

## CITIZENSHIP EDUCATION AND THE FREE EXERCISE OF RELIGION

by

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It is often asserted that constitutional stability requires formal citizenship education.<sup>1</sup> Although it is not explicitly mentioned in the Constitution, I will assume that states have the inherent power to engage in citizenship education; that is, that states have the authority to see that children are educated in a way that prepares them for citizenship so as to assure the stability of the constitutional scheme of government.<sup>2</sup>

Just as it is almost unthinkable that the government does not have this education power, it is equally unthinkable that, in a democracy, this power is unlimited.<sup>3</sup> But questions regarding the scope and limits of the education power abound, and various positions have been taken on the issue, including the position that First Amendment rights make public schooling itself an unconstitutional enterprise.<sup>4</sup> But this position seems to take the view that the Constitution suffers from an auto-immune disease. While I agree there are limits; I will not argue that those limits are so severe as to negate an inherent power to educate for citizenship.

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<sup>1</sup> JOHN RAWLS, A THEORY OF JUSTICE 453-512 (1971).

<sup>2</sup> The Tenth Amendment to the United States Constitution reserves power to the states. State police power includes education power. State constitutional amendments impose duties on legislatures to provide for education.

<sup>3</sup> The United States Supreme Court has, of course, imposed limits. *See, e.g.,* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Wallace v. Jaffree, 472 U.S. 38, 50 (1985) (“[T]he Court has identified the individual’s freedom of conscience as the central liberty that unifies the various clauses in the First Amendment”).

<sup>4</sup> Commenting on *West Virginia State Board of Education v. Barnette*, Nadine Strossen observed that “unqualified, *Barnette* leads inexorably to the abolition not only of the compulsory flag salute but also of compulsory education: school officials are permitted to educate only by persuasion, never by compulsion.” Nadine Strossen, “*Secular Humanism*” and “*Scientific Creationism*”: Proposed Standards for Reviewing Curricular Decisions Affecting Students’ Religious Freedom, 47 OHIO ST. L. J. 333, 367 n.197 (1986). *See also* Note, *Freedom and Public Education: The Need for New Standards*, 50 NOTRE DAME LAW. 530, 538 (1975). *See generally* Stanley Ingber, *Religious Children and the Inevitable Compulsion of Public Schools*, 43 CASE W. RES. L. REV. 773, 783 (1993) (outlining and rejecting an argument based on the religion clauses that leads to the conclusion that public education is unconstitutional).

What I want to do here is explore what those limits are by asking whether it would be constitutional for a government school to adopt a program for citizenship education that grows out of the deliberative democracy movement.<sup>5</sup> The specific program I will be examining is that of Eamon Callan.<sup>6</sup> I focus on Callan because he has worked more than other deliberative democrats to explicate the implications of a commitment to deliberative democracy for citizenship preparation.<sup>7</sup> Callan shares with other deliberative democrats a belief in the conception of core liberal values, and the use of the coercive power of the state to enforce these values throughout the schools.<sup>8</sup> Deliberative democrats deny, in other words, that parents and children have a right to avoid instruction in their version of core liberal values.<sup>9</sup> Are they correct in their reading of the Constitution? This is the central focus of this article. I have focused on this issue because there are a growing number of deliberative democrats who seek to shape public education according to their principles, and because the inquiry sheds important light on constitutional and citizenship education. The constitutional challenge I examine most closely is a challenge based on the Free Exercise Clause.<sup>10</sup>

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<sup>5</sup> AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); *DELIBERATIVE POLITICS* (Stephen Macedo ed., 1999). The deliberative democracy movement is constitutionally interesting because these scholars agree that the coercive power of the state may and should be used to promote certain core liberal values. They are not unique in supporting the notion that the state may promote core liberal values, but there is challenge because they have systematically developed a conception of democracy and the necessary core values, and thus have provided a grounding for their claim that coercion may be used to support those values. Thus, they stand in contrast to other commentators who also support state authority to use coercion in the name of core values, but have not provided the same groundwork for justifying the use of the coercion they advocate. Strossen, *supra* note 4.

<sup>6</sup> EAMON CALLAN, *CREATING CITIZENS: POLITICAL AND LIBERAL DEMOCRACY* (1997).

<sup>7</sup> *See, e.g.*, STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* (2000).

<sup>8</sup> Deliberative democrats are not the only people who support the idea that the state does have coercive power to promote core liberal values. A central difference between the deliberative democrats and others is that they derive their conception of core liberal values from a systematically-developed theory regarding democracy and justice, whereas many other advocates of coercive power derive their conception of the core liberal values inductively by looking at American traditions and practices. Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 *YALE L. & POL'Y REV.* 169 (1996).

<sup>9</sup> *Id.*; Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls*, 105 *ETHICS* 468 (1995).

<sup>10</sup> Whether the Free Exercise Clause is still available for challenges based on the incidental effects on religion of general policies is discussed later. *See infra* note 40. I assume for these purposes that the answer is “yes,” but I do

I want to conclude this introduction with a sweeping observation: the philosophy and legality of citizenship education is extraordinarily complex. The difficulty of the general topic is well captured by Nomi Stolzenberg, who commented upon a lower court decision, *Mozert v. Hawkins County Board of Education*.<sup>11</sup> In that case, fundamentalist parents sought, based on the Free Exercise Clause, an exemption for their children from a reading program that they said had the effect of undermining the religious faith of their children. The school said the program's purposes were to teach reading and tolerance. The *Mozert* parents lost their case, thus their children were not granted an exemption. In writing about the case, Stolzenberg said:

*Mozert* thus crystallizes the paradox of tolerance for the intolerant: the fundamentalists' call for eliminating tolerance from the public schools can be rebuffed only at the expense of maintaining an environment that is exceedingly inhospitable to the fundamentalists, and is potentially inimical to the survival of their way of life.<sup>12</sup>

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not take up the much-debated question of whether the Free Exercise Clause should permit the Court to order mandatory free exercise exemptions.

<sup>11</sup> *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987). The *Mozert* decision has provoked substantial commentary. See, e.g., George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 864 (1988); Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U.L. REV. 603, 613-14 (1987); Strossen, *supra* note 4, at 340-404; STEPHEN BATES, *BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS* (1993).

<sup>12</sup> Nomi Maya Stolzenberg, "*He Drew a Circle That Shut Me Out.*": *Assimilation, Indoctrination, and the Paradox of Liberal Education*, 106 HARV. L. REV. 581, 584 (1993).

Part One of this article provides a broad-brush overview of constitutional doctrine as it bears on citizenship education in the public schools. The remaining parts of the article focus on a Free Exercise challenge to the introduction of a Callanesque program of citizenship education in a public school. Part Two thus explicates Callan's theory. Part Three outlines my approach to the Free Exercise Clause. Part Four applies that approach to a challenge brought against a Callanesque program of citizenship education. Part Five takes up other possible rights-based limits on the education power and offers a suggestion regarding how citizenship education might proceed without violating the Free Exercise Clause.

## I. THE VIEWS OF THE JUSTICES

### A. *The Free Speech Clause*

One must begin any discussion of the Free Speech Clause and citizenship education with *West Virginia State Board of Education v. Barnette*.<sup>13</sup> The most straightforward formulation of the *ratio decidendi* states that compelling students, upon pain of expulsion, to participate in the flag salute violates their First Amendment rights. But the case is often cited as the source of a famous quotation that suggests a far broader reading of the case:

If there be any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.<sup>14</sup>

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<sup>13</sup> *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>14</sup> *Id.* at 642.

This passage suggests that the First Amendment imposes additional limitations on school officials to inculcate their pupils beyond merely prohibiting the compulsory flag salute.<sup>15</sup> The Court, however, made clear that states had the indirect authority to seek to promote patriotism and loyalty:

[T]he State may “require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guarantees of civil liberty, which tend to inspire patriotism and love of country.” Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan . . . .<sup>16</sup>

The message that emerges from the two quoted passages is somewhat muddled. On the one hand, the First Amendment exists to protect the sphere of intellect and spirit, and on the other hand, the public schools may teach a history course designed to promote patriotism and may do so, apparently, by teaching only history that would tend to inspire patriotism. The Court seems to be endorsing a history without warts, an “airbrushed” history. This is an open invitation to manipulate the consciousness of pupils through a selective presentation of the past.<sup>17</sup> As long as naked compulsion is not used, government schools may seek to invade the sphere of intellect and spirit. In short, the legacy of *West Virginia State Board of Education v. Barnette* is ambiguous. As we shall see, this ambiguity regarding the education power has carried over into the modern era.

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<sup>15</sup> Justice Stevens quoted the first paragraph of the quotation in the text in the majority opinion in *Wallace v. Jaffree*, 472 U.S. 38 (1985). In this Establishment Clause case, he used the paragraph to help support his description of the First Amendment as protecting “individual freedom of conscience,” the concept of “individual freedom of mind.” *Id.* at 52, 53.

<sup>16</sup> *Barnette*, 319 U.S. at 631.

<sup>17</sup> Stephen E. Gottlieb, *In the Name of Patriotism: The Constitutionality of “Bending” History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497 (1987).

In fact, three distinct general conceptions of the education power and the Free Speech Clause have emerged in the opinions. The view developed by the liberal justices is arguably the most incoherent. These justices speak of the school as a marketplace of ideas, talk about a right of freedom of conscience, and yet also acknowledge the importance of schools as instruments of inculcation. In *Tinker v. Des Moines Independent School District*, the seminal case in which the Court recognized that students did not shed their right to freedom of speech at the schoolhouse door, the majority opinion written by Justice Fortas repeated Justice Brennan's comments from an earlier case: "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" <sup>18</sup> Liberal justices have been willing to extend student free-speech rights into contexts in which the exercise of those rights may blunt the curricular message that the school district wants to convey to its students:<sup>19</sup>

Free student expression undoubtedly sometimes interferes with the effectiveness of the school's pedagogical functions. Some brands of student expression do so by directly preventing the school from pursuing its pedagogical mission: the young polemic who stands on soapbox during calculus class to deliver an eloquent political diatribe interferes with the legitimate teaching of calculus. And the student who delivers a lewd endorsement of a student-government candidate might so extremely distract an impressionable high school audience as to interfere with the orderly operation of the school. . . . Other student speech, however,

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<sup>18</sup> *Tinker v. Des Moines Indep. Sch. Dist.* 393 U.S. 503, 512 (1969) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)). In *Tinker*, students successfully claimed that school officials had violated their First Amendment right to freedom of speech when those officials prohibited students from wearing black armbands to school to protest the Vietnam War. The Court ruled that school officials could only block interpersonal communication among students if it materially and substantially interfered with the requirements of appropriate discipline or collided with the rights of others. The requirements of this standard were not satisfied in this case.

<sup>19</sup> In *Bethel Sch. Dist. No. 403 v. Fraser*, the majority upheld a school decision to discipline a student for delivering a speech that employed an elaborate sexual metaphor when nominating another student for a school office. 478 U.S. 675 (1986). In reaching its decision, the majority did not rely on the *Tinker* standard. See *supra* note 18 and see *infra* note 28 and accompanying text. Justice Brennan concurred, finding that the speech was sufficiently disruptive that the *Tinker* standard was satisfied. *Id.* at 689 (Brennan, J., concurring). However, Justice Marshall dissented, arguing that the *Tinker* standard had not been satisfied. *Id.* at 690 (Marshall, J., dissenting). See Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 865 (1979).

frustrates the school's legitimate pedagogical purposes merely by expressing a message that conflicts with the school's without directly interfering with the school's expression of its message: a student who responds to a political science teacher's question with the retort, "Socialism is good," subverts the school's inculcation of the message that capitalism is better . . . .<sup>20</sup>

Thus, unless the student speech was disruptive of discipline, the liberal justices would not permit school officials to block student speech merely because it was incompatible with the school's pedagogical message. Relying on this approach, three justices dissented from the ruling of the majority that upheld the authority of a school principal to excise articles from the school newspaper for "legitimate pedagogical concerns."<sup>21</sup> The dissent argued that, "[i]f mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor each of the students or student organizations . . . converting our public schools into 'enclaves of totalitarianism' . . . that 'strangle the free mind at its source.'"<sup>22</sup> This concern for protecting the free mind led the liberal justices to place limits on the authority of school officials to remove books from the school library. Finding that the First Amendment protected the students' "right to hear," Justice Brennan fashioned a constraint on school board authority to remove books from the school library: if a school board intends, by their removal decision, to deny students access to

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<sup>20</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 279 (1988) (Brennan, J., dissenting). In that case, school officials removed two pages from the student newspaper that was written and edited by a journalism class. *Id.* at 262. The school principal was concerned that the sexual content of one of the articles was inappropriate for younger students in the school, that the article did not sufficiently protect the identity of pregnant students discussed in the article, and that the father who was criticized in print in another article should have had an opportunity to reply to the comments of his daughter. *Id.* at 263.

<sup>21</sup> The majority ruled that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities as long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.

<sup>22</sup> *Id.* at 280 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637).

ideas with which the school board disagrees, and if this intent is a decisive factor in the decision, then the board has exercised its authority in violation of the Constitution.<sup>23</sup>

The position of the liberal justices regarding the limits on the education power to inculcate in the classroom is not as clear as it might seem. None of the cases in which they spoke of the marketplaces of ideas and the right to receive ideas dealt with inculcation by the school in the classroom; this fact alone raises a question regarding what these justice's views are regarding classroom instruction, i.e., does the right to hear extend to the classroom?<sup>24</sup>

Furthermore, these same justices have endorsed the notion that the public schools are legitimate agents of inculcation. In the library case, Justice Brennan himself acknowledged that “public schools are vitally important ‘in the preparation of individuals for participation as citizens,’ and as vehicles for ‘inculcating fundamental values necessary to the maintenance of a democratic political system.’”<sup>25</sup> These justices have thus left us with what can most charitably be described as a nascent, but not yet fully worked out, doctrine regarding the education power of the state.<sup>26</sup>

A second group of justices who might be dubbed the cultural conservatives, drop the marketplace-of-ideas rhetoric and talk exclusively about the inculcation of core values. Justice Powell thus noted with approval “authorities” who saw the schools as an “ ‘assimilative force’ by which diverse and conflicting elements in our society are brought together on a broad but

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<sup>23</sup> Board of Educ. v. Pico, 457 U.S. 853, 871 (1982). In that case, board members authorized the removal of nine books from the school library. There was no majority opinion, but a majority of the Court concurred with the judgment that the case ought to be remanded for trial on the merits. See generally Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197 (1983); Virgil v. School Bd., 862 F.2d 1517 (11th Cir. 1989).

<sup>24</sup> Justice Brennan, at the outset of his opinion in *Pico*, emphasized that this case was about library books and about their removal, not their acquisition. *Pico*, 457 U.S. at 862. He further emphasized that the library was the principal locus of the student's right to free inquiry. *Id.* at 868.

<sup>25</sup> *Id.* at 864 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)). Justice Brennan made virtually identical comments in *Plyler v. Doe*, 457 U.S. 202, 221 (1982). In that case, the Court struck down Texas' policy of excluding illegal alien children from the public schools under the Equal Protection Clause.

<sup>26</sup> A complete theory would also have to take into account the Establishment and Free Exercise Clauses, the equity principle inherent in the Free Speech Clause, and the substantive due process rights of parents. See *infra*, notes 323-55 and accompanying text.

common ground.”<sup>27</sup> Justice Burger, in another case, elaborated on this power to inculcate by identifying as fundamental values a “tolerance of divergent political and religious views,” and the recognition that in public debate one should take into account the sensibilities of others and not use “terms of debate [that are] highly offensive or highly threatening to others.”<sup>28</sup> In another case, Justice Burger identified the protection of children from ignorance, and the living of a self-sufficient and law-abiding life as compelling state educational interests.<sup>29</sup> Although Justice Burger has identified these core values as permissible objects of state compulsory education, he did not go on to address what other values, if any, the state may seek to inculcate other than briefly alluding to the fact that elected school officials may seek to have the school express the view of their community on the subjects taught to the students. Thus, although the position of the cultural conservatives on the scope of the education power does not incorporate the same obvious tension as the position of the liberal justices, their approach is incomplete insofar as they do not specify with precision which values are those which may be inculcated. They implicitly limit the education power to the inculcation of those values “necessary to the maintenance of a democratic political system” without identifying what those values may be. If they were to do so they would, of course, have to specify their conception of “a democratic political system” and engage in an analysis of why certain values are necessary for the maintenance of that system. In

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<sup>27</sup> *Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (rejecting an Equal Protection challenge to a New York statute that forbade the permanent certification as a public school teacher any person who was not a United States citizen unless that person manifested an intention to apply for citizenship).

<sup>28</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681-83 (1986).

<sup>29</sup> These comments arose in a Free Exercise Clause case in which the Amish claimed that a compulsory education law that required their children to attend formal schooling beyond the eighth grade violated their Free Exercise rights. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The Court ruled in favor of the Amish finding, *inter alia*, that the state had not met its burden that requiring the Amish children to continue beyond age fourteen in formal school was necessary to meet the state’s compelling state interests. *Id.* at 234-36. In reaching this conclusion Justice Burger agreed with the state that some degree of education was necessary to prepare children to participate effectively and intelligently in our political system, but he found that the informal education provided by the Amish after age 14 prepared their children to be self-sufficient and law-abiding. *Id.* at 222. Justice Burger, by implication, concluded that actual participation in political life was not a compelling goal. *See infra* notes 61-65 and accompanying text.

short, the cultural conservative justices, like the liberal justices, have only offered us a nascent conception of the education power.

I turn now to a third perspective that might be labeled either judicial minimalism or strong democracy. The justices who share this view, including Chief Justice Rehnquist, Justice Scalia, and former Justice Powell, see the education power as a power given to state and local government largely free of judicial supervision and, thus, free of judicially forged constitutional limitations. Justice Rehnquist's dissent in the library book censorship case captures this view eloquently:

[I]t is helpful to assess the role of government as educator, as compared with the role of government as sovereign. When it acts as an educator, at least at the elementary and secondary school level, the government is engaged in inculcating social values and knowledge in relatively impressionable young people. Obviously there are innumerable decisions to be made as to what courses should be taught, what books should be purchased, or what teachers should be employed. In every one of these areas the members of a school board will act on the basis of their own personal or moral values, will attempt to mirror those of the community, or will abdicate the making of such decisions to so-called "experts." . . . In the very course of administering the many-faceted operations of a school district, the mere decision to purchase some books will necessarily preclude the possibility of purchasing others. The decision to teach a particular subject may preclude the possibility of teaching another subject. A decision to replace a teacher because of ineffectiveness may by implication be seen as a disparagement of the subject matter taught. In each of these instances, however, the book or the exposure to the subject matter may be acquired elsewhere. The managers of the school district are not proscribing it as to the citizenry in general, but are simply determining that it will not be included in the curriculum or school library. In short, actions by the government as educator do not raise the same First Amendment concerns as actions by the government as sovereign.<sup>30</sup>

Further, Justice Rehnquist, in rejecting Justice Brennan's invocation of a right to receive ideas, stated that the idea that students have such a right in school "is contrary to the very nature of an inculcative education."<sup>31</sup> Schools must engage in a "winnowing process" to develop their

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<sup>30</sup> Board of Educ. v. Pico, 457 U.S. 853, 909-10 (1982).

<sup>31</sup> *Id.* at 914.

programs of inculcation and the Court must not interfere except in that rare circumstance when the school goes too far and, for example, favors only materials written by Republicans or rejects all materials written by blacks.<sup>32</sup> Justice Powell would go further in removing the Court from judicial supervision of school boards: “Judges rarely are as competent as school authorities to make [decisions about the worth of a book]; nor are judges responsive to the parents and people of the school district.”<sup>33</sup> And despite the fact that Justice Rehnquist was able to find common ground with Justice Brennan on the following proposition – the school board’s “discretion may not be exercised in a narrowly partisan or political manner”<sup>34</sup> – Justice Powell rejected this standard as “a meaningless generalization.”<sup>35</sup>

The three positions reviewed here are all positions regarding the limits, if any, the Free Speech Clause of the First Amendment places on the discretion of school boards over the school curriculum. Similarly, the equity principle often said to be an implicit part of the First Amendment arguably also has implications for the school board’s discretion over the school curriculum.<sup>36</sup> The Free Speech Clause undoubtedly places some limits on the authority of states to regulate the content of instruction in private schools and in home schools.<sup>37</sup> The full examination of these potential lines of development take us beyond where the justices are today; but I take note of them to underscore the conclusion that no group of Supreme Court justices has yet developed a complete or mature view of the bearing of the Free Speech Clause on school board discretion to control the curriculum or the implications of the Free Speech Clause for the regulation of private schooling.

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<sup>32</sup> *Id.* at 907.

<sup>33</sup> *Id.* at 894.

<sup>34</sup> *Id.* at 895, 907.

<sup>35</sup> *Board of Educ. v. Pico*, 457 U.S. 853, 895 (1982).

<sup>36</sup> *Gottlieb*, *supra* note 17.

### B. The Free Exercise Clause

The Free Speech Clause is, of course, not the only provision of the Constitution that speaks to state and school board discretion to control the school program. The most visible and controversial cases have, of course, arisen under the Establishment Clause.<sup>38</sup> Since a discussion of these cases takes me away from the main focus of my remarks, I will not deal further at this point with the Establishment Clause.<sup>39</sup>

The Free Exercise Clause, however, bears directly on my concern with citizenship education. Despite their sharp differences over the implications of the Free Speech Clause for the discretion of school authorities to control the school's program, all three groups of justices agree that the Free Exercise Clause imposes limits on state authority to control the education of the young.<sup>40</sup> The central case is *Wisconsin v. Yoder*, in which the Court addressed the claim of

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<sup>37</sup> Tyll van Geel, *State Control of the Private School's Curriculum: An Essay in Law, Jurisprudence, and Political Philosophy*, in *PUBLIC VALUES, PRIVATE SCHOOLS* (Neal E. Devins ed. 1989); *Runyon v. McCrary*, 427 U.S. 160 (1976).

<sup>38</sup> *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down a statute that required the teaching of "creation science" if the school taught the theory of evolution); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down a statute which authorized schools to open the school day with a one-minute period of silence for meditation or voluntary prayer); *Stone v. Graham*, 449 U.S. 39 (1980) (prohibiting a school from posting the Ten Commandments on the wall of each school classroom); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down a statute which prohibited teaching the theory that man evolved from other species of life); *School Dist. v. Schempp*, 374 U.S. 203 (1963) (prohibiting opening the school day with a voluntary religious ceremony).

In addition many lower court decisions have addressed challenges to the school curriculum based on the Establishment Clause. *See generally* *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340 (D. Md. 1969) (rejecting a claim that a sex education course violated the Establishment Clause); *Florey v. Sioux Falls Sch. Dist.* 49-5, 619 F.2d 1311 (rejecting a claim that a school Christmas assembly violated the Establishment Clause). *See generally* Michael Imber & Tyll van Geel, *EDUCATION LAW* 74-88 (2d ed. 2000).

<sup>39</sup> *See infra* note 323 and accompanying text.

<sup>40</sup> The justices whom I have called the liberals and cultural conservatives represented, on the one hand, by Justice Brennan, and on the other by Justice Burger made up the majority that reshaped Free Exercise Clause jurisprudence in the 1960's. Until that point, the Court had taken the position that, "[I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden." *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961). Then, in *Sherbert v. Verner*, the Court shifted to the framework discussed in the text. *Sherbert v. Verner*, 374 U.S. 398 (1963). *See infra* notes 43-47 and accompanying text. In 1990, Justice Scalia, writing for a new majority, reversed the *Sherbert* decision and adopted a new Free Exercise Clause jurisprudence that harkened back to the approach used in *Braunfeld*: "[T]he Free Exercise Clause 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)." *Employment Division, Dep't. of Human Resources v. Smith*, 494 U.S. 872, 879 (1990). If this is all the

Amish parents that their right to the free exercise of religion was violated by the state effort to compel their children to attend formal schooling beyond the eighth grade.<sup>41</sup> The case arose after the respondents were tried and convicted of violating the state's compulsory education law for not having their 14-year-old children enrolled in any private school until at least age 16.

