An Argument from Democracy against School Choice: A Critique of Zelman v. Simmons-Harris

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Introduction

In Zelman v. Simmons-Harris1 the court recently addressed the question of the constitutionality of vouchers programs in the education system.2 A vouchers program enables parents of little means to send their children to private schools and to receive state funding for tuition. The court dismissed the claim that since a vouchers program allows for the transfer of public funds to religious schools it constitutes a violation of the prohibition on the establishment of religion. The court ruled, firstly, that the vouchers represent an attempt on the part of the state to promote the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system and that they do not constitute an attempt to establish religion. Secondly, the court

1 536 U.S. 639 (2002).
2 In Zelman the Court dealt with a voucher program in Cleveland, Ohio. Together with two similar programs in Florida and Milwaukee, The Cleveland program program was a first attempt in the United States to implement a voucher program.
ruled that even though the majority of participating students had enrolled in religiously affiliated schools, this result should not be considered as establishment of religion, since it was the outcome of a genuine choice of parents between a variety of religious and non-religious schools.

In this article we wish to criticize the majority opinion in the *Zelman* case. The majority judges ignored the perils entailed in the education system’s transition to a vouchers system. The experience of the vouchers program operated in Cleveland, Ohio, reveals that 96% of the parents whose children participated in this program chose to send their children to religious schools. It is therefore reasonable to assume that a widespread transition to a vouchers system would result in a substantial increase in the number of students educated in religious schools. Such an increase raises concern for the stability of democracy. As John Rawls argued, the stability of democratic society is linked to the fact that most of the citizens in that society share a set of values advocating equality, liberty and tolerance. In our view, it should not be assumed that a commitment to these values arises out of nowhere. These values do not just appear, they must be learned, and the education system is the most effective means of passing them on from one generation to the next. Since some of the religious schools do not teach the values of equality, liberty and tolerance, there is good reason for concern that many students in the United States will not acquire those values, a commitment to which is, as stated, a necessary condition for the existence of democracy. In our opinion the legal arrangement that ought to be applied is one which does not permit the vouchers system. The Establishment clause implies not only a negative bar against the establishment of religion, but also an affirmative establishment of a secular civil order for the resolution of public moral disputes.

The historical experience of the Founding Fathers, who were exposed to the devastating effects of the religious wars in Europe, led them to conclude that preventing of such a reality in the United States necessitates that decisions in the public sphere will not be

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governed by religious considerations. However, as argued above, the success of such an arrangement depends on the existence of a commitment among the majority of citizens in the state to certain core democratic values. It follows that the state cannot allow that the control over children’s education will be left entirely to their parents. A commitment to democratic values is other-regarding, given that its absence amongst some citizens affects the lives of others. To our mind, the state of affairs which existed prior to Zelman was adequate. The number of pupils in religious schools was relatively low, since the state refrained from funding private schools. Consequently, there was little danger of widespread lack of commitment to democratic values.

This legal arrangement strikes us as preferable to an arrangement whereby the state conditions the funding of private education on a requirement that institutes of private education teach democratic values. At first glance the later option seems optimal, since it combines a concern for respecting cultural differences along with awareness of the importance of an education for fundamental democratic values. However, upon further scrutiny this option is revealed to be inadequate. The funding of education in private schools is likely to create an increase in the number of pupils attending these schools, and at the same time there are liable to be significant difficulties in enforcing a requirement to educate for democratic values.

The state of the Israeli education system during the last decade sheds light on the vouchers issue. The legal set up in Israel resembles the second option described above. Under the Israeli model, the state funds private education, but also requires private schools to teach a core curriculum consisting of 75% of the curriculum taught in public schools including, inter alia, an education for fundamental democratic values. During the last decade the extent of the state’s involvement in the funding of ultra-orthodox Jewish community (“Haredi”) education increased. In conjunction with this, there was a dramatic 220% rise in the number of pupils attending ultra-orthodox community’s schools. This led to the current state of affairs in which one of every five Jewish students in the Israeli

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primary school system is educated within the Haredi education system. The Israeli experience regarding the enforcement of the requirement that schools receiving state funding teach the core curriculum indicates a clear failure in the case of Haredi schools. This is a worrying state of affairs. Within a few years these students will be Israeli citizens and they will not be equipped with those civic virtues that are necessary for the stability of a democracy.

In our opinion a correct interpretation of the establishment clause disallows vouchers programs. It should be noted that the Supreme Court in Zelman did not obligate States to operate a voucher system, it only permitted them to do so. In view of the threat which the enactment of such a system would pose to the stability of democracy, we are of the opinion that States ought to refrain from using it.

The article is comprised of two parts: a theoretical part and a legal part. The first part addresses two questions: 1. Should a democracy act so as to ensure its continued existence? 2. What should a democracy do so as to ensure it continued existence? In this part we shall claim, firstly, that a democratic state has a right and even a duty to act to conserve the democratic form of government. Next we will argue that the most effective way of ensuring the existence of democracy is not the creation of legal or constitutional prohibitions against anti-democratic associations, but ensuring that amongst citizens there is widespread commitment to the values of equal liberty, tolerance and respect, as well as a capacity for critical thought. The most effective means of obtaining this goal is to develop such commitment and capacity in schools. At the end of the theoretical part we will discuss and refute four objections to our position that the state should educate for democratic values.

In the second, legal part, we will present the Court’s ruling in Zelman and a critique thereof. We will argue that the Court was mistaken in ignoring the detrimental effects which the permit it gave for the adoption of vouchers programs might have on the commitment of future citizens to democratic values. In contrast to the majority ruling, which assumes that the establishment clause permits neutrality between religious and
secular outlooks, we argue, with Sullivan, that the establishment clause should be understood as taking a non-neutral stand in favor of the 'establishment' of a civil order for the resolution of public moral disputes. Therefore the state is forbidden to fund the activities of religious institutions even while it funds the activities of non-religious institutions.

In order to illustrate the dangers which the funding of education in religious schools poses for democracy, we shall later describe the Israeli experience in breadth. In Israel funding was granted to religious education and this led to substantial erosion in education for democratic values. At the end of this part we will examine three possible courses of action that might be taken in an attempt to ensure education for democracy after Zelman: non-funding of private schools, funding of private schools conditioned on the fulfillment of a requirement to educate for democratic values, and the positing of a legal obligation requiring private schools to educate for democratic values (with or without a decision to fund such schools). We will evaluate each of these courses of action for its effectiveness in promoting democratic education and with regard to its constitutional merits.
A. The Stability of Democracy and Education for Democracy

It is reasonable to assume that the use of the vouchers system in the United States would lead to an increase in attendance at religious schools. As we shall demonstrate in section B.2., this assumption is supported by the Israeli experience, which illustrates that the funding of religious schools significantly increases the amount of children attending such schools. The Israeli experience illustrates further that attempts to condition such funding upon a requirement that the schools in question teach values of tolerance, have failed. This gives rise for concern that the deployment of the vouchers system in the United States would cause more and more children to grow unequipped with the values which are, as we will try to demonstrate, essential for the stability of any democracy.

