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William A. Galston

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EXPRESSIVE LIBERTY, MORAL PLURALISM, POLITICAL PLURALISM: THREE SOURCES OF LIBERAL THEORY

WILLIAM A. GALSTON*

I. THE CIVIC AND EXPRESSIVE DIMENSIONS OF LIBERALISM

Above and beyond artful institutional contrivances, liberal democracies rely on cultural and moral conditions that cannot be taken for granted. To remain "liberal," however, these regimes must safeguard a sphere in which individuals and groups can act, without state interference, in ways that reflect their understanding of what gives meaning and value to their lives. What is the relationship between the "civic" and the "expressive" strands of liberalism? What should we do when state action designed to bolster the preconditions of liberal democracy constrains expressive liberty in troubling ways, or conversely, when the exercise of expressive liberty is at odds with what may be regarded as liberal democratic preconditions. This conflict inevitably arises in public institutions such as schools, but it also emerges when the state seeks to regulate the structure and conduct of voluntary associations.

Must civil associations mirror the constitutional order if they are to sustain that order? The resolution of this issue revolves in part around empirical questions. For example, to what extent do illiberal or undemocratic voluntary associations engender patterns of conduct, belief, and character that weaken liberal democratic polities? Scholars certainly do not agree on this point in

* Professor, School of Public Affairs, and Director, Institute for Philosophy and Public Policy, University of Maryland. An earlier version of portions of this Essay was delivered as the Judge Simon E. Sobeloff lecture at the University of Maryland School of Law on February 13, 1997 and published as *The Legal and Political Implications of Moral Pluralism*, 57 MD. L. REV. 236 (1998).

general, and they rarely agree in specific cases.¹ Theorists such as Stephen Macedo are right to emphasize the dangers of complacency.² Liberal democratic citizens are made, not born, and we cannot rely blithely on the invisible hand of civil society to carry out civic paideia.³

Alternatively, Nancy Rosenblum urges attention to the dynamics of moral and political psychology; theoretical abstractions can lead us to overestimate the actual importance of "congruence" between regime-level principles and the associations of civil society.⁴ Incongruity evokes fears that frequently outrun facts, as they did in the nineteenth century when waves of Catholic immigration led Protestant Americans to worry about the future of democratic institutions.⁵ Notwithstanding these fears, Catholics soon became the most loyal of citizens—and one of the most adept groups at the game of grassroots democratic politics.⁶

Rosenblum asks us to look at different functions of civil associations. As she explains, they can express liberty as well as personal or social identity; provide arenas for the accommodation of deep differences; temper individual self-interest; help integrate otherwise disconnected individuals into society; nurture trust; serve as seedbeds of citizenship; and resist the totalizing tendencies of both closed communities and state power.⁷

It is not obvious as an empirical matter that civil society organizations within liberal democracies must be organized along liberal democratic lines in order to perform some or all of these functions. Many of the fears Protestants voiced a century ago concerning the antidemocratic tendencies of Catholicism now are focused on Protestant fundamentalism.⁸ It appears that in prac-

1. See, e.g., Stephen Macedo, *Transformative Constitutionalism and the Case of Religion: Defending the Modern Hegemony of Liberalism*, 26 POL. THEORY 56, 56-57 (1998); Nancy L. Rosenblum, *Civil Societies: Liberalism and the Moral Uses of Pluralism*, 61 SOC. RES. 539, 540-41 (1994).

2. See Macedo, *supra* note 1, at 56-57.

3. See *id.* at 56-58.

4. See Rosenblum, *supra* note 1, at 540-41.

5. See Macedo, *supra* note 1, at 66.

6. See *id.* at 66-67; see also Neal Devins, *The Countermajoritarian Paradox*, 93 MICH. L. REV. 1433, 1438-39 (1995) (book review) (detailing the power of the Catholic church in the family planning debate).

7. See Rosenblum, *supra* note 1, at 551-58.

8. See Phillip E. Johnson, *Concepts and Compromise in First Amendment Reli-*

tice, however, these denominations, far from undermining democracy, serve as arenas of political mobilization and education. Consider recent findings reported by political scientists Sidney Verba, Kay Schlozman, and Henry Brady: these churches serve as important training grounds for political skills, particularly for those without large amounts of other politically relevant assets such as education and money.⁹

There is room for deep disagreement about the policies that many religious groups are advocating in the political arena, but there appears to be little doubt that these groups have fostered political education and engagement to an extent that few other kinds of associations can match, at a time when most social forces are pushing toward political and civic disengagement.¹⁰ In addition, they seem to have done so without undermining their members' commitment to democratic pluralism. Alan Wolfe's recent empirical study of middle-class morality shows that among self-declared religious conservatives, support for core democratic principles and for tolerance of difference is very high.¹¹

Although the impact of civil society on the formation of citizens is a legitimate concern, the burden of proof lies with those who seek to shape or restrict the internal life of nonpublic associations. In my judgment, the available evidence does not warrant alarm, certainly not to the point of justifying new intrusions into parental and associational practices.

The empirical relation between the civic and expressive dimensions of liberal democracy is nested in a conceptual issue: What is the content of citizenship that institutions should be trying to strengthen? Without venturing to answer this question, let me offer a hypothesis: the more demanding the conception of citizenship, the more intrusive the public policies needed to promote it. Toward the beginning of *Emile*, Rousseau retells Plutarch's story of the Spartan mother with five sons in the army.¹²

gious Doctrine, 72 CAL. L. REV. 817, 842-45 (1984); Macedo, *supra* note 1, at 66.

9. See SIDNEY VERBA ET AL., VOICE AND EQUALITY: CIVIC VOLUNTEERISM IN AMERICAN POLITICS 325-30 (1995).

10. See *id.* at 18, 317-20, 357, 529-31.

11. See ALAN WOLFE, ONE NATION, AFTER ALL 39-132 (1998).

12. See JEAN-JACQUES ROUSSEAU, EMILE OR ON EDUCATION 40 (Allan Bloom

A Helot arrives with the news that all have been slain in battle.¹³ "Base slave," she retorts, "did I ask you that?"¹⁴ "We won the victory," he replied, whereupon the Spartan mother hastened to the temple to give thanks to the gods.¹⁵ Rousseau comments laconically: *that* was a citizen.¹⁶ The example may seem far-fetched, but the point is clear: the more our conception of the good citizen requires the sacrifice of private attachments to the common good, the more vigorously the state must act (as Sparta did) to weaken those attachments in favor of devotion to the public sphere.¹⁷

Within the civic republican tradition, state intrusion to foster good citizens poses no threshold issues; not so for liberal democracy, whose core commitments place limits on the measures the state legitimately may employ.¹⁸ I want to explore the resources liberal theory can bring to bear on the adjudication of these tensions, taking as my point of departure some examples from American constitutional law.

II. CIVIC AND EXPRESSIVE DIMENSIONS OF AMERICAN CONSTITUTIONALISM

Reflecting the nativist passions stirred by World War I, the State of Nebraska passed a law forbidding instruction in any modern language other than English.¹⁹ A Nebraska trial court convicted a teacher in a Lutheran parochial school under this statute for teaching a Bible class in German.²⁰ In *Meyer v. Nebraska*, decided in 1923, the Supreme Court struck down this

trans., Basic Books 1979) (1762).

13. *See id.*

14. *Id.*

15. *Id.*

16. *See id.*

17. This point applies, *mutatis mutandis*, to other demanding concepts of citizenship based on ideals such as autonomy, critical rationality, and deliberative excellence.

18. *See* Lan Cao, *Law and Economic Development: A New Beginning?*, 32 TEX. INT'L L.J. 545, 553 (1997) (book review) (noting that "where legal rules are applied with principled consistency to both the state and its citizens, they generally restrain rather than expand the arbitrary exercise of state power").

19. *See Meyer v. Nebraska*, 262 U.S. 390, 396-97 (1923).

20. *See id.*

law as a violation of the Fourteenth Amendment's guarantee of liberty.²¹ Writing for the Court, Justice McReynolds declared:

That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. . . . The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. . . . But the means adopted, we think, exceed the limitations upon the power of the State and conflict with rights assured to plaintiff in error.²²

The majority decision identified the underlying theory of the Nebraska law with the plenipotentary State of Sparta, as well as with Plato's *Republic*, which it quoted at length and sharply distinguished from the underlying premises of liberal constitutionalism.²³

Consider, second, *Pierce v. Society of Sisters*, decided in 1925.²⁴ Through a ballot initiative, the people of Oregon had adopted a law requiring parents and legal guardians to send all students between the ages of eight and sixteen to public schools.²⁵ The Society of Sisters, an Oregon corporation that maintained a system of Catholic schools, sued, claiming that the law was inconsistent with the Fourteenth Amendment.²⁶ The Supreme Court emphatically agreed:

The 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. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.²⁷

21. See *id.* at 399-403.

22. *Id.* at 401-02.

23. See *id.*

24. 268 U.S. 510 (1925).