Respondents defended themselves on the ground that enforcement of the law infringed on their free-exercise rights. The Court characterized the problem it faced as a problem of balancing:

“[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional

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*Smith* decision had said, it would be clear that the Free Exercise Clause would, for these justices, not serve as a meaningful constraint on the education power of the state. But the *Smith* decision also stated clearly that the *Sherbert* approach would remain the approach when the case involved the double claim that a general law had an incidental effect on the right of parents to control the upbringing of their children and those same parents' right of freedom of religion. Thus, in this “hybrid situation” the justices whom I have called judicial minimalists have also gone on record saying that the Free Exercise Clause operates as a constraint on education power. While it may be argued that carving out these “hybrid situations” from the approach usually taken in Free Exercise Clause cases is not well grounded and, accordingly, a position that cannot be taken as stable, I am proceeding here by taking the justices at their word. In short, I presume that when it comes to examining challenges to the education power under the Free Exercise Clause, all three of the groups of justices that I have identified will use the framework discussed in the text.

The majority's effort in *Smith* to distinguish *Yoder* has been the subject of dispute. Professor Dent argues for the continued vitality of *Yoder*. George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students*, 43 CASE W. RES. L. REV. 707, 713 (1993). Professor Ingber believes that *Yoder* will eventually be overruled. Ingber, *supra* note 4, at 788.

The First Circuit, in *Brown v. Hot, Sexy & Safer Prods., Inc.*, had to deal with such a hybrid claim. See 68 F.3d 525 (1st Cir. 1995). In that case, two minors and their parents objected to the minors' compelled attendance at a sexually explicit AIDS awareness program. The parents raised, among other claims, both a substantive due process claim to control the upbringing of their children and a Free Exercise claim. The First Circuit declined to decide whether the right to rear children was fundamental, but even if it were, it declared that the defendants' conduct did not intrude on such a right. The court said that Supreme Court precedent protecting parental rights only prohibited states from restricting parents' educational options, and did not establish a parent's right to object to a public school curriculum. Having reached this conclusion, the court concluded that the case before it was no longer a “hybrid” case and thus, the *Yoder* framework did not apply. The Free Exercise doctrine of the *Smith* case applied, and under that case, the parents' Free Exercise claim also should be dismissed. For a criticism of this decision, see Recent Case, *First Circuit Denies Parents A Constitutional Right to Prevent Children from Receiving School-Sponsored AIDS Education*. - *Brown v. Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1044 (1996), 110 HARV. L. REV. 1179 (1997).

<sup>41</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

interests of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, “prepare [them] for additional obligations.”<sup>42</sup> Continuing, the Court said:

It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause . . . .<sup>43</sup>

The Court thus went on to inquire into whether the respondents had established that theirs was a religious claim (as opposed to a philosophical claim), that the claim was sincere, and that indeed enforcement of the law so as to require Amish children to attend an additional two years of formal schooling had a substantial impact on the practice of their religion.<sup>44</sup> The Court also arguably imposed on the Amish parents the additional burden of establishing that their “alternative mode of continuing informal vocational education” advanced the state’s interests, which invoked support of its compulsory education requirement.<sup>45</sup> At the same time, the Court seemed to demand of the state that it establish that its interests in requiring the two additional years of education that Amish were resisting were “so compelling that even the established religious practices of the Amish must give way.”<sup>46</sup> If the Amish met the burdens imposed on them and the State could not meet its burden, the Amish would win their exemption even if the compulsory education law did not discriminate on its face against religion in general or against

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<sup>42</sup> *Id.* at 214 (referring to *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925)).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 215, 218.

<sup>45</sup> *Id.* at 235.

<sup>46</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). Thus, there is an ambiguity in the decision regarding the allocation of the burden of proof. On the one hand, the Court seems at points to require the Amish to establish that their informal system of vocational mode of education serves the state’s compelling interests. *Id.* at 235-36. On the other hand, the case can be read to impose on the state the burden of showing that granting the exemption would frustrate the realization of the state’s compelling interests. While it is often the case that the allocation of the burden of proof is in practical effect decisive in how the case comes out, this was not true here. But the way the burden is

the Amish in particular: “A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.”<sup>47</sup>

Applying this framework, the Court ultimately ruled in favor of the Amish and required Wisconsin to grant the Amish an exemption from complying with the state’s demand that they send their children to formal schooling beyond the age of 14. My interest at this point is not to go through a detailed examination of the Court’s application of this framework, but only to go sufficiently deeply into the opinion to make the point that the framework used by the Court is under-developed in certain crucial respects. First, as to the requirement that the Amish were making a religious claim, the Court concluded that they were, but did so in a way that shed no light on the question regarding what would count as a religious claim in future cases. The state, in litigating the case, had conceded that the Amish way of life was religiously based and that there was proof that the Amish’s non-modern, self-sufficient, isolated, and aloof community life stemmed from a literal interpretation of the Bible, an undoubtedly religious text.<sup>48</sup> The Court did acknowledge that, “a determination of what is a ‘religious’ belief or practice entitled to constitutional protection may present a most delicate question . . . .”<sup>49</sup> The Court hinted at an approach to this matter by noting that a “subjective evaluation,” a “personal” and/or “philosophical” viewpoint such as that of Thoreau, who also withdrew from modern life, could not receive Establishment Clause protection.<sup>50</sup>

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allocated in future cases is likely to be decisive. *See generally* State v. Whisner, 351 N.E.2d 750 (Ohio 1976); Sheridan Rd. Baptist Church v. Department of Educ., 396 N.W.2d 373 (Mich. 1986).

<sup>47</sup> *Yoder*, 406 U.S. at 220.

<sup>48</sup> *Id.* at 209, 216.

<sup>49</sup> *Id.* at 215.

<sup>50</sup> *Id.* at 216.

Second, the Court did not explore how the sincerity of the belief was to be established in the future.<sup>51</sup> In *Yoder*, the matter was easily disposed of because the state did not dispute the sincerity of the Amish. The Amish had, since the sixteenth century, been pursuing a simple, Christian life that de-emphasized material success, the competitive spirit, and which was isolated from the modern world. The Amish remained consistent in their rejection of telephones, automobiles, radios, and television, and had been consistent in their adoption of simple modes of dress and speech, and in living by farming and manual work.<sup>52</sup> Religious beliefs remained throughout the centuries the steady guide for their chosen way of life.

Third, the Court, by addressing the issue of impact at greater length, did shed more light on what it might take in future cases to establish the substantiality of the impact of a facially neutral law. In this case, the extra two years of schooling that the state wanted the Amish children to have had a double effect: first it led to placing the Amish child in a high school with an environment that was totally opposed to the Amish way of life – an environment that stressed competition, a life of the intellect, and scientific accomplishments.<sup>53</sup> Second, it pulled the child out of the informal, learn-by-example-and-doing, vocational education the child was to receive from his or her parents at home on the farm. At a crucial time in his or her life, the child would be pulled away from the religious and value instruction he or she was to receive from the parents. The consequence of forcing Amish children into the modern public school was, according to expert testimony presented at trial, to place Amish children under great psychological stress, and could, in time, even lead to the destruction of the Old Order Amish as significant percentages of

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<sup>51</sup> Sincerity of belief is important in Free Exercise cases because the temptation exists for people to claim to be religious adherents simply in order to avoid having to comply with laws they find onerous, such as tax laws.

<sup>52</sup> *Yoder*, 406 U.S. at 210-11.

<sup>53</sup> Apparently the Amish children did not have available the option of obtaining the additional two years of schooling in a private school more suited to the Amish culture, but instead were faced with having to satisfy the compulsory education law in a public high school. *Cf. id.* at 207.

the children were induced by their high school experience to leave the Amish community.<sup>54</sup> Because the impact of the law was not significantly in dispute, the Court was not forced to analyze the concept of impact, and, as a consequence, the concept of impact remained “in the background, unclarified, and inchoate.”<sup>55</sup>

Having assured itself that the Amish had established their claim as a sincerely held religious claim and that enforcement of the compulsory education law had a substantial impact, the Court turned to the matter of the state’s interest in enforcing the compulsory education law. The state argued that its interests were so compelling that the Amish religiously-based practice of informal vocational education after age 14 had to give way.<sup>56</sup> If the state were correct in this claim, it would ultimately have prevailed in the case. In reviewing the Court’s analysis, my interest is in the part of the opinion which sheds light on the Court’s view of what is to count as a compelling state interest in future cases.

The state proffered three interests supporting its compulsory education law – a citizenship preparation interest, a vocational training interest, and an interest in protecting the child from child labor. My interest is in the Court’s assessment of the state’s interest in citizenship education.<sup>57</sup> The state, the Court noted, had an interest in preparing citizens “to participate

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<sup>54</sup> *Yoder*, 406 U.S. at 212, 218.

<sup>55</sup> Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 943 (1989).

<sup>56</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 221 n.29 (1972).

<sup>57</sup> Regarding the vocational training interest the Court found that there was no evidence in the record that established that the Amish method of informal vocational education did not sufficiently prepare the Amish children in skills and work habits for life outside the Amish community if they ultimately chose to leave the community. *Id.* at 24-25. In making this finding the Court assumed without analysis that the state interest in assuring that the Amish who leave the community would not become burdens on society was compelling. The Court also expressed doubt that the extra two years of formal schooling would eliminate the problem of the children ending up as burdens on society. *Id.* In addition, the Amish program of instruction was an ideal vocational education for preparation for life in the Amish community. *Id.* at 224-27.

Again without analysis, the Court assumed the state’s interest in keeping children off the labor market and in school was compelling. But again, the Court found that those interests were not jeopardized by the Amish way of raising their children: “There is no intimation that Amish employment of their children on family farms is any way deleterious to their health or that Amish parents exploit children at tender year.” *Id.* at 229.

effectively and intelligently in our open political system if we are to preserve freedom and independence.”<sup>58</sup> The Court’s analysis of the state’s argument at this point becomes a marvel of deflection and ambiguity. First, having taken note of this interest in a politically engaged citizenry, the Court never directly examines that issue again in the opinion. In fact, the Court could not comfortably focus on this interest of the state and reach the result it did (granting the Amish their exemption) because the Amish in fact do not vote, and they do not engage in or participate in the political life of the country. Since the discussion which follows in the Court’s opinion does not refer specifically to this interest, we can only infer that some of the subsequent passages in the opinion were meant to address the state interest in political participation.

I turn now to those passages. In one sentence the Court says, “the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests.”<sup>59</sup> Later in the opinion, the Court repeats this point when it states the “record strongly indicates that accommodating the religious objections of the Amish by foregoing one, or at most two, additional years of compulsory education will not . . . result in an inability . . . to discharge the duties and responsibilities of citizenship . . . .”<sup>60</sup> In other words, the Court said that the parents should prevail because the state’s interest would not be damaged by exempting the Amish from the compulsory education law. In fact, because the state’s interests were not frustrated by the way the Amish raised their children, the Court ultimately concluded that the Amish should be granted their exemption from having to comply with the state’s demand that they send their children to two additional years of formal schooling.

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<sup>58</sup> *Id.* at 221.

<sup>59</sup> *Id.* at 222.

<sup>60</sup> *Id.* at 234.

But we need to stop and ask why the additional two years of schooling just as the Amish child is reaching maturity would not be important to further the state's interests. It seems that this conclusion makes the most sense if the Court has, *sub silentio*, dropped its original characterization of the state's conception of citizenship and substituted for it a different conception of citizenship; the Court, in other words, seems to have ceased viewing the state's educational interests as producing politically active citizens. And, indeed, there is evidence within the opinion that suggests this is precisely what has happened. First, the Court noted that the Amish informal educational program was designed to prepare the child for life in the Amish community, not in modern society.<sup>61</sup> The Court went on to write glowingly of the Amish community as a "highly successful social unit within our society, even if apart from the conventional 'mainstream.'" <sup>62</sup> Continuing, the Court described the Amish as productive people who reject public welfare and who are "very law-abiding members of society." The Amish, reasoned the Court, exemplify the virtues of Jefferson's "sturdy yeoman," and their "idiosyncratic separateness exemplifies the diversity we profess to admire and encourage."<sup>63</sup> And since the Amish educational program serves these ends, the state cannot complain that its interests are not being served. But of course, the state would have nothing to complain about if the goals of the Amish community coincided with the interest of the state. That is to say, the only way the Amish education program could be said to satisfy the state's conception of citizenship is if the state's conception of citizenship were redefined to be no more than that its citizens be self-sufficient and law-abiding. And this is what I believe has happened in the course of the opinion. The Court has come to view the state's compelling interest as amounting to a fairly minimal conception of citizenship, and given this minimalist conception, granting the

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<sup>61</sup> *Id.* at 222.

<sup>62</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 222 (1972).

Amish their exemption would not frustrate the state's interests. The Court silently changed its definition of the state's compelling interests from one that emphasized educating citizens "to participate effectively and intelligently in our open political system"<sup>64</sup> to one that fostered a citizenship that is law-abiding.

What does this tell us about the Court's conception of the state's compelling educational interests? The case seems to suggest that only those interests that are clearly and undoubtedly related to constitutional stability are going to be counted as "compelling." Few would doubt that obedience to law is an essential characteristic of citizens of the political system if the system is to remain stable. But there is the question of how actively engaged in political life the public must be for the system to be stable.<sup>65</sup> Arguably, the Court backed away from accepting the goal of active participation as a compelling interest.

To conclude this part of my discussion, after *Yoder* the Free Exercise Clause remains available for parents and children to resist state efforts to control private education and to carry out its own program of instruction in its own schools. However, the scope of the free exercise right and the extent of the limitation is not clearly delineated in the *Yoder* decision. As noted, at crucial points in the opinion there are ambiguities and uncertainties. Litigants who want to use the Free Exercise Clause will thus have to come forward with a plausible interpretation of the concepts that have been sufficiently defined and operationalized to be useful in analyzing concrete cases.

### *C. Conclusion*

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<sup>63</sup> *Id.* at 225-26.

<sup>64</sup> *Id.* at 221.

<sup>65</sup> See generally SIDNEY VERBA ET AL., VOICE AND EQUALITY (1995) (exploring who participates, the conditions leading to participation, the consequences of both, and the lack of participation).

The justices of the Supreme Court have only begun to sketch a coherent picture of the education power as it relates to citizenship education. But some things are reasonably clear. It is unlikely that purely religious materials would be permitted to be used in connection with an effort to teach citizenship unless that material were merely the subject of an objective study.<sup>66</sup> We know that the compulsory flag salute is not permissible.<sup>67</sup> But beyond these points, we do not know too much more with any certainty. It is probably safe to say that all the justices would agree that schools have the authority to keep their classrooms free of materials that are pervasively vulgar or inappropriate for the age of the student, even if the materials have some other political, literary, or scientific value.<sup>68</sup> We know that some justices -- not a majority -- would protect a right to hear in the context of the library, but perhaps not in the context of the classroom where inculcation may be permissible. We know other justices are clearer in their support of a government authority to inculcate values needed to sustain democracy, but they have not clarified what exactly this means. Other justices would just as soon not impose limits on the education power, except to bar the most extreme and improbable use of that power. But we also know that the Free Exercise Clause is available to parents to challenge state efforts to control their educational discretion, but the framework for bringing such a challenge has not been fully worked out by the justices, and we do not know how the Court would use those doctrines when it comes to a challenge to the public school curriculum itself.

Thus, there remains considerable work to be done in developing the jurisprudence of citizenship education. This task of fleshing out both the free-speech and free-exercise limitations on the education power is, however, a daunting undertaking that requires taking into account

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<sup>66</sup> "I will use the term "democratic pluralism" for views that endorse these three claims: in a nutshell, that moral pluralism is compatible with agreement on rules of a democratic political game, but not with more substantive agreement." Joshua Cohen, *Pluralism and Proceduralism*, 69 CHI.-KENT. L. REV. 589, 591 (1994).

<sup>67</sup> *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

matters such as the overall purpose of government, the various sources and purposes of the education power, the concept of democracy, a theory of democratic stability and instability, the relationship between religion, liberalism, and democracy, substantive due process doctrines, and the Equal Protection Clause. This is an undertaking worthy of book-length treatment. But perhaps I can make some progress toward the law in this area by looking especially at the Free Exercise Clause and its implications for adopting a Callanesque program of citizenship education. My goal, then, is to examine in more detail the parental free-exercise challenge to a program of citizenship adopted from Callan's book.

## II. CITIZENSHIP EDUCATION OF A DELIBERATIVE DEMOCRAT

### A. *Deliberative Democracy: A Snapshot*

I turn now to an overview of Callan's program of citizenship education.<sup>69</sup> He offers a compelling vision of what citizenship education could be – a vision that many people might find so attractive that they would be tempted to say that anybody who rejected the program was being unreasonable and that coercion may be used to expose them to it. His conception rejects the view that the government must be neutral regarding the promotion of ideals or ways of life.<sup>70</sup> Callan, in fact, accepts the fact that there is a better way of life and that the state may seek to promote it.<sup>71</sup>

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<sup>68</sup> *But see* *Virgil v. School Bd.*, 862 F.2d 1517 (11th Cir. 1989).

<sup>69</sup> CALLAN, *supra* note 6.

<sup>70</sup> “[W]e cannot coherently reject the importance of liberal soulcraft.” *Id.* at 5, 224. Callan thus rejects the following conception of state neutrality: “The central organizing idea in the contemporary characterization of liberalism, by both liberals and their critics, has been the neutrality of the state toward moral ideals, or, to use the more current phrase, conceptions of the good life. The kind of neutrality in question goes beyond a purely procedural conception, such as the impartial and consistent application of legal rules . . . . It is a substantive conception, requiring state neutrality among theories of what is valuable in life. Thus, according to this view, the state must remain neutral not only with respect to religious conceptions and ways of life, as the Establishment and Free Exercise Clauses are often taken to mandate, but also with respect to, and among, secular conceptions.” Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350, 1351 (1991).

<sup>71</sup> Gardbaum, *supra* note 70, at 1353. “The structure of the general argument for political perfectionism (whether of the liberal or nonliberal variety) is as follows: (a) one way of life is better than others; (b) as a result, the state should promote it.” *Id.*

Callan's program grows out of a new conception of democracy termed "deliberative democracy" (also called political liberalism) which has its roots in the recent work of the great American social philosopher, John Rawls.<sup>72</sup> Deliberative democrats such as Callan develop their views to take account of and respond to the reality of a deeply plural society in which different groups live their lives based on principles that are incommensurate with the principles of other groups; such a group may be tempted to seek to have its principles be the principles that form the grounding of society and social cooperation. Deliberative democrats also reject what they call "procedural democracy" or "democratic pluralism", which they associate with the Constitution itself.<sup>73</sup>

Callan and the other deliberative democrats aspire to something more than agreements based on bargaining, on deals arrived at through log-rolling. Joshua Cohen encapsulates the vision in this way:

In a world full of cruelty, depravity, and grief, we ought not to dismiss the virtues of a politics of group bargaining within a framework of rules that win general compliance – "a mere *modus vivendi*" . . . . Still, Liberalism defends the possibility of doing better: of achieving a consensus on political justice under conditions of fundamental moral, religious, and philosophical disagreement.

The key to that possibility is that political values – for example, the value of fair cooperation among citizens on a footing of mutual respect – are extremely important values and can be acknowledged as such by conflicting moral conceptions, by views that disagree with one another about ultimate values and about the best way to live. To be sure, those views will explain the importance of political values in very different terms: for example, as rooted in autonomy, or self-realization, or human happiness properly understood, or the appropriate response to life's challenges, or the value of individuality, or the equality of human beings as God's creatures. These competing explanations of the political

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<sup>72</sup> JOHN RAWLS, *POLITICAL LIBERALISM* (1993). An important statement of deliberative democracy can be found in GUTMANN & THOMPSON, *supra* note 5. The writings of Stephen Macedo draw out the educational implications of deliberative democracy. Macedo, *supra* note 7; Macedo, *supra* note 9.

<sup>73</sup> Thus, deliberative democrats reject what is sometimes called procedural democracy. Jürgen Habermas, *Three Normative Models of Democracy*, in *DEMOCRACY AND DIFFERENCE* 21 (Seyla Benhabib ed., 1996). But they also reject communitarianism. Callan states that "a political theory qualifies as 'communitarian' if it rejects liberal understandings of autonomy and justice on the basis of their supposed inability to accommodate the moral importance of ascribed roles and communal attachments." CALLAN, *supra* note 6, at 229.

values will in turn manifest themselves in conflicting views about individual conduct and personal virtue.

Still, an affirmation of the importance of political values is not the unique property of a particular moral outlook. For this reason, the different moral views that flourish in a society governed by a conception of justice rooted in the ideal of fair cooperation on a footing of mutual respect may each have good and sufficient reason to support that conception as the correct account of justice and not simply as a suitable accommodation to conditions of disagreement. Citizens who endorse different moral axioms may still arrive at the same theorems about political justice, and some people may simply endorse a view of justice without resting that endorsement on a more comprehensive moral theory.

In such a society, we have an "overlapping consensus" on a "political conception of justice." Citizens achieve social unity because they all accept that conception and so agree to conduct the fundamentals of political argument on the shared ground that the conception makes available and to set aside for political purposes their deep, ultimate, and persistent disagreements about what we are like, what the world is like, and how best to face its demands.<sup>74</sup>

Deliberative democrats have thus set for themselves a difficult goal when they seek to ground a just, peaceful society on the ideal of free and equal citizenship.<sup>75</sup> People are expected to -- and indeed have the right to -- hold their comprehensive views, their religious beliefs, or their belief in a secular philosophy such as utilitarianism.<sup>76</sup> Yet these "comprehensive views" may not form the basis of civil society.<sup>77</sup> When people enter the public forum they must

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<sup>74</sup> Joshua Cohen, *A More Democratic Liberalism* 92 MICH. L. REV. 1503, 1505-06 (1994) (reviewing JOHN RAWLS, *POLITICAL LIBERALISM* (1993)).

<sup>75</sup> CALLAN, *supra* note 6, at 7.

<sup>76</sup> Comprehensive doctrines have several features. They affirm "some general and comprehensive or partially comprehensive moral doctrine . . . . By virtue of their generality, moral doctrines that ground the many versions of comprehensive liberalism must be at least 'partially comprehensive' in identifying and connecting virtues and principles that have some application across our lives, beyond the sphere of politics. A moral doctrine becomes fully comprehensive if it claims to organize all relevant values into a systematic whole." *Id.* at 13-14.

<sup>77</sup> Callan notes that Rawls argues that comprehensive liberalism is "inherently repugnant to pluralism." Two major points of Callan's book are that, (1) Rawls's own doctrine is "really a disguised instance of comprehensive liberalism" because it unavoidably embraces a strong conception of autonomy (*see supra* note 7); and that, even so, (2) Rawls's and his own conception of political liberalism is in fact compatible with pluralism. *Id.* at 13, 16, 40. Thus Callan's own position is that a certain form of comprehensive liberalism should provide the basis for a liberal society. "Comprehensive liberalism is also inherently diverse in ways that make some varieties more responsive to pluralism than others, and hence less clearly vulnerable to the charge that Rawls thinks damns the category as a whole." *Id.* at 18.

Other deliberative democrats acknowledge that embracing their views has implications beyond the public forum. "Even suitably circumscribed political liberalism is not really all that circumscribed: it will in various ways promote a way of life as a whole." However, "political liberalism holds out the hope of politics as a shared moral

“bracket” or set aside their comprehensive views even if they are religious views to which their God commands them to adhere.<sup>78</sup> Thus, an important question arises:

[W]ould the comprehensive views that flourish within a society regulated by a conception of justice that aims to reconcile values of liberty and equality uphold that conception? Would they endorse a rationale for the conception that draws on certain abstract ideas of fair cooperation and of persons as free and equal? And would they accept the requirement that political justification proceed on the ground made available by that conception and the abstract ideas associated with it?<sup>79</sup>

Deliberative democrats are convinced that the answer to these questions can be “yes.”<sup>80</sup> If people come together prepared to engage with others on the basis of respect, reciprocity, and

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order without depending on unrealistic expectations of agreement on the most difficult questions of life.” Macedo, *supra* note 9, at 477, 492-93, 495.