The issue of choice in education, and the vouchers system, is therefore related to a more general issue – that of the protection of democracy and its stability. Accordingly, in this part we wish to discuss two questions pertinent to this general issue: (1) Should democracy act so as to ensure its continued existence? (2) What should democracy do to ensure its continued existence?

A.1 Should Democracy act so as to ensure its continued existence?

Although it may seem obvious that democracy should not stay idle when facing events that threaten its very existence, there are nonetheless those who argue that no action should be taken to ensure democracy’s existence. According to the doctrine of procedural democracy, the essence of democracy is exhibited in the process whereby decisions are made in accordance with the will of the majority of the citizens.⁶ Deciding according to the will of the majority is a procedural solution for value-laden disputes, which does not entail taking a moral stand.⁷ In light of this, should the majority of the citizens wish to replace the democratic system of government by an alternative system, they are at liberty

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to do so. Any attempt to prevent such change would constitute an offense against the
democratic idea, since the will of the majority would have thus been discarded.\(^8\) As stated
by Hamilton in The Federalist: it is a "fundamental principle of republican government"
to allow "the people to alter or abolish the established Constitution, whenever they find it
inconsistent with their happiness".\(^9\)

It is worth considering the fact that underlying the doctrine of procedural democracy is
actually an ethical assumption regarding the importance which people place on their own
liberty, since the doctrine supports a procedure which ensures that decisions will be
reached in a manner which gives maximal expression to the will of the citizens.\(^10\) The
idea is that if the decisions reached represent the will of the citizens, then the citizens are
afforded the liberty to determine their own fate. However, if at the root of the doctrine of
procedural democracy lies an assumption regarding the importance of liberty, its position
whereby, if the majority of citizens prefer an undemocratic system of government they
should not be prevented from forming it, is paradoxical. This is so because respecting the
liberty of the citizens in this case would mean the annihilation of all their liberty
henceforth. One can find similarity here to the case of a man wishing to sell himself into
slavery as discussed by Mill. Mill put it thus: “by selling himself for a slave, he abdicates
his liberty; he forgoes any future use of it beyond that single act. He therefore defeats, in
his own case, the very purpose which is the justification of allowing him to dispose of

\(^8\) Hans Kelsen viewed ideas of a self-defending democracy in the German Weimar republic as
antidemocratic. In his view, a democracy which tries to force itself against the will of the majority
ceases to be a democracy, and the rule of the people cannot be maintained against the people’s will.

\(^9\) The Federalist No. 78, at 494 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

\(^10\) In view of the existence of a value-laden preference in the doctrine of procedural democracy, it has
been argued against the procedural approach that it is self-contradictory. See, Laurence H. Tribe,
“The puzzling persistence of process-based constitutional theory” 89 Yale L.J. 1063, 1069-1071
(1980); Ronald M. Dworkin, “The forum of principle” 56 N.Y.U. L.Rev. 469, 505 (1981); Amy
Gutmann & Dennis Thompson, Democracy and Disagreement 28 (1996); For a similar claim in the
context of the right to free speech, see Frederick Schauer, Free Speech: A Philosophical Enquiry,
Ch. 3 (1982).
himself. ...The principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom.”¹¹ We believe that Mill is correct and that it is indeed paradoxical to respect a person’s freedom not to be free. We think that similarly – on the national level – it is paradoxical to allow the people to abolish democracy and thus deprive themselves of any liberty henceforth.¹²

Further, it should be noted that the implementation of a majority’s decision to cancel democracy would prevent not only the liberty of the majority which so wishes, but also the liberty of the minority objecting to such change. In this respect the decision to cancel democracy is more problematic than the case discussed by Mill, since it is other-regarding. Clearly, satisfying the preferences of a majority is inappropriate when it involves serious harms. A position that employs without exceptions a procedure of aggregating the preferences which people have is problematic, since it might lead to tyranny of the majority and it prevents protection of minority rights.

Another argument that can be made against the doctrine of procedural democracy is that it treats people’s preferences as a given and ignores the question of how these preferences were formed. Since the abolition of democracy transgresses against what seems to be one of man’s most essential interests – the liberty to determine his own fate – a preference for the abolition of democracy raises strong suspicion that the process, which led to the formation of such preference, was faulty. There is extensive literature exploring the

¹¹ John S. Mill, "On Liberty" in On Liberty, Representative Government, The Subjection of Women 5, 125-126 (Edited with an introduction by Millicent G. Fawcett, 1969). Margaret J. Radin, Contested Commodities, 44-45 (1996) mentions a criticism of Mill’s argument. The critique concentrates on the fact that the person is not allowed to do something he wants to do and regards Mill’s suggestion as paternalistic. In our opinion, this criticism seems to miss Mill’s point that it is justifiable to deprive a person a some amount of a person’s liberty in order to guarantee that she will enjoy a greater amount of liberty.

various ways in which the process of preference formation could be problematic.\textsuperscript{13} We will mention here only those ways that are relevant to the present context.

First, sometimes a person forms a preference even though he lacks relevant information. Thus people may prefer to abolish democracy because they lack knowledge regarding the deficiencies of other forms of government. Second, they may know something about the possibility of the abuse of power by non-democratic forms of government, but still underestimate its significance. This may be the case in light of the tendency of many people to commit the cognitive error of discounting the possibility that a dangerous event will occur when the probability for its occurrence is low.\textsuperscript{14} Third, some preferences are myopic. Myopia refers to the tendency of people to refrain from taking an action that will have high benefits for them in the long-run only because this action involves high short-term costs.\textsuperscript{15} Thus someone might avoid visiting the dentist in spite of the high costs in the long run of this neglect. Myopia involve weakness of the will, i.e., the person understands what it would be rational to do but fails to do it because his will succumbs to his impulse, laziness, etc. In the context of democracy, even if we assume that people know that in the long-run democracy will have high benefits, they still might prefer, myopically, to abolish democracy. This might be the case in times of an enduring and severe economic and political crisis, which reduces people's ability to bear the short-run costs in order to enjoy the long-term advantages of democracy. Fourth, some preferences evolve as a result of external influence on a person which does not pass through her rationality. Manipulators and demagogues like Hitler take advantage of people's despair and anxieties, which make them vulnerable to emotional exploitation.


\textsuperscript{14} Amos Tversky & Daniel Kahanman, "Availability: A heuristic for judging frequency and probability" 5 Cognitive Psychology 207 (1973).

The historical experience of Germany and Algeria helps to illustrate some of these possibilities. In Germany, the financial and political crisis which followed the First World War, brought a strong sense of despair amongst many Germans, which in turn made them vulnerable to manipulators and demagogues the likes of Hitler. This state of affairs led many Germans to desire to abolish democracy and to place a strong leader instead. In 1991 the fundamentalist Islamic Party won the elections in Algeria with a decisive majority amongst voters, despite its having declared prior to the elections that it intended to form a theocracy and thereby abolish democracy. A severe financial crisis, increasing despair, and fear of the influence of French-Western culture upon extensive parts of the population, made many Algerians more susceptible to the theocratic messages of the fundamentalist party.

