>th</sup> Cir.), *cert. denied sub nom*, *Smith v. Barrow*, 540 U.S. 1005 (2003); *Brown v. Hot, Sexy, and Safer Productions*, 68 F.3d 525 (1<sup>st</sup> Cir. 1995).

<sup>145</sup> See, e.g., *Peterson v. Minidoka County School District No. 331*, 118 F.3d 1351 (9<sup>th</sup> Cir. 1977); *Jensen v. Reeves*, 45 F. Supp. 2d 1265 (D. Utah 1999); *Hicks v. Halifax County Board of Education*, 93 F. Supp. 2d 649 (E.D.N.C. 1999).

<sup>146</sup> See *supra* at pp. 58-63.

<sup>147</sup> See, e.g., *Roman v Appleby*, 558 F Supp. 449, 456, (holding that protection of public health is compelling state interest for purpose (E.D. Pa. 1983); *State v. Bontrager*, 114 Ohio App. 3d 367 (1986) (requirement that hunter wear hunter orange was compelling state interest because clothing requirement bore a real and substantial relation to public health, safety, morals or general welfare; *Pollock v. Marshall*, 656 F. Supp. 957 (S.D. Ohio 1987) (hair length requirements for prisoners furthered a compelling state

Court's most deferential posture to parents' religious claims that we have seen in recent years – that to satisfy the standard the state must show “harm to the . . . public safety, peace, order, or welfare has been demonstrated or may be properly inferred,”<sup>148</sup> without the requirement that the harm be to an interest necessary to perpetuate the polity, supports this interpretation.

The second part of my approach – requiring that state laws seek to further comprehensive rather than political conceptions of the good – can be easily integrated into a heightened scrutiny analysis through courts striking down comprehensive goals as not compelling.<sup>149</sup> The third part of my approach – a more lenient scrutiny of educational programs as children mature, ranging from accepting compelling programs for young children to important programs for older children – is somewhat more difficult to harmonize with the constitutional test, but still possible under requirement that the means chosen by the state be either necessary to pursue the state interest or the most restrictive means possible. Courts amenable to my approach can consider the age at which children are exposed to programs to be a key factor that courts in determining the presence of necessity: the argument here is that as students come closer to becoming full members of society it becomes more necessary for the state to take measures ensuring that they are adequately acculturated.

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interest because, among other things, longer hair has a greater tendency to clog sinks, showers and similar accommodations creating a sanitation problem).

<sup>148</sup> *Id.* at 406 U.S. at 230.

<sup>149</sup> *Cf.* Van Geel, at 363 (“An important implication of these ‘tests’ for assessing how compelling a state’s purpose is that they rule out as compelling the purpose of promoting a particular conception of ‘the good life.’”).

## Conclusion

Isaiah Berlin eloquently described the tradeoffs between satisfying competing claims of authority when he wrote that “[t]he world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realization of some of which must inevitably involve the sacrifice of others.”<sup>150</sup> I have argued that, when it comes to civic education, a healthy liberal democracy must do the delicate work of balancing a number of different claims of authority. And because these sources of authority, at least sometimes, favor conflicting results, no neat, easy solution that satisfies all the relevant interests will always – perhaps, often – be possible. That this is the case, however, is not reason to adopt a too-easy default in favor of only one of several important interests. Instead, the importance of the interests at stake in civic education – the autonomy interests of both parents and children, the interests of the democracy in passing along its ways of life, and the interest of the polity in perpetuating vibrant citizenship – demand that we do the best we can to reach an accommodation among all of them.

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<sup>150</sup> ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 18, 169 (1969).