25. See *id.* at 530-31.

26. See *id.* at 532-33.

27. *Id.* at 535.

Consider, finally, the case of *Wisconsin v. Yoder*,²⁸ decided by the Supreme Court a quarter century ago. *Yoder* presented a clash between a Wisconsin law, which required school attendance until age sixteen, and the Old Order Amish, who claimed that high school attendance would undermine their faith-based community life.²⁹ The majority of the Court agreed with the Amish, and asserted that the State of Wisconsin had not made a compelling case for intervening against their practices: "[H]owever strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests. . . . [T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children."³⁰

Taken together, these three cases stand for two propositions. First, in a liberal democracy, there is in principle a division of authority between parents and the state.³¹ The state has the right to establish certain minimum standards, such as the duty of parents to educate their children, and to specify some minimum content of that education, wherever it may be conducted.³² Parents, however, have a wide and protected range of choices as to how to discharge that duty to educate.³³ Suitably revised and extended, these considerations apply to the liberties of civil associations as well. Second, there are some things the liberal state may not do, *even in the name of forming good citizens*.³⁴ The appeal to the requisites of civic education is powerful, but not always dispositive when opposed by claims based on the authority of parents or the liberties of individuals and associations.

A free society, these cases suggest, will defend the liberty of individuals to lead many different ways of life. It will protect a zone within which individuals will freely associate to pursue shared purposes and express distinctive identities. It will adhere

28. 406 U.S. 205 (1972).

29. See *id.* at 207-09.

30. *Id.* at 215, 232.

31. See *Pierce*, 268 U.S. at 535.

32. See *Yoder*, 406 U.S. at 233.

33. See *id.*

34. See *id.* at 234.

to what lawyers would call a rebuttable presumption in favor of liberty: the burden of proof lies on those who seek to restrict associational liberty, not those who defend it.

During the twentieth century, the extension of state power has multiplied the public principles held to be binding on families and civil associations.³⁵ Many of these principles are designed to ensure that these associations do not exclude or abuse specific individuals arbitrarily; they promote public purposes widely accepted as morally compelling.³⁶

We are familiar with the moral advantages of central state power; we also must attend to its moral costs. What might be called a paradox of diversity exists: if we insist that each civil association mirror the principles of the overarching political community, meaningful differences among associations all but disappear; constitutional uniformity crushes social pluralism. If, as I shall argue, our moral world contains plural and conflicting values, the overzealous enforcement of general public principles runs the risk of interfering with morally legitimate individual and associational practices.

My argument constitutes a challenge both to the classical Greek conception of the political order as the all-encompassing association³⁷ and to the Hobbesian/Austinian/Weberian conception of plenipotentary sovereign power.³⁸ A liberal polity guided (as I believe it should be) by a commitment to moral and political pluralism will be parsimonious in specifying binding public principles and cautious about employing such principles to intervene in the internal affairs of civil associations. It rather will pursue a policy of *maximum feasible accommodation*, limited only by the core requirements of individual security and civic unity.

35. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 514, 605 (1983) (requiring private schools to comply with the principle of nondiscrimination in order to receive tax-exempt status).

36. See, e.g., Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1491o (1994); The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1994); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12215 (1994).

37. See generally ARISTOTLE, *POLITICS* 2-4 (Trevor J. Saunders trans., Clarendon Press 1995) (350 B.C.) (discussing fundamental associations).

38. See generally THOMAS HOBBES, *LEVIATHAN* 144-54 (E.P. Dutton & Co. 1950) (1651) (discussing rights of sovereigns).

That there are costs to such a policy cannot reasonably be denied. It will permit internal associational practices (e.g., patriarchal gender relations) of which many strongly disapprove.³⁹ It will allow many associations to define their membership in ways that may be viewed as restraints on individual liberty.⁴⁰ It also will, within limits, protect those whose words and way of life express deep disagreement with the regime in which they live.⁴¹ Unless liberty—individual and associational—is to be narrowed dramatically, however, we must accept these costs.

III. THE RESOURCES OF LIBERAL THEORY

I spoke earlier of the resources liberal theory can bring to bear on the adjudication of disputes between state power and associational freedom. Three concepts are of particular importance.

A. *Expressive Liberty*

The first concept is what I call "expressive liberty." By this I mean the absence of constraints, imposed by some individuals on others, that make it impossible (or significantly more difficult) for the affected individuals to live their lives in ways that express their deepest beliefs about what gives meaning or value to life. An example of such constraints is the experience of the Inquisition for Iberian Jews, who were forced to endure persecution or to renounce their religious practices.⁴²

39. For important discussions of these and related issues, see Nancy Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, in *FREEDOM OF ASSOCIATION* 75 (Amy Gutmann ed., 1998); Kent Greenawalt, *Freedom of Association and Religious Association*, in *FREEDOM OF ASSOCIATION*, *supra*, at 109.

40. See *Roberts v. United States Jaycees*, 468 U.S. 604 (1984) (holding that the right to freedom of association was not violated when a court compelled an all-male civic organization to accept women). The policy I defend would have led to the opposite result in this case. See *supra* note 39 and accompanying text.

41. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that flag burning constituted expressive conduct protected by the First Amendment).

42. See Daniel Basterra Montserrat, *The Constitutional Development of Religious Freedom in Spain: An Historical Analysis*, 4 J. TRANSNAT'L. & POL'Y 27, 29-30 (1995).

Expressive liberty offers the opportunity to enjoy a fit between inner and outer, belief and practice. Not all sets of practices will themselves rest on, or reflect a preference for, liberty as ordinarily understood. For example, being Jewish is not always (indeed, is not usually) a matter of choice. Once that fact is established, however, through birth and circumstance, it becomes a matter of great importance for Jews to live in a society that permits them to live in accordance with their understanding of an identity that is given rather than chosen, and that typically is structured by commandments whose binding power does not depend on individual acceptance. Expressive liberty can protect the ability of individuals and groups to live in ways that others would regard as unfree.

Expressive liberty is an important value because for most people, it is a precondition to leading a life they consider complete and satisfying. This is not an accident. Part of what it means to have sincere beliefs about how one should live is the desire to live in accordance with them. Only in rare cases (perhaps certain kinds of Stoicism) do constraints imposed by other individuals and social structures have no effect on the ability of believers to act on their convictions. Most of us experience impediments to acting on our deepest beliefs as sources of deprivation and unhappiness, resentment, and anger. Expressive liberty is a human good because its absence is an occasion for misfortune that few would endure willingly.

Although expressive liberty is a good, it is not the only good, and it certainly is not limitless. Expressive liberty does not protect every act flowing from sincere belief—for example, human sacrifice—but it does protect a range of practices that many regard as objectionable—for example, male circumcision and the gender separation commanded by Orthodox Judaism.⁴³

Expressive liberty is possible only within societies whose members do not impede one another's opportunity to live their lives as they see fit. To be meaningful in practice, an ethics of liberty requires a sociology and a politics of liberty. Institutional arrangements can help police a zone of mutual abstention, but

43. See William E. Brigman, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, 23 J. FAM. L. 337, 337, 353 (1984-85).

these institutions cannot succeed in the absence of a pervasive belief that it is wrong to deprive others of their expressive liberties. Expressive liberty has civic preconditions—in particular, internalized norms of self-restraint when faced with practices that reflect understandings of the good life you may not share.⁴⁴ Fostering this self-restraint, a core liberal virtue,⁴⁵ is (within limits) a legitimate object of civic action.

B. Moral Pluralism

Expressive liberty would not be very significant if the zone of legitimate beliefs and practices were narrow—that is, if the moral considerations that lead us to forbid human sacrifice would also rule out a wide range of other practices and limit us to a single conception of the human good. This does not seem to be the case. I have come to believe that something along the lines of Isaiah Berlin's moral pluralism offers the best account of the moral universe we inhabit.⁴⁶ Berlin depicts a world in which fundamental values are plural, conflicting, incommensurable in theory, and uncombinable in practice—a world in which there is no single, univocal *summum bonum* that can be defined philosophically, let alone imposed politically.⁴⁷

Moral pluralism is not an argument for radical skepticism, or for relativism.⁴⁸ The moral philosophy of pluralism stands between relativism and absolutism.⁴⁹

First, *moral pluralism is not relativist*. From a moral-pluralist perspective, some things, such as the great evils of human existence, are objectively bad, and they should be avoided in both our individual and collective lives.⁵⁰ Conversely, some things are objectively good.⁵¹