We must emphasize that we are not ignoring the fact that there are some people for whom liberty can at times be burdensome, and that there are times when people are not benefited by an increase in freedom. Notwithstanding this, a person’s preference that democracy in her state be cancelled means that she is from now and ever after completely

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16 According to Hanna Arendt and Carl Friedrich, the totalitarian regimes of Nazism and Stalinism appeared as a result of the entering of irrational elements into politics. This was made possible by the democratization process, which gave to the opinions and preferences of the masses political weight, at a period in which their social atomization made them an easy prey for manipulation by the elites. They argue that after the disintegration of the traditional social structures in Europe during the nineteenth century as a result of processes like industrialization, urbanization, democratization and secularization, Europeans entered the twentieth century feeling atomized and alienated, lacking a sense of direction and self-confidence. For such people it was a relief when totalitarian ideologies offered the security of belonging to a collective and exemption from personal responsibility. See Tony Bennett, “Theories of the media, theories of society” in *Culture, Society and the Media* (Michael Gurevitch, ed., 1982).


18 For the claim that an increase in freedom is not necessarily beneficial see Gerald Dworkin, “Is more choice better than less?” in *Midwest Studies in Philosophy* 47 (Vol. 7, Peter French ed., 1982).
depriving herself of the right to decide on her own fate and is placing her fate in the hands of a sovereign who is not accountable to anyone.

In view of these reasons we are of the opinion that the doctrine of procedural democracy ought to be rejected. The process of decision by majority is instrumental for ensuring the values of freedom and equality. Democracy expresses a commitment to specific values and is not a morally neutral concept. Consequently, democracy is substantial and not procedural and must protect itself from destruction.

A rather similar discussion can be found in political theory literature when liberals wonder whether a liberal state ought to tolerate the intolerant. A common way of characterizing liberalism is to say that it is the position that the state should demonstrate neutrality between the various value-laden outlooks of its citizens, that it should not promote one outlook which it perceives to be worthy nor set restraints upon outlooks it disapproves of, that it must tolerate the various outlooks of its citizens. Rawls has asked whether it follows from this that a liberal state should also tolerate intolerant outlooks.

Rawls is of the opinion that the intolerant does not have the moral right to require the state to be tolerant towards him, since such a right could only stem on the basis of reciprocity. We believe that Rawls is correct. Anyone who demands that others be tolerant towards him whilst unwilling to act in such manner himself is a free-rider taking advantage of the general spirit of tolerance in his society. In Rawls’ opinion, it should not be deduced from this that the tolerant has a right to suppress the intolerant in every case. Such a right exists only when the tolerant "sincerely and with reason believe that intolerance is necessary for their own security".19 According to Rawls, as long as no such

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19 John Rawls, *A Theory of Justice* 218 (1971). Also see Stephen Macedo, *Diversity and Distrust* 147 (2000) ("We should tolerate the intolerant, as long as they do not genuinely threaten the survival of free institutions, but we need not bend over backward to make life easy for them").
threat exists, one ought to act tolerantly, because it is reasonable to assume that this will influence the intolerant to become tolerant.\textsuperscript{20}

It seems that Rawls’ approach is motivated by a concern for the preservation of the stability of democracy. Thus his guiding consideration when deciding which course of action to adopt in response to the intolerant is which response is likely to enhance the level of toleration within the society and hence, it seems, the stability of democracy. In our view, it is possible to challenge Rawls’ assumption that there is a good chance that a tolerant environment would influence the intolerant to become tolerant. It would not be unreasonable to fear that the intolerant might instead take advantage of the toleration demonstrated towards him in order to increase support for his intolerant views.

As we said, it is commonly believed that the liberal, who supports toleration and neutrality towards various conceptions of the good, should exhibit absolute toleration and neutrality. This is a mistake, we believe, because if the liberal were to behave tolerantly towards those who wish to destroy democracy, his behavior might lead to the terminating of liberty and tolerance. In other words, it is not true that the liberal should be completely neutral.\textsuperscript{21} Since the liberal is guided by a commitment to liberty and equality, he should be willing to take those measures necessary to secure the existence of a system of government which realizes liberty and equality.\textsuperscript{22} Therefore, the conventional

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\item[\textsuperscript{20}] Rawls, id at 219. A similar approach can be found in Bollinger who argues that the purpose of protecting even extremely offensive speech under the First Amendment is to teach citizens toleration throughout political life. See Lee Bollinger, The Tolerant Society: Freedom of Speech and Extremist Speech (1986).
\item[\textsuperscript{21}] As stated by Gutmann: "Political liberalism does not claim to be neutral in its effect on different ways of life. Its neutrality is limited to its refusal to invoke any particular conception of the (nonpolitical) good life." See Gutmann, Civic Education, supra note 5, at 559.
\item[\textsuperscript{22}] An analogy can be found in Milton’s discussion of the freedom of expression in his Areopagitica. According to Milton, although the freedom to express different opinions should not be limited, the freedom to express the opinion calling for the establishment of a theocracy must be checked. See John Milton, Areopagitica, in Complete Prose Works of John Milton 565 (Vol. 2, Don M. Wolfe ed., 1959) (New Heaven, Yale University Press).
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characterization of liberalism as an approach, which does not seek to promote any particular set of values, is misleading. Liberalism does seek to promote certain values; however it differs from other approaches which seek to do so, such as theocratic approaches or a nationalist approach that places supreme importance on the glory of the nation. In contrast to such other approaches, liberalism does not seek to force people to live in accordance with any one particular way of life. Instead, it instructs them not to prevent others from living as they deem fit.

A.2. What should be done in order to ensure the existence of Democracy?

One means of securing the existence of democracy is to establish constitutional prohibitions on actions designed to replace the state’s democratic regime by another system of government. Examples of a general constitutional arrangement can be found in German and Israeli constitutional law. The manner in which the Nazi party took advantage of the German democracy so as to effect its destruction, led those who drafted Germany’s constitution after the Second World War to prohibit constitutional amendments that deny Germany’s democratic character. Any attempt to make such an amendment would in Germany be considered an unconstitutional constitutional amendment. Additionally, the German constitution contains a prohibition on the existence of political parties whose purpose is to deny the state’s democratic character.

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23 This point was thoroughly discussed in Joseph Raz, *The Morality of Freedom* 62-105 (1986).
25 German Const. § 79(3).
26 German Const. §18, 21; Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 217-237 (2nd ed., 1997). For the implementation of this provision see
A similar constitutional arrangement exists in Israel. In 1985, in response to the rising clout of a racist and antidemocratic Jewish political movement, the Basic Law: The Knesset (which lays down constitutional principles concerning the Israeli parliament) was amended so that it now prohibits parties which deny the democratic character of the state from competing in the general elections. The constitutional shielding of these arrangements is designed to substantially decrease the risk that the rules of the democratic game and the law will be utilized to overturn democracy.