<sup>78</sup> Callan comments that “Rawls vacillates between saying that public reason simply substitutes the end of reasonable agreement for moral truth in politics saying that we rightly accept the ideal of reasonable agreement as the politically fundamental part of the moral truth.” CALLAN, *supra* note 6, at 215. Callan asks, “Why should we suppose that seeking reasonable agreement matters unless we thought it was true that reasonableness is the virtue that rightly shapes the way we live together under pluralism? Neutrality on that point cannot be squared with commitment to the reasonable as the authoritative norm of political morality. That being so, the end of reasonable agreement is not an ideal of interpersonal solidarity that trumps truth, . . . . The interest in moral truth is as important to public reason as it is to Millian ethical confrontation. The difference is that we modestly seek a circumscribed reasoned agreement on how to live with each other because we know that trying to find and enforce a more ambitious consensus exceeds the limits of our ability to reason together towards the truth and invites oppression.” *Id.* at 215.

As a liberal, Callan rejects the view of political philosophers such as Leo Strauss, who argue that religion is necessary for the social order. STEPHEN HOLMES, *THE ANATOMY OF ANTILIBERALISM*, 61-87 (1993). Callan however does not dispute the right of individuals to embrace religion in their private lives. CALLAN, *supra* note 6, at 15.

Even if one does not believe that religion is a necessary foundation for the social order, one might still believe that religious arguments may enter the public forum. There is a growing body of literature on this topic. *See, e.g.*, Steven Shiffrin, *Propter Honoris Respectum: Religion and Democracy*, 74 NOTRE DAME L. REV. 1631 (1999); Sanford Levinson, *Abstinence and Exclusion: What Does Liberalism Demand of the Religiously Oriented (Would Be) Judge?* in RELIGION AND CONTEMPORARY LIBERALISM 76 (P.J. Weithman ed., 1997); MICHAEL J. PERRY, RELIGION IN POLITICS (1997); MICHAEL J. PERRY, LOVE AND POWER (1991); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988). For a view supporting the position of Callan, see Robert Audi, *The Separation of Church and State and the Obligations of Citizens*, 18 PHIL. AND PUB. AFFAIRS 259 (1989).

<sup>79</sup> Cohen, *supra* note 66, at 599.

<sup>80</sup> In fact, Callan believes that the absence of political culture means that “the institutions of liberal democracy seem poised for collapse because the shared public morality that once enlivened them has vanished and therefore, they survive only as a pointless system of taboo or a modus vivendi among antagonistic groups who will support it only so long as support serves their interests.” CALLAN *supra* note 6, at 2. “A necessary feature of free societies is the extension of a particular set of rights to all citizens, including rights to liberty, association, and political participation. But so far as citizens use their rights to protect or advance the different ways of life they cherish, any such society is also pluralistic in ways that may pose a threat to liberal democracy.” *Id.* at 9.

reasonableness, the vision can be realized.<sup>81</sup> That is to say, deliberative democracy focuses considerable attention on the way in which dialogue in the public square should be approached, the rules or principles the plural participants should follow as they deliberate:<sup>82</sup> “[w]hen citizens make moral claims in a deliberative democracy, they appeal to reasons or principles that can be shared by fellow citizens who are similarly motivated. The moral reasoning is in this way mutually acceptable.”<sup>83</sup> Stated differently, “[w]hen citizens deliberate, they seek agreement on substantive moral principles that can be justified on the basis of mutually acceptable reasons.”<sup>84</sup> And “any claim fails to respect reciprocity if it imposes a requirement on other citizens to adopt one’s sectarian way of life as a condition of gaining access to the moral understanding that is essential to judging the validity of one’s moral claims.”<sup>85</sup> And when the deliberation involves appeals to empirical claims, “reciprocity requires that they be consistent with relatively reliable methods of inquiry.”<sup>86</sup> When people rely on what Rawls calls “public reason,” it is possible “to secure a consensus on political questions that is acceptable to all.”<sup>87</sup>

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<sup>81</sup> Callan acknowledges a line of thought that suggests that the dialogue will “often not dissipate in shared endorsement of a more balanced and sober truth, even when the virtues that conduce to successful dialogue are securely in place; instead the dialogue may take us nowhere because there is no more balanced and sober truth to be had.” *Id.* at 214.

<sup>82</sup> Callan writes, “A framework for political deliberation is devised that supports the established verities of liberal politics and also enables the creation of reasoned agreement on new and contentious problems. That framework is given by the theory of public reason.” *Id.* at 15. The theory of public reason is not supposed to express any single comprehensive doctrine. *Id.* at 16. But as noted, Callan argues that the theory of public reason is in fact a disguised form of comprehensive liberalism. *See supra* note 76.

<sup>83</sup> GUTMANN & THOMPSON, *supra* note 5, at 55. For an argument rejecting these central requirements of deliberative democracy see Shiffrin, *supra* note 78.

<sup>84</sup> GUTMANN & THOMPSON, *supra* note 5, at 55. The dialogue that Rawls envisions is intended to lead to an overlapping consensus with regard to a political conception of justice. RAWLS, *supra* note 72, at 11-15. Callan embraces Rawls, yet he also speaks of the moral dialogue as moving towards “moral truth.” He interprets Rawls as saying that the “end of reasonable agreement is not an ideal of interpersonal solidarity that trumps truth . . . .” Though interest in moral truth is central, “we modestly seek a circumscribed reasoned agreement on how to live with each other because we know that trying to find and enforce a more ambitious consensus exceeds the limits of our ability to reason together towards the truth and invites oppression.” CALLAN, *supra* note 6, at 215.

<sup>85</sup> GUTMANN & THOMPSON, *supra* note 5, at 57. Callan observes that “domination is a denial of reciprocity.” CALLAN, *supra* note 6, at 48.

<sup>86</sup> GUTMANN & THOMPSON, *supra* note 5, at 56.

<sup>87</sup> CALLAN, *supra* note 6, at 16.

Thus, the principle of respect requires that the terms of cooperation be terms that are accessible and that reasonable citizens can accept on the basis of their reason.<sup>88</sup> The state must not exercise its power in terms of cooperation that the citizens cannot reasonably endorse as free and equal deliberators, because to do so is to act with disrespect. Callan describes Rawls as follows:

The idea of the reasonable is as fundamental to Rawls's conception of the person as the idea of the rational. The development of the sense of justice that occurs under the auspices of the reasonable is a matter of growing competence and commitment to something we can only do together – the reciprocal determination of terms of cooperation that we could agree to be justified. To be just in Rawls's sense is necessarily to care about others as partners in an enterprise of making justice that would be unintelligible without their reciprocal engagement.<sup>89</sup>

But the aim of deliberative democrats is to establish a principled system of cooperation that is stable and this requires an educational program.<sup>90</sup> As Callan puts it, “creating virtuous citizens is as necessary an undertaking in a liberal democracy as it is under any other constitution.”<sup>91</sup> “If the virtues of liberal politics can be confidently expected to flourish as a constitutional consensus develops over time, the deliberate pursuit of controversial educational aims in schools or elsewhere is simply unnecessary.”<sup>92</sup> However, once we acknowledge “the power of countervailing cultural and economic pressures in any given society, we are also compelled to see its public institutions as sites of acute ethico-political conflict in which the

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<sup>88</sup> Shiffrin vigorously attacks this feature of deliberative democracy. Shiffrin, *supra* note 78, at 1634-45.

<sup>89</sup> CALLAN, *supra* note 6, at 76.

<sup>90</sup> *Id.* at 112. “What we sometimes forget is that the vitality of the political order depends on education that is dedicated to specific ideals of character.” *Id.* at 3. Callan goes on to reject the claim that a concern with virtue does not mix with liberalism. “If public deliberation is sometimes undermined by a stifling homogeneity in soulcraft, it is also defeated by the failure to sustain the common dispositions that liberal dialogue presupposes.” *Id.* at 7.

<sup>91</sup> *Id.* at 3. Callan makes a point in passing that raises deep issues which he does not explore in his book. He notes that “[V]irtue is no substitute for judicious institutional design. But neither is institutional design any substitute for virtue.” *Id.* at 7. Callan also notes that “Rawls's project is defeated if its aim is utopian. The aim would be utopian for any society that lacked ‘sufficient political, social or psychological forces either to bring about an overlapping consensus (when one does not exist), or to render one stable (should one exist).’ ” *Id.* at 44-45.

<sup>92</sup> *Id.* at 50.

triumph of liberal democratic values is by no means assured.”<sup>93</sup> We cannot count on luck or chance for the emergence of a virtuous citizenry. We need a “common education” which prescribes “a range of educational outcomes – virtues, abilities, different kinds of knowledge – as desirable for all members of the society to which the conception applied.”<sup>94</sup> And in urging that government use its coercive power to advance this common education, Callan rejects the proposition that “all assimilation is the insidious cousin of totalitarianism.”<sup>95</sup> In fact, he asserts that “there can be no oppression in the moulding of a character that would refuse to resort to domination or manipulation in dealing with fellow citizens and would resist these measures when others use them.”<sup>96</sup>

### *B. The Goals of Callan’s Citizenship Education Program*

Callan conceives of his program of education as a mandatory or inalienable right – that is, children have a moral right to this program as well as a duty to subject themselves to it.<sup>97</sup> This is a right neither they nor their parents may choose to waive or avoid. Thus, in Callan’s view, government would not merely be permitted to expose children to his conception of political education, government would be morally obligated to provide this program and obligated to require that students enroll in it. Yet he is aware of the dilemma that a liberal democracy faces:

If the role of the state in education is to keep faith with its Constitutive morality, a path must be found between the horns of a dilemma. The need to perpetuate

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<sup>93</sup> *Id.* Callan acknowledges that the schools he proposes will themselves be sites of conflict. Callan’s educational project thus appears to assume that the current society needs to be reformed. His proposals are thus made in order to realize his vision of a just and stable democracy. But he also seems to assume that the just and stable society has been realized and based on this premise he can be confident that his proposals for how the common schools should operate will in fact be faithfully executed.

<sup>94</sup> CALLAN, *supra* note 6, at 163. Callan distinguishes common education from common schooling. “A school is common if it welcomes students of an appropriate age, without regard to differentiating factors of a particular kind.” *Id.* Thus in a common school there may be either or both common education and non-common (separate) education. And a selective private school may offer either or both common education and/or non-common (separate) education.

<sup>95</sup> *Id.* at 173.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 157, 166, 181-82. “Children have a right to an education whose content is given by their prospective interest in sovereignty. Most obviously, that means they need to be equipped with the capabilities to live more than the one way of life their parents would prescribe.” *Id.* at 189.

“fidelity to liberal democratic institutions and values from one generation to another suggests that there are some inescapable shared educational aims, even if the pursuit of these conflicts with the convictions of some citizens. Yet if repression is to be avoided, the state must give parents substantial latitude to instill in their children whatever religious faith or conception of the good they espouse. Similarly, the state must permit communities of like-minded citizens to create educational institutions that reflect their distinctive way of life, even if that entails some alienation from the political culture of the larger society. How can we honor both the commitment to a shared political morality and the accommodation of pluralism that is commonly in tension with it?”<sup>98</sup>

What is this program of common education?<sup>99</sup> It is far more than what Callan calls the “minimalist conception” of common education. A “minimalist conception” is one that focuses only on “the inculcation of respect for law, and, only a little less uncontroversially, that all other shared aims derive from a concern with enhancing economic productivity and competitiveness.”<sup>100</sup> Callan’s goals are far more ambitious and, as noted earlier, are designed to take into account that we live in a plural society and are expected to be the kind of citizen who will achieve cooperation on the basis of reciprocity, reason and respect. The general objective is to foster in children two moral powers – a capacity for a sense of justice and a conception of the good and, in addition, the powers of reason.<sup>101</sup>

It is the capacity for a sense of justice which is most central to Callan’s educational program. Having a sense of justice means, first, a commitment to moral reciprocity and, second, a willingness to recognize the burdens of judgment.<sup>102</sup>

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<sup>98</sup> *Id.* at 9-10. Callan notes that “any morally defensible approach to education under pluralism must acknowledge both the necessity of some common education and the acceptability of at least certain kinds of separate education for those would choose them . . . . The acceptability of at least some kinds of separate education follows from the need to respect the many different convictions and ways of life that flourish under pluralism and the divergent educational aspirations that flow from these.” *Id.* at 166.

<sup>99</sup> See *supra* note 94.

<sup>100</sup> CALLAN, *supra* note 6, at 169.

<sup>101</sup> *Id.* at 24.

<sup>102</sup> *Id.* at 24-25.

Reciprocity means that, “[r]easonable persons are predisposed sincerely to propose principles intended to fix the rules of fair cooperation with others; they are ready to discuss proposals made with the same intention by others; and they are prepared to comply with such proposals should others be willing to do likewise.”<sup>103</sup>

Reciprocity is a virtue designed to help us find and implement mutually acceptable terms of cooperation in circumstances where we initially disagree about what fairness requires. In exhibiting reciprocity, I begin by putting before you what I take to be fair. But I must also be ready seriously to discuss the opposing proposals that you make in the hope of moving, through the discipline of dialogue, towards a common perspective that each of us could adhere to in good conscience. Your viewpoint is as important as mine to the fulfillment of that hope, and only through emphatic identification with your viewpoint can I appreciate what reason might commend in what you say. For if I am to weigh your claims as a matter of fairness rather than a rhetorically camouflaged expression of sheer selfishness, I must provisionally suspend the thought that you are simply wrong and enter imaginatively into the moral perspective you occupy. But since you and I are reasoning about fairness, I cannot be uncritical about your view (or my own) and simply split the difference between us as if we were just haggling about how best to satisfy divergent preferences. Emphatic identification must be combined with a willingness to bring shared resources of reason to bear on the conflict at hand by assessing, for example, the comparative strength of the assumptions behind our prereflective judgments or by exploring together the plausibility of the implications that flow from the rival moral principles we invoke in defense of our opposing views.<sup>104</sup>

In addition to being taught reasonableness, children need to learn about and to accept the “burdens of judgment.”<sup>105</sup> When students learn about the burdens of judgment, they learn an explanation for the fact that society is characterized by -- and will continue to be characterized by -- comprehensive religious, philosophical, and moral doctrines that are reasonable in the sense that reasonable people affirm them.<sup>106</sup> The burdens of judgment explain the emergence of these

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<sup>103</sup> *Id.* at 25.

<sup>104</sup> *Id.* at 26.

<sup>105</sup> CALLAN, *supra* note 6, at 25. Callan says, “The very point of reciprocity – reasonable agreement on fair terms of cooperation – cannot be achieved without acceptance of some of the burdens of judgment, even in the idealized circumstances of an ethnically and religiously monistic society.” *Id.* at 27.

<sup>106</sup> RAWLS, *supra* note 72, at 36.

reasonable comprehensive views. As Rawls puts it, “[t]he idea of reasonable disagreement involves an account of the sources, or causes, of disagreement between reasonable persons so defined. These sources I refer to as the burdens of judgment.”<sup>107</sup> Thus in learning about the burdens of judgment, children will come to have a respect for reasonable differences.<sup>108</sup> Even the heretic will come to be seen as not living beyond the moral pale.<sup>109</sup> They learn that not all people who disagree with them are unreasonable. Children will learn to avoid preemptory contempt for views of fellow citizens.<sup>110</sup> In this connection they need to learn to engage in “interpretative charity” – “a determination to confront one’s opponents’ arguments in their strongest rather their weakest forms and to reformulate those arguments, where necessary, to

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<sup>107</sup> *Id.* at 55. Rawls provides the following list of causes of reasonable disagreement: “(a) The evidence – empirical and scientific – bearing on the case is conflicting and complex, and thus hard to assess and evaluate; (b) even where we agree fully about the kinds of considerations that are relevant, we may disagree about their weight, and so arrive at different judgments; (c) to some extent all our concepts, and not only moral and political concepts, are vague and subject to hard cases; and this indeterminacy means that we must rely on judgment and interpretation (and on judgments about interpretations) within some range (not sharply specifiable) where reasonable persons may differ; (d) to some extent (how great we cannot tell) the way we assess evidence and weigh moral and political values is shaped by our total experience, our whole course of life up to now; and our total experiences must always differ. Thus, in a modern society with its numerous offices and positions, its various divisions of labor, its many social groups and their ethnic variety, citizens’ total experiences are disparate enough for their judgments to diverge, at least to some degree, on many if not most cases of any significant complexity; (e) often there are different kinds of normative considerations of different force on both sides of an issue and it is difficult to make an overall assessment; (f) finally, . . . any system of social institutions is limited in the values it can admit so that some selections must be made from the full range of moral and political values that might be realized. This is because any system of institutions has, as it were, a limited social space. In being forced to select among cherished values, or when we hold to several and must restrict each in view of the requirements of the others, we face great difficulties in setting priorities and making adjustments. Many hard decisions may seem to have no clear answer.” *Id.* at 56-57.

<sup>108</sup> “Suppose I am deeply convinced of the truth of atheism and think that human life is wasted by the illusion of religious belief. You believe with a passion that matches my own that life can have no meaning without belief in God. We want to engage in reciprocity-governed dialogue about the role of the state in regulating our children’s education. But we get nowhere so long as either of us insists that the religious or irreligious beliefs of the other deserve no respect in the making of policy. The idea of the burdens of judgment is necessary to Rawls’s political liberalism because it alone supports reasonable accommodation among contending views both in selecting which principles of justice best satisfy the ambitions of political liberalism and in deliberation about how such principles are to be applied once they are selected.” CALLAN, *supra* note 6, at 32.

<sup>109</sup> As a society becomes more pluralistic, “The cultural development of the society now requires a fuller recognition of the burdens of judgment if reciprocity is to operate as it should. The reach of that virtue must now be enlarged beyond the limits of reasonable orthodoxy to include reasonable heresy as well. Failure to extend reciprocity in this way will thwart the social realization of its distinctive end because ethically heretical citizens, if they continue to be regarded by most people as living beyond the moral pale, will be denied the terms of social cooperation that a reasonable understanding of their claims would warrant.” *Id.* at 27-28.

<sup>110</sup> *Id.* at 217.

bring out their full latent force.”<sup>111</sup> They also need to be “capable of distinguishing, with a fair degree of reliability, those sources of conflict in their moral practices that are due to the burdens of judgment from those that are not.”<sup>112</sup> “Acceptance of the burdens [of judgment] is rather a necessary manifestation of reciprocity.”<sup>113</sup> Callan sees the burdens of judgment as a crucial element in making the Rawls political conception of justice work in a plural society: “[r]espect for the limits of the reasonable in our dealings with fellow citizens must be regarded not only as an authentic virtue; it must be prized as the paramount virtue . . . because to relax in our respect is to open the door to contempt towards those who reasonably disagree with us.”<sup>114</sup>

But if children are going to have a capacity for reasonableness and to work with and accept the burdens of judgment, they also need to have a conception of the good and to pursue it rationally “otherwise I cannot understand what is at stake for the good of others when we try to settle the terms of cooperation.”<sup>115</sup> There is thus an interdependence between the reasonable and the rational and both need to be goals of citizenship education.<sup>116</sup> Callan however envisions a division of labor here with the family being the primary site for teaching the child the conception

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

<sup>112</sup> *Id.* at 27. Callan seems to be saying that if we are not capable of recognizing differences that arise which are not rooted in the burdens of judgment we will end up accepting positions that are in fact unreasonable and treating them with a respect that they are not due. “The fact that much extant pluralism is to be explained in ways that divest it of any title to respect is often dangerously overlooked in discourse on moral education under pluralism.” *Id.* at 216.

<sup>113</sup> CALLAN, *supra* note 6, at 28. Callan offers another argument in support of educating children in the burdens of judgment: In the Rawlsian society “basic institutions of society are effectively regulated by a conception of justice that citizens accept and know their fellow citizens to accept.” *Id.* at 32. These liberal principles of justice require me to forgo or at least moderate the appeal to my own religious convictions.” *Id.* “Unless I accept the burdens of judgment and apply them to my own comprehensive beliefs, I will find that forgoing my comprehensive beliefs “will seem an arbitrary restriction on appeals to the truth on matters of the highest moral significance. I will be alienated from the polity and my view of the polity will be that it is illegitimate.” *Id.* at 32-33.

<sup>114</sup> *Id.* at 37.

<sup>115</sup> *Id.* at 24, 180. Callan thus seeks here to reconcile autonomy and community. By making education in a particular culture a prerequisite for becoming autonomous he seeks to reconcile autonomy and the institutions such as the family which perpetuate cultures. But there is a paradox here – he would educate the child in a particular way of life in order to assure the child has the autonomy to reject that way of life. For a discussion of Callan and autonomy see *infra* notes 129-55 and accompanying text.

<sup>116</sup> CALLAN, *supra* note 6, at 81.

of the good and its rational pursuit, and only after the child has learned a conception of the good does the state take over educating the child in a common education in a common school.<sup>117</sup>

Although reciprocity, reasonableness, rationality, and good are the principal pillars of Callan's conception of citizenship education, his conception entails a number of additional supportive and corollary goals. These goals are the promotion of the motivation to be just, a sense of liberal patriotism, the fostering of a set of intellectual virtues, and the promotion and protection of autonomy.

Callan's conception of motivation is multifaceted. He conceives of the motivation to be just as an aspect of virtue or character. Citizens should be "critically committed" to justice, not merely habitually behaving in ways we associate with reasonableness.<sup>118</sup> Citizens thus should be committed in the sense that they should want to be just. Valuing justice is a commitment we should have and not merely do have. It is a commitment that we understand will make our lives truly good by honoring some important source of value outside our own lives.<sup>119</sup>

But Callan wants his citizens to have the motivation to be rooted in affective attachments to others and the polity. First, cognitive commitment to the principle of justice needs to be accompanied by natural attachments to particular persons and groups: "[t]he ties of friendship and trust intensify the moral feelings that attend the virtue of justice, and enlarge the obligations we owe to others."<sup>120</sup> In addition, citizens need to be attached to their polity: "[t]he feasibility of eliciting a justice that is sufficiently wide in scope for political purposes seems remote unless that process proceeds via emotional identification with the particular political community in

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<sup>117</sup> Arguably by following this two-step process the danger that Stephen Arons points to may be reduced: "If the government were able to use schooling to regulate the development of ideas and opinions by controlling the transmission of culture and the socialization of children, freedom of expression would become a meaningless right. . . ." STEPHEN ARONS, *COMPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING* 206 (1983).

<sup>118</sup> CALLAN, *supra* note 6, at 197-98.

<sup>119</sup> *Id.* at 198.