44. See David Heyd, *Introduction to TOLERATION* 1, 1-17 (David Heyd ed., 1996).

45. See MICHAEL WALZER, *ON TOLERATION* 71-82 (1997).

46. See JOHN GRAY, ISAAH BERLIN 113-14 (1996).

47. See *id.* at 35; George Crowder, *Pluralism and Liberalism*, 42 POL. STUD. 293, 295 (1994).

48. See GRAY, *supra* note 46, at 46; CHARLES LARMORE, *THE MORALS OF MODERNITY* 171-74 (1996).

49. See GRAY, *supra* note 46, at 46-47.

50. See STUART HAMPSHIRE, *MORALITY AND CONFLICT* 154-55 (1983).

51. See STUART HAMPSHIRE, *INNOCENCE AND EXPERIENCE* 33 (1989) (discussing the

Second, *moral pluralism is not absolutist*.⁵² Some multiple goods cannot be reduced to a common measure, cannot be ranked in a clear order of priority, and do not form a harmonious whole.⁵³ No single conception of the good is valid for all individuals: what is good for A may not be equally good for B.⁵⁴ In addition, no one preferred structure exists for weighing goods.⁵⁵ In our moral as well as material lives, there are more desirable goods than any one individual or group can possibly encompass; to give one kind of good pride of place is necessarily to subordinate, or to exclude, others.⁵⁶ Some individuals and groups may be morally broader than others, but none is morally universal.⁵⁷

The best reasons we have for believing that something like moral pluralism is true stem not from abstract argument, but from concrete experience. Not infrequently, our lives present conflicts of goods or values that seem fundamental but deeply heterogeneous, with no evident basis for comparison and choice. For instance, Sartre's famous example of the young man torn between his mother and the French Resistance;⁵⁸ or the choice faced by members of the Resistance to attack German soldiers and officials with the near certainty of prompting retaliation against civilians, or to accept the liberty-denying terms of the occupation.⁵⁹ In history's rear-view mirror, we see the heroism of the Resistance magnified,⁶⁰ but from the standpoint of many ordinary people at the time, the balance of goods appeared quite ambiguous.⁶¹

"minimum common basis for a tolerable human life"); H. L. A. HART, *THE CONCEPT OF LAW* 193-200 (1961) (discussing the "minimum content of natural law").

52. See BRIAN BARRY, *POLITICAL ARGUMENT: A REISSUE WITH A NEW INTRODUCTION*, at xxxix-xliv, 3-8 (1990).

53. See *id.* at xxxix; GRAY, *supra* note 46, at 25.

54. See BARRY, *supra* note 52, at xxxix; GRAY, *supra* note 46, at 113.

55. See BARRY, *supra* note 52, at xli-xliv; Crowder, *supra* note 47, at 295.

56. See JOHN RAWLS, *A THEORY OF JUSTICE* 34-36 (1971).

57. See GRAY, *supra* note 46, at 43-44.

58. See JEAN-PAUL SARTRE, *EXISTENTIALISM AND HUMANISM* 35-37 (Philip Mairet trans., 1948).

59. See generally LUCIE ANBRAC, *OUTWITTING THE GESTAPO* (Konrad Bieber trans., 1993) (offering an account of the obstacles faced by the French Resistance movement).

60. See *id.* at 232 (recalling the "glorious and tragic history of the Resistance").

61. See JOHN F. SWEETS, *THE POLITICS OF RESISTANCE IN FRANCE 1940-1944*, A

My experiences dealing with policy disputes while in government greatly fortified my belief in value pluralism. In case after case, I encountered conflicting arguments, each of which seemed reasonable up to a point. Each appealed to an important aspect of our individual or collective good, or to deep-seated moral beliefs. Typically, there was neither a way to reduce these considerations to a single common measure, nor an obvious way to give one moral claim priority over the others. The most difficult political choices, I came to believe, are not between good and evil, but between good and good.

One might suggest that the case for moral pluralism cannot be compelling because moral pluralism rejects, by fiat, the claims of religion. While moral pluralism rejects a single *summum bonum*, many religions insist that there is one: love of God, or imitation of God, or union with God.⁶² In my view, this is a verbal difficulty that disappears when we examine the concrete experience of faith communities over time. Even when a religion appears to assert a dominant end, on closer inspection it turns out that each religious doctrine, or concept of God, establishes a complex field of values, the relations among which are contestable and contested.⁶³ There is an inner logic that leads to pluralism within, and not just between, religions. Every religion faces its own version of the political problem we are exploring—the tension between unity and diversity in circumstances of liberty.⁶⁴

C. Political Pluralism

The political pluralism developed by early twentieth-century British theorists, such as J.N. Figgis, G.D.H. Cole, and Harold

HISTORY OF THE MOVEMENTS UNIS DE LA RÉSISTANCE 1817 (1976) (explaining that many French were hostile to the Resistance and believed it provoked repressive measures).

62. See GRAY, *supra* note 46, at 118 (discussing the challenge the pluralist thesis poses to the belief in a universal good for all human beings propounded in certain religions).

63. See, e.g., MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 82-83 (1997) (discussing the current debate over homosexuality in the Christian church).

64. See, e.g., *id.*

Laski, provides a third source of support for the thesis of this essay.⁶⁵ For our purposes, the key idea offered by these thinkers was a critique of the plenipotentiary state, whether understood in an Aristotelian or Austinian manner.⁶⁶ Instead, they argued that our social life comprises multiple sources of authority and sovereignty—individuals, parents, associations, churches, and state institutions, among others—none of which is dominant for all purposes and on all occasions.⁶⁷ Nonstate authority does not exist simply as a concession or gift of the state.⁶⁸ A well-ordered state recognizes, but does not create, other sources of authority.⁶⁹

The theory of multiple sovereignties does not imply the existence of separate social spheres, each governed by its own form of authority. Political pluralism is consistent with the fact of overlapping authorities whose relationship must somehow be resolved.⁷⁰ For example, both parents and state institutions have power over the education of children. From a pluralist point of view, the state cannot rightly resolve educational disputes with parents by asserting the comprehensive authority of its conceptions over theirs.

A tale from medieval times recounts that on one occasion Bulan, King of the Khazers, summoned four wise men to his kingdom—a secular philosopher, a Christian scholar, a Moslem scholar, and a rabbi.⁷¹ After interrogating them seriatim on the content and basis of their beliefs, Bulan called his people together in an assembly, declared that he accepted Judaism, and decreed that all Khazers would thenceforth be instructed in and practice Judaism as their communal faith.⁷²

65. See generally THE PLURALIST THEORY OF THE STATE: SELECTED WRITINGS OF G.D.H. COLE, J.N. FIGGIS, AND H.J. LASKI (Paul Q. Hirst ed., 1989) (offering excerpts summarizing the theorists' views) [hereinafter PLURALIST THEORY].

66. See Paul Q. Hirst, *Introduction* to PLURALIST THEORY, *supra* note 65, at 1, 2; H.J. Laski, *The Pluralist State*, in PLURALIST THEORY, *supra* note 65, at 183, 186.

67. See Hirst, *supra* note 66, at 2.

68. See *id.* at 2-3.

69. See *id.*

70. See *id.* at 29. For a discussion of this issue in the context of control over education, see AMY GUTMANN, *DEMOCRATIC EDUCATION* 19-47 (1987).

71. See Isaak Heinemann, *Commentary to Book I*, in JEHUDA HALEVI, KUZARI: THE BOOK OF PROOF AND ARGUMENT 50-51 (Isaak Heinemann ed., East & West Library 1947).

72. See *id.*

I suspect that this chain of events strikes most readers today as strange. Would it be less strange if—rather than one man deciding for all—the people had assembled themselves and, after the most scrupulous democratic deliberation, settled on Judaism as the official religion of the Khazer nation? I think not. This story poses a threshold question: does the state possess the legitimate power to make collectively binding decisions on religion for its people? If not, the question of how such decisions should be made is never reached. From a pluralist perspective, religion is a clear example of a matter that is not subject to plenipotentary state power.

In matters of this sort, individuals and civil associations are not required to give an account of—or justify—their themselves before any public bar.⁷³ A congressional committee therefore could not rightfully compel representatives of minority religions to explain the essentials of their faith. Indeed, as Ira Katznelson argues, such individuals are not morally required to give an account of themselves to anyone, public or private, because a meaningful pluralism entails “the right not to offer a reason for being different.”⁷⁴ Katznelson builds on Susan Mendus’s metaphor of “neighborliness.”⁷⁵ We owe our neighbors civil behavior that is mindful of the impact on them of what we do, but ordinarily “neighbors do not owe each other reasons” for the way they choose to lead their lives.⁷⁶

D. Expressive Liberty, Moral Pluralism, and Political Pluralism

I began by suggesting that there are three important, but sometimes neglected, resources on which liberal theory can draw. I will now elaborate on the relationship among them.

I need not dwell on the relationship between expressive liberty and moral pluralism. Suffice it to say that if moral pluralism is the most nearly adequate depiction of the moral universe we inhabit, the range of choice-worthy human lives is very wide.

73. See IRA KATZNELSON, *LIBERALISM'S CROOKED CIRCLE: LETTERS TO ADAM MICHNIK* 171 (1996).

74. *Id.*

75. See *id.* at 173.

76. *Id.* at 173.