This is the doctrine of “self-defending democracy”. As can be deduced from Fox and Nolte’s encompassing article, the meaning given to the doctrine in the countries in which it has been adopted is that of establishing restrictions on political organization by antidemocratic entities. In our opinion, the constitutional solution of “self-defending democracy” is not the best means of securing the continued existence of a democratic system of government. This solution treats the symptoms of the disease rather than preventing its outbreak. The reason for the formation of antidemocratic organizations is a lack of appreciation for the vital need for a democratic system of government. Establishing restrictions on such organizations does not serve to treat the flow of antidemocratic sentiments. Such sentiments continue to exist after the disqualification of an antidemocratic party.

especially The Socialist Reich Party Case (1952) 2 BVerfGE 1 (Translation available at Kommers, id, at 218-222).


For a review see Gregory Fox & George Nolte "Intolerant democracies" 36 Harv. Inter. L.J. 1 (1995).
Thus, in Turkey the Islamic party Refah was disqualified in 1998 after having won the elections with almost a third of the electors’ votes.\textsuperscript{30} A lack of commitment towards democracy on the part of large sectors of the Turkish public is a problem that the disqualification of the Refah party did not eliminate. Should the antidemocratic sentiment spread, the antidemocratic elements will increase their strength and despite the disqualification they will realize their power and replace the democratic regime with a theocracy. In Algeria, after the fundamentalist Islamic party won 189 seats out of a total of 231 in the first stage of the 1991 elections, the Algerian army took control of the state and canceled the second round of elections.\textsuperscript{31} As a result a civil war broke out in Algeria and has thus far taken more than 100,000 lives.\textsuperscript{32} Similarly, it would not be unreasonable to speculate that if the Nazi party had been prohibited from contending in the 1932 elections, it would nonetheless have assumed power in an illegal manner.\textsuperscript{33}

The constitutional solution is not commendable for additional reasons. The constitutions of many states are amendable, and there is therefore some chance that the doctrine of “self-defending democracy” will be canceled in those states.\textsuperscript{34} Also, it is possible to appoint judges who could limit the possibility of disqualifying antidemocratic parties by

\textsuperscript{30} The European Human Rights Court approved the disqualification of the Refah Party that had declared its intention to establish a plurality of legal systems based on differences in religious belief, to institute Islamic law (the Sh\textsuperscript{aria}), a system of law that was in marked contrast with the fundamental principles of democracy, particularly with regard to criminal law and criminal procedure, the legal status of women and the way it intervenes in all spheres of life in accordance with religious precepts. See, \textit{Judgment in the case of Rafah Partisi (The Welfare Party) v. Turkey} (July 31, 2001, Available at http://hudoc.echr.coe.int/hudoc).

\textsuperscript{31} Fox & Nolte, \textit{supra} note 29, at 7.


\textsuperscript{33} As fox and Nolte (\textit{supra} note 29, at 12) acknowledge, "a successful ban of any one of the parties would not necessarily have saved the Republic". Also see, Robert Moss, \textit{The Collapse of Democracy} 182 (1977).

\textsuperscript{34} Thus, for example, it is possible to amend the Israeli \textit{Basic Law: The Knesset} in a way that abolishes the prohibition against antidemocratic political parties with a majority of 61 out of 120 representatives in the Israeli Parliament. See §4, §46 of the \textit{Basic Law: The Knesset}.  

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way of interpretation. It is also worth noting that the disqualification of parties based on
the assertion that they are antidemocratic is not always motivated by the desire to secure
democracy. Sometimes the motivation for such disqualification is the politicians’ and the
establishment’s desire to hush rival opinions or to acquire political gain.35

Beyond these reasons of principle, from the perspective of American constitutional law
the positing of such prohibitions on political organization seems problematic. Unlike
Germany and Israel, the American constitution does not establish prohibitions on
antidemocratic organization.36 Freedom of association is guaranteed in the first
amendment to the constitution, and there is a strong presumption against the
constitutionality of viewpoint-based restrictions of expression.37 To the best of our
knowledge, in the United States there are not and have never been legal arrangements
preventing antidemocratic elements from taking advantage of democratic principles in
order to overset democracy. It is true that there were legal arrangements which dealt with
antidemocratic elements, such as the communist party, and which limited the political
activities of these elements.38 However the reason for these limitations was not the

Fox and Nolte (supra note 29, at 57) themselves admit that "self-protection legislation is itself
subject to abuse".
36 It should be noted, however, that article IV, section 4 of the U.S. Constitution provides as follows:
"The United States shall guarantee to every State in this Union a Republican Form of
Government…" This provision could be interpreted as making the republican form of government
obligatory in states and unalterable by future majority. For such an understanding see Holmes, supra
note 12, at 239.
37 Rosenberger v. Rector and Visitors, 515 U.S. 819, 828 (1995) ("It is axiomatic that the
government may not regulate speech based on its substantive content or the message it
Hudnut, 771 F.2d 323 (7th Cir. 1985); Cass F. Sunstein, Democracy and the Problem of Free
38 See The Smith Act of 1940; Section 9(h) of the Labor-Management Relation Act of 1947; The
Subversive Activities Control Act of 1950; The Communist Control Act of 1954. The U.S. Supreme
Court considered these acts to be legitimate forms of preemptive democratic self-defense. See, for
example, the Supreme Court’s ruling regarding the Smith Act in Dennis v. United States, 341 U.S.
spurning of the antidemocratic ideology in itself, but the fear that the antidemocratic elements intended to make use of antidemocratic means so as to replace the democratic system of government. Thus the assumption was that the Communist movement was attempting to promote its objectives "by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system".\textsuperscript{39} Presently, the commonly accepted position in the United States is that it is possible to limit antidemocratic organization only when it advocates imminent lawless actions and only if this advocacy is likely to produce such actions.\textsuperscript{40}

We believe that the stable existence of democracy is dependent upon a sense of commitment on the part of the majority of citizens towards a system of government which seeks to realize the values of liberty and equality. Such a position is detectable between the lines in Rawls. When he ponders how western democracies maintain their stability even though their citizens hold different, often conflicting, conceptions of the good, Rawls’s answer is that the majority of citizens in these democracies are committed to equality, liberty and tolerance.\textsuperscript{41} Indeed, many political theorists now believe that the health and stability of modern democracy depends, not only on the justice of its basic institutions, but also on the qualities and attitudes of its citizens.\textsuperscript{42} As Habermas puts it,