<sup>120</sup> *Id.* at 93.

which justice is to be enacted.”<sup>121</sup> What is crucial is “. . . the general point that so long as we endorse justice as reasonableness, any credible account of its development and stability will take the formation of particularistic political attachments as critically important.”<sup>122</sup> Thus, Callan supports promoting among children what he calls “liberal patriotism”:

The problem of stability that pluralism creates for the well-ordered society has to do with the fragility of any reconciliation between the good of citizens and the political virtue they must evince if the justice of the basic structure is to endure. The ideal of a liberal patriotism suggests a way in which the reconciliation might hold fast against the division and disharmony that pluralism, even at its reasonable best, will tend to arouse. So far as citizens come to think of justice as integral to a particular political community they care about, in which their own fulfillment and that of their fellow citizens are entwined in a common fate, then the sacrifices and compromises that justice requires cannot be sheer loss in the pursuit of one’s own good. They cannot be sheer loss because for liberal patriots the flourishing of a just community has become a central constituent of their own good. The idea of liberal patriotism is thus a way of integrating the twin aspects of reason that inhere in Rawls’s political conception of the person: the rational pursuit of individual good and the reasonable pursuit of justice. And in the absence of that integration, the centrifugal pressures of pluralism itself should make us worry about the durability of any overlapping consensus on a conception of justice.<sup>123</sup>

In addition to being liberal patriots, citizens should be critical thinkers. If liberal democracy is to survive from one generation to another “civic virtues informed by critical reason must be widely and deeply diffused among the citizenry.”<sup>124</sup> Citizens need to be able to engage in serious and independent ethical criticism.<sup>125</sup> Citizens must be able to engage in “ ‘ethical

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<sup>121</sup> *Id.* at 77. Callan does not embrace what he calls the “integrative strategy.” This strategy seeks to pre-empt or mitigate conflicting conditions that create the need for justice in the first place. It is a strategy Callan associates with communitarians and philosophers that espouse the virtue of caring. *Id.* at 70-87.

<sup>122</sup> *Id.* at 94-95. A sense of trust is crucial in a plural society: “If trust is weak, then we will be inclined to interpret the judgments of those who disagree with us, rightly or wrongly, as instances of unreasonable pluralism, and the compromise and moderation appropriate to justice will likely be blocked.” *Id.* at 95.

<sup>123</sup> CALLAN, *supra* note 6, at 96-97. Callan adds, “The reasons that properly motivate us as moral agents are not necessarily confined to the ones that apply at the most basic level of moral justification. . . . That being so, it becomes rational to nourish a sense of solidarity among those who share that common status so far as solidarity makes it more likely that the relevant rights and duties will be honored.” *Id.* at 97-98.

<sup>124</sup> *Id.* at 112, 115.

<sup>125</sup> *Id.* at 5.

confrontation’ – the conflict of different and earnestly held moral views in circumstances where no one has the right to silence dissent.”<sup>126</sup> But if “ethical conciliation” is to emerge, citizens need certain capacities and skills. Thus, students should learn to reject the notion that “every enduring source of moral difference is something we should agree to disagree about. The dialogical task is about learning to think wisely about the difference between reasonable and unreasonable pluralism, and so far as unreasonable pluralism is part of our lives, there is much we cannot agree to disagree about.”<sup>127</sup> Hence students need to be cultivated in the “intellectual virtues that reasonableness entails and developing a discerning eye for the corresponding vices of unreason that threaten to contaminate public reason.”<sup>128</sup>

Closely allied to the notion of citizens having certain critical thinking capacities is the notion of autonomy, which plays three different roles in Callan’s theory.<sup>129</sup> First, the child has a “prospective interest in personal autonomy” as an adult, and this right to prospective sovereignty operates as a side-constraint on parental efforts to educate the child.<sup>130</sup> Callan argues that some degree of autonomy is necessary for a good life.<sup>131</sup> Scattered through the book are several

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<sup>126</sup> *Id.* at 209.

<sup>127</sup> *Id.* at 215.

<sup>128</sup> CALLAN, *supra* note 6, at 215. “These vices are dispositions that entail some culpable deficiency of ability or motivation in the exercise of reason, like a feeble commitment to evidence gathering, a weak propensity to alter beliefs in the light of evident inconsistencies or decisive counter evidence, a reluctance to respond to criticism with relevant replies, and the like. A further source of moral pluralism that discredits what it explains is the desire to dominate. By ‘domination’ I mean the abuse of some inequality of power or influence to advance purportedly justified moral views that in fact merely serve individual or factional interests.” *Id.* at 215-16.

<sup>129</sup> Callan rejects the attacks of communitarians on the value of autonomy. Communitarians, he argues, assert that autonomy is inconsistent with well-being “because of the change that necessarily takes place in people when they come to think of received cultural ties and responsibilities as objects of choice.” *Id.* at 53. Callan argues that the communitarian attack on liberalism is premised on wrongful conceptualization of the concept of autonomy to which liberals adhere. Liberalism “does not require that we detach ourselves from all our ends. The requirement is only that we be capable of asking about the value of any particular end with which we currently identify and be able to give thoughtful answers to what we ask. . . . Liberal theory invites us to conceive the self as revocably encumbered in the sense that we can reject ends currently constitutive of identify should we come to see them as worthless.” *Id.* at 54.

<sup>130</sup> *Id.* at 147.

<sup>131</sup> The term “good” carries a double meaning to Callan: It means good in the sense of “well-being” and good in the sense of being moral or ethically responsible. *Id.* at 68. It should also be noted that Callan speaks of people having

different arguments in support of this claim. First, autonomy is needed for “well-being” because “[e]ven if becoming a virtuoso of self-rule is far from necessary for a good life, one might rightly think that something substantially above a primitive level of agency is a fundamental human interest.”<sup>132</sup> Next, Callan also seems to argue that being autonomous is a moral duty. If we are to live responsibly, we must engage in “episodic reflection” on even our deep commitments “because just because we have been taught to cherish something does not necessarily make it worthy of choice.”<sup>133</sup> Also, autonomy is necessary for living a life of the right kind of integrity: “[a] life of integrity requires an inner consistency or unity *only* to whatever extent standing for one’s best judgment does.”<sup>134</sup> In addition, “[g]iven the connection between integrity and responsible choice on the one hand and autonomy on the other, a life that spurns autonomy altogether and is yet good seems scarcely imaginable.”<sup>135</sup> Thus Callan’s theory embraces what I call a conception of “personal autonomy.”

Second, the promotion of autonomy is a central goal of Callan’s program of citizenship education. Let’s call this “political autonomy.” (As we shall see, political autonomy is necessary to establish a just system.) But it appears – and this is not wholly clear from the text – that the goal here is to develop a degree of autonomy that is higher than that needed for merely living a good life. That is to say, although personal autonomy may not include the ability and inclination to subject received ethical and other ideas to critical scrutiny, as well as “the

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a conception of “the good.” To live a good life means, thus, in part also having a conception of the good which one rationally pursues. *See supra* notes 115-17 and accompanying text.

<sup>132</sup> CALLAN, *supra* note 6, at 152. That degree of autonomy which is necessary for a good life is a condition beyond “ethical servility” and the importance of overcoming ethical servility supports a right to an education in the great sphere. *See infra* notes 161-68 and accompanying text.

<sup>133</sup> *Id.* 58, 59. Callan reaches this conclusion after a lengthy critical discussion of the criticisms Michael Sandel made of the conception of the self which underlies Rawls’ theory and Sandel’s attack on the value of autonomy, and after discussing the theory of autonomy of Meir Dan-Cohen. *Id.* at 52-59.

<sup>134</sup> *Id.* at 65. Callan reaches this point based on the writing of Cheshire Calhoun who “proposes that standing for one’s own best judgement about how to live rather than integration of the self, is the core of integrity.” *Id.*

<sup>135</sup> *Id.* at 68.

motivational and affective propensities that guide the exercise of the ability in securing a self-directed life,” these are most certainly components of political autonomy.<sup>136</sup> Third, autonomy in this broad sense is not just a goal but also an incidental byproduct -- albeit a desirable one -- of teaching students to be reasonable and to shoulder the burdens of judgment. Finally, it should be noted that Callan seems to take the position that people who have learned what I have called “political autonomy” will find that their “personal autonomy” will also have been expanded.<sup>137</sup> The upshot is a person who is strongly autonomous in both public and private life.<sup>138</sup> Yet Callan insists that this “Rawlsian doctrine of autonomy is certainly less expansive than its major precursors within the liberal tradition.”<sup>139</sup>

Callan equates personal autonomy with “reasoned self-rule.”<sup>140</sup> His more elaborate definition holds that:

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<sup>136</sup> *Id.* at 40, 227.

<sup>137</sup> Gerald Dworkin identifies three areas in which people might be autonomous: moral, political, and social. He notes that in all three “we find there is a notion of self which is to be respected, left unmanipulated, and which is, in certain ways, independent and self-determining.” GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 11-12 (1988).

<sup>138</sup> “Acceptance of the burdens of judgment ramifies widely across our thought and conduct outside the public sphere, and in so doing undermines Rawls’s sharp distinction in scope between comprehensive and political liberalism.” CALLAN, *supra* note 6, at 41.

<sup>139</sup> *Id.* Callan’s conception of autonomy, he is careful to note, is markedly different from John Stuart Mill’s: “Millian individuality entails the overall superiority of lives that exhibit eccentricity, dissent, and innovation over others; and to that extent, a liberalism based on individuality becomes a more expansive doctrine than liberalisms which take their bearings from a general ideal of autonomy that is neutral on the choice between individualistic and more conventional ways of life.” *Id.* at 18-19. Thus Callan’s educational program is markedly different from “the devotee of J.S. Mill who hopes to rear a shining example of iconoclastic individuality. . . .” *Id.* at 143.

<sup>140</sup> *Id.* at 11. Note that the quoted phrase has two central components “reason” and “self-rule.”

I am autonomous to the degree that I have developed powers of practical reason, a disposition to value those powers and use them in giving shape and direction to my own life, and a corresponding resistance to impulses or social pressures that might subvert wise self-direction.<sup>141</sup>

To be autonomous also means that we are “capable of asking about the value of any particular end which we currently identify and be able to give a thoughtful answer to what we ask.”<sup>142</sup> In addition to having these capacities, the autonomous person is motivated to live a self-directed life.<sup>143</sup>

Callan’s idea is that “human beings have a right to order the diverse possible constituents of the good life in their own way, to choose a life in which [a stronger degree of] autonomy is pursued at the expense, say, of secure religious conviction or to reverse those priorities.”<sup>144</sup>

Children have a prospective interest in personal autonomy which adults are obligated to respect; adults who seek to educate in a way that denies the child autonomy deny “the moral equality of the child’s prospective interests and the parent’s own realized interest in personal sovereignty.”<sup>145</sup> Yet Callan opens the door to the denial of autonomy only up to a point. The point is crossed if the goal is to make the child “ethically servile.”<sup>146</sup>

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<sup>141</sup> *Id.* at 148. According to this definition students would also have the capacity and motivational disposition ultimately to rethink the Rawls and Callan conception of liberalism and to reject it. Of course, if they were to do this, they would then be “unreasonable.” There is, thus, a tension within Callan’s theory between his insistence on the correctness of his view and the possibility that students taught to be autonomous will reject his view. Callan’s students are thus educated to accept his political virtues while remaining free to modify or even reject those virtues. He seeks both to constrain students from rejecting his virtues while simultaneously protecting their autonomy to do that very thing.

It is also interesting to note that Callan involves the state in promoting autonomy in non-neutral ways. Callan embraces the view that his preferred way of life may be coercively promoted by the state.

<sup>142</sup> *Id.* at 54.

<sup>143</sup> CALLAN, *supra* note 6, at 227.

<sup>144</sup> *Id.* 156. Anything less than this is ethical servility. *See infra* note 146.

<sup>145</sup> CALLAN, *supra* note 6, at 147. Parents who seek to deny the child’s interest in prospective sovereignty “cannot reconcile their demand with the fundamental moral equality of persons in the family. If the child’s prospective interests in personal sovereignty is assigned parity of weight with the adult’s interest, efforts to render their children servile will constitute a violation of the child’s rights, given any credible interpretation of what those interests are.” *Id.* at 155.

<sup>146</sup> The child who is raised ethically servile “maintains an ignorant apathy towards all alternatives to the ethical ideal I inculcated during childhood. . . . [M]y Ethically Servile Child does not think of herself as under any duty to defer

Although parents are not strictly obligated to promote a fuller degree of autonomy (but they are obligated to avoid producing ethically servile children), the public schools are. Callan argues that a citizenry with a capacity for (political) autonomy is a necessary condition for justice as reasonableness.<sup>147</sup> If schools did not foster autonomy, they would leave the “political order acutely vulnerable to distortion in ways that are oppressive or conducive to social conflict.”<sup>148</sup> He thus rejects schools that merely teach students elementary political rights and democratic procedures.<sup>149</sup> Effective protection for the prospective interest in sovereignty and the realization of justice necessitates a degree of autonomous development “incompatible with servility.”<sup>150</sup> In fact, children have a right “to be equipped with the capabilities to live more than the way of life their parents would prescribe.”<sup>151</sup>

But political autonomy is not a mere stand-alone goal in Callan’s conception of citizenship education. In fact, the political virtues he believes should be taught – reasonableness, acceptance of the burdens of judgment – “bring autonomy through the back door of political

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to me. She may enumerate her rights correctly, talk eloquently about their meaning, and prize them as highly as anyone reasonably could. Yet in a deep sense she remains subordinate to my will because the choices I made in moulding her character effectively pre-empt serious thought at any future date about the alternatives to my judgment. . . . [T]he field of deliberation in which the agent operates as an adult has been constrained through childhood experience so as to ensure ongoing compliance with another’s will.” *Id.* at 153-54.

<sup>147</sup> Callan seems to make three arguments here. First, the individual who is not himself or herself autonomous is vulnerable to manipulation by others. Second, he argues that people who are not autonomous will themselves be blind to the oppression of others and themselves be vulnerable to manipulation. *Id.* at 48. Three, he notes that those to whom we owe justice are often very different from us, “and that being so, a reliable understanding of what justice demands will require us to engage critically with the pluralism of our moral environment.” *Id.* at 49. “The political argument purports to show that justice as virtue under pluralism requires autonomy.” *Id.* at 52. Thus, Callan rejects the argument that the virtue of justice is independent of autonomy. *Id.* at 46.

<sup>148</sup> *Id.* at 50.

<sup>149</sup> *Id.* at 51.

<sup>150</sup> CALLAN, *supra* note 6, at 190.

<sup>151</sup> *Id.* at 189. Besides the importance of an autonomous citizenry for realizing a just society, Callan also claims that “a life that spurns autonomy altogether and is yet good seems scarcely imaginable.” *Id.* at 68. Callan is, of course, not the only philosopher concerned with assuring the child has an “open future.” Joel Feinberg says that “education should equip the child with the knowledge and skills that will help him choose whichever sort of life best fits his native endowment and matured disposition. It should send him out into the adult world with as many open opportunities as possible, thus maximizing his chances for self-fulfillment.” Joel Feinberg, *The Child's Right to an Open Future*, in *FREEDOM & FULFILLMENT* 84 (1992).

liberalism.”<sup>152</sup> When students are taught to be “critically attuned to the wide range of reasonable political disagreement within the society,” and taught imaginative engagement with rival values about good, evil, right, and wrong, and taught to confront these views on their own terms without dismissing them peremptorily, they are, claims Callan, being given an education in autonomy.<sup>153</sup> Furthermore, “the accession of autonomy in the sense that matters here is an alteration of character rather than a mere expansion to a repertoire of capacities. “Autonomy” signifies not merely the ability to subject received ideas to critical scrutiny; it also refers to the motivational and affective propensities that guide the exercise of the ability in securing a self-directed life.”<sup>154</sup> The program in which Callan would have students educated would thus develop both the capacities and the motivation to develop those capacities:

[a]n education directed towards autonomy in the sense that sustains civic virtue will attempt to elicit the desire to think autonomously, nourish a proper pride in

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<sup>152</sup> CALLAN, *supra* note 6, at 40.

<sup>153</sup> *Id.* “The moral authority of the family and the various associations in which the child grows up must be questioned to the extent that the society contains reasonable alternatives to whatever that authority prescribes. All this looks like a pretty familiar depiction of central elements in an education for autonomy because the psychological attributes that constitute an active acceptance of the burdens of reason, such as the ability and inclination to subject received ideas to critical scrutiny, also constitute a recognizable ideal of ethical autonomy. . . . Learning to accept the burdens of judgment in the sense necessary to political liberalism is conceptually inseparable from what we ordinarily understand as the process of learning to be ethically (and not just politically) autonomous.” *Id.*

In making this argument, Callan seeks to set himself apart from the position of Rawls: “Rawls cannot coherently say that coming to accept the burdens of judgment is an unintended effect of the education his theory implies. And since coming to accept the burdens means attaining a substantial ethical autonomy, he cannot regard the achievement of autonomy as a merely accidental consequence of the pursuit of humble educational goals. . . . To agree with Rawls is to accept a pervasive and powerful constraint (the burdens of judgment) on how we should think about the various convictions and practices that proliferate in the background culture of liberal politics and how we should form our own convictions and make our own choices in that setting. That constraint enjoins us to be critically autonomous to a substantial degree, and, given the requirement of reciprocity, to respect the autonomy of others when we cooperate politically with them.” *Id.*

One might note that although Callan places great emphasis upon consequences of accepting the burdens of judgment for the development of autonomy he does not in fact provide a detailed analysis of how accepting the burdens of judgment by itself leads to autonomy. Perhaps merely by understanding the burdens of judgment (*see supra* note 107 for a definition of the burdens of judgment), we would come to the same conclusion as he does. It would have been useful, however, if Callan had provided a more extended argument making the connection between the burdens of judgment and the emergence of autonomy as he defines it. *See supra* note 141 and accompanying text. In other words, Callan should have made the link more explicit between, on the one hand, “practical reason,” and “corresponding resistance to impulses or social pressures that might subvert wise self-direction” and, on the other hand, acceptance of the burdens of judgment.

<sup>154</sup> *Id.* at 227.

independent judgment and a disdain for both thoughtless conformity and nonconformity, all the while refining the deliberative capacities that desire and emotion will inform. All this makes the educational task a lot more controversial than it might otherwise be.<sup>155</sup>

In sum, “[a] political education that meets the challenge will teach the young the virtues and abilities they need in order to participate competently in reciprocity-governed political dialogue and to abide by the deliverances of such dialogue in their conduct as citizens.”<sup>156</sup>

Callan states that:

Justice as reasonableness is the prime virtue of citizenship for a free people. A certain notion of reciprocity is the nerve of that virtue: the reasonable citizen is disposed to propose fair terms of cooperation to others, to settle differences in mutually acceptable ways, and to abide by agreed terms of cooperation so long as others are prepared to do likewise.<sup>157</sup>

Callan acknowledges that his goals are ambitious, yet he insists he is not seeking to turn students into philosophers – students are not being asked to come “to understand Rawls’s philosophical argument for mutual respect in the midst of pluralism.” What they are asked to do is learn to be reasonable and to shoulder the burdens of judgment, which is not the same thing as “grasping the philosophical rationale of pluralism.”<sup>158</sup> Thus Callan rejects the argument that what he seeks to undertake may be beyond the capacity of all but the most extraordinary students.<sup>159</sup>

### *C. The Methods of Instruction*

Callan would have educators help students achieve his educational goals via three routes: one, the child is to engage with ways of life at odds with that of his or her family; two, the child is to engage in ethical confrontation; and, three, the child is to undertake the study of the history

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<sup>155</sup> *Id.* at 227-28.

<sup>156</sup> *Id.* at 28.

<sup>157</sup> CALLAN, *supra* note 6, at 175.

<sup>158</sup> *Id.* at 219.

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

of his or her country. Callan thus would have the schools use non-neutral methods of instruction to promote their goals.<sup>160</sup>

What some educators might call a multicultural education, Callan calls an exploration of the globe, an exploration of “the great sphere.”<sup>161</sup> In addition, Callan says:

[t]he essential demand is that schooling properly involves at some stage sympathetic and critical engagement with beliefs and ways of life at odds with the culture of the family or religious or ethnic group into which the child is born. Moreover, the relevant engagement must be such that the beliefs and values by which others live are entertained not merely as sources of meaning in *their* lives; they are instead addressed as potential elements within the conceptions of the good and the right one will create for oneself as an adult.<sup>162</sup>

If we are to produce reasonable citizens, we need to help students come to an “increasing appreciation of ‘a multiplicity of perspectives.’”<sup>163</sup> Introduction to the “great sphere” is also a necessary condition for the fostering of autonomy: “On any barely defensible conception of the powers of practical reason and the motivational and affective propensities that attend their exercise, the open-ended growth of autonomy will require at some point an education that encourages the kind of learning promoted by the great sphere.”<sup>164</sup> The school should take “active measures to enable independent critical reflection on that diversity.”<sup>165</sup> Education in the

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<sup>160</sup> See Gardbaum, *supra* note 70, at 1354.

<sup>161</sup> Callan takes the phrase “great sphere” from the writings of Bruce Ackerman whom Callan quotes: “‘The entire educational system will, if you like, resemble a great sphere. Children land upon the sphere at different points, depending on their primary culture; the task is to help them explore the globe in a way that permits them to glimpse the deeper meanings of the dramas passing on around them. At the end of the journey, however, the now mature citizen has every right to locate himself at the very point from which he began – just as he may also strike out to discover an unoccupied portion of the sphere.’” CALLAN, *supra* note 6, at 132 quoting BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 159 (1980).

Another way to conceive of education in the great sphere is as an educational program that is “fair,” “balanced,” or even “neutral.” Looked at in this way Callan could be said to endorse neutrality as a means of promoting an ideal of autonomy. See generally Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 *STAN. L. REV.* 385 (1996).

<sup>162</sup> CALLAN, *supra* note 6, at 133. Callan says children “have a right to an education that includes an understanding of ethical diversity. . . .” *Id.* at 158.

<sup>163</sup> *Id.* at 177.

<sup>164</sup> *Id.* at 148.

<sup>165</sup> *Id.* at 190.

great sphere, in other words, is an antidote to ethical servility:<sup>166</sup> “[a] tight link seems clear between the development of autonomy and the kind of understanding that schooling as the great sphere makes available.”<sup>167</sup>

Callan’s school will involve more than multiculturalism. Pupils in a Callanesque school will be asked to confront ethical dilemmas. Students can only learn the “complex and onerous psychological disposition” he would have them learn “by investigating specific ethical questions from multiple perspectives . . . . [T]he effects of contingencies of social position and experience on disparities among such views must be imaginatively explored; and the various ways in which reasonable ethical doctrines select and order values must also be appreciated as these give shape to conflicting ways of life.”<sup>168</sup> Students are in this way to engage in an “ethical confrontation.” Through ethical confrontation they will acquire the virtues we want them to acquire through exercise.<sup>169</sup> In addition, “[e]thical confrontation is the engine of collective moral enlightenment. Only by its means do we enjoy the opportunity of giving up uncritically held error in favor of truth.”<sup>170</sup> And, “[t]he dialogical task is about learning to think wisely about the difference between reasonable and unreasonable pluralism, and so far as unreasonable pluralism is a part of our lives, there is much that we cannot agree to disagree about.”<sup>171</sup> Ultimately the exercise in

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<sup>166</sup> *Id.* at 152, 190. “The great sphere certainly requires a level of autonomous development above the condition of mere agency; but on no account does it demand commitment to reasoned self-rule as the apogee of human development. The lesson it teaches is that each of us must learn to ask the question of how we should live, and that how we answer it can be no servile echo of the answers others have given, even if our thoughts commonly turn out to be substantially the same as those that informed our parents’ lives. Agreement with those we love, even when it is in large part due to a concord of thought and feeling that love has fed, is not the same as ethical servility.” *Id.* at 154-55.

<sup>167</sup> CALLAN, *supra* note 6, at 148.

<sup>168</sup> *Id.* at 35.

<sup>169</sup> “The thesis is that virtues and skills in their more refined forms are the fruit of educational processes in which we exercise them as more primitive habits, becoming ever more adept and discerning as we practice, reflect, and practice again in the light of what prior practice and reflection have taught us.” *Id.* at 177.

<sup>170</sup> *Id.* at 209.