Although some ways of life can be ruled out as violating minimum standards of humanity, most cannot.⁷⁷ Under this theory, the zone of human agency protected by the norm of expressive liberty is capacious indeed. Moral pluralism supports the importance of expressive liberty in ways that monistic theories of value or accounts of the *summum bonum* do not.⁷⁸

Moral pluralism and political pluralism have a relationship of mutual support. Moral pluralism suggests that not all intrinsic goods are political goods; many are social or private.⁷⁹ These goods are heterogeneous. In particular, the goods of family, social life, and religion cannot be understood adequately as functionally related to the political order. They affect politics, but they are not only for the sake of politics. Not every religion can be reduced without remainder to "civil" religion; not every parental decision serves, or needs to serve, the common good.⁸⁰ This heterogeneity of value precludes instrumental rank-ordering, and political goods therefore do not enjoy a comprehensive priority over others in every circumstance.⁸¹

Moral pluralism lends support to the proposition that we should not regard the state as all-powerful,⁸² while political pluralism helps define and defend the social space within which we can translate the heterogeneity of value into a rich variety of worthy human lives.⁸³ This mutual support, however, does not rule out all hierarchical relations between the state and other activities. In a free society with a multiplicity of individual and associational beliefs, practices that give expression to these beliefs inevitably will come into conflict. In some cases, the contending parties will be able to negotiate some accommodation. This is not always the case. State power legitimately can regu-

77. See Crowder, *supra* note 47, at 299-300.

78. Cf. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 395-98 (1986) (discussing the importance of choice to moral pluralism); Crowder, *supra* note 47, at 294-96 (discussing clashing values and the role of choice).

79. Cf. GRAY, *supra* note 47, at 25 (discussing the variety of sometimes incommensurable human values).

80. Cf. RAZ, *supra* note 78, at 393-95 (asserting that individual autonomy can serve both the personal and public good).

81. See GRAY, *supra* note 46, at 25.

82. See *id.* at 143-44.

83. See Hirst, *supra* note 66, at 2, 29-30.

late the terms of the relationship among social agents, provided that the public structure is as fair as possible to all and allows ample opportunities for expressive liberty.⁸⁴ In this respect, unlike others, the state enjoys a certain priority: it is the key source of order in a system of ordered liberty.

IV. MORAL PLURALISM AND POLITICAL LIBERALISM

In recent years, a debate has surfaced concerning the theoretical relationship between moral pluralism and political liberalism. Although the British philosopher John Gray has long been an ardent foe of the "new liberalism" represented by John Rawls, he now has extended his critique to a paradigmatic classical liberal: Isaiah Berlin.⁸⁵ Berlin is famous for an account of liberalism resting on two master-ideas: moral pluralism and negative liberty, understood as the unimpeded capacity of each individual to choose among competing conceptions of good or valuable lives.⁸⁶

Gray's thesis is that these two master-ideas do not fit together.⁸⁷ The more seriously we take moral pluralism, the less inclined we will be to give pride of place to negative liberty as a good that trumps all others.⁸⁸ We will accept that lives defined by habit, tradition, or the acceptance of authority can be valid forms of human flourishing.⁸⁹ We therefore will recognize that liberalism—understood as the philosophy of societies in which liberty takes pride of place—enjoys only local authority.⁹⁰ If Berlin's account of pluralism is correct, Gray concludes, liberalism cannot sustain its universalist claims and emerges at best as one valid form of political association among many others.⁹¹ My thesis is that the fit between moral pluralism and political liberalism is tighter than Gray supposes, but that his objection none-

84. *See id.* at 27-28.

85. *See, e.g.,* GRAY, *supra* note 46.

86. *See id.* at 17, 43.

87. *See id.* at 2.

88. *See id.* at 159.

89. *See id.*

90. *See id.* at 161.

91. *See id.* at 160-61.

theless has important implications for our understanding of the role of deep pluralism within liberal societies.

What is the relationship between moral pluralism and the political philosophy of liberalism? According to Charles Larmore, moral pluralism cannot provide a foundation for liberal politics.⁹² The reason is that the aim of liberalism is to find principles that all reasonable people would accept, regardless of their particular views concerning the good.⁹³ Moral pluralism is far too controversial to be among those principles; individuals may readily be regarded as reasonable, even though they reject the pluralist account of our moral universe.⁹⁴

In my view, this position (though much in vogue) conflates the practical problem of reaching consensus with the theoretical task of achieving justification. Suppose that pluralism is the most nearly adequate account of morality and that liberalism enjoys a similar status in political theory. It would be odd if these two bodies of truth were not mutually consistent. To be sure, pluralism could prove consistent with modes of politics other than liberal, and liberalism might have room for moral views other than pluralism. At the very least, however, moral pluralism should not affirm any propositions that liberalism denies, or vice versa. Of course reasonableness and truth are different, but that is no argument against the relevance of truth for theoretical justification—if the truth is available. Larmore's thesis is sustainable only when the gap between what is reasonable and what is true cannot be closed. Michael Walzer proposes a more determinate account of the relation between moral pluralism and liberalism—not that one logically entails the other, but rather that they reflect the same fundamental attitude.⁹⁵ Walzer observes:

I don't know anyone who believes in value pluralism who isn't a liberal, in sensibility as well as conviction. . . . You

92. See LARMORE, *supra* note 49, at 154, 173.

93. See *id.* at 154.

94. See *id.* at 154-55, 173-74.

95. See Michael Walzer, *Are There Limits to Liberalism?*, N.Y. REV. OF BOOKS Oct. 19, 1995, at 31.

have to look at the world in a receptive and generous way to see a pluralism of Berlin's sort And you also have to look at the world in a skeptical way, since the adherents of each of the different values are likely to rank them very high on a scale designed for just that purpose. And receptivity, generosity, and skepticism are, if not liberal values, then qualities of mind that make it possible to accept liberal values (or, better, that make it likely that liberal values will be accepted).⁹⁶

This is surely a plausible conjecture, although assessing its truth would require a much longer excursion into political psychology and sociology than Walzer undertakes. The question is whether the effort to find a more systematic philosophic relationship between moral pluralism and liberalism is, as Gray and others contend,⁹⁷ doomed to fail. I think not. Consider the possibility that pluralism is one premise in an argument for a protected zone of political liberty. The argument runs as follows: If the moral philosophy of pluralism is roughly correct, there is a range of indeterminacy within which various choices are rationally defensible though not rationally required. Given that no one uniquely rational ordering or combination of incommensurable values exists, no one could ever provide a generally valid reason, binding on all individuals, for a particular ranking or combination. Restrictive policies, whose justification includes the assertion that there is a unique rational ordering of value, therefore have no basis.

Three important considerations may be advanced against—or at least in qualification of—this thesis. The first is that in practice different moral conceptions cannot always coexist in the same social space, and that in such cases the political system must tilt in one direction or another.⁹⁸ This may be true, but it does not weaken the link between pluralism and liberalism. On the contrary, moral pluralism itself teaches us that all goods are

96. *Id.*

97. See Crowder, *supra* note 47, at 293; Glen Newey, *Metaphysics Postponed: Liberalism, Pluralism, and Neutrality*, 45 POL. STUD. 296, 296 (1997).

98. See Crowder, *supra* note 47, at 297.

not compossible.⁹⁹ Political conflicts are bound to mirror this fact, and when they do, it is not government restricting liberty but (so to speak) the moral structure of the universe.

The second countervailing consideration is that even when different moral conceptions can exist within the same social space, there nonetheless may be compelling reasons for the political system to prefer some to others.¹⁰⁰ For example, it may turn out that a particular understanding of the good, though not intrinsically preferable to others, functionally is preferable, perhaps even essential to the preservation of the institutions that protect expressive liberty. Indeed, this is what we should expect if my initial conceptual distinction between the civic and expressive dimensions of liberalism has any application in practice. Still, the empirical ambiguities of functional relations, coupled with the presumption in favor of liberty, should make us very cautious about adopting liberty-restricting policies on this basis.

The third counterargument, that of John Gray, is the most challenging. The rejection of arguments based on uniquely superior moral understandings does not, Gray contends, suffice to rule out all justifications an illiberal regime may offer for its restrictive policies. Such a regime

need not claim, when it imposes a particular ranking of incommensurable values on its subjects, that this ranking is uniquely rational, or even that it is a better ranking than others that are presently found in the world. It need only claim that it is a ranking embedded in, and necessary for the survival of, a particular way of life that is itself worthwhile, and that this ranking, and the way of life it supports, would be imperilled by the unimpeded exercise of choice.¹⁰¹

This argument deserves careful consideration by every committed liberal, but ultimately it is not compelling for two reasons. First, I cannot think of an instance in which an illiberal regime has sought to justify itself on Gray's basis. Instead, such regimes characteristically offer universalist claims—about the

99. See *id.* at 294-95.

100. See *id.* at 304.

101. GRAY, *supra* note 46, at 153.

dictatorship of the proletariat, the master-race, the will of Allah, or whatever.¹⁰² This is no accident. The mobilization of social force against the desire for freedom requires an intensity of conviction that only universalist claims can engender.¹⁰³

Second, there is a distinction between two ways—call them potential and actual—of justifying a way of life. Potential justification is addressed to those who are not (yet) leading that life. It is a claim that it would be worthwhile for them to do so, a claim that they may well resist. Actual justification, by contrast, is addressed to people who already are leading a way of life. Its objective is defensive rather than offensive—the preservation of a way of life rather than its extension. In these circumstances, to claim that a way of life is “worthwhile” is to say (in part) that it is worthwhile *for those who are leading it*. It is hard to see how that claim can be plausible unless the people identify with the way of life in question; worthwhileness and expressive liberty are linked. As explained above, this does not necessarily mean that they “chose” it¹⁰⁴—but if the people identify with the way of life at issue, the regime need not use coercion to maintain it. If (as it appears) Gray is characterizing the efforts of a regime to defend an existing way of life that does not embody the concepts of autonomy and choice,¹⁰⁵ the clash between collective preservation and individual choice should not arise.