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\item 39. See also Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1; Justice Harlan’s opinion for the Court in Yates v. United States, 354 U.S. 298 (1957) (the Smith Act does prohibit advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end).
\item 40. Brandenburg v. Ohio, 395 U.S. 444 (1969). This case seems to produce "the most speech-protective standard yet evolved by the Supreme Court". See, Gerald Gunther, "Learned Hand and the origin of modern First Amendment doctrine: Some fragments of history" 27 Stan. L.Rev. 719, 755 (1975); Ely, supra note 6, at 115.
\item 41. Rawls, Political Liberalism, supra note 3, at xviii.
\item 42. Will Kymlicka, Contemporary Political Philosophy 285 (2nd ed., 2002). Kymlicka further notes that "without citizens who possess these qualities, democracies become difficult to govern, even unstable." See references id at endnotes 3, p. 322.
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"the institutions of constitutional freedom are only worth as much as a population makes of them". 43

In our view, there is no good reason to assume that citizens’ commitment to the attitudes and values necessary for the stability of democracy develops ex nihilo. People discover values in the cultural environment in which they live, and it would thus be wrong to neglect an examination of the value contents to which citizens are exposed. This does not imply that people lack autonomy, that they hold a particular set of values as a result of a process of environmental conditioning. The idea is just that, with the exception of a few extraordinary individuals, people do not create their values themselves but rather discover them in their cultural surroundings. Autonomy signifies an individual’s ability to critically examine the ideas and values she comes across in her culture. In view of all this, we are of the opinion that it is essential for a democracy to create a democratic culture.

One can find a variety of different opinions amongst political theorists as to the type of qualities which ought to be possessed by the citizens of democratic states, and the values to which they ought to subscribe. The overwhelming majority is of the opinion that citizen commitment to values of equal liberty, respect for the other and tolerance is crucial for democracy’s survival. 44 There are those who add that citizens of democratic states should have a reasonable ability to exercise critical analysis and autonomous thought, 45 and a measure of awareness regarding their rights. 46 The absence of these

44 See, e.g., Amy Gutmann, Democratic Education 40-45 (1987); Kymlicka, supra note 42, at 285; Macedo, supra note 19, at 10.
45 See, Gutmann, id, at 44; Harry Brighouse, "Civic education and liberal legitimacy" 108 Ethics 719 (1998). But see, Galston, supra note 24, at 253-245 (one has a right to an un-deciphered life and therefore should not be encouraged to develop critical thought, which leads to historic revisionism).
46 Rawls, Political Liberalism, supra note 3, at 122, 199. Rawls argues that citizens should possess knowledge of their constitutional and civil rights so as to ensure that their continued membership in their society will not be based on ignorance or fear of punishment for crimes that do not exist.
increases the risk that citizens will fall under the sway of a charismatic authoritarian leader.

In recent years numerous political theorists have supported the conception of ‘deliberative democracy’. According to this conception, democracy in the full sense of the word exists only when the political decisions are reached after a process of public deliberation. Such a process takes place when the claims raised by the citizens are reasoned by arguments based on reciprocity and appeal to public, rather than personal, interests. In order to ensure this process, citizens must possess qualities such as willingness to listen to others, reluctance to voicing strong opinions on every issue, the ability to present rationale arguments and an interest in participation in the democratic process.

While ‘deliberative democracy’ is a laudable concept, it is obviously an ideal unrealized in the democracies we know. Indeed, the known democratic states do not have democracy in the full sense of the word. We would not wish to describe the existing state of affairs as a lack of democracy and to demand that democracy be protected by ensuring proper deliberation. We make do with a more moderate suggestion, aimed at the protection of democracy in the sense of a system of government in which the people are sovereign and decisions express the will of the majority, while the rights of minorities are protected by constitutional guarantees. We believe that in order to ensure such a system of democracy a democratic culture must exist in which people are committed to values of equal liberty, tolerance and respect for the other, and have reasonable capacity for independent and

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48 See the interesting discussion in Diego Gambata, "Claro! An essay on discursive machismo" in Elster, Deliberative, id, at 19 (the article discusses the cultural contexts in which deliberation can succeed. The author argues that in Latin American states there is a widespread culture of inattentiveness to the opinions of others, aggressiveness, incapacity to accept doubts, and extensive use of passion as opposed to logical argument, and willingness to co-operate).
critical thought. When people are committed to the value of equal liberty, there is small danger that they will be willing to cancel the democratic system of government under which the people are sovereign and decisions express the will of the citizenry. Moreover, widespread commitment amongst the citizens of a state to the values of respect to others and tolerance ensures that the constitutional protections of minority rights shall be supported by a compatible sentiment.

As we have already stated, attitudes and values are influenced by the cultural environment in which people live. Consequently, it would be wrong to omit an examination of the value contents to which people are exposed, and it is necessary to ascertain that they are exposed to a democratic culture. People are exposed to values in different arenas: their families, their peer groups, voluntary associations within civil society, the media and schools. It seems to us that amongst all these arenas, the most suitable venue for exposure to democratic culture and values is the education system. Intervention in the family unit and peer groups is impractical. Also, it raises difficult problems concerning the invasion of people’s intimate affairs and an infringement against their privacy. With regards to voluntary associations within civil society (such as churches, support groups and human rights organizations), it is sometimes claimed that by participating in the association’s activities people acquire the virtues necessary for maintaining democracy. Ann Mary Glendon, for example, says that civil society is the “seedbed of civic virtues”. However, such a claim is empirical rather than analytical, and there is no assurance that the associations within civil society will indeed equip

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49 Such a claim is voiced by philosophers and social scientists. See, for example, Michael Walzer, "The Civil Society Argument", in Dimensions of Radical Democracy: Pluralism, Citizenship and Community 89, 106 (Cantal Moufffe, ed., 1992); Nancy Rosenblum & Robert Post "Introduction" to Civil Society and Government (Nancy Rosenblum & Robert Post eds., 2002). This claim is based on the groundbreaking research by Robert Putnam, Making Democracy Work: Civic Tradition in Modern Italy (1993), who demonstrated the empirical correlation in different areas of Italy between the level of voluntary association within the civil society and the success of the democratic project.

people with the virtues which contribute to the stability of democracy.\footnote{For a criticism along these lines see Will Kymlicka, \textit{Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship} 302 (2001); Stephen Macedo, "Constituting civil society: School vouchers, religious non-profit organization and liberal public values" 75 \textit{Chi-Kent.L.Rev.} 417, 428 (2000); Stephen Macedo, "The constitution, civic virtues, and civil society: Social capital as substantive morality" 69 \textit{Ford. L.Rev.} 1573, 1574 (2001); Amy Gutmann, "Introduction" to \textit{Freedom of Association} 3 (Amy Gutmann ed., 1998).} Exposure to the media has without doubt an effect on the viewers’ attitudes and values and, consequently, in certain cases there is room to consider intervention in order to safeguard democratic culture.\footnote{For a suggestion in this spirit, supporting a prohibition on the transmission of stereotypical messages in advertisements to safeguard the value of equality, see our article "Advertisements, stereotypes and freedom of expression" \textit{Journal of Social Philosophy} (forthcoming 2004).} This notwithstanding, intervention in communication contexts raises serious First Amendment problems.\footnote{The Supreme Court frowns upon attempts to limit contents and considers them to be viewpoint discrimination. Only in rare cases does it approve such limitations. In 1987 the FCC decided that the fairness doctrine violates the first amendment since it involves an attempt of the government to tell broadcasters what to say. The doctrine can no longer be justified on the basis of its contribution to diversity in broadcasting, since licenses are not scarce anymore. \textit{See} Syracuse Peace Council, 2 FCC Rcd. 5043, 5055 (1987). This decision was upheld by a Court of Appeals in \textit{Syracuse Peace Council v. FCC}, 867 F. 2d 654 (D.C.Cir. 1989).}