<sup>171</sup> *Id.* at 215. Callan opposes the approach to moral education called “values clarification.” “It invites children to think of rival moral judgements as no more than so many different preferences to be tolerated as we tolerate the odd tastes of people who do not share our own.” *Id.* at 207. He also rejects approaching moral education by “

ethical confrontation is to help students learn to move toward ethical conciliation: “the fitting response to ongoing moral conflict is sometimes not renewed effort to achieve dialogical victory over our adversaries but rather the attempt to find and enact terms of political coexistence that we can they can reasonably endorse as morally acceptable.”<sup>172</sup>

Teachers engaged in promoting ethical confrontation are permitted -- even required -- to oppose forthrightly the vices of unreason and domination as they arise in the classroom.<sup>173</sup> It would be a derogation of the teacher’s duty to embrace an “ ‘anything goes’ attitude to moral pluralism.”<sup>174</sup>

Finally, to promote particularistic bonding with the polity, to promote liberal patriotism, Callan outlines an approach to the teaching of history that moves between what he calls “sentimental civic education” and a “pedagogy that dwells relentlessly on the past moral failings of the society.”<sup>175</sup> The latter approach “threatens to leave prospective citizens alienated from [a society’s] future” and the former threatens the society by failing to cultivate critical reason.<sup>176</sup>

Instead, Callan believes that history should be taught in a way that the moral failings are not overlooked and yet the question is asked “ ‘what is the best of this tradition?.’ ”<sup>177</sup> Thus, for example, in studying the Declaration of Independence students would be asked to look at the “moral ambiguities and partialities that surrounded” its writing, and to look at it as “a source of continued moral inspiration in the present and legitimate pride in the past.” Yes, we should look

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‘pretending that we have a large heterogeneous family to raise and educate.’ ” This approach assumes away the reality of a world of real moral differences and reduces ethical differences “to the contrasting volitional commitments so that pluralism was indeed just a matter of varying talents, strengths, interests and ethnic color. But that is not our world. Our world is a place of real moral pluralism . . . .” *Id.* at 209.

<sup>172</sup> CALLAN, *supra* note 6, at 215.

<sup>173</sup> *Id.* at 216.

<sup>174</sup> *Id.* at 216-17. Callan believes that his form of education can simultaneously promote autonomy and yet not convey a message of relativism, subjectivism, or that reason can reach no definitive conclusions about anything.

<sup>175</sup> *Id.* at 98.

<sup>176</sup> *Id.* at 98, 112. Sentimental education is also flawed in that it involves the sustaining of fictions, misrepresentation, and simplifications. *Id.* at 105, 106.

at what was dominant and most powerful in the past, but we should also not let this occlude and undermine what is best:<sup>178</sup>

Emotional generosity and the imagination are central to the kind of historical sensibility I want to affirm because without them one cannot adequately answer the question “what is the best of this tradition?”, especially in circumstances where the best may have to be contrasted with what has been dominant. Looking to the past without the easy consolidations of sentimentality means confronting a story in which evil may loom larger than good, and the good that is perceptible is not instantiated in anyone or anything in pristine radiance. A readiness to be affectively engaged by the good in that setting requires a certain interpretive generosity, and a corresponding resistance to the meanness of spirit that goes with insisting that the good must be perfection if it is to be good at all.<sup>179</sup>

#### *D. Common Schools with a Common Education*<sup>180</sup>

Callan’s position on private schools – what he calls separate as opposed to common schools – is complex:<sup>181</sup> “Any morally defensible approach to education under pluralism must acknowledge *both* the necessity of some common education and the acceptability of at least certain kinds of separate education for those who would choose them.”<sup>182</sup> What parents may not insist upon is completely educating their children in separate schools with a separate (or non-common) education since this is the route to ethical servility.<sup>183</sup> Parents may not reject having their child educated in the great sphere:<sup>184</sup> “I suggest that the moral importance of overcoming

<sup>177</sup> CALLAN, *supra* note 6, at 119.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 119-20.

<sup>180</sup> *See supra* note 94.

<sup>181</sup> I omit extended discussion of the funding of separate schools and whether parents have a right to state-sponsored separate, even religious, schooling. In brief, Callan finds that the argument for a right to state-sponsored separate education to be weak. CALLAN, *supra* note 6, at 182-89. He also concludes that, as a matter of policy, the state ought not to fund separate schooling except separate schooling which provides an education that rests on a reasonable conception of education, i.e. one that we, taking into consideration the burdens of judgment as we make our assessment, conclude is to be respected. *Id.*

<sup>182</sup> *Id.* at 166.

<sup>183</sup> Callan has an extended discussion of parental rights to which I shall return below. *See infra* notes 327-55 and accompanying text.

<sup>184</sup> CALLAN, *supra* note 6, at 148. The child has a right to education in the great sphere. *Id.* Parents who claim that they as parents have a right to exclude the child from education in the great sphere rest this claim to a right on their

ethical servility supports the right of children to an education that includes the kind of understanding that the great sphere would promote, and the option of vetoing that education cannot belong within the scope of parents' rights so long as those rights are construed in a manner that eschews parental despotism."<sup>185</sup>

Yet Callan makes some room for both separate schools and separate education. He recognizes that parents have a zone of personal sovereignty which assures them of some discretionary choices regarding how their children are to be educated:<sup>186</sup> "The thought of agents of the state with enough power to compel parents to buy [a] piano [instead of taking a family trip to Disneyland] should repel everyone."<sup>187</sup> But there is another "educational" reason for Callan to tolerate separate schools and separate education up to a point:

If I am to be capable of reciprocity, I must understand what it is to have a conception of the good and to pursue it rationally; otherwise I cannot understand what is at stake for the good of others when we try to settle the terms of cooperation.<sup>188</sup>

Callan thus supports an education that will help the child develop a conception of the good and the natural starting point for this is education in the parent's received culture and tradition:<sup>189</sup>

Separate schooling of limited duration, created for the sake of separate education, may be one useful way of creating the developmental antecedents of the mature liberal virtues. From the standpoint of the parents who embrace some transformative educational aim for their children, the early years of schooling may a crucial stage in securing a deeply felt understanding of what their way of life

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own claim to autonomy. *Id.* But if there is "fundamental moral equality of persons in the family" parents cannot deny to children the autonomy they claim themselves which comes through education in the great sphere. *Id.*

<sup>185</sup> *Id.* at 152.

<sup>186</sup> *Id.* at 145.

<sup>187</sup> *Id.* at 145-46.

<sup>188</sup> *Id.* at 180.

<sup>189</sup> Callan, however, provides a warning against "an education that seeks to arrest the development of autonomy." *Id.* at 67. His argument at this point is not that such an effort violates the child's right to prospective sovereignty and wrongly may attempt to promote ethical servility. *Id.* Rather it is that such a program of instruction "runs the risk of being self-defeating. Such an education might well succeed in instilling the moral assurance that simple integrity entails, but only at the cost of entrenching a complacency or close-mindedness that is destructive of real integrity, simple or otherwise." *Id.* The concept of simple integrity is discussed below. *See infra* notes 214-18 and accompanying text.

means. From the standpoint of the state, the experiences that separate schooling furnishes will lay the ground-work for the political virtues by cultivating their psychological precursors; and given the close and mutually reinforcing relation between the values of the family and the ethos of the separates school, it may be even a more solid groundwork than common schools could typically provide.<sup>190</sup>

Callan thus concludes that separate schooling and separate education in the early years of schooling is tolerable.<sup>191</sup> In the culminating years, however, the child should undergo a common education. And since Callan believes that a common education and the goals he wants to achieve are best achieved in a common school, he would require students to attend a common school in the culminating years of education.<sup>192</sup> The “genuinely common school mirrors the diversity of the society it serves.”<sup>193</sup> Thus it is in this context that the students can best engage in moral confrontation and learn the virtues of reasonableness and acceptance of the burdens of judgment.<sup>194</sup>

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<sup>190</sup> CALLAN, *supra* note 6, at 181.

<sup>191</sup> Callan’s view on the regulation of separate schools is at best hedged and ambiguous. At one point he seems to hint that regulation may be justified. He notes that if “respect for reasonable people is the nerve of political liberalism, it cannot be coherently denied that religious education should honor the limits of the reasonable.” *Id.* at 38. But he also draws a distinction between two conceptions of toleration. There is, first, toleration of pluralism whose source is in the burdens of justification. And there is toleration which would include “forbearance to the persistence of unreasonable pluralism. . . .” *Id.* The question he addresses is whether we should let separate schooling which is unreasonable go its way. He agrees there is a heavy price to be paid in tolerating separate education that may violate a child’s right to prospective sovereignty, that breeds ethical servility and which fails to teach to ends which are part of a decent common education. *Id.* at 189-91. Yet he warns that there is a price to be paid in using coercion. *Id.* The use of coercion may in fact be counter-productive. He suggests there may be occasions for prudent accommodation. *Id.* Next, he acknowledges that not all good lives can be led on the aegis of liberal pluralism, i.e. that system is not equally hospitable to all ways of life. *Id.* Thus the ends of common education “may be resisted because of fidelity to goods that free societies cannot fully accommodate. Our recognition of this “may moderate the zeal with which we prosecute those ends in dealing with cultural enclaves who reject them.” Yet he warns that this must be “a strict tolerance if our commitment to common education is to mean anything at all.” *Id.*

<sup>192</sup> *Id.* at 182.

<sup>193</sup> *Id.* at 206.

<sup>194</sup> Common schools are better suited to realizing his educational goals. As places of diversity this is the context in which to learn reciprocity, reasonableness, and the burdens of judgment. These are places where students can actually practice what they must be able to do as citizens. And instruction in liberal patriotism can help create the ties across the cleavages found in the common school. An appreciation of multiple perspectives is best achieved in this setting. *Id.* at 177-78. The common school is the one institution where ethical confrontation can occur and “students can learn to respect the differences such encounters will never overcome.” *Id.* at 218. The school far more than the family is the setting in which a child will learn to accept the burdens of judgment. The investigation of ethical questions from multiple perspectives is best undertaken in the heterogeneous common school. *Id.* at 35.

Callan claims that this system of education still leaves parents with considerable control over their children's education:<sup>195</sup>

If the particular ends to which schooling as the great sphere is wedded cannot rightly be rejected by parents, this still leaves the education of any child underdetermined in countless important ways. Many educational questions it leaves unanswered are still within the scope of parents' rights and will properly be settled in any particular case in a way that expresses their distinctive vision of the right and the good.<sup>196</sup>

But as we shall see, this claim does not do full justice to the impact that Callan's educational program would have on the child and on the parents' efforts to raise the child in a particular culture.

### *E. Effects*

Callan openly acknowledges the deep impact that his educational program and that deliberative democracy itself would have upon the character of our current and future citizens. "Emotionally fraught conflict" will arise as students who hold to different truths collide.<sup>197</sup> More importantly as an educational matter, the students caught up in these moral conflicts will experience moral distress: "Moral distress is an inevitable consequence of real dialogue under pluralism, and this will be true in the dialogical task of common education in common schools."<sup>198</sup>

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<sup>195</sup> Callan does not address important issues regarding the governance of the common school system. Thus, he does not take up such matters as the respective roles of the federal, state, and local governments. Nor does he discuss the degree of discretion that his conception of political education leaves to the elected bodies at each level regarding the control of the common school system. For example, Callan does not address the views of people like Justice Powell who believe in the importance of local democratic control of education. See *supra* notes 30-35 and accompanying text. Presumably the democratically elected school board is required to work within the parameters of Callan's conception of political education. For a discussion of these and other governance issues, see TYLL VAN GEEL, *AUTHORITY TO CONTROL THE SCHOOL PROGRAM* (1976); AMY GUTMANN, *DEMOCRATIC EDUCATION* (1987).

<sup>196</sup> CALLAN, *supra* note 6, at 156-57.

<sup>197</sup> *Id.* at 207.

<sup>198</sup> *Id.* at 202. "By 'moral distress,' I refer to a cluster of emotions that may attend our response to words or actions of others, or our own that we see as morally repellent. Moral distress comes in two basic varieties: the other-regarding kind triggered by perceived failings of others, and the self-regarding kind that entails some negative evaluation of what we have done or who we are. These emotions must as a rule be experienced as painful and seriously disturbing . . ." *Id.* at 200.

In addition, since real moral dialogue, as opposed to carefully policed conversations about the meaning of some moral orthodoxy, cannot occur without the risk of offence, an offence-free school would oblige us to eschew dialogue. But to avoid offence is to suppress all that might arouse other-regarding moral distress. That means a policy of suppression would destroy the school's role as a vehicle of moral education . . . . A moral education cleansed of everything that might give offence is not a coherent possibility.<sup>199</sup>

If the moral dialogue is to continue, as Callan goes to some length to discuss, students will need to learn certain virtues in order to avoid, on the one hand, falling into humiliated silence or fearful withdrawal, and, on the other hand, simply becoming hostile.<sup>200</sup> He acknowledges that if these corollary virtues are not learned, and they are not easily achieved, then the “dialogue may be worse than useless: it may be morally debilitating.”<sup>201</sup>

Moral distress is likely to be accompanied by other consequences. Education in a school following Callan's approach “will certainly weaken convictions [of children] when strength of conviction is simply a product of ignorance.”<sup>202</sup> Thus, the child may come to question religion and other facets of culture that the child has learned at home. Acceptance of the burdens of judgment will not have consequences only for the public beliefs of the child. Full acceptance of the burdens of judgment means applying them to private or “extra-political beliefs”<sup>203</sup> and “[t]o retain a lively understanding of the burdens of judgment in political contexts while suppressing it

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<sup>199</sup> *Id.* 201-02. “Other regarding moral distress is the emotional fuel of ethical confrontation, and therefore, its presence in dialogue should hearten us as a sign that public moral education is proceeding as it should rather than alarm us as a portent of social conflict or demoralization.” *Id.* at 210. Callan rejects the view that caring ought to be the aim of moral dialogue and that the relationship with the other is more important than the topic of the moral dialogue. CALLAN, *supra* note 6 at 202-06.

<sup>200</sup> First, students must learn to “chasten the experience of distress, to forgo the temptation of implacable belligerence, without at the same time suppressing an emotion that is inescapable from a serious interest in moral truth.” *Id.* at 212. Second, control of belligerent proclivities is part of another set of dispositions such as “the affective self-knowledge to differentiate moral from the other varieties of distress that conflict may trigger.” *Id.* Third, the dialogue may be conducted in a way which is counter-productive in the long run. “When confrontation badly shakes a child's ethical confidence it may render the child less likely to profit from subsequent dialogue.” *Id.* at 212-13.

<sup>201</sup> CALLAN, *supra* note 6, at 213.

<sup>202</sup> *Id.* at 134.

<sup>203</sup> *Id.* at 30.

everywhere else would require a spectacular feat of self-deception that cannot be squared with personal integrity.”<sup>204</sup>

As noted earlier, political education will unavoidably -- and properly -- foster autonomy. Teaching children to think in particular ways will “bring autonomy through the back door.”<sup>205</sup> Learning to accept the burdens of judgment in the sense necessary to political liberalism is “conceptually inseparable from what we ordinarily understand as the process of learning to be ethically (and not just politically) autonomous.”<sup>206</sup> Children will learn the capacities that make it possible for them to take individual responsibility for the life they lead.<sup>207</sup> This does not mean, Callan asserts, that children will become emotionally detached from their commitments. Children will simply have the capacity to ask themselves about the value of any particular end with which they currently identify: “Responsible choice is not holding something back emotionally; it is simply the effective recognition that what is categorically valued might not be categorically valuable, and that if our lives are to be good we might need sometimes to think for ourselves about the possible gap between the two.”<sup>208</sup>

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<sup>204</sup> *Id.* at 31.

<sup>205</sup> *Id.* at 40; *see supra* notes 152-55 and accompanying text. “The core of my argument is the thesis that the development of virtue of justice under pluralism implies the growth of autonomy to a notably sophisticated level.” CALLAN, *supra* note 6, at 68.

<sup>206</sup> CALLAN, *supra* note 6, at 40. However, Callan notes that “The Rawlsian doctrine of autonomy is certainly less expansive than its major precursors within the liberal tradition. The style of thought and conduct the doctrine requires does not preclude assent to any of the major philosophical or moral positions that have divided liberal theorists among themselves.” *Id.* at 41.

<sup>207</sup> *Id.* at 237.

<sup>208</sup> *Id.* at 59, 54. Callan thus rejects the communitarian claim that liberalism gives us “an inflated picture of the significance of choice in good lives and to alienate us from some of the deepest aspects of human well-being.” He thus also rejects the claim that autonomy “generates an alienated sense of our relation to all ends. The [supposed liberal] ideal declares that all are contingent possessions of the self, to be retained or disowned according to its sovereign choosing.” The problem is that the communitarian attack is against a conception of autonomy that is not one that Rawls or “any other morally credible liberalism” embraces. *Id.* at 52, 53, 55.

The acceptance of the burdens of judgment “makes a big difference to how we understand the significance of religious truth in our own lives and the lives of others.”<sup>209</sup> Moreover, “[i]f acceptance is compatible with some kinds of fundamentalism, these will have to be very different from many that are currently familiar, and the religious education intended to sustain them would have to depart drastically from the insular and dogmatic education that characterizes garden-variety fundamentalism.”<sup>210</sup> The faith-based views that can be accommodated with the burdens of judgment belong to a “restricted subset – call it sophisticated belief – that harbours internal tensions.”<sup>211</sup> Yet Callan advocates acceptance of the burdens of justification “that would still leave room for many faith-based comprehensive doctrines in the background culture.”<sup>212</sup>

But one form of religious life will most certainly be adversely affected. The promotion of autonomy will conflict with a life of “simple integrity”:

Someone has simple integrity when three conditions hold. First, the roles with which the individual identifies circumscribe her pursuit of the good closely and locate that good within the shared practices of her community. Second, the responsibilities her roles entail are harmonized, so that there is ordinarily no or at most modest friction between them. Third, the individual identifies wholeheartedly with the role or configuration of roles that structures her life, and she lives in close fidelity to its requirements.<sup>213</sup>

Membership in a religion can thus be a life of simple integrity: membership gives focus to one’s pursuit of the good inside a community of like-minded people; faith imposes harmony

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<sup>209</sup> His program of instruction will also affect the students’ understanding of the good. Political education’s effects will go further. “[P]olitical education must mould and constrain the identity of citizens beyond the public sphere.” *Id.* at 34. It will affect the child’s conception of the good. CALLAN, *supra* note 6 at 35. In other words, the child will be encouraged to rethink the conception of the good he or she learned in her early education within the family and, possibly within a separate school.

<sup>210</sup> *Id.* at 38.

<sup>211</sup> *Id.* at 37.

<sup>212</sup> *Id.* Callan says that citizens are engaged in a “high-wire act.” They on the one hand would fall off the wire if they let comprehensive doctrines influence their political judgments. But they also fall off the wire if “acceptance of the burdens of judgment eats away at the creed that public reason pushes outside its boundaries.” *Id.*

on the roles one plays; and wholeheartedness is affirmed by devotion to God.<sup>214</sup> Thus, Callan acknowledges that an education in autonomy will undermine efforts to raise children in a religious life of this kind. To expose the child to rival ways of life will subject the child's faith to a crisis which "would endanger the wholehearted commitment upon which simple integrity depends."<sup>215</sup> Acceptance of the burdens of judgment "makes a big difference to how we understand the significance of religious truth in our own lives and the lives of others."<sup>216</sup> Callan's political education program will "penetrate the background culture," and even if it permits and encourages diversity, "the likely cultural consequences of Rawlsian civic education will still seem like a catastrophe to many people."<sup>217</sup>

At the same time, Callan sees his education program as leaving the option open to children ultimately to choose a religious life that is not marked by "simple integrity":<sup>218</sup> "To learn to accept the burdens of judgment is not to endorse secular humanism, blanket moral scepticism or any other anti-religious posture one cares to imagine."

Callan's political education program is thus not wholly neutral regarding the kinds of life choices that it favors and disfavors. He sees the program he advocates as one that "shapes the self in profound and often disturbing ways."<sup>219</sup> Yet Callan claims that his political liberalism "avoids any oppressive assault on diversity"<sup>220</sup> because, according to him, "[t]he account of political virtue [is] explicitly designed to cohere with the many differences in creed and identity

<sup>213</sup> *Id.* at 60.

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

<sup>215</sup> CALLAN, *supra* note 6 at 60-61. Having said this, Callan goes on to doubt the value of simple integrity and to argue that it is not the only kind of integrity necessary to our well-being. Autonomy, he argues, need not make our lives bad. And in fact Callan goes on to argue that a life "that spurns autonomy altogether and is yet good seems scarcely imaginable." *Id.* at 59, 61-68.

<sup>216</sup> CALLAN, *supra* note 6, at 38.

<sup>217</sup> *Id.* at 39.

<sup>218</sup> "There is no reason to suppose that autonomy must trump all rival goods. . . . [H]uman beings have a right to order the diverse possible constituents of the good life in their own way, to choose a life in which autonomy is pursued at the expense, say, of secure religious conviction or to reverse those priorities." *Id.* at 155-56.

that a liberal society will *properly* welcome.”<sup>221</sup> Yet having said this, Callan also offers up a rather ambiguous view of the effects of his program. He asserts in one place that, “[o]ne powerful source of diversity in a free society is the particular kind of character education that its political institutions depend on. The cultivation of serious and independent ethical criticism and the enlargement of imagination that process entails, will naturally conduce to diversity in how people live . . . .”<sup>222</sup> Yet, in the introduction to Chapter Two, he writes, “The central thesis of this chapter is that political education at its best will be far less banal, and much more corrosive of some powerful and long-entrenched sources of diversity, than many would like. That is not something we should be apologetic about: liberal democracy at its best, in education as in other social endeavors, will not leave everything as it is.”<sup>223</sup>

Callan sees political education as the middle way between two unacceptable alternatives. The problem is what to do about the “continued presence of unreasonable pluralism,” that is, the continued presence of people and groups that hold unreasonable views such as racist views.<sup>224</sup> One response is coercive “state intervention against those who are deemed unreasonable. But that will trigger cruel bloody strife . . . . [W]e would have a kind of Jacobin liberalism, at permanent war with all who deviate, however slightly from the righteous community of reasonable citizens.”<sup>225</sup> But it would also be a failing to “distinguish adequately between liberal virtue and vice within the sphere of conduct we rightly tolerate.”<sup>226</sup> Thus, adopting of the position that the state ought to be neutral even as to unreasonable views is not acceptable. The

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<sup>219</sup> *Id.* at 13.

<sup>220</sup> *Id.* at 16.

<sup>221</sup> CALLAN, *supra* note 6, at 9 (emphasis added). Elsewhere he writes, “The challenge of pluralism is, in part, the problem of conceiving the ends and means of civic education in a way that does not wrongly impair diversity.” *Id.* at 12.

<sup>222</sup> *Id.* at 5.

<sup>223</sup> *Id.* at 13.

<sup>224</sup> *Id.* at 22.

<sup>225</sup> *Id.* at 23.

middle way is, first, to distinguish between the range of values and voices we should embrace in a suitably public reason, hence the theory of public reason and the exclusion of these views from the public square.<sup>227</sup> And, secondly, we need to educate children in the virtues needed to support that system of public reason while recognizing a continuing place for separate schools and separate education.

But we should not let Callan be the last word on what his theory is all about. Another apt summary can be found in an article by Professor Stephen Carter, who had this to say about other deliberative democrats, but it is also a fitting characterization of Callan:

I emphasize this problem because most liberal accounts of compulsory schooling as education for citizenship rest on the supposition that the values the schools are to inculcate are better than the alternatives – which is why such theorists as [Amy] Gutmann and Stephen Macedo partly reject the view . . . that the state must be entirely neutral among competing comprehensive conceptions of the good. They would answer that the state must hold at least some “minimal” commitment, sufficient to enable its citizens to function in a liberal state. And this functioning includes not only respect for such liberal values as equality but also the ability to act autonomously, to choose for oneself among the available conceptions of what the good life entails. Gutmann is particularly clear that compulsory liberal education may, and often should, cause children to reject the religious traditions of their parents – at least if those traditions are illiberal. Liberal education, in her view, effectively substitutes useful values for the dangerous and illiberal ones she seems to think children learn from their parents.<sup>228</sup>

Thus, in the effort to promote toleration (which is defined in a certain way) Callan may very well require the religious to participate in an educational experience that is intolerant of them.<sup>229</sup> But intolerance may be constitutionally justifiable if the school can meet the requirements of the Free Exercise Clause.