Note that this pluralist case for a zone of liberty is a claim about limits on coercive interference in individual or group ways of life.¹⁰⁶ It is not an argument that each way of life itself must embody a preference for liberty. This distinction—liberty *within* ways of life versus liberty *between* ways of life—is part of a broader contrast.

There are two quite different standpoints, with different historical roots, for understanding modern life. The first of these, which gives pride of place to *autonomy*, is linked to what may be

102. See, e.g., Shlomo Avineri, *Peaceful Transitions to Democracy: On Problems of Transition in Post Communist Society*, 19 CARDOZO L. REV. 1921, 1923 (1998).

103. See, e.g., *id.*

104. See *supra* text accompanying notes 43-45.

105. See GRAY, *supra* note 46, at 152-53.

106. See *supra* text accompanying note 17.

called the Enlightenment project—the experience of liberation, through reason, from externally imposed authority.¹⁰⁷ Within this project, the examined life is understood as superior to reliance on tradition or faith, and preference is given to self-direction over any external determination of the will.¹⁰⁸

The alternative standpoint, which gives pride of place to *diversity*, finds its roots in what I shall call the Reformation project—that is, to the effort to deal with the political consequences of religious differences emerging within Christendom.¹⁰⁹ In this project, the central task is that of accepting and managing diversity through mutual toleration within a framework of civic unity.¹¹⁰

In my judgment, social theorists—especially liberals—go astray when they give pride of place to an ideal of personal autonomy, understood as the capacity for critical reflection and for choice guided by such reflection.¹¹¹ The inevitable consequence is that the state takes sides in the ongoing tension between reason and faith, reflection and tradition, needlessly marginalizing and antagonizing groups that cannot embrace the Enlightenment project conscientiously.

Rightly understood, liberalism is about the protection of diversity, not the promotion of autonomy. In practice, liberal societies are unusually hospitable to critical reflection of all kinds,¹¹² but that does not mean that the cultivation of critical reflection is a higher-order political goal: liberal societies can and must make

107. The phrase “Enlightenment project” is my term; John Gray also uses it, but in a somewhat different sense. See generally JOHN RAWLS, *POLITICAL LIBERALISM* at xviii (1993) (discussing references to a “so-called Enlightenment project”); Charles Larmore, *Political Liberalism*, 18 *POL. THEORY* 339, 342-46 (1990) (discussing autonomy and diversity in liberal societies). For further discussion, see William A. Galston, *Two Concepts of Liberalism*, 105 *ETHICS* 516 (1995).

108. See RAWLS, *supra* note 107, at xvii; Larmore, *supra* note 107, at 343.

109. See, e.g., RAWLS, *supra* note 107, at xviii-xxviii; Larmore, *supra* note 107, at 345-46.

110. See, e.g., RAWLS, *supra* note 107, at xviii-xxviii; Larmore, *supra* note 107, at 345-46.

111. See Crowder, *supra* note 47, at 302 (discussing the importance Stephen Macedo and Joseph Raz place on autonomy).

112. Typical examples of this include an unfettered press and vigorous competition among political parties and ideologies.

room for individuals and groups whose lives are guided by tradition, authority, and faith.

V. POLITICAL CHOICES

As this discussion suggests, a distinction exists between pluralism at the level of individual lives and pluralism at the level of political institutions. Two differences are key.

A. *The Political Weighing of Competing Values*

Even if there are no binding rational principles guiding the manner in which individuals weigh competing goods, the same need not be the case for political choices. For example, suppose you take as a basic principle of political morality that each group is to be treated in accordance with the strength of its valid claims. In the context of moral pluralism, this warrants a strategy of compromise and balance to accommodate multiple valid claims. So understood, the politics of compromise is not an unprincipled, split-the-difference tactical pragmatism; nor is it the pursuit of conflict reduction for its own sake, a bare *modus vivendi*. Rather, it is the right thing to do in circumstances of moral pluralism.¹¹³

Even if we cannot reduce qualitatively different claims to a common measure, there may be ways of deliberating about trade-offs among them that allow us to distinguish between more and less reasonable outcomes. For example, the claim that one good should enjoy an absolute or lexical priority over others typically is hard to sustain in a deliberative political context. In situations in which an increment of one good can be obtained only at the cost of rapidly increasing losses of other goods, most people will agree that at some point enough is enough.¹¹⁴ They also realize that circumstances alter cases.¹¹⁵ Gray sometimes uses existentialist language to characterize the politics of value

113. This is also an argument in favor of the messiness of politics and against a pernicious legalism that absolutizes competing claims and creates winner-take-all outcomes.

114. See BARRY, *supra* note 52, at 8.

115. See *id.*

pluralism,¹¹⁶ but his focus on radical choice, unguided by reason, seems empirically dubious. Considerations short of mathematical or logical rigor may incline people to agree on a decision.

B. Narrowness and Capaciousness

We can make a second distinction between individual and social pluralism. While any particular life necessarily represents a narrowing of value—one among many possible rankings and combinations of values and goods—the same is not the case (at least not in the same way and to the same extent) for societies. Some societies may embody a collective narrowing—an individual choice writ large.¹¹⁷ Others may represent capaciousness—that is, they may encompass a range of ways of life that can neither be commensurated nor combined at the level of individuals.¹¹⁸

Does value pluralism entail a preference for social capaciousness over social narrowing? Gray's position appears to be that the preference for capaciousness is a matter of history rather than logical entailment; it reflects the central role of autonomy in our culture, and the fact of (increasing) interpenetration of cultures, which in many circumstances can be halted and reversed only through tactics ranging from the coercive to the barbaric.¹¹⁹ Gray argues, however, that capaciousness is not required in circumstances in which homogeneity may be preserved (through tradition, precedent, or authority) unless deliberately perturbed by outside influences.¹²⁰

My view of the relation between value pluralism and social capaciousness is quite different. It rests on a modest proposition

116. See, e.g., GRAY, *supra* note 46, at 8.

117. Examples of this sort of regime include the Iranian theocracy established by Ayatollah Khomeini and the even more rigorous regime instituted by the Taliban in Afghanistan.

118. Contemporary liberal democracies represent this type of capaciousness. It is important, however, not to confuse capaciousness with neutrality. Any regime will have characteristic broad tendencies to advantage certain ways of life and disadvantage others. See WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 95-97, 290-96 (1991).

119. See JOHN GRAY, *LIBERALISMS: ESSAYS IN POLITICAL PHILOSOPHY* 212-15 (1989).

120. See *id.* at 213-15; *supra* notes 101-06 and accompanying text.

concerning what might be called philosophical anthropology. While it is true, as Gray suggests, that we are beings whose good is given only in part by our (generic) nature,¹²¹ it is also the case that the diversity of human types is part of what is given. A narrow society is one in which only a small fraction of inhabitants can live their lives in a manner consistent with their flourishing and satisfaction. The rest will be pinched and stunted to some considerable degree. All else being equal, this is an undesirable situation, and one that is best avoided. To the maximum extent possible in human affairs, liberal societies do avoid this kind of pinching.¹²² This is an important element of their vindication as a superior mode of political organization.¹²³

Gray has argued rightly that liberal polities are not neutral in their sociological effects; certain forms of life are placed on the defensive, or marginalized.¹²⁴ Still, there is more scope for diversity in liberal societies than anywhere else,¹²⁵ and those societies have it in their power to adopt policies that maximize the possibility of legitimate diversity.¹²⁶

VI. LIBERAL POLITICS AND CIVIC DIVERSITY

Within liberal political orders (as in all others), there must be some encompassing political norms. The question is how "thick" the political is to be. The answer will help determine the scope of legitimate state intervention in the lives of individuals, and in the internal processes of organizing that make up civil society.

121. See GRAY, *supra* note 119, at 257.

122. Cf. Boaventura de Sousa Santos, *Oppositional Postmodernism and Globalizations*, 23 LAW & SOC. INQUIRY 121, 129 (1998) (discussing liberal society as a society of individuals, free and equal, and equally endowed with freedom of choice).

123. See, e.g., Thomas Morawetz, *Persons Without History: Liberal Theory and Human Experience*, 66 B.U. L. REV. 1013, 1027-30 (1986) (discussing liberal theories' focus on political neutrality based on moral neutrality regarding ways of living).