It seems to us that schools should fulfill a significant function in the nurturing of the virtues and values necessary for the existence of a democratic culture. As we have seen, we cannot expect any other institution to fulfill this function. The most effective means of passing on values from one generation to the next is through the education system. As Minnich notes, "it is in and through education that a culture and polity, not only tries to perpetuate, but enacts the kinds of thinking it welcomes, and discards and/or discredits the kinds it fears".\footnote{Elizabeth Minnich, \textit{Transforming Knowledge} 5 (1991).} Exposure to cultural contents at a young age is decisive to the formation of people’s values and attitudes.\footnote{Aristotle, \textit{Nicomachean Ethics}, Book 2: sec. 1 (Translated with an introduction by David Ross, 1980) (Oxford, Oxford University Press) (says with regards to the manner in which virtues develop within man that "It makes no small difference, then, whether we form habits of one kind or of}
education would mean that children would be exposed only to those values passed on to
them by their parents. This is problematic, because some parents do not believe in equal
liberty, respect or tolerance and will pass such attitudes on to their children. These
children will later become citizens and their intolerant attitudes will affect the lives of
other citizens.

In our view and as aforesaid, schools ought to educate towards a commitment of the
values of equal liberty, tolerance and respect for others. Furthermore, pupils should be
encouraged to develop a reasonable capacity for independent critical thought. We are not
able to discuss here in detail the ways of affording these values and virtues and so we will
make do with a few examples and comments. Minow reviewed hundreds of plans
designed to develop co-existence and she indicates a number of approaches in this
regard.\(^{56}\) Thus one approach places emphasis on the importance of contact between
different ethnic, racial and religious groups for the purpose of eradicating stereotypes and
prejudices.\(^{57}\) Another approach teaches pupils about human rights by exposing them to
the universal principles that appear in international conventions regarding human rights.\(^{58}\)
The latter approach has been subjected to criticism, arguing that it is not possible to teach
tolerance by cognitive means alone and that these values must be internalized at an
emotional level.\(^{59}\) An illustration of this can be found in the approach, which confronts
pupils with historical horrors as a means of developing critical thought, tolerance, caring
and compassion.\(^{60}\) As for the development of a reasonable capacity for independent and

another from our very youth; it makes a very great difference, or rather all the difference”); Plato,
The Republic of Plato, 377 (Bloom Alan, trans., 1968) (Plato suggests that what children undergo is
crucial in influencing their entire lives and therefore that there is great importance to the contents to
which children are exposed).

\(^{56}\) Martha Minow, "Education for co-existence” 44 Ariz. L.Rev. 1 (2002).
\(^{57}\) Id, at 10-15. It should be noted that in Brown v. Board of Education 347 U.S. 483 (1954) the
Supreme Court relied on such an approach in its ruling that the existence of separate institutes of
education for Blacks and Whites represents a breach of the equal protection clause.

\(^{58}\) Minow, supra note 56, at 15-18.
\(^{59}\) See, e.g., Daniel Goleman, Emotional Intelligence (1995).
\(^{60}\) Minow, supra note 56, at 21-23.
critical thought, we believe that logical thought ought to be encouraged amongst pupils, they should be taught to identify fallacious arguments, they should be introduced to the a variety of arguments in the areas of ethics and religion and to the criticisms voiced against these arguments.61

It should be noted that there is some tension between education for values of equal liberty, tolerance and respect and between the nurturing of critical thought. This tension comes to a fore in relation to the treatment required on the part of the education system with regards to opinions and arguments which contradict the values of equal liberty, tolerance and respect. The aspiration to develop critical thought seems to imply that a broad array of arguments and outlooks ought to be presented, including those that deny the importance of equal liberty, tolerance and respect. Despite this, we are of the opinion that the educational system should not give voice to opinions and arguments against, say, equality between races or against religious tolerance. In so much as such opinions and arguments arise, educators ought to respond with negative assessment thereof. Our reasons for this will be presented herein bellow

A.3. Objections to Education for Democracy

In section A.1. we discussed an argument that might be raised against the very idea that steps ought to be taken to secure the continued existence of democracy. In this section we wish to contend with objections concerning our suggestion that the continued existence of democracy should be secured by education for democratic values.

Firstly, it might be argued that education for democratic values exhibits intolerance towards non-liberal conservative communities. Such communities do not believe in the values of tolerance, equal liberty and independent thought. Hence, the teaching of democratic values represents an imposition of values and conveys intolerance. Such a

61 For such a suggestion see Brighouse, supra note 45, at 732-733.
claim was raised by Christian fundamentalist parents in the case of Mozart. These parents argued that a public school syllabus that included readings from a variety of sources constituted “a subtle form of brainwashing or indoctrination: an effort to change or influence the children's values, or to coerce them into adopting humanist beliefs.” The criticism of our suggestion will furthermore argue that there is an inconsistency in a position which is willing to demonstrate tolerance only towards those who believe in the value of tolerance.

However, as explained above, the intolerant has no moral right to demand to be treated tolerantly, since he does not fulfill the basic requirement of reciprocity and is a “free rider” on the spirit of tolerance which exists in society as a result of the contribution made by others. According to Rawls, so long as there is not a threat to people’s security, tolerance should be exercised towards the intolerant because it can be assumed that this will influence him to become tolerant. It appears to us that Rawls’s assumption is likely to be shared by civil libertarians, who would argue that restrictive measures should be taken against intolerant factions only when there is a clear threat to the continued existence of democracy. In our view this attitude is faulty. Without an education towards democracy, which ensures widespread commitment to democratic values, there is a risk that the intolerant might manage to influence many. Intervention after such an influence took place might turn out to come too late. A distinction that appears relevant in this context is the distinction suggested by Spinner between non-liberal communities wishing to influence the political arena, such as fundamentalist Christians in the United States or Ultra-orthodox Jews in Israel, and between separatist non-liberal communities, such as