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<sup>226</sup> CALLAN, *supra* note 6, at 24.

<sup>227</sup> *Id.* at 22. *See supra* notes 83-89 and accompanying text.

<sup>228</sup> Stephen L. Carter, *Parents, Religion, and Schools: Reflections on Pierce 70 Years Later*, 27 SETON HALL L. REV. 1194, 1210 (1997).

<sup>229</sup> *See supra* note 228 and accompanying text. *See also infra* notes 230-322 and accompanying text.

### III. AN ELABORATION OF THE FREE EXERCISE FRAMEWORK

It should now be evident that any school adopting Callan's political education program could easily find itself the defendant in a suit claiming a violation of the right to the free exercise of religion.<sup>230</sup> Would a parent and child be successful in such a suit?<sup>231</sup> Let us first elaborate on the free-exercise framework I discussed earlier in order to make it analytically more useful for addressing challenges to the curriculum of a public school.<sup>232</sup> The framework, to be worthy of

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<sup>230</sup> The Free Exercise Clause states that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST., amend. I. A free exercise claim may not be the only challenge the school could face. *See infra* notes 323-55 and accompanying text.

<sup>231</sup> I will not be discussing a related hypothetical case, namely, a free exercise challenge brought against a state effort to require private schools to offer Callan's political education program. Callan, in fact, may not endorse imposing his conception of citizenship education on the private school. He might not even be willing to regulate private education to prevent private efforts to make the child ethically servile. As Callan notes:

If some of the official teachers of the Roman Catholic Church conflict with our best theory of the ends of civic education, it does not follow that we have any reason to revise our theory; but neither does it mean we have any reason to impose those ends on Catholic schools and the families they serve. My interest here is still confined to the ends of civic education on its best interpretation, and nothing can be directly inferred from that about the propriety of marshalling the power of the state against those who would reject the interpretation.

CALLAN, *supra* note 6, at 44. He adds "The difference between the formation of a liberal theory on some broad matter of principle, like political education, and the imposition of that theory on others is well drawn . . ." *Id.* at 228. But if Callan were to agree to the regulation of private education, clearly much of what is to be said about challenging Callan in the context of a public school program would be relevant to state regulatory efforts.

State regulations of private schools and home schooling have often been the target of suits under the Free Exercise Clause. *See generally* *Blackwelder v. Safnauer*, 689 F. Supp. 106, 135 (N.D.N.Y. 1988) (denying challenge to home schooling regulations); *Johnson v. Charles City Community Sch. Bd. of Educ.*, 368 N.W.2d 74, 84 (Iowa 1985) (refusing an "Amish exception" to parents of children in fundamental Baptist school, stating "[t]heir educational needs are plainly not as circumscribed as those of Amish children. Whatever they may feel about their children's religious needs, the plaintiffs have not established that their children's educational needs are significantly different from those of other children."); *State v. Whisner*, 351 N.E.2d 750 (Ohio 1976) (striking down challenges to state regulations of private religious schools). *See also* *Murphy v. State*, 852 F.2d 1039, 1040-41 (8th Cir. 1988) (rejecting challenge to home schooling requirements, annual testing requirement imposed only on home-schooled children and if child failed to achieve appropriate score, child must be placed in public or private school); *State ex rel. Douglas v. Faith Baptist Church*, 301 N.W.2d 571, 573 (Neb. 1981) (upholding injunction against Christian school that refused to permit any state monitoring).

*Compare, e.g.,* *People v. Bennett*, 501 N.W.2d 106 (Mich. 1993), *rev'd sub. nom. People v. DeJonge* 501 N.W.2d 127 (Mich. 1993) (rejecting a substantive due process challenge to Michigan's teacher certification requirement as applied to home schooling parents) *with* *People v. DeJonge*, 501 N.W.2d 127 (Mich. 1993) (holding that Michigan's teacher certification requirement violates the Free Exercise Clause as applied to home schooling parents who object to certification on religious grounds).

<sup>232</sup> Although lower courts have addressed free exercise challenges to a public school's program of instruction, Supreme Court precedent has not. *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 124 Cal. Rptr. 68 (Cal. Ct. App. 1975) (holding that sex education and family living courses did not impair free exercise of religion nor represent an establishment of religion since the statute provided for a parental right to remove children from instruction); *Brown v. Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995); *Mozert v. Hawkins Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987); *Smith v. Ricci*, 446 A.2d 501 (N.J. 1982) (upholding a state regulation

the name “law,” must include generally applicable standards which the courts and other decision-makers can use to distinguish between meritorious and non-meritorious free-exercise claims.<sup>233</sup>

After developing an interpretation of the free-exercise framework to be used here, I will apply the revised framework to a hypothetical suit brought by a student whom I have named Faith, and her parents who have challenged the school’s requirement that Faith participate in a program of political education inspired by Callan.

Remember that Supreme Court precedent requires that a religious parent seeking a free-exercise exemption on behalf of his or her child must establish that the claim is both religious and sincerely held. Although this is an important element of the burden of proof that the plaintiffs must meet, I will presume for these purposes that Faith and her parents have established these two points. This hypothetical does not explore the delicate matter of the definition of religion,<sup>234</sup> nor the sincerity with which the claim is made.<sup>235</sup>

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requiring school districts to develop and implement family life education program in public schools). *But see* *Moody v. Cronin*, 484 F.Supp. 270 (C.D. Ill. 1979) (holding that the state violated the Free Exercise Clause by requiring students to participate in coeducational physical education classes in which "immodest apparel" was worn).

<sup>233</sup> “To be worthy of the name, any process of adjudication must produce generally applicable standards by which decision-makers distinguish meritorious from non-meritorious claims.” *Lupu*, *supra* note 55, at 937.

<sup>234</sup> Both courts and commentators have wrestled with the constitutional definition of religion. *Courts*: *Peterson v. Minidoka County Sch. Dist. No. 331*, 118 F.3d 1351 (9th Cir. 1997) (holding that the Free Exercise Clause is not limited to beliefs mandated by a church); *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981) (holding that religion addresses fundamental and ultimate questions having to do with imponderable matters; a religion is comprehensive in nature; it consists of a system of beliefs; a religion can be recognizable by certain formal and external signs); *Malnak v. Maharishi Mahesh Yogi*, 592 F.2d 197 (3d Cir. 1979) (striking down on Establishment Clause grounds teaching of a course on Science of Creative Intelligence Transcendental Meditation in New Jersey public schools). *See also* *United States v. Seeger*, 380 U.S. 163, 176 (1965) (maintaining that religion is "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those" who are admittedly religious).

*See also* Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 597-601 (limiting definition of religion to views with "extratemporal consequences"); George C. Freeman III, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 GEO. L.J. 1519, 1520 (1983) (the founders equated religion with theism); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 805 (1984) (the "most plausible single-factor approach to religion is one that is based on 'higher reality' in some broad sense"); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 240, 285-86 (1989) (the key to religion as "the role that a sacred or transcendental reality plays in imposing obligations upon the religious faithful."); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1002 (1990) ("[A]ny belief about God, the supernatural, or the transcendent, is a religious belief."); Jonathan Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73

The three aspects of the *Sherbert-Yoder* framework I will elaborate upon are: (i) the substantiality of burden requirement; (ii) the notion of a compelling state interest; and (iii) the necessity requirement. In working out these concepts I will aim at an understanding that is sensitive to religious liberty.<sup>236</sup> But, as we shall see, this general aim is not fully determinative of a particular conception of these central concepts.

Before turning to those issues, we need to deal with the argument that parents who voluntarily send their children to public schools and children who voluntarily attend the public

YALE L.J. 593, 604 (1964). ("[A]n attempt to define religion, even for purposes of increasing freedom for religions, would run afoul of the 'establishment' clause, as excluding some religions, or even as establishing a notion respecting religion.").

Professor Marshall highlights the difficulties entailed in defining religion for free-exercise purposes: First, exemption analysis threatens free exercise values because it requires courts to consider the legitimacy of the religious claim of the party seeking the exemption. Under the exemption analysis, the court must first determine, at a definitional level, whether the belief at issue is "religious." Then it must determine whether the belief is sincerely held. As has been well-documented, both inquiries are not only awkward and counterproductive; they also threaten the values of religious freedom. Moreover, the judicial definition of religion does more than simply limit religion; it places an official imprimatur on certain types of belief systems to the exclusion of others. At the very least, as Justice Stevens has argued, this power of approval or disapproval raises Establishment Clause problems.

William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 310-11 (1991). See also Dent, *supra* note 40.

<sup>235</sup> Inquiring into the sincerity with which a belief is held also incurs several risks. Lupu, *supra* note 55, at 956. As one commentator has noted:

First, the inquiry into sincerity cannot completely escape the distinctly bad aroma of an inquisition. . . . Second, the questioning of sincerity may operate invisibly and subconsciously against unknown or unpopular religions. . . . Finally, the use of sincerity to separate meritorious from non-meritorious claims presents inescapable questions concerning the relationship between sincerity and religiosity.

John T. Noonan, Jr., *How Sincere Do You Have to be to be Religious?*, 1988 U. ILL. L. REV. 713 (1989).

<sup>236</sup> "The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission." Lee v. Wiseman, 505 U.S. 577, 589 (1992). One court has noted that:

Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority.

Wallace v. Jaffree, 472 U.S. 38, 52 (1985). JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 49-57 (1996) (the Framers adopted the Free Exercise Clause because they considered religion uniquely important and valuable); Stephen L. Carter, *The Free Exercise Thereof*, 38 WM & MARY L. REV. 1627 (1997); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 541 (1991) ("If the two religion provisions are read together in the light of an overarching purpose to protect freedom of religion, most of the tension between them disappears."); Laycock, *supra* note 234, at 1001-02 (government must "minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.").

schools waive their free exercise rights.<sup>237</sup> First, this argument hardly seems valid regarding students whose parents may require them to attend public school; it is difficult to conceive of their position in the schools as wholly voluntary.<sup>238</sup> Second, regarding the possibility that the parents have waived their free exercise rights, in this case their rights and the rights of their children are so entangled it would be wrong to treat the two sets of rights separately.<sup>239</sup>

Turning now to the *Sherbert-Yoder* framework, in a free exercise case the plaintiffs must establish that the ostensibly neutral government policy which has an incidental effect on freedom of religious belief has an effect which amounts to a substantial burden on the free exercise of religion.<sup>240</sup> Proof of such a substantial burden will trigger strict scrutiny.<sup>241</sup> Unfortunately, the Supreme Court's cases "leave the essential distinction between substantial and insubstantial burdens largely undefined."<sup>242</sup>

In the face of this vacuum, various efforts have been made to define this threshold requirement. The mere "offensiveness" of the school's message to the religious is insufficient to

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<sup>237</sup> *Curtis v. School Comm. of Falmouth*, 652 N.E.2d 580, 586-87 (Mass. 1995) (rejecting claims of parents that a condom distribution program violated their Fourteenth Amendment substantive due process rights to control the upbringing of their children and their right of free exercise of religion).

<sup>238</sup> See generally *Plyler v. Doe*, 457 U.S. 202 (1982). But it might be argued that it was not the state which forced the students into the public schools but their parents, hence there is no state action. But this argument seems too formalistic, and, in any event, raises the question of whether parents may waive the constitutional rights of their children. Could a parent waive a high school student's right to freedom of speech? To an attorney? To a search of the student's automobile? A full examination of these issues is beyond the scope of this article.

<sup>239</sup> See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925).

<sup>240</sup> Proof of some burden may be a necessary requirement to satisfy requirements of Article III of the Constitution: "At the most general level, judicial gloss on the 'cases' or 'controversies' language of Article III imposes the requirement of actual or imminent injury upon all claims in the federal courts." Lupu, *supra* note 55, at 960. Proof of a substantial burden is required because "a doctrine that would trigger active free exercise review whenever government activity had any impact whatsoever upon religion would have an immense sweep." *Id.* at 964.

However, proof by the plaintiff of a substantial impact would not have to be forthcoming if the school's program had as its principle purpose the frustration of the right to hold to one's religious faith. Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1233-1234 (1996) (discussing *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992), Professor Dorf writes "the joint opinion cannot mean that laws having as their principal purpose the frustration of a constitutional right without serving some other substantial interest will be upheld so long as the government's tools only include relatively minor obstacles.").

<sup>241</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 214, 221 (1972).

<sup>242</sup> Dorf, *supra* note 240, at 1215.

amount to a substantial burden.<sup>243</sup> But it is fair to the precedent and to the requirements of Article III to say that the incidental effect of the secular program of instruction does amount to a substantial burden when, taken in the totality of the circumstances, we can say that the student must pay a price for sticking by his or her religious beliefs.<sup>244</sup> And we can say that the price is substantial when a school's program makes a student feel defensive about his or her beliefs, or causes tension within the student's family. The degree to which the student feels under attack and needs to marshal his or her own resources in order not to be a victim of pressure must be real and beyond what one might experience in a friendly exchange with someone with whom one disagrees. Thus, when a student has to summon courage to stand by her beliefs, she is paying a price. Two cases support this conclusion.

The first is *Wisconsin v. Yoder* in which the Court paid considerable attention to the psychological pressure the Amish children would be placed under if they were required to attend

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<sup>243</sup> "People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation." *Lee v. Weisman*, 505 U.S. 577, 597 (1992).

Professor Marshall opens his article on this topic with quotations from two Supreme Court opinions: " 'If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.' " (citing *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). " 'It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.' " (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988)) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)). Continuing, Professor Marshall writes: "I conclude that the infusion of an offensiveness component into religion clause jurisprudence is inappropriate and should be eliminated. In establishment and free exercise matters, as well as in speech, communication should not be inhibited out of deference to listener sensibilities." William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 353 (1991). "[R]eligious individuals who allege that their faith has been denigrated by government action have no claim under the Free Exercise Clause." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 165 (1992).

Professor Dent, however, does argue offense alone can raise a free exercise claim. Commenting on what the Court said about offense in *Lee v. Weisman*, Professor Dent wrote:

The Court's statement makes sense if the goal of free exercise claimants is to invalidate government acts that offend them. This is because an invalidation or prohibition would deprive other citizens, who are not offended, of the benefits of those acts. In general, though, free exercise claimants do not seek to invalidate government action, but instead only seek some accommodation for themselves. Thus, the Court's warning of a limit to relief from an offensive government action seems less appropriate when the relief sought is not invalidation, but accommodation.

Dent, *supra* note 40 at 728-29.

<sup>244</sup> By analogy, the plaintiff in *Sherbert v. Verner*, 374 U.S. 398 (1963), was in the position of having to pay a price to stick by her religious beliefs, namely, she had to forgo unemployment insurance if she refused a job that required her to work on her Sabbath.

the two additional years of public schooling.<sup>245</sup> The Court recognized in that case that students were being pushed toward a change of identity. This pressure was different from the kind of ordinary pressure which most students experience in schools.

The Court in *Lee v. Weisman*, an Establishment Clause case, described the kind of experience which may also properly be said to raise a free exercise issue:<sup>246</sup>

To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerance citizenry . . . . By the time they are seniors, high school students no doubt have been required to attend classes and assemblies and to complete assignments exposing them to ideas they find distasteful or immoral or absurd or all of these.<sup>247</sup>

In this same decision, the Court also identified an example of the kind of burden that raises constitutional concerns. The Court began its analysis by noting that “there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.”<sup>248</sup> Furthermore, “[r]esearch in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards

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<sup>245</sup> See *supra* notes 53-55 and accompanying text.

<sup>246</sup> Dent has noted that:

Applying *Weisman*, an Establishment Clause case, to free exercise issues is somewhat controversial since the religion clauses of the First Amendment are often treated as embracing separate, even contradictory principles. The distinction made is that the Free Exercise Clause confers benefits on religion, while the Establishment Clause imposes burdens on religion. This, however, is a false dichotomy – the principles protected by the two clauses are not antipodal, but are remarkably similar. Establishments of religion are offensive because they force people to submit to or subsidize a faith they do not espouse, or to suffer the indignity of seeing their government endorse such a faith. To the irreligious, however, the injury caused by religion is no worse than injury caused by governmental adoption of a nonreligious doctrine that they reject. Establishments of particular religions, as opposed to nonreligious doctrines, are therefore distinctly repugnant primarily to those who espouse other religions. Religion cannot be singled out as divisive. Although religious conflict has caused much strife, nonreligious disputes have been even more deadly both in this country and in the rest of the world. The principle function, then, of the two religion clauses is the same – to eliminate or minimize government offense to citizens' religious beliefs.

Dent, *supra* note 40, at 720-21. See also Abner S. Greene, *The Pledge of Allegiance Problem*, 64 *FORDHAM L. REV.* 451 (1995).

<sup>247</sup> *Lee v. Weisman*, 505 U.S. 577, 590-91 (1992).

<sup>248</sup> *Id.* at 592.

conformity, and that the influence is strongest in matters of social convention.”<sup>249</sup> Thus when students are “induced to conform” or subjected to the “risk of indirect coercion,” exposed to “subtle coercive pressures” or the school uses “social pressure to enforce orthodoxy,” a constitutional problem arises.<sup>250</sup>

The Court identified two interrelated points at which the student was under pressure to conform. First, the student had to decide whether or not to attend her own graduation given the fact that the ceremony was going to open and close with a prayer to which she objected.<sup>251</sup> Second, once having decided to go to the ceremony, the student faced the decision of whether to protest by remaining seated during the prayers, or to conform by standing and thus participating.<sup>252</sup> It was true that attendance at the graduation ceremony was technically voluntary, but not in reality: “Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term ‘voluntary,’ for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.”<sup>253</sup> And once in the ceremony she faced “subtle and indirect” pressure to stand and not to protest.<sup>254</sup> The Court further reasoned that “[i]n this atmosphere the state-imposed character of an invocation and benediction by clergy selected by the school combined to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit.”<sup>255</sup> Given this analysis, the Court concluded by stating that “[w]e know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity. But, by any reading of

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<sup>249</sup> *Id.* at 593.

<sup>250</sup> *Id.* at 588, 592, 594, 599.

<sup>251</sup> *Id.* at 594-595.

<sup>252</sup> *Id.* at 593.

<sup>253</sup> *Lee v. Weisman*, 505 U.S. at 595.

<sup>254</sup> *Id.* at 593.

<sup>255</sup> *Id.* at 597.

our cases, the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause.”<sup>256</sup>

As Professor Ingber notes, we can glean further insight into the nature and degree of the psychological burden that free exercise claimants suffer from the theory of cognitive dissonance: “The psychological theory of cognitive dissonance, however, recognizes an inalienable connection between action and belief. According to this theory, the tension created within an individual by the conflict between belief and compelled inconsistent behavior is often resolved by altering the belief system to make it accord with the required conduct.”<sup>257</sup> Students asked to engage in behaviors, including cognitive exercises, that conflict with their beliefs will, thus, experience discomfort possibly leading to an alteration of their beliefs as the solution for the discomfort they experience.

Calibrating the subjective burden free exercise claimants suffer is one way to get at the issue of substantial burden. A second, more objective way is through a comparison of burdens. Professor Dorf writes:

By asking whether the burden imposed by a particular law on an adherent of a minority faith greatly exceeds the law's effect on the majority -- whose religious preferences the law reflects -- we can give the substantiality test some concrete substance.

Although courts may not be prepared to find outright discrimination in disproportionate burdens, the inequality of burdens could still serve as a rough proxy for substantiality. To determine the substantiality of the burden that a law imposes on a religion, it will often be useful to compare that burden with the law's effect on persons who do not share the religion of the person challenging the law. In *Braunfield v. Brown*, Orthodox Jews challenged a Sunday closing law, in part because it burdened their right to observe the Saturday Sabbath by requiring Jewish-owned stores to remain closed for two days rather than one. In such a case, a court could examine the unequal character of the burden imposed by the challenged law rather than attempt to conduct a detailed economic inquiry to

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<sup>256</sup> *Id.* at 598-99.

<sup>257</sup> Stanley Ingber, Comment, *Religious Children and the Inevitable Compulsion of Public Schools*, 43 CASE W. RES. L. REV. 773, 775 n.10 (1993).

determine the harm caused to Orthodox Jewish businesses. It would be sufficient to note that the combined impact of the legal and religious obligations on a Saturday Sabbath observer is much more severe than the corresponding impact on Sunday Sabbath observers and nonobservers.<sup>258</sup>

Thus, for example, we might expect students in a Callanesque school to experience more cognitive dissonance than other students, and this would be an indicator of their experiencing a substantial burden.

I should note that this approach to defining substantial burden represents a rejection of the approach taken in the *Mozert* decision.<sup>259</sup> The majority opinion adopted the position that a free exercise claim only arose in the face of coercion in the rather traditional sense of the term. Free exercise is not violated in the absence of compulsion; that is, there is no violation unless one is "required to affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by [one's] religion."<sup>260</sup> But that principle is no longer viable in light of *Lee v. Weisman*.

Once the elements of a free exercise claim have been proven by the plaintiff the burden shifts to the state to establish that granting the requested exemption would frustrate a compelling state interest and that not granting the exemption is necessary to realize that interest. But how are we and the judiciary to determine if the state's educational purposes are compelling? Unfortunately, the cases are not helpful in identifying the criteria to be used in determining if a

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<sup>258</sup> Dorf, *supra* note 240, at 1217-18.

<sup>259</sup> *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987). This approach is also different from the approach adopted by the Seventh Circuit in *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994), in which parents challenged a school's reading program as violative of the Establishment and Free Exercise Clauses. To make out a free exercise claim the court ruled that the parents must show that the use of the reading: [H]as a coercive effect that operates against the parents' practice of their religion. . . . The burden to the parents in this case is, at most minimal. The [school officials] are not precluding the parents from meeting their religious obligation to instruct their children. Nor does the use of the series compel the parents or children to do or refrain from doing anything of a religious nature.

*Id.* at 689-90.

<sup>260</sup> *Mozert*, 827 F.2d at 1064.

particular articulated stated purpose is a compelling state interest.<sup>261</sup> We thus have to develop the criteria ourselves.

Professor Gottlieb provides a start toward identifying the criteria to be used. He notes that those purposes that may lay claim to being compelling can be related to the constitutional text:

Great open-ended clauses of the Constitution spell out major purposes of free government: the protection of life, liberty, and property. The structure of government and many of the clauses of the Constitution spell out another: democracy. And the Civil War was fought to add a fifth: equality. A large number of what are known as compelling governmental interests (or what we should call compelling public purposes) are implicit in, derive from, or logically dependent on those five values spelled out in mandatory language in the Constitution. Values like order and national security derive from and therefore support the breadth and weight of those basic values.<sup>262</sup>

This takes us part of the way down the road toward identifying what is to count as compelling, but much is still left open to debate. Take for example, a state purpose associated with the notion of promoting equality. As we know from the Supreme Court's racial affirmative action cases, not every governmental purpose undertaken in the name of equality will be accepted as compelling.<sup>263</sup> In other words, the government cannot simply make all its purposes compelling merely by associating those policies with words such as "equality" or "national security."<sup>264</sup> The policy has to be compelling. Amorphous or diffuse goal statements can too easily operate as

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<sup>261</sup> "The Court is often so careless about describing the pedigree of compelling public purposes that it often appears that compelling interests are whatever the Court chooses to dignify by that name." STEPHEN E. GOTTLIEB, *Introduction: Overriding Public Values*, in PUBLIC VALUES IN CONSTITUTIONAL LAW 7 (1993).

<sup>262</sup> *Id.* at 8.