124. See GRAY, *supra* note 119, at 260.

125. Cf. Crowder, *supra* note 47, at 301 (pointing out that a "typical difference between liberal and non-liberal societies is that the former permits individuals to choose within limits, which goods to pursue, whereas in non-liberal societies such choices are made by society as a whole or by some recognized authority").

126. See GALSTON, *supra* note 118, at 296-301; Crowder, *supra* note 47, at 301.

The constitutional politics of moral pluralism will seek to restrict enforceable general norms to the essentials.¹²⁷ By this standard, the grounds for national political norms and state intervention include basic order and physical protection;¹²⁸ the sorts of goods that Hampshire, Hart, and others have identified as necessary for tolerable individual and collective life;¹²⁹ and the components of shared national citizenship.¹³⁰ It is difficult, after all, to see how societies can endure without some measure of order and material decency. Since Aristotle's classic discussion of the matter,¹³¹ it has been evident that political communities organize around conceptions of citizenship that they must defend and nurture through educational institutions, as well as less visible formative processes.¹³²

How much farther should the state go in enforcing specific conceptions of justice, authority, or the good life? What kinds of differences should the state permit? What kinds of differences may the state encourage or support? I want to suggest that an understanding of liberalism guided by expressive liberty, moral pluralism, and a political pluralism of divided sovereignty yields clear and challenging answers in specific cases.

Let me begin with a simple example. Although we may regret the exclusion of women from the Catholic priesthood and from the rabbinate of Orthodox Judaism, I take it that we would agree that otherwise binding antidiscrimination laws should not be invoked to end these practices. What blocks the extension of these laws is our belief that religious associations, and perhaps others as well,¹³³ enjoy considerable authority within their own

127. See GALSTON, *supra* note 118, at 178, 180, 182.

128. See *id.*

129. See *id.* at 38, 167, 178.

130. See *id.* at 178.

131. See ARISTOTLE, *supra* note 37, at 2-4.

132. See *id.* at 2-4, 18-21.

133. The most significant Supreme Court case addressing this issue outside the context of religion is *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (holding that the right to freedom of association was not violated when a court compelled a men's civic organization to accept women). For commentary from various perspectives, see Amy Gutmann, *Freedom of Association: An Introductory Essay*, in FREEDOM OF ASSOCIATION, *supra* note 40, at 3; George Kateb, *The Value of Association*, in FREEDOM OF ASSOCIATION, *supra* note 40, at 35; Rosenblum, *supra* note 40, at 75.

sphere to determine their own affairs, and, in so doing, to express their understanding of spiritual matters.¹³⁴ We can believe this without necessarily endorsing the specific interpretation of gender roles and roles embedded in broader religious commitments.

A less clear-cut example stems from the issues raised in the case of *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*¹³⁵ A private fundamentalist school decided not to renew the contract of a pregnant married teacher because of its religiously based belief that mothers with young children should not work outside their homes.¹³⁶ After receiving a complaint from the teacher, the Civil Rights Commission investigated, found probable cause to conclude that the school had discriminated against an employee on the basis of religion, and proposed a consent order including full reinstatement with back pay.¹³⁷

As Frederick Mark Gedicks observed, *Dayton Christian Schools* involved a clash between a general public norm (nondiscrimination) and the constitutive beliefs of a civil association.¹³⁸ The teacher unquestionably experienced serious injury through loss of employment.¹³⁹ On the other hand, forcing the school to rehire her clearly would have impaired the ability of the religious community, of which it formed a key part, to exercise its distinctive religious views—not just to profess them, but also to express them in its practices.¹⁴⁰ The imposition of state-endorsed beliefs on that community would have threatened core functions of diverse civil associations—the expression of a range of conceptions of the good life and the mitigation of state power.¹⁴¹ In this

134. See NANCY ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* 75-111 (1998).

135. 477 U.S. 619 (1986).

136. See *id.* at 623.

137. See *id.* at 623-24.

138. See Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 101-02.

139. See *id.* at 102.

140. See *id.* For a strong defense of associational activity as expressive, see Kateb, *supra* note 133, at 35-63.

141. See Kateb, *supra* note 133, at 60-61.

case and others like it, a liberal politics guided by moral pluralism would give priority to the claims of civil associations.¹⁴²

Current federal legislation and constitutional doctrine reflect this priority to a considerable degree. Although Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of religion,¹⁴³ section 702 of the statute exempts religious organizations.¹⁴⁴ In the case of *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,¹⁴⁵ decided in 1987, the Supreme Court not only upheld this accommodation in principle, but also extended its reach to a wide range of secular activities conducted under the aegis of religious organizations.¹⁴⁶

This does not mean that all religiously motivated practices are deserving of accommodation. Some clearly are not. No civil association can engage in human sacrifice: there can be no free exercise for Aztecs. Nor can a civil association endanger the basic interests of children by withholding medical treatment in life-threatening situations.¹⁴⁷ There is, however, a basic distinction between the minimal content of the human good, which the state must defend, and diverse conceptions of flourishing above that baseline, which the state must accommodate to the maximum extent possible. Although room exists for reasonable disagreement as to where that line should be drawn, an account of liberalism built on expressive liberty and on moral and political pluralism should make us very cautious about expanding the scope of state power in ways that mandate uniformity.

There are two complications for the position I have described. First, the expansion of the modern state means that most civil

142. See Gedicks, *supra* note 135, at 105, 115.

143. See 42 U.S.C. § 2000e-2(m) (1994).

144. See *id.* § 2000e-1(a).

145. 483 U.S. 327 (1987).

146. See *id.* at 336-38.

147. See *Novak v. Copp County-Kennestone Hosp. Auth.*, 849 F. Supp. 1559, 1567 (N.D. Ga. 1994) (holding that minor's parent may not refuse a medically necessary blood transfusion for the minor on the basis that it offends the parent's religious beliefs); cf. *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1994) (holding that the right to practice religion does not include liberty to expose the community or children to communicable disease or to expose children to ill health or death).

associations now are entangled with it in one way or another.¹⁴⁸ If limited, even involuntary, participation in public programs requires civil associations to govern the totality of their internal affairs in accordance with general public principles, the zone of diversity is narrowed dangerously. A liberal constitutional jurisprudence consistent with the thesis I am defending would limit the reach of public principles to those areas in which, for example, civil associations are participating directly and substantially in programs that confer public benefits on their members.

Second, there is a distinction between permission and encouragement. The state does not have to confer benefits on civil associations that violate important public principles. From this standpoint, the Court decided *Bob Jones University* correctly by denying tax-exempt status to a discriminatory school.¹⁴⁹

One of the most discussed examples of the tension between the expressive and civic dimensions of liberal democracy concerns the controversy that erupted in Hawkins County, Tennessee a decade ago between Christian fundamentalist parents and the public schools.¹⁵⁰ The parents charged that textbooks selected by the school board conveyed teachings at odds with the faith they sought to transmit to their children.¹⁵¹ They therefore requested that their children be allowed to use alternative textbooks and, if necessary, study the contested subjects outside the regular classroom.¹⁵² After early efforts by individual school administrators to accommodate the parents' request collapsed, a legal process ensued that culminated in a pro-school board decision by the U.S. Court of Appeals for the Sixth Circuit.¹⁵³

Amy Gutmann and Dennis Thompson offer the most systematic philosophical analysis of this controversy in the course

148. See Gedicks, *supra* note 138, at 101, 169.

149. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) (denying tax exempt status to a school that did not admit persons who engaged in or advocated interracial dating or marriage).

150. See AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 63-69 (1996).

151. See *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1060-61 (6th Cir. 1987).

152. See *id.* at 1059-61.

153. See *id.* at 1070.

of their path-breaking account of deliberative democracy.¹⁵⁴ Gutmann and Thompson contend that fidelity to democratic deliberation as they define it entails the rejection of the fundamentalists' attempts to have their children shielded from reading materials they found offensive to their faith.¹⁵⁵ The question to raise is whether their conception of democratic deliberation proves in the end to be compatible with an understanding of liberalism based on expressive liberty and moral and political pluralism. I conclude that it is not and offer in its place a more capacious account of liberal democratic public argument.

The linchpin of Gutmann and Thompson's account of deliberation is the idea of reciprocity. Building on the work of Rawls and Scanlon, they say that the

foundation of reciprocity is the capacity to seek fair terms of social cooperation for their own sake. . . . From a deliberative perspective, a citizen offers reasons that can be accepted by others who are similarly motivated to find reasons that can be accepted by others. . . .

. . . . [Thus,] a deliberative perspective does not address people who reject the aim of finding fair terms for social cooperation; it cannot reach those who refuse to press their public claims in terms accessible to their fellow citizens.¹⁵⁶

This understanding of reciprocity raises some deep questions (e.g., concerning the nature of moral motivation), but I will not pursue them here. Instead, staying within the bounds of Gutmann and Thompson's account, I offer three caveats. First, the phrase "social cooperation" tends to suggest a common course of action that all citizens (must) pursue, but there are other equally legitimate forms of cooperation, including agreements to disagree, to go our various ways without hindrance or cavil, to "live and let live." Neighborliness, as Katznelson and Mendus define it, is a form of cooperation.¹⁵⁷

In addition, there are different kinds of "public claims." Individuals may argue that the political community as a whole

154. See GUTMANN & THOMPSON, *supra* note 150, at 63-69.

155. See *id.* at 66-67.

156. *Id.* at 52-53, 55.