63 A detailed description of the parents in Mozart, 827 F.2d 1058 claims can be found in Nomi Stolzenberg "He drew a circle that shut me out': Assimilation, indoctrination, and the paradox of a liberal education" 106 Harv. L.Rev. 581, 597 (1993).
64 Nomi Stolzenberg, id, talks about 'the paradox of liberal education' arising in this context.
65 Kymlicka, supra note 42, at 310.
66 Rawls, A Theory of Justice, supra note 19, at 219. Rawls calls this a "psychological principle".
67 See supra at p. 10.
the Amish.\textsuperscript{68} The Amish voluntarily separate themselves from the rest of society: they do not vote and they do not try to influence public policy. In Spinner’s opinion, since the Amish do not represent a threat to the existence of Liberal democracy, it is possible to accommodate their desire to be left alone and to refrain from interfering with their system of education. It should be noted, however, that for those interested in promoting children's interest in autonomy, although communities such as the Amish indeed do not represent a threat to democracy, the lack of even minimal intervention in education in such communities represents complete neglect of children’s interest of autonomy.\textsuperscript{69}

A second claim which might be raised against education for democratic values, is that such education is not neutral between all outlooks. It will result in an erosion of minority cultures, which do not share a secular liberal outlook. The argument is that such education would lead to the assimilation of the cultures of those minorities into the secular liberal culture, a result which should distress anyone committed to multiculturalism and pluralism. Thus McConnell objects to the introduction of requirements for education to democratic values on the grounds that this would bring an end to educational pluralism.\textsuperscript{70} There is no doubt that religious fundamentalists fear that the enhancement of critical thought amongst children will lead some of those children to doubt religious doctrines. As the parents argued in \textit{Mozert}: "The readings impart a skeptical view of religion and teach children to view Scriptural truth as myth".\textsuperscript{71} In the


\textsuperscript{69} Here below at p. 29, we discuss the fact that the issue of education for democracy creates a clash between the interests of three parties: the state, parents and children.

\textsuperscript{70} As McConnell puts it, "educational pluralism would be a mirage if the result were to yoke all schools to a single set of prescriptive standards." See, Michael W. McConnell, "Establishing disestablishment: Why democratic values are ill-served by democratic control of schooling" in \textit{Political and Moral Education, NOMOS XLIII} 87 (Stephen Macedo & Yael Tamir eds., 2002).

\textsuperscript{71} This allegation of the parents in \textit{Mozert}, 827 F.2d 1058 appears in \textit{Stolzenberg}, supra note 63, at 596.
opinion of these parents, even the "mere exposure"\textsuperscript{72} to ideas and outlooks other then their own might weaken their children’s commitment to religious values.

There is a core of truth to the \textit{Mozert} parents concern. To be sure, there is no point in denying that education for democratic values can present a problem for communities whose members do not share such values and could erode at their culture.\textsuperscript{73} However, the \textit{intention} behind education for democratic values is not to harm other cultures, but to secure the critical interest in the subsistence of democracy. Hence, such education is neutral in its intentions, if not in its results. A requirement for neutrality in results is impractical, since virtually every governmental policy will have some non-neutral effects on certain groups.\textsuperscript{74} Indeed, the mainstream of modern Liberalism does not require neutrality in the results of government policy which aims to promote a legitimate public interest.\textsuperscript{75} The erosion of certain cultures is a cost, which, in our opinion, it is worth paying so as to ensure the essential interest of preserving democracy. Without an education for independent critical thought, there is danger that future citizens might fall prey to manipulations by leaders with totalitarian aspirations. Without widespread citizen commitment to values of tolerance, mutual respect and equal liberty, an anti-democratic spirit might take wind in the society, bringing democracy to a downfall. It is worth noting that in the absence of democracy the threat of damage to minority cultures is liable to be far greater. A similar assertion can be found in Macedo who criticizes the demand for almost unlimited freedom of association. He states that freedom of association itself

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\bibitem{72} The court in \textit{Mozert}, id, ruled that “mere exposure” differs from specific teaching of alternative values. For criticism see \textit{Stolzenberg}, id, at 599-610.

\bibitem{73} \textit{Macedo}, supra note 51, at 181.

\bibitem{74} David A. Reidy "Pluralism, liberal democracy, and compulsory education: Accommodation and assimilation" 32(4) \textit{Journal of Social Philosophy} 585, 592 (2001); See also Macedo’s (\textit{supra} note 68, at 484) discussion of the Indian constitution. India’s constitution is exceptional in that it requires neutrality also in the results of policy concerning the relation to various religions. The problem is that it is impossible to satisfy all desires. If a concession is made in favor of one group, another group also demands concession and accommodations.

\bibitem{75} See, e.g., Rawls, Political Liberalism, \textit{supra} note 3, at 190-200; Gutmann, Civic Education, \textit{supra} note 5, at 559; Macedo, \textit{supra} note 51, at 426.

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depends upon people’s willingness to support democratic institutions and respect the rights of others.\textsuperscript{76}

A third possible claim against our suggestion is that it upsets parents’ right to educate their children. The opinion that parents should have exclusive authority to educate their children can be found in the writings of Locke and others.\textsuperscript{77} This approach is founded upon the assumption that parents are better disposed then anyone else to secure their children’s future interests,\textsuperscript{78} or on the belief that the possibility of raising their children as they see fit is fundamental to parents’ welfare.\textsuperscript{79} In our view, an approach which grants parents an exclusive right to educate their children is problematic, given that children are destined to become citizens and their behavior will have an effect on society and on the democratic institutions. The state has a legitimate interest to be involved in the education of children so as to ensure that its future citizens will be equipped with the values and intellectual tools essential to the existence of democracy.\textsuperscript{80}

A fourth possible claim against our suggestion is that education for democratic values gives insufficient respect to children’s autonomy in two respects. Earlier we pointed to the tension, which exists between education for democratic values and between the nurturing of independent critical thought, and we stated that in our opinion schools should not give voice to arguments against racial equality and religious tolerance. It can

\textsuperscript{76} Macedo, supra note 51, at 420. See also Amy Gutmann, "Assessing arguments for school choice: Pluralism, parental rights, or educational results?" in School Choice: The Moral Debate 126 (Alan Wolfe ed., 2003).


\textsuperscript{78} Locke, id.

\textsuperscript{79} Such an assertion can be found in Eamonn Callan, Creating Citiznes: Political Education and Liberal Democracy 144 (1997).

\textsuperscript{80} Gutmann, Democratic Education, supra note 44, at 29.
be argued that this position demonstrates a lack of faith on our part in the pupils’ capacity for independent and critical thought and lack of respect to their autonomy.\textsuperscript{81} Our response is that the capacity for independent and critical thought develops gradually over a long learning process, and we are therefore doubtful that children will manage to contend with arguments in support of intolerance and racism. Moreover, one must keep in mind that children do not reach school as a \textit{tabula rasa}, and in many instances they have already internalized antidemocratic opinions and values absorbed at home. Attempts to contend with such opinions and values at a cognitive level, by presenting refuting information and arguments, are liable to fail. Hence, it is preferable not to expose pupils to non-democratic values, and to induce them to internalize democratic values at an emotional level as well.\textsuperscript{82}

A further criticism from the aspect of children’s autonomy that might be voiced against our suggestion is that it makes do with the nurturing of independent and critical thought. It does not attempt to realize the ideal of an autonomous human being in the Millian sense of developing each person’s unique characteristics, encouraging individuality, and insisting that everyone take charge of their own life story.\textsuperscript{83} The criticism will go on to say that our suggestion reveals concern for citizens’ interest in stable democracy, but largely neglects children’s interest in an education allowing for optimal development.\textsuperscript{84} It limits the state’s intervention in the educational contents at schools to the minimum necessary for safeguarding democracy and leaves much control over the contents to which children will be exposed at school in the hands of their parents. This is done even though it is known that some parents favor a type of education which would limit their children’s autonomy.