<sup>263</sup> See *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>264</sup> Governmental efforts to satisfy close judicial scrutiny in equal protection and First Amendment free speech cases by invoking the demands of national security are notorious. See *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Korematsu v. United States*, 323 U.S. 214 (1944).

covers for discriminatory and bigoted purposes; and these statements much less often operate as covers for legitimate, but insubstantial purposes.<sup>265</sup>

What else does an articulated purpose need in order to be called compelling? For one, we might ask whether the purpose is of sufficient importance that we would agree that it would provide a plausible predicate for the invasion of other rights in addition to the right at risk in the case before us. For example, assume that a state has adopted a law prohibiting discrimination in employment against gays and lesbians. To estimate the importance of the purpose, we might ask whether that policy would provide a predicate for possibly controlling not just the hiring practices of the Boy Scouts, but also of a private religious school, a conservative political organization, and even a church.<sup>266</sup>

A second test of the importance of a purpose is whether the state has, in fact, pursued the same purpose in other policy contexts. We see Justice Brennan using this test in a free speech case, *Members of City Council v. Taxpayers for Vincent*.<sup>267</sup> The case involved a First Amendment challenge to a provision of the Los Angeles Municipal Code that prohibited posting signs on public property. This provision was used to prohibit posting political campaign signs on utility poles. The city argued that the ordinance served to address the problem of increasing visual clutter caused by an accumulation of signs posted on public property. A majority of the Court concluded that the city's aesthetic interest was "sufficiently substantial to justify this

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<sup>265</sup> Professor Tribe makes the follow observation about *Reynolds v. United States*, 98 U.S. (8 Otto) 145 (1878), in which the Court affirmed the conviction of a Mormon defendant for polygamy over his religious objection: "The *Reynolds* Court perceived a sufficient secular purpose in preserving monogamous marriage and preventing exploitation of women. Few decisions better illustrate how amorphous goals may serve to mask religious persecution." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1271 (2d ed. 1988).

<sup>266</sup> See generally *Dale v. Boy Scouts of America*, 734 A.2d 1196 (N.J. 1999), *rev'd*, 120 S. Ct. 2446 (2000). This argument is, in a sense, the mirror image of the slippery-slope argument. When we are concerned with slippery slopes, we are in fact concerned that approving a particular purpose may lead to additional policies with which we disagree.

<sup>267</sup> 466 U.S. 789 (1984).

content neutral, impartially administered [prohibition].<sup>268</sup> In his dissent, Justice Brennan asserted that he did not believe the city had “shown that its interest in eliminating ‘visual clutter’ justifies its restriction of appellee’s ability to communicate with the local electorate.”<sup>269</sup> He further reasoned as follows:

In cases like this, where a total ban is imposed on a particularly valuable method of communication, a court should require the government to provide tangible proof of the legitimacy and substantiality of its aesthetic objectives . . . . [Statements] of aesthetic objectives should be accepted as substantial and unrelated to the suppression of speech only if the government demonstrates that it is pursuing an identified objective seriously and comprehensively and in ways that are unrelated to the restriction of speech.<sup>270</sup>

Although Justice Brennan proposed his “test” to smoke out bad motives, his “test” is also useful for determining the actual importance the government places on its own purpose. We would have far less confidence in the importance of the purpose and the government’s “sincerity” if the city did not “comprehensively” pursue its articulated interest in aesthetics.

A third way to test the compelling nature of the state’s purpose is to ask whether there is a consensus behind the goal. Or, to state the point differently, the greater the controversy surrounding the purpose, the greater the likelihood that the purpose is narrowly partisan or serves partial interests rather than the collective good.<sup>271</sup> But it need not be simply a collective good that the state is pursuing – it may be the avoidance of a collective bad. Thus, the state’s goal is more likely to be deemed to be compelling when the evil is graver and is understood to be a collective evil. The Court’s decision in *Pierce v. Society of the Sisters* reflects this approach.<sup>272</sup> The case arose when a private religious school and private military academy challenged as a violation of the Fourteenth Amendment a state law that required all students to attend public

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<sup>268</sup> *Id.* at 816.

<sup>269</sup> *Id.* at 818.

<sup>270</sup> *Id.* at 828. This inquiry would help assure the Court that the asserted interest in aesthetics is not a façade for content-based suppression. *Id.*

<sup>271</sup> Dent, *supra* note 40, at 713; van Geel, *supra* note 23, at 203, 250, 297.

schools, thereby threatening to put the private schools out of business. In holding that the law violated the Fourteenth Amendment rights of the private schools, as well as those of the parents who wanted to send their children to private schools, the Court made two points. First, “[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.”<sup>273</sup>

Second, the state has the authority reasonably to regulate all schools in order, among other things, to ensure “that certain studies plainly essential to good citizenship” be taught and that “nothing be taught which is manifestly inimical to the public welfare.”<sup>274</sup> Finding that the plaintiffs were not engaged in an “inherently harmful” undertaking, the Court ruled that the legislation was an unreasonable infringement of their liberty as protected by the Fourteenth Amendment. What clearly emerges from this decision is the idea that a state has a sufficiently strong interest to infringe upon a constitutional right if the target of the policy is an activity which is (a) manifestly, (b) inimical, (c) to the public welfare. The state, in other words, has a compelling interest in addressing harms to the public good which virtually no reasonable person can deny exists.

An important implication of these “tests” for assessing how compelling a state’s purpose is that they rule out as not compelling the purpose of promoting a particular conception of “the good life.” Thus, a state that seeks to promote a life of self-actualization through the public schools might be permitted to do so, but the goal would not be one that we could say was compelling. It would not be a goal that we would agree is sufficiently important to warrant the infringement of a range of rights, nor would it be a goal the government has promoted

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<sup>272</sup> 268 U.S. 510 (1925).

<sup>273</sup> *Id.* at 535.

comprehensively, nor would it be non-controversial, and finally it would not be a goal that was directed towards avoiding a manifest harm to the public good.

Now I turn to the requirement that the state must use means that are necessary to the achievement of its compelling goal. This is a multi-faceted burden that means, first, that the state must convince the court that its method will in fact work and that it is no more intrusive than other means to the same end.<sup>275</sup> Furthermore, the state must show why consistency of enforcement of its policy is necessary to realize the purpose it is pursuing. Stated differently, the question is whether the state can establish that there is consistency or uniformity in the execution of its policy. If not, then the objecting students must be granted an exemption from materials or even course(s) to which they object.<sup>276</sup> Professor Tribe has identified four interests a state may have – avoiding administrative complexities; avoiding giving religious practitioners an advantage over others; avoiding the appearance of favoritism; and avoiding inducing people fraudulently to make free exercise claims to obtain the advantage of the exemption.<sup>277</sup> In addition, the state might claim that enforcing its policies inconsistently invites religious divisiveness in the schools. And the state might argue that its overall compelling purposes cannot be achieved if some students are provided a different education from others. For example, assuming the state's compelling purpose is teaching students tolerance, the state might argue that the key value cannot be established if some pupils are not exposed to a curriculum that

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<sup>274</sup> *Id.* at 534.

<sup>275</sup> *Texas v. Johnson*, 491 U.S. 397 (1989); *Roe v. Wade*, 410 U.S. 113 (1973); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

<sup>276</sup> Accommodation might also be accomplished by deleting the offending materials from the curriculum or by adding materials to neutralize the offending materials. Both options, however, run the risk of offending the establishment clause. *Strossen*, *supra* note 4, at 393-94.

Students who object to the curriculum of the public schools have the option of voluntarily withdrawing and attending private schools. *Pierce*, 268 U.S. at 510.

<sup>277</sup> *TRIBE*, *supra* note 265, at 1272-73. Although I raise this issue in connection with litigating the merits of the free exercise claim, the issue might also be addressed as a matter of the remedy to be provided once the free exercise violation has been established. The awkwardness of raising this issue as a remedial question is assuming, for

teaches tolerance. To make this point more concrete, it would not be possible to maintain public health if certain people with an infectious disease were granted an exemption for religious reasons from the requirement to be quarantined. Arguably, the most serious arguments the state might advance at this point are administrative complexity, religious divisiveness, and the “quarantine” argument.<sup>278</sup>

The administrative complexities that would be imposed on schools if they were required to permit students to opt out are potentially not trivial. At a minimum, it may require the provision of a parallel course or two or, in a “worst case scenario,” the school may be forced to provide a totally parallel education program.<sup>279</sup> Exemptions -- whether from a course or the entire school program -- would entail added financial expenditures as well as administrative time and energy. But the state’s interest in consistent application of its policy would seem only to rise to the point of “necessity” if accommodation actually threatened the larger school program either because of expenditures being drained away or because of administrative complexities. The burden on the state in demonstrating this degree of “inconvenience” is a substantial one.

Clearly the state would not -- indeed could not -- provide an alternative program that itself violated the limitations of the Establishment Clause. That is, any alternative program made available to the objecting students and parents must not be written to support their religious views; it should only avoid the free exercise burden that regular materials and courses impose.<sup>280</sup>

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example, that it would be administratively inconvenient to grant an exemption. It opens the door to the possibility of there being a serious free exercise violation without a remedy.

<sup>278</sup> The state might, of course, also argue that granting the exemption would give the religious an advantage the non-religious do not get and that it would show favoritism toward the non-religious. For this argument to work, it would seem that the state would have to concede that the non-religious also enjoy a constitutionally protected right to freedom of belief, thus protecting religious freedom of belief but not non-religious freedom of belief is a form of favoritism. But whether non-religious freedom of belief does enjoy the same constitutional protection is matter of some dispute. *See infra* note 325 and accompanying text.

<sup>279</sup> If the free exercise challenge is directed toward values and experiences that pervade the curriculum, the exemption considered would have to be from virtually the whole school program.

<sup>280</sup> Strossen, *supra* note 4, at 393-94.

The religious divisiveness argument raises a problem analogous to the “heckler’s veto” or the hostile audience issue in free speech cases. In these free speech cases, the hostile audience issue arises when the audience is provoked into taking violent action by the message or its form, for example the burning of a flag.<sup>281</sup> The idea here is that granting the exemption to religious objectors would divide the school along religious lines, thus making it difficult to carry out the school’s program. The appropriate standard for deciding when the provocation caused sufficient disruption to warrant denial of the exemption can be drawn from the *Tinker* opinion.<sup>282</sup> That is to say, state officials will meet their burden of proof that the exemption would cause divisiveness if they can establish that there is a reasonable forecast of material and substantial disruption because of the exemption.

Finally, we come to the so-called “quarantine argument.” It will not be easy for a school to argue that granting the exemption would make things so problematic that the basic goals of the school’s program could not be realized. To establish this claim, the school would have to establish that if the students were exempted they would, as adults, pose a threat to the public good, and that the school’s program would in fact reduce that threat. Stated differently, the school would have to establish that students who sought the exemption, if raised without being exposed to the school’s program, would pose a “manifestly inimical” threat to the public welfare.<sup>283</sup>

#### IV. CALLAN AND A FREE EXERCISE CHALLENGE

I turn now to the central question: would a free exercise challenge brought against a Callanesque program of political education succeed? Deliberative democrats would deny the

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<sup>281</sup> *Texas v. Johnson*, 491 U.S. 397, 398 (1989). *See also* *Edwards v. South Carolina*, 372 U.S. 229, 236 (1963); *Feiner v. New York*, 340 U.S. 315, 320 (1951).

<sup>282</sup> *Tinker v. Des Moines Independent Sch. Dist.*, 393 U.S. 503, 509 (1969).

<sup>283</sup> *See supra* note 274 and accompanying text.

exemption.<sup>284</sup> These philosophers take the view that their conception of citizenship is so important that religious parents should not be permitted to exempt their children from instruction in the “three Rs” – reciprocity, reasonableness, and respect.

To make the analysis that follows more concrete, let us assume that there is a high school student, Faith, in a Callanesque school and that this student and her parents share the following views.<sup>285</sup> Faith believes that religion is necessary to civil society and to avoid an inexorable march toward totalitarianism; that virtue is not possible when divorced from God; that “[i]n a democratic society, state and society must draw from the same moral well.”<sup>286</sup> Faith also shares with her parents the traditional view that citizens are expected to draw upon their religion as a source of moral guidance and virtue both in their private and public lives.<sup>287</sup> She and her parents also believe that religious groups – not the state – are the best instruments for transmitting virtue. Furthermore, duty to God precedes the claims of civil society. Thus, Faith holds that the demands of civil society must be judged against the demands of God. There is a moral truth and, like Callan, she would have society be more than a *modus vivendi* among interests. Society must be based on a moral truth. That must enter the public square. Yet Faith and her parents also happen to believe in the separation of church and state, meaning that the state should not control or support religion. In their view, it has been the state that historically has been the central threat to religious freedom. And, in their view, state policies that affect religious freedom must – within bounds – give way. Religious value comes before and is superior to both the individual

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<sup>284</sup> Macedo, *supra* note 9; CALLAN, *supra* note 6, at 146-47, 157-61.

<sup>285</sup> I am assuming that Faith and her parents’ views are religious and are held sincerely. *See supra* notes 51 and 235 and accompanying text.

<sup>286</sup> RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE* 82 (2d ed. 1984). “Some also attribute the disorder and spiritual squalor of liberal democracies to the decline of religion. By discrediting free will and ascribing all evil to social forces, secularism created a “no-fault” mentality that rejects any moral criticism of individual misconduct.” George W. Dent, Jr, *Secularism and the Supreme Court*, 1999 B.Y.U. L. REV. 1, 41, 44 (1999).

and to civil society. That is, religious obligations such as those found in the first four Commandments are obligations, and belief in them is not a mere subcategory of personal moral judgment. Government policies which frustrate religious obligations, such as the Fourth Commandment's requirement that one honor one's father and mother, need to give way. Finally, Faith and her parents do not endorse the use of governmental coercion to impose or foster religious belief; they embrace what might be called the negative right of political freedom, tolerance.<sup>288</sup>

The points of conflict between Callan and Faith are many and deep. Enrolled in a Callanesque school, Faith would be asked to reconsider her beliefs and to question her parent's views. Callan's program would seek to make Faith an autonomous person, putting at risk her adherence to a faith-based life. Callan's program would purposefully seek to produce moral distress in Faith, thereby laying the groundwork for her shifting to a different culture. Callan would seek to convince Faith that her religious views may not be the basis on which she should seek the cooperation of others. A Callanesque school would ask Faith to rethink, if not change, her views on the foundations of civil society: Callan's program of political education would contradict Faith's view that religion was good for the civil society. She would be taught that political life cannot draw from the same well from which Faith draws in her private life. And even if Faith believes in religious tolerance for religious reasons, she would be taught that she could not espouse tolerance for those reasons. But she would seek to translate those religious

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<sup>287</sup>“Rather, neutrality should mean that religion may participate in public discourse on the same basis as secular creeds, and religious organizations may receive government benefits on the same basis as nonsectarian organizations.” Dent, *supra* note 286, at 61.

<sup>288</sup> *Id.* at 31-32. (discussing religion's support for human rights); Carter, *supra* note 236, at 1631. (rejecting the view that believers oppose religious pluralism).

reasons so that they were as accessible as possible to those who did not share her same religious grounding.<sup>289</sup>

It thus appears that Callan's program of political education would impose a substantial burden on Faith's right to hold her religious beliefs and the right of her parents to teach Faith those beliefs. This conclusion seems especially reinforced by the unique context of the school where students are at least a quasi-captive audience, face authority figures, and peer pressure. The school would deliberately foster moral distress in Faith and deliberately force her to rethink her religious views.<sup>290</sup> Faith would, in fact, be challenged to a degree and in a way that the non-religious students would not be. Faith, in other words, would be able to establish that she was being asked to pay a heavy price for adhering to her religious views.<sup>291</sup>

Next we must ask whether the purposes behind the Callanesque program of citizenship education are compelling. The purposes of the program are multiple: to foster reasonableness and reciprocity;<sup>292</sup> to promote acceptance of the burdens of judgment and autonomy;<sup>293</sup> to foster critical commitment to justice;<sup>294</sup> to foster liberal patriotism;<sup>295</sup> to foster a capacity for critical thinking;<sup>296</sup> and to promote a conception of the good life.<sup>297</sup> Although many people would argue that these are attractive goals, the question is whether they satisfy the "tests" discussed above so that we would conclude that these goals are compelling in the constitutional sense. A case could

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<sup>289</sup> CALLAN, *supra* note 6, at 125.

<sup>290</sup> *See supra* notes 197-99, 202-04 and accompanying text.

<sup>291</sup> *See supra* notes 244-60 and accompanying text.

<sup>292</sup> *See supra* notes 102-04 and accompanying text.

<sup>293</sup> *See supra* notes 105-14, 129-55 and accompanying text.

<sup>294</sup> *See supra* notes 118-19 and accompanying text.

<sup>295</sup> *See supra* notes 120-23 and accompanying text.

<sup>296</sup> *See supra* notes 124-28 and accompanying text.

<sup>297</sup> *See supra* note 115 and accompanying text. In addition, the state might argue that its program of instruction serves the purpose of assuring the realization of the child's moral right to an education as defined by Callan. The main arguments that Callan mounted on behalf of his program of political education were not, however, premised on the notion of a child's positive right to an education. Since Callan did not elaborate a conception of a child's positive moral right to an education, I will not take up whether the state's educational program supported with such an argument should be interpreted as serving a compelling state purpose.

be made that the goals are “related to the constitutional text,” but that case hinges on, for example, establishing that our Constitution should be interpreted to embrace deliberative democracy.<sup>298</sup> This is not a claim that even Callan embraces, and it is a claim inconsistent with Madison’s discussion of the constitutional system in *The Federalist*.<sup>299</sup> Moreover, is it unlikely that we would embrace these goals as sufficiently important to warrant the invasion of other important interests or constitutional rights.<sup>300</sup> Would we want to institute a state test on reasonableness, reciprocity, and respect and deny a high school degree to students who did not achieve the minimum required score? Would we agree that reasonableness and reciprocity are so important that the religiously-committed who are likely to bring their faith into the public square are not to be permitted to be elected to public office?<sup>301</sup> Would we deny the right to vote to people who did not rate sufficiently highly in reciprocity, reasonableness, and respect?

Next, are the goals underlying the Callanesque program of political education goals that the government has pursued comprehensively?<sup>302</sup> The answer is most certainly “no.” Take one example, the national debate over abortion. Anti-abortion laws have not been premised on reasons that pro-choice advocates could be expected to accept, but this is exactly what deliberative democrats argue should be done in the name of respect, reasonableness, and reciprocity.<sup>303</sup> Do Callan’s goals enjoy the support of a consensus?<sup>304</sup> The answer would again be an emphatic “no.” For example, if we look at what a prominent proponent and a widely

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<sup>298</sup> See *supra* note 262 and accompanying text.

<sup>299</sup> CALLAN, *supra* note 6, at 1-2, 44-45; THE FEDERALIST NO. 10 (James Madison).

<sup>300</sup> See *supra* note 266 and accompanying text.

<sup>301</sup> *McDaniel v. Paty*, 435 U.S. 618, 619 (1978) (striking down a Tennessee statute that barred ministers and priests from serving as delegates to the state’s constitutional convention).

<sup>302</sup> See *supra* notes 266-70 and accompanying text.

<sup>303</sup> GUTMANN & THOMPSON, *supra* note 5, at 73-79, 82-90.

<sup>304</sup> See *supra* note 271 and accompanying text.

respected professor of education urges should be taught in the public schools, we see that these proposals are markedly different from Callan's.<sup>305</sup>

Finally, might it be argued that Callan's program is addressed toward rectifying a harm to the public good that is manifestly inimical?<sup>306</sup> To support this argument, the state would have to establish that the views of Faith and her parents, as well as those of other religious people, are manifestly inimical to the public welfare. There are scholars who in fact have argued that the religious do not fit into our constitutional system: "Over the years, any number of scholars -- Stanley Fish is perhaps the most recent -- have questioned whether a deeply religious individual can possibly be committed to the liberal values of pluralism and dialogue. The religiously devout, Fish argues, are less interested in participating in the marketplace of ideas than in shutting it down."<sup>307</sup> A related charge that might be brought against religious parents is that they fail to educate their children as autonomous critical thinkers, which results in "manifestly inimical" consequences for a stable democracy.

But arguments such as these are going to be virtually impossible to sustain except perhaps with regard to a small percentage of the population.<sup>308</sup> There is considerable evidence, for example, that children who attend religious schools emerge believing in tolerance to the same extent -- if not more strongly -- than children who attend private schools.<sup>309</sup> It is mere

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<sup>305</sup> JOHN I. GOODLAD, *A PLACE CALLED SCHOOL* 50-56 (1984); WILLIAM A. GALSTON, *LIBERAL PURPOSES* 213-37 (1991).

<sup>306</sup> See *supra* notes 272-74 and accompanying text.

<sup>307</sup> Carter, *supra* note 236, at 1629. Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 79 (1990) (arguing that religion is incompatible with the modern democratic state because religious claims are based on absolute truths which are unprovable and therefore insulated from political examination).

<sup>308</sup> There are Muslims, for example, who do not embrace the notion of the secular state serving as a "neutral" umbrella for a pluralistic society. In fact, in their view the only acceptable foundation for society is Islam itself. ADDA B. BOZEMAN, *THE FUTURE OF LAW IN A MULTICULTURAL WORLD* (1971).

<sup>309</sup> ANDREW M. GREELEY & PETER H. ROSSI, *THE EDUCATION OF CATHOLIC AMERICANS* (1966); ANTHONY S. BRYK ET AL., *CATHOLIC SCHOOLS AND THE COMMON GOOD* 55 (1993); Jay Greene, *Civic Values in Public and Private Schools*, in *LEARNING FROM SCHOOL CHOICE* 83-106 (1998). Professor Gilles also notes that:

speculation that believers lack the capacity for critical thinking that Callan (and others) have argued is necessary to sustain democratic systems.<sup>310</sup> Furthermore, we have had a long history of strong religious movements in the United States and that history does not establish that religious people and religious organizations have been any more dangerous to the public welfare than other “factions.” According to Madison, any faction -- whether religious or not -- poses a danger, but a properly designed republic can mitigate, and seems to have mitigated, the danger that factions pose to a stable democracy.<sup>311</sup> More generally, modern research on the necessary conditions for democratic stability do not support the proposition that religious people are per se a threat to democracy.<sup>312</sup> Callan and other deliberative democrats may respond that such stability is a mere *modus vivendi* and as such may neither be stable nor morally adequate.<sup>313</sup> But arguably it has been just such a *modus vivendi* that has characterized American stability for several hundred years. Besides, the aspiration for “a national debating society in which all citizens ‘reason together’ using a common framework of argument in an atmosphere of total equality,” is neither a realistic description of actual democratic politics, nor a realistic aspiration.<sup>314</sup>

Finally, the government should not be permitted to meet its burden by arguing that the very fact that Faith and her parents seek a free exercise exemption proves that their views are

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The fact that our judgments will differ in some particulars should not prevent us from recognizing that traditionalists are at least as likely as the rest of us to be decent, hardworking, law-abiding, promise-keeping people living in stable, loving families – and, conversely, that practicing members of traditionalist faiths are at least as likely as the rest of us to lead violent, predatory, irresponsible, or self-destructive lives.

Stephen G. Gilles, *Liberal Parentalism and Children’s Educational Rights*, 29 CAP. U. L. REV. 9, 21 (1997). See also Dent, *supra* note 286, at 61-62.

<sup>310</sup> Salomone, *supra* note 8, at 216 (“Although it seems evident that critical thinking skills are key to democratic government, we cannot assume that all religiously inclined parents who challenge certain instructional programs or materials prefer their children to think any less critically.”).

<sup>311</sup> THE FEDERALIST, *supra* note 299, at 56-65.

<sup>312</sup> ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 13 (1989); ROBERT D. PUTNAM, MAKING DEMOCRACY WORK 3 (1993).