157. See KATZNELSON, *supra* note 73, at 173.

ought to pursue a particular course of action. They also may argue, however, that the question at hand should not be treated as a public matter in the first place, or that even if it is a legitimate public matter, some individuals and groups may (or must) be exempted from the constraints of otherwise general decisions. Some public claims are "offensive"—you (all) should do what I say—while others are "defensive"—I need not do what you say, even if you speak in the voice of the entire political community. The kinds of reasons offered in support of defensive claims rightly may differ from those for offensive claims.

Finally, the requirement that the terms of public argument should be "accessible" to one's fellow citizens turns out to be highly restrictive: "[A]ny 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."¹⁵⁸ Over the past two decades, a substantial debate has developed over the nature of what Rawls calls "public reason."¹⁵⁹ It may well make sense to urge all citizens to do their best to translate their commitments into terms that citizens who do not share them can understand, but the norm of reciprocity should not be interpreted to screen out the kinds of core beliefs that give meaning and purpose to many lives. This caveat is especially important in the United States, where levels of religious belief and observance are far higher than in any other industrialized democracy.¹⁶⁰ It is difficult to imagine that any liberal democracy can sustain conscientious support if it tells millions of its citizens that they cannot rightly say what they believe as part of democratic public dialogue.

I want to suggest that an inclusive understanding of public reason is especially appropriate in the context of what I have called actual justification—that is, the effort to defend rather than extend a way of life. It is one thing to contend that the United States should be a "Christian nation" and should restore official Christian prayer to public schools. That was the situa-

158. GUTMANN & THOMPSON, *supra* note 150, at 57.

159. See, e.g., *id.* at 34-39.

160. See THE WORLD ALMANAC AND BOOK OF FACTS 1998, at 654 (1997).

tion that existed in the grade schools of my youth, when I, as a Jew, was compelled to recite the Lord's Prayer. I do not see how such a regime possibly could be defended through legitimate public reasons. It is quite a different thing to seek, on conscientious grounds, defensive exemption from general public policies that may be legitimate and acceptable to a majority of citizens.

Suppose a fundamentalist parent said to a secular philosopher:

Because of the content of your deepest beliefs, you happen not to experience a conflict between those beliefs and the content of the public school curriculum. But if *you* believed what *I* believe, you would experience that conflict, and you would seek for your child what I am seeking for mine. Moreover, the accommodation I seek is one that I would readily grant, were our positions reversed. I am not asking you to enter into the perspective of my particular religious beliefs. But I am asking you to enlarge your sympathies by imagining what it would be like to be in my shoes.

This fundamentalist is offering as a public reason, not the specific *content* of religious belief, but rather the *fact* of that belief and of the resulting clash with secular public policies. The secular interlocutor is being asked to imaginatively experience that clash as part of a process that could create a wider shared understanding—even if the particulars of faith are not easily communicable. I do not see why such a request is outside the legitimate bounds of public reason.¹⁶¹

Gutmann and Thompson insist that "there is a public interest in educating good citizens, and no citizen can fairly claim that

161. This is especially true for Gutmann, who praises the cultivation of the imagination as an important and politically relevant goal of education. See Amy Gutmann, *Civic Education and Social Diversity*, 105 *ETHICS* 557, 572 (1995) (raising the question of how imaginative powers are to be strengthened in civic education that satisfies the *Mozert* parents' objections). The answer is hardly obvious. At my son's bar mitzvah, our rabbi commented that students' engagement with the lives of Jewish patriarchs and matriarchs—especially the portions of their lives that seem strangest to modern readers—can be a powerful force for the cultivation of imaginative sympathies. That was certainly true for my son, who wrestled productively (if not wholly successfully) with the question of why Sarah asked Abraham to have a child by Hagar, and why Abraham consented.

what constitutes good citizenship is whatever happens to conform to his or her particular religion."¹⁶² Although this proposition has some truth, as applied to the clash between the fundamentalist parents and the public schools, it raises three issues that are specific instances of the broad questions with which this essay began.

The first is empirical: Is it the case that the accommodation sought by the fundamentalist parents would significantly impair the development of democratic citizens? The Hawkins County School Board never offered evidence on this point,¹⁶³ and it is hard to see how they could have done so. Besides, the fundamentalist parents are constitutionally permitted to withdraw their children from the public schools and instead send them to Christian academies.¹⁶⁴ It is hard to believe that the consequences of such a choice for democratic citizenship are more favorable than a policy of accommodation with the public schools would have been. Perhaps Gutmann and Thompson believe that *Pierce v. Society of Sisters* was wrongly decided and that the logic of deliberative democracy requires that all children be sent to public schools. Or perhaps they believe, as Stephen Macedo does, that the sphere of legitimate state regulation of private schools is so wide as to obviate this problem.¹⁶⁵

The second issue raised by Gutmann and Thompson's assertion is conceptual: How is the good citizenship whose development we seek through education to be defined? The answer is contested,¹⁶⁶ and in any event it likely is to be complex. The ca-

162. GUTMANN & THOMPSON, *supra* note 150, at 67.

163. See *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1058-61 (6th Cir. 1987).

164. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

165. See Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?*, 105 ETHICS 468, 468 (1995). I find it difficult to believe that the "exposure to diversity" Macedo believes is essential to the inculcation of liberal tolerance in children is likely to succeed if it is crammed down the throats of their parents. I believe that in the long run, the *practice* of toleration—the policy of providing the widest possible scope for diversity consistent with the minimum requirements of liberal social unity—offers the best hope of generating gratitude toward the regime that makes this possible, and hence, support for the principle of toleration itself.

166. Compare GALSTON, *supra* note 118, at 221-28 (emphasizing that a wide range of virtues, including virtues specific to the different roles individuals have in society,

capacity for deliberation surely is one element, but there are others, such as law-abidingness, personal responsibility, and the willingness to do one's share (through taxes, jury duty, military service, etc.) to sustain a system of social cooperation.¹⁶⁷ In comparing the civic consequences of different educational strategies, one must examine all relevant dimensions, not just one. It is possible, although I am unaware of any evidence on the matter, that on average the graduates of Christian academies are less well prepared for democratic deliberation than are graduates of the best public schools. Nonetheless, they may be better citizens in other respects.

The final issue cuts even deeper. Suppose it is the case that a particular public policy is conducive to the cultivation of democratic citizenship. Does it follow that this policy is always right or permissible? For liberalism as I understand it, the answer is no, not always. Expressive liberty and political pluralism serve to limit the state's power to mold individuals into citizens.¹⁶⁸ That is what it means to affirm a sphere of parental power not subject to state control. As explained above, that is also the clear meaning of *Meyer v. Nebraska* and *Pierce v. Society of Sisters*.¹⁶⁹ Gutmann and Thompson rightly insist that there is an important public interest in educating good citizens,¹⁷⁰ but there are other morally significant interests with which the formation of citizens sometimes comes into conflict, and to which the claims of citizenship sometimes must give way.¹⁷¹

are necessary to sustain the liberal state), with STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* 269-74 (1990) (focusing on autonomy as the primary liberal virtue, one that is the source of other liberal virtues).

167. Cf. *Wisconsin v. Yoder*, 406 U.S. 205, 224-25, 233 (1972) (reasoning that the qualities of Amish life—such as vocational learning after the eighth grade; obedience of religion, morals, and laws; determination and willingness to work; ability to participate in democratic process; and accountability—fulfill the necessary additional obligations that justify the withdrawal of their children from public schools for reasons related to their religion).

168. See *supra* notes 77-84 and accompanying text.

169. See *supra* notes 19-27 and accompanying text.

170. See GUTMANN & THOMPSON, *supra* note 150, at 65-66.

171. See *Yoder*, 406 U.S. at 235-35 (stating that requiring Amish children to attend compulsory education beyond the eighth grade would endanger their moral beliefs, and, therefore, the state's interest in compulsory education bears a heavy burden in attempting to outweigh Amish continued vocational training).

I believe that a genuinely liberal society will organize itself around the principle of maximum feasible accommodation of diverse ways of life, limited only by the minimum requirements of civic unity. This principle expresses and requires the practice of tolerance—the conscientious reluctance to act in ways that impede others from living in accordance with their various conceptions of what gives life meaning and worth. Tolerance is the virtue that sustains the social practices and political institutions that make expressive liberty possible.

Gutmann and Thompson criticize this way of thinking on the grounds that it

would not go far enough for the purposes of deliberative democracy. It provides no positive basis on which citizens can expect to resolve their moral disagreements in the future. Citizens go their separate ways, keeping their moral reasons to themselves, avoiding moral engagement. This may sometimes keep the peace But *mere toleration* also locks into place the moral divisions in society and makes collective moral progress far more difficult.¹⁷²

In my view, Gutmann and Thompson are far too optimistic regarding the actual possibilities of resolving moral disagreements, and much too grudging about the practical worth of toleration. In most times and places, the avoidance of repression and bloody conflict is itself a morally significant achievement—all the more so if it is based on internalized norms of restraint rather than a *modus vivendi* reflecting a balance of power.¹⁷³ The agreement to disagree is a way of dealing with moral disagreement that is not necessarily inferior to agreement on the substance of the issue. In the real world, there is nothing “mere” about toleration. As Michael Walzer says,

Toleration itself is often underestimated, as if it is the least we can do for our fellows, the most minimal of their entitlements. . . . Even the most grudging forms and precari-

172. GUTMANN & THOMPSON, *supra* note 150, at 62-63 (emphasis added).

173. See, e.g., Michael P. Scharf, *The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Trial Since Nuremburg*, 60 ALB. L. REV. 861, 864, 874 (1997) (describing the horrors of war-torn Bosnia, a place where toleration would be a significant achievement).

ous arrangements [of toleration] are very good things, sufficiently rare in human history that they require not only practical but also theoretical appreciation.¹⁷⁴

I do not deny that "collective moral progress" is possible. It is much rarer, though, than one would like and, if history is any guide, at least as likely to be achieved through the exercise of political power, military force, or slow unplanned processes of social abrasion and influence, as through democratic deliberation.¹⁷⁵ Liberals have never scorned (indeed, they have rightly prized) principles of social organization that "lock into place" *religious* divisions in society.¹⁷⁶ A society that makes room for a wide, though not unlimited, range of cultural and moral divisions is no less an achievement.

To what extent is it possible to implement policies based on this principle? Would the kind of accommodation sought by the fundamentalist parents not lead to a slippery slope of endless claims against public school systems? The actual sequence of events in Hawkins County suggests otherwise.

The parents raised objections, not to the public school curriculum as a whole, but to one specific line of English readers.¹⁷⁷ They initially proposed to remove their children from reading classes every day and personally teach them out of different textbooks somewhere on the school grounds.¹⁷⁸ The principal of the middle school rejected that proposal, but he apparently understood why the parents felt the way they did.¹⁷⁹ He offered a counter-proposal approved by the school superintendent and chairman of the school board: the children could go to the library during reading period, where they would read from an alternative textbook on their own, without parental involvement or supervision.¹⁸⁰ The fundamentalist parents quickly accepted this

174. MICHAEL WALZER, *ON TOLERATION* xi-xii (1997).

175. The abolition of slavery in the United States required a civil war and subsequent military occupation, as did the defeat of fascism in Germany.

176. *See, e.g.,* Rosenblum, *supra* note 1, at 541; VERBA ET AL., *supra* note 9, at 325-30.

177. *See* *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1060-61 (6th Cir. 1987).

178. *See id.*

179. *See id.*

180. *See* STEPHEN BATES, *BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS*

offer and agreed on alternative readers.¹⁸¹ Within a few weeks, ten middle school children were using the readers.¹⁸²

If this accommodation had been accepted by all schools in Hawkins County, that would have been the end of the matter. It was not.¹⁸³ A number of elementary school principals refused to go along, and they suspended some children.¹⁸⁴ The next month, after a contentious meeting, the school board changed course and suppressed the policy that had been implemented by the middle school with the approval of the board chairman.¹⁸⁵ It was only at that juncture that the parents felt compelled to escalate a limited policy dispute into a broader legal controversy.¹⁸⁶

In short, the parents were willing to play by the rules, enter into a civil dialogue with school officials, and accept proposals that fell short of their original desires. The logic of their position was perfectly compatible with the principles of constitutional order and with a workable system of public education. There was no slippery slope.

This should not be surprising; the limited public education accommodation for the Old Order Amish endorsed by the Supreme Court in *Wisconsin v. Yoder* a quarter of a century ago has not led to an escalation of faith-based demands. Indeed, few other groups have even sought similar treatment for themselves. Properly interpreted, the constitution of a liberal democracy is capacious enough to accommodate groups whose beliefs and practices do not much resemble those of most college professors.

Still, accommodation cannot be unlimited; a constitution is not a suicide pact. A liberal democracy must have the capacity to articulate and defend its core principles, with coercive force if needed. I agree with Gutmann and Thompson that democracy cannot be understood simply as a set of procedures.¹⁸⁷ The issue

RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS 71 (1993).

181. *See id.*

182. *See id.*

183. *See id.* at 77 (noting that Church Hill Elementary and Carter's Valley Elementary, both Hawkins County Schools, refused to allow the accommodations).

184. *See id.* at 76 (explaining that, according to one family's account, the parents were ordered to remove their children from school).

185. *See id.* at 85.

186. *See id.* at 87-92.

187. *See generally* GUTMANN & THOMPSON, *supra* note 150 (discussing the concept

between us concerns the extent and substance of the principles that a democracy must enforce.

In my view, which I have discussed at length elsewhere, these principles include what is required for civil order, justice, and the basics of human development.¹⁸⁸ Beyond this limited uniformity, a liberal democracy insists on the priority of liberty—that is, on the importance of allowing human beings to live their lives in ways congruent with their varying conceptions of what gives life meaning and purpose. It is only on this basis—in both theory and practice—that a political community can embrace divergent views concerning the ultimate source of moral authority.

For two millennia, political orders have grappled with the challenges posed by revealed religions that are not “civil” religions.¹⁸⁹ Liberal democracy, rightly understood, represents the most adequate response to this challenge. At the heart of the liberal democratic settlement is a principled refusal to allow religion to engulf the political order, or politics to invade and dominate religion.¹⁹⁰

My argument is not against deliberation as such, but only against a restrictive understanding of deliberation that rules out much of what is central to the lives of so many of our fellow citizens. The “civic magnanimity” that Gutmann and Thompson so compellingly advocate¹⁹¹ can and should be capacious enough to include the dissenting parents of Hawkins County.

VII. A RIGHT OF EXIT

I want to conclude with a brief discussion of the conception of political liberty flowing from the pluralist view. Within broad

of a deliberative democracy, whose characteristics are far more expansive than its procedural operations).

188. See, e.g., WILLIAM A. GALSTON, *JUSTICE AND THE HUMAN GOOD* (1980); WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* (1991); William A. Galston, *Two Concepts of Liberalism*, 105 *ETHICS* 516 (1995).

189. See, e.g., Dhananjai Shivakumar, *Neutrality and the Religion Clauses* 33 *HARV. C.R.-C.L. L. REV.* 505, 506-07 (1998) (noting the challenge in dealing with the interests of so-called minority religions).

190. See Rosenblum, *supra* note 1, at 541.

191. See GUTMANN & THOMPSON, *supra* note 150, at 82-84.

limits, civil associations may order their internal affairs as they see fit.¹⁹² Their norms and decision-making structures may abridge individual freedom and autonomy significantly without legitimating external state interference,¹⁹³ but these associations may not coerce individuals to remain as members against their will, or create conditions that in practical terms make departure impossible.¹⁹⁴

The reason is this: It is possible to enjoy what I call expressive liberty within associations that are hierarchical and directive, as long as there is a reasonable fit between institutional structures and individual beliefs. When the two diverge, however, continued membership is no longer compatible with expressive liberty, and coerced membership is a denial of expressive liberty.

Thus, there is a form of liberty whose promotion is a higher-order political goal: an individual's right of exit from groups and associations that make up civil society. This liberty will involve not only insulation from certain kinds of state interference, but also a range of affirmative state protections.

To see why this is so, we need only reflect on the necessary conditions for a meaningful right of exit. These might include knowledge conditions that offer chances for awareness of alternatives to the life one is in fact living; psychological conditions, including freedom from the kinds of brainwashing practiced by cults; fitness conditions, or the ability of individuals to participate effectively in some ways of life other than the one they wish to leave; material conditions, such that individual poverty and deprivation do not make exit impossible in practice; and social diversity, affording an array of meaningful options.¹⁹⁵

This last comment points to a background feature of the judgment I rendered about the decision in *Dayton Christian Schools*—

192. See Hirst, *supra* note 66, at 2, 6.

193. See Gedicks, *supra* note 138, at 150-52; *supra* notes 37-41, 128-35, and accompanying text.

194. See Gedicks, *supra* note 138, at 150-53 (dealing with the importance of the right to exit in a religious context).

195. See generally *id.* (discussing possibilities for an individual's right to leave a religious group).

the existence of employment alternatives for the affected teacher.¹⁹⁶ If that religious community had been coextensive with the wider society—if there were no practical exit from its arena of control—I would have to revise my conclusion significantly. The pluralist concept of liberty is not just a philosophical abstraction; it is anchored in a concrete vision of a pluralist society in which different modes of individual and group flourishing have found a respected place.

196. *See id.* at 152.