<sup>313</sup> See *supra* note 74 and accompanying text.

manifestly inimical to the public welfare. Such an argument is the equivalent of making the false argument that anybody who opposes the government's conception of political education is a threat to the democracy. Furthermore, "[a]rguably, parents who seek individualized accommodation by opting out are in fact demonstrating tolerance for the views of others by not seeking the broader remedy of completely eliminating the offensive program or materials. One can be tolerant of diverse views without adopting them or foregoing one's own convictions."<sup>315</sup>

Callan's purposes thus do not meet the constitutional criteria for labeling those purposes compelling. But even if we were to assume that Callan's goals were compelling, we must ask whether his means for achieving those purposes are necessary. Is consistency of execution of the political education program necessary?<sup>316</sup> That is, would non-consistency entail substantial financial and administrative costs, and produce divisiveness in the school? Is Callan's program of producing moral distress the only way students can learn his three "Rs"? Is it necessary to be as irreligious as Callan in order to promote reciprocity, reasonableness, and respect? Is it necessary to require that children attend common schools? Is there not a reasonable chance that citizens will learn reciprocity and reasonableness merely by participating in a plural society?

I address these questions in reverse order. Callan claims that his pedagogical prescriptions are *the only way* to achieve his goals but he in fact offered no empirical support for this position.<sup>317</sup> Next, it is hard to see how exempting certain pupils from a Callaneseque political education program would produce divisiveness in the high school.<sup>318</sup> High school educational programs are generally programs in which students are involved in different courses

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<sup>314</sup> Shiffrin, *supra* note 78, at 1641.

<sup>315</sup> Salmone, *supra* note 8, at 217.

<sup>316</sup> See *supra* notes 275-83 and accompanying text.

<sup>317</sup> See *supra* note 275 and accompanying text.

<sup>318</sup> Recall that Callan would only require exposure to his program during the high school years. See *supra* notes 180-96 and accompanying text.

and even different individual “tracks.”<sup>319</sup> And there is no evidence that students who have exercised options available under state statutes to exempt themselves from sex education courses has led to divisiveness in the school.<sup>320</sup> In fact, it may be the failure to exempt students that will lead to the divisiveness and conflict that characterized the district which resisted the Mozart’s request for an exemption.<sup>321</sup> Whether exempting some students from the program of instruction would frustrate the realization of Callan’s vision of deliberative democracy is but a reprise of the argument that the religious are, as a group, unreasonable and intolerant; as noted above, this is an argument not based in fact.<sup>322</sup> Finally, there is the claim that granting the exemption would impose significant financial and administrative burdens on the school. Again, given that the modern high school already offers its students many options, it would seem as if this mandatory exemption would not mark a sharp departure from what the schools are already doing, and thus would not create an undue burden on the schools. In any event, if the school is to succeed in making the case that a mandatory exemption should not be granted, the school would have to establish that the burden arising from the mandatory exemption would be sufficiently disruptive and that other aspects of the school’s program would be placed in jeopardy.

#### V. SUBSTANTIVE DUE PROCESS AND PARENTAL RIGHTS

A free exercise challenge to a program of citizenship education based on Callan’s theory is not the only challenge that may arise. Faith and her parents may argue that Callan’s program violates the Establishment Clause in that his philosophy is arguably religious.<sup>323</sup> The other

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<sup>319</sup> ARTHUR G. POWELL ET AL., *THE SHOPPING MALL HIGH SCHOOL* 118-171 (1985).

<sup>320</sup> N.Y. EDUC. LAW § 803 (McKinney 2000).

<sup>321</sup> BATES, *supra* note 11; ARONS, *supra* note 117; Rosemary C. Salomone, *Struggling With the Devil: A Case Study of Values in Conflict*, 32 GA. L. REV. 633 (1998).

<sup>322</sup> See *supra* notes 306-14 and accompanying text. There in fact is a danger in enacting Callan’s program: can we in fact trust government schools with the kind of power Callan wants to invest in them? See *supra* note 93.

<sup>323</sup> Even if Callan is correct that deliberative democracy is a comprehensive view, it is unlikely that his interpretation of deliberative democracy would satisfy most of the proposed definitions of religion. See *supra* note 234. Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978). See also generally *Brown v.*

possibilities include a challenge by Faith's parents asserting that Callan's program of political education violates the First Amendment in the same way that the student's rights were violated in *West Virginia v. Barnette*.<sup>324</sup> That is to say, Faith might argue that Callan's program will in effect require her to confess the possibility that her religious views are incorrect; thus she faces the same wrong of compelled speech barred by *Barnette*. Both religious and non-religious students may carry that argument a step further to argue that the program violates an implicit First Amendment "political establishment clause."<sup>325</sup> Another line of attack, ironically in light of the purpose of Callan's program to promote autonomy, may be that the program violates a student's First Amendment right to freedom of belief.<sup>326</sup> And both religious and non-religious parents may claim that the program violates their Fourteenth Amendment substantive due process rights as parents to control the upbringing of their child. This latter argument deserves more scrutiny.

Callan wrote that "[a] negative parental right to choice, which nonetheless comes with some strings attached, forms part of the agreed background to disputes about parents' educational role in liberal societies. No one supposes a totalitarian state that dictates the course

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Woodland Joint Unified Sch. Dist., 27 F.3d 1373 (9th Cir. 1994) (rejecting claims that Impression Reading Series which asked elementary school students to read, discuss, or contemplate witches conveyed message of endorsement of religion of witchcraft); *Smith v. Board of Sch. Comm'rs*, 827 F.2d 684 (11th Cir. 1987) (rejecting claim that school program establishes secular humanism); *Grove v. Mead School Dist.*, 753 F.2d 1528 (9th Cir. 1985) (rejecting argument that book used in high school English classes promoted religion of secular humanism); *Fleischfresser v. Directors of Sch. Dist.* 200, 15 F.3d 680 (7th Cir. 1994); *Wright v. Houston Indep. Sch. Dist.*, 366 F. Supp. 1208 (S.D. Tex. 1972) (rejecting argument that public schools' teaching evolution established secularism); *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 124 Cal. Rptr. 68 (1975) (rejecting argument that public school's family life and sex education program established religion hostile to parents' theistic religion); *Smith v. Ricci*, 446 A.2d 501 (N.J. 1982) (rejecting argument that public school program in family life education established secularism); Mitchell, *supra* note 11, at 613-14.

<sup>324</sup> *West Virginia v. Barnette*, 319 U.S. 624 (1943).

<sup>325</sup> Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104 (1979); Gottlieb, *supra* note 17, at 501. *But see* Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1613 (1993).

<sup>326</sup> van Geel, *supra* note 23, at 239; Strossen, *supra* note 4, at 365-68; DAVID A. J. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986).

of education in all its fine detail would not thereby violate the rights of parents.”<sup>327</sup> But he also notes that the parental right is limited: “Nor does anyone think that someone who makes gravely harmful choices about the education of his children by depriving them, say, of the benefit of language is nonetheless acting within his rights.”<sup>328</sup> Thus, for Callan, the crucial issue is the scope of the parental negative right to be free from state regulation, and solving that problem “depends crucially on our understanding of why we should recognize it in the first place.”<sup>329</sup> Callan thus proceeds to examine several different warrants for a parental right, but concludes that none of these conceptions operates to block a state from insisting that the child be educated in the great sphere, or be taught to be autonomous as required by his conception of democracy.<sup>330</sup> Callan’s “principal claim is that although parents might have a right to reject schooling that

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<sup>327</sup> CALLAN, *supra* note 6, at 136.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 138.

<sup>330</sup> Callan first looks at a parental right to educational choice based on the child’s interest in minimal developmental needs, e.g. cultural coherence. *Id.* at 140. But he concludes that the parental right conceived this way provides no basis for rejecting an education in the great sphere. His educational program would not pose:

some serious threat to the satisfaction of the elementary needs of children. That cannot be said with any show of reason. Critical thought of the kind that the great sphere seeks to elicit may lead to psychological conflict, and eventually estrangement from parents, along with the burden of suffering that estrangement is likely to bring in its wake. But these possible outcomes do not frustrate the needs that ground the child-centered argument, even if they would preclude the realization of ideals to which many people subscribe.

*Id.* at 140.

Callan argues that parents would have no more success in claiming a right that trumped their child’s rights if they attempted to ground their right in the “best interests of the children.” *Id.* at 141. Besides the contestability of any particular interpretation of the concept, it can have negative implications for parental rights. CALLAN, *supra* note 6, at 136. For example, if Faith’s parents were correct in their interpretation of the best interests of the child, and were Faith granted an exemption, that argument would serve as an argument that no child should be exposed to Callan’s program even if parents want their child educated according to Callan’s prescriptions. *Id.*

A third reason for recognizing a negative parental right regarding the raising of children is to recognize that child-rearing has “expressive significance” for parents, that is to say, child rearing is a significant source of self-fulfillment for the parent, it is one of the “central meaning-giving tasks of our lives.” *Id.* at 142-43. Thus no one could reasonably propose a liberal regime that did not recognize the parental right. *Id.* But:

[a] moral theory of relationships in the family that says only the interests of one or both parents counts is despotic. . . . We should want a conception of parents’ rights in education that will not license the oppression of children. But we should also want a conception that will do justice to the hopes that parents have and the sacrifices they make in rearing their children. Neither desideratum can be discarded if our interpretation of rights in the family is to accommodate the moral equality of its members.

*Id.* at 144-45.

instills commitment to an open-ended ideal of autonomous development, they have no right to reject educational provision that would conduce to the degree of autonomous development that schooling as the great sphere, properly understood, would seek to establish.”<sup>331</sup>

Before discussing legal precedent, it is useful to recall the distinction between the scope of a right and the question of whether a right is infringed upon in the first place. Parents claiming that the state has infringed upon their rights to control the upbringing of their children may fail in either of two ways. First, their claim may fail because of how the scope of their right has been defined. This is the approach that Callan has chosen. Parents cannot successfully object to state coercion regarding his program of political education because the parental right does not include a right to block their children from being taught to be autonomous. Second, parental claims may fail because, regardless of how the scope of the right is defined, it has been determined that the right was not in fact infringed upon. This distinction can be clarified with the following example. Suppose the scope of parental right is defined to include only the exclusive right to control the religious upbringing of the child. In that case, any program of political education might arguably not infringe upon the parental right because it does not address a domain where the parent has exclusive control.<sup>332</sup> The parental right to control religious upbringing might also be said not to be violated if the parents have voluntarily consented to the state’s undertaking the religious education of the child (assuming, of course, the

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<sup>331</sup> CALLAN, *supra* note 6, at 135.

<sup>332</sup> The state’s program of political education may have intended or unintended “side effects” on the child’s religious up-bringing. It would then have to be decided whether unintended effects are to be considered an infringement of the parental rights. Analogous problems have arisen under the Free Speech Clause and the Free Exercise Clause. *See* *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). And, of course, current free exercise doctrine focuses on this problem:

It is a permissible reading of the [Constitution], in the one case, as in the other, to say that if prohibiting the exercise of religion . . . is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.

*Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 878 (1990).

state had such power in the first place). Or perhaps there is no “violation” because the degree of infringement is trivial or because the infringement is supposedly justified.

The First Circuit took an approach that combined both limiting the scope of the parental right and finding no violation because of a voluntary waiver. The case arose when high school parents complained that the compelled attendance of their children at a sexually-explicit AIDS awareness assembly violated their privacy right to direct the upbringing of their children.<sup>333</sup> The court observed that the Supreme Court had yet to decide whether the right to rear and educate one's child is a fundamental right that merited heightened scrutiny.<sup>334</sup> The Court nonetheless concluded that it need not decide that question because “we find that, even if it were, the plaintiffs have failed to demonstrate an intrusion of constitutional magnitude on this right.”<sup>335</sup>

The court found that Supreme Court precedent evinces:

the principle that the state cannot prevent parents from choosing a specific educational program – whether it be religious instruction at a private school or instruction in a foreign language. That is, the state does not have the power to ‘standardize its children’ or ‘foster a homogenous people’ by completely foreclosing the opportunity of individuals and groups to choose a different path of education.<sup>336</sup>

Hence, the court concluded that the liberty interest of parents upheld by the Supreme Court in *Pierce* and *Meyer* did not include the right to “dictate the curriculum” and to “restrict the flow of information” at the public school to which they voluntarily sent their children.<sup>337</sup> The Court also reasoned:

We think it is fundamentally different for the state to say to a parent, “You can’t teach your child German or send him to a parochial school” than for the parent to say to the state, “You can’t teach my child subjects that are morally offensive to

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<sup>333</sup> *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995).

<sup>334</sup> The Court noted that the Supreme Court in *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), used the language of “reasonable relation” suggesting that it was not using the strict scrutiny test. *Id.* at 533.

<sup>335</sup> *Meyer*, 262 U.S. at 533.

<sup>336</sup> *Id.*

<sup>337</sup> *Brown*, 68 F.3d at 525.

me.” The first instance involves the state proscribing what the state shall teach their children. If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools 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 as described in *Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools.<sup>338</sup>

Relying on similar reasoning, another court rejected a parental challenge brought against the school’s program of condom distribution.<sup>339</sup> Here, the court first concluded that “parents possess a fundamental liberty interest, protected by the Fourteenth Amendment, to be free from unnecessary governmental intrusion in the rearing of their children.”<sup>340</sup> But then the court concluded that the parents failed to demonstrate that the condom distribution program had a coercive effect on their parental liberties. The precedents the court noted “strongly imply that, in order to constitute a constitutional violation, the State action at issue must be coercive or compulsory in nature. Coercion exists where the governmental action is mandatory and provides no outlet for the parents, such as where refusal to participate in a program results in a sanction or expulsion.”<sup>341</sup> First, participation in the program was voluntary – there was no penalty or disciplinary action attached to a refusal to participate.<sup>342</sup> Second, the court rejected the parents’ argument that coercion was present merely because the parents were required by the compulsory

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<sup>338</sup> *Id.*

<sup>339</sup> *Curtis v. School Comm. of Falmouth*, 652 N.E.2d 580 (Mass. 1995). *But see* *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (A.D. 2d 1993). In that case, the court did hold that the parental right was fundamental and it was violated by the condom distribution program. But the court also specifically distinguished the condom distribution program from exposure “to talk or literature on the subject of sexual behavior,” finding that this claim would “falter in the face of the public school’s role in preparing students for participation in a world replete with complex and controversial issues.” *Id.* at 266.

<sup>340</sup> *Curtis*, 652 N.E.2d at 585.

<sup>341</sup> *Id.* at 586.

<sup>342</sup> *Id.* at 585-86.

education law to send their children to school. Thus, just as the First Circuit did, the Massachusetts Supreme Court distinguished *Meyer* and *Pierce*.<sup>343</sup>

This review of lower court precedent points to a number of closely interrelated issues which warrant further brief comment: first, whether the scope of the parental right includes control over the child's political education; second, whether the parental right to control the upbringing of their children stops at the public schoolhouse door; third, assuming the parental right does extend into the public school, what counts as an infringement of that right; and four, whether the parental right is a fundamental right that triggers the use of the strict scrutiny test. I will quickly pass by the first question on the ground that most everybody would agree that the scope of parental rights includes the political education of the child; few people would deny that the parental right to control the upbringing of their children does not include the right to educate their child to favor, say, direct democracy as opposed to representative democracy.<sup>344</sup> It was the second issue that was central to the decisions of the First Circuit and Massachusetts Supreme Court.

Do parents, in effect, voluntarily waive their rights to control the political upbringing of their children when they decide to send their children to public schools rather than exercising their *Pierce* right to send their children to a private school?<sup>345</sup> Professor Arons argues that the

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<sup>343</sup> *Id.* at 587. The court also rejected the parents' free exercise claim, finding they had failed to demonstrate a "substantial burden," i.e. coercion of the parental rights. *Id.* The parents argued that the condom problem burdened their free exercise rights "by creating a conflict between the religious teaching of parents as to the issue of premarital sexual intercourse, and the view, allegedly endorsed by the school committee, that sexual activity before marriage is not only permissible but also can be made safe." *Id.* at 588. The parents also raised in this context the compulsory education argument they had raised in connection with their Fourteenth Amendment right claims. *Id.* The court responded, "Although all citizens have a right freely to exercise their religion, the free exercise clause 'cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens' . . ." *Id.*

<sup>344</sup> Callan seems to have taken the position that the scope of the parental right regarding political education is limited in certain important respects.

<sup>345</sup> See *supra* notes 237-39 and accompanying text (discussing this issue in the context of a free exercise claim). Also note that this issue touches on the "somewhat eroded" doctrine of "unconstitutional conditions" which states

selective funding of public schools and not of private education has the practical effect of coercing less wealthy parents into the public schools which forces them to waive their rights.<sup>346</sup>

Professor Gilles has argued that the selective funding of public schools “is a major viewpoint-based license fee [tuition at a private school] that dissenting parents must pay to engage in educative speech within the sphere of formal schooling.”<sup>347</sup> Furthermore, he rejects the argument that selective funding of particular messages which are transmitted by and in the public school is not coercive, and thus raises no constitutional issue:

As *Barnette* illustrates, the fact that parents may – at considerable cost – use the *Pierce* exit option does not immunize state educational regulation from First Amendment scrutiny. The mandatory flag salute in *Barnette* was required by law only in the public schools. Yet the Supreme Court held that imposing this condition upon receiving a free education constituted the “coercive elimination of dissent.” Because it creates a penalty for dissent indistinguishable from the one in *Barnette*, the same conclusion applies to selective funding generally. Consequently, at least when selective funding is intended to induce parents to conform their educative speech to the majority’s values, it should be seen as presumptively unconstitutional.<sup>348</sup>

Viewed differently, we might ask why government may choose to fund one point of view and not another.<sup>349</sup> To go down this road would vitiate even the minimal limitations that the dissenters in *Pico* would impose upon the public schools.<sup>350</sup>

In short, it seems that we should not embrace the absolute view that, just because the *Pierce* option is available, parents must be automatically deemed to have waived their constitutional rights to control the upbringing of their children in the context of the public school. Yet we also need to take seriously the warning of the First Circuit that taking this position may

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that the government may not condition the receipt of a benefit upon the waiver of constitutional rights. *TRIBE*, *supra* note 265, at 781.

<sup>346</sup> Stephen Arons, *The Separation of School and State: Pierce Reconsidered*, 46 HARV. EDUC. REV. 76 (1976).

<sup>347</sup> Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 1025 (1996).

<sup>348</sup> *Id.* at 1025-26.

<sup>349</sup> See generally *Rust v. Sullivan*, 500 U.S. 173 (1991) (holding that the federal government could prohibit recipients of federal funds supporting family planning and counseling from giving abortion-related advice).

<sup>350</sup> *Board of Educ. v. Pico*, 457 U.S. 853, 885 (1971).

force the public schools to cater to the individual preferences of each parent. Perhaps this problem can be side-stepped if we also take into account the degree to which each school's program actually intrudes on the parental right, the third issue noted earlier. Hence, the position that may protect parental rights and yet not take us down the road to custom-tailored educational programs is one that holds that parents do not voluntarily waive their right as parents with regard to educational programs that impose a substantial burden on the child-parent educational relationship. And we can determine if the burden is substantial by using the same approach discussed earlier with regard to the substantial burden requirement in the free exercise framework.<sup>351</sup> Using this approach, it follows that Faith's parents would be successful in meeting the threshold requirement of establishing that their rights as parents have been infringed by Callan's education program.

But infringement does not mean that there has been a constitutional violation; we must still select the appropriate test and apply it to Faith's parents' claim. Whether Faith's parents' right is a fundamental right triggering the use of strict scrutiny was decided in favor of the parents by the Massachusetts court in the condom-distribution case and was raised, but not decided, by the First Circuit. One approach to deciding this question is to return to the decisions in *Pierce* and *Meyer* to ascertain whether the Court used a rational-basis or a strict-scrutiny test. Those opinions reveal that the Court spoke about a "rational relationship."<sup>352</sup> This language seems to suggest that the Court was using the rational-basis test, but this conclusion is not correct. While the language of the opinion evokes the modern rational-basis test,<sup>353</sup> these opinions arose at a historical moment when the Court was in fact approaching challenges to

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<sup>351</sup> See *supra* notes 243-60 and accompanying text.

<sup>352</sup> *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>353</sup> See, e.g., *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488 (1955).

governmental regulations in a manner that was equivalent to today's strict scrutiny test. That is to say, these cases placed the burden of proof on the government and the Court closely scrutinized the government's arguments. The cases in this era rested, in other words, on the implicit assumption that the affected rights were fundamental.<sup>354</sup> Furthermore, if the issues in *Pierce* and *Meyer* were to arise today, a number of scholars argue that the decisions would be decided on First Amendment grounds. That is to say, the parental rights at stake would be conceptualized as free speech rights.<sup>355</sup> For both of these reasons, then, the rights that Faith's parents invoke ought to be viewed as fundamental and the strict scrutiny test ought to apply. Again, for the reasons discussed in connection with the free exercise challenge raised by Faith's parents, the conclusion to be reached is that the school must grant Faith an exemption grounded in her parents' substantive due process rights under the Fourteenth Amendment.

## VI. CONCLUSION

The analysis of a Callanesque program in light of the principles of the Free Exercise Clause and of the Fourteenth Amendment has demonstrated that Callan's program to promote a specific conception of tolerance is itself intolerant. His program serves as a kind of acid bath for the very kind of religious views that were prominent at the founding and that were an important source of support, among others, for the Constitution itself.<sup>356</sup> Second, the opposition to vouchers by deliberative democrats such as Callan is premised upon the necessity of requiring all

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<sup>354</sup> See generally *Lochner v. New York*, 198 U.S. 45 (1905); GERALD GUNTHER & KATHLEEN SULLIVAN, *CONSTITUTIONAL LAW* 469-70 (13th ed. 1997).

<sup>355</sup> TRIBE, *supra* note 265, at 1319-20; Gilles, *supra* note 347. See also ARONS, *supra* note 117, at 189-221; Arons, *supra* note 346; Stephen Arons & Charles Lawrence III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309 (1980).

<sup>356</sup> DALE S. KUEHNE, *MASSACHUSETTS CONGREGATIONALIST POLITICAL THOUGHT 1760-1790* (1996).

children to be exposed to the kind of educational program developed by Callan.<sup>357</sup> To the extent that this argument raises serious free exercise issues, the argument against vouchers is weakened.

Finally, if Callan's political education program is too troubling to be embraced, what kind of political educational program should the government support? This question is too large to explore with any care here and now. But I do want to make a suggestion that may serve the twin goals of helping to uphold the interest of democratic stability without trampling on students' and parents' constitutional rights. One way in which the Gordian knot might be cut is by offering students an opportunity to study *The Federalist* and the Constitutional Convention itself.<sup>358</sup> If students came to understand why it was that the authors of *The Federalist* rejected direct democracy and favored a large polity and representative government; why the architecture of the government is as it is; how the Framers wanted the representatives to deliberate; and what the Framers expected of the electorate, they may come to a *critical* appreciation of the system. This study of *The Federalist* and of the Convention could be accompanied by an introduction to constitutional law and to a comparative study of democracies, all of which could accomplish something Madison himself wanted citizenship education to accomplish: expansion of the mind, a weakening of local prejudice, and an enlargement of benevolent feelings.<sup>359</sup> American citizenship education would be more effective if students were asked to grapple with Madison's and the other Framers' aspirations, vision, and reasoning.

This need not be -- and should not be -- an uncritical encounter. The Constitution was, after all, the product of a political compromise the center of which was slavery and its protection

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<sup>357</sup> CALLAN, *supra* note 6, at 182-89.

<sup>358</sup> THE FEDERALIST, *supra* note 299.

<sup>359</sup> *James Madison to William T. Barry, August 4, 1822* in THE MIND OF THE FOUNDER 343 (rev. ed. 1981).

for a time.<sup>360</sup> Whether to proceed with the final adoption of the Constitution as it emerged from the Convention is a challenging question that students could be asked to address without posing the same threat to their constitutional liberties as Callan's program of political education would pose.<sup>361</sup>

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<sup>360</sup> U.S. CONST., art. I, § 9 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”).

<sup>361</sup> SANFORD LEVINSON, CONSTITUTIONAL FAITH 180-94 (1988) (discussing the question of whether we would have signed the Constitution in 1787).