\textsuperscript{81} Brighouse, supra note 45.
\textsuperscript{82} Eamonn Callan, “Liberal legitimacy, justice, and civic education” 111 \textit{Ethics} 141 (2000).
\textsuperscript{83} See John S. Mill, \textit{On Liberty}, 56-57 (Edited with an introduction by Elizabeth Rapaport, 1987). (“Human nature is not a machine to be built after a model and set to do exactly the work prescribed for it, but a free, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living things”). Dewey can also be seen to aspire to this ideal. See John Dewey, \textit{A Common Faith} 32 (1934).
\textsuperscript{84} James G. Dwyer, \textit{Vouchers Within Reason} 50-54 (2002).
Our suggestion indeed does not seek to realize the Millian ideal of autonomy. Not everyone shares this ideal, and it would thus be improper for the state to use its coercive powers so as to see it realized. The liberalism which we support is ‘Political Liberalism’ as opposed to ‘Comprehensive Liberalism’. The fundamental insight of Political Liberalism is that despite the differences between people in modern democracies with regards to comprehensive religious, moral and philosophical outlooks, they can nonetheless agree on liberalism at the political level. In other words, they can agree that conduct in the political arena should reflect respect for all. This can be achieved by showing toleration towards others’ comprehensive outlooks and by refraining from coercive enforcement of outlooks that are not shared by all.85

Our suggestion is motivated by the desire to ensure that citizens respect other citizens. We have no interest in imposing an ideal of autonomy which some find objectionable. Our aim is to assure the subsistence of the democratic system, which affords people equal liberty. With regards to the criticism of our suggestion on the grounds that it neglects children’s interest in obtaining an education allowing for optimal development, it is true that our suggestion does not fully protect this interest. The issue under discussion involves the interests of three parties: the child, the parents and the state. Parents have an interest in passing their values and culture on to their children, the democratic state has an interest in preserving democracy, and the child has an interest to acquire skills and to be exposed to a variety of options so as to optimize her development. It seems to us that a worthy approach is one which factors the interests of all three parties and refrains from attributing exclusive significance to any one of these parties.

B. Legal Aspects of Education for Democratic Values

In the previous section we advocated the defense of democracy by means of education for democratic values of equal liberty, tolerance and respect. In this section we wish to

85 Rawls, Political Liberalism, supra note 3; Macedo, supra note 68, 473-474.
discuss constitutional issues pertinent to the advocacy of such a form of education. Recently, the Supreme Court ruled in Zelman v. Simmons-Harris\textsuperscript{86} that the funding of private school education by means of the voucher system does not contradict the Establishment Clause of the First Amendment. We will examine the implications of the Zelman ruling for the issue of education to democracy in the United States and will explain why we find this ruling problematic. We will demonstrate the incursion upon the commitment to democratic values, which might be caused by the funding of private schools, by referring to the grave results of the policy of funding the schools of the ultra-orthodox community as experienced in Israel. Then, working from a perspective which takes Zelman as the legal reality, we will present three possible ways of securing education for democracy. We will indicate how these solutions can be established in constitutional law and will consider the merits of constitutional arguments which might be raised against them.

**B.1. Zelman v. Simmons-Harris**

Zelman dealt with a reform in the Cleveland, Ohio education system under which a vouchers program was employed, thereby allowing parents from low-income families to receive funding to provide for the education of their children in private schools. This program was devised in order to enable such parents to provide their children with better education than that provided by inner city public schools. A group of Ohio taxpayers challenged the program on the grounds that the transfer of funds to private religious educational institutions violated the Establishment Clause of the First Amendment. The Supreme Court determined, by 5-4 majority, that the program represented a state attempt to promote the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system and was not an attempt to establish religion. The court determined that although the majority of the public funds utilized through the program reached religious schools, this effect should not be seen as establishment of religion. The court emphasized that the program is neutral between religious and non-religious outlooks because it "provides assistance directly to a broad

\textsuperscript{86} Zelman, 536 U.S. 639.
class of citizens who, in turn, direct government aid to religious schools wholly as a result of their genuine and independent choice".  

In our view, this ruling threatens to have problematic repercussions for the stability of democracy in the United States. As a result of the validation given in Zelman for vouchers programs, low-income parents will be able to send their children to private schools. It is reasonable to assume that presently many parents send their children to public schools only because they cannot afford the cost of educating them in private religious schools. Research concerning Americans’ views with regards to religion reveals that some ninety percent of Americans believe in God, a percentage far greater than that revealed in similar research conducted in Europe. In fact, 96% of the parents of pupils who participated in the vouchers program in Cleveland elected to send their children to religious schools. In view of this it is reasonable to assume that large scale implementation of vouchers programs will lead to a not insignificant increase in the number of pupils attending private religious schools.

A segment of these religious schools is problematic because of a lack of commitment to democratic values. On the basis of data obtained from The U.S. Department of Education, Dwyer concludes that a million pupils, comprising 20% of all private school students and 25% of all religious school students, attend Fundamentalist Christian schools. In Dwyer one can find a description of what goes on in the most problematic amongst these schools. These schools convey implicit and explicit messages of intolerance and hostility towards believers of other persuasions, particularly Catholics and Jews. Moreover, they teach their pupils that "women are morally and socially inferior to men

87 Id, at 2467.
89 See Dwyer, supra note 84, at 238.
90 Such schools are referred to as “teacherless schools” or “self-paced curriculum schools.” They contain a third of the pupils in Fundamentalist schools, that is to say 8% of all pupils in religious schools.
and should pursue no ambition other than service to men in the home" and that "only male students should go to college".\footnote{Dwyer, supra note 84, at 172} The Civil War is described as a holy Christian War whose objective was to maintain the biblical distinction between races.\footnote{Id., at 171.} It appears reasonable to assume that some of the schools of other religious communities also fail to furnish their pupils with democratic values.\footnote{Dwyer notes that Catholic education has a history of sexism and of lack of critical thought (id, at 174). On the antidemocratic character of the Haredi Jewish community in the United States see William B. Helmreich, The World of the Yeshiva: An Intimate Portrait of Orthodox Jewry, 313-319 (1982) (mentioning that the strict ultra orthodox community in the United States uses methods of indoctrination in order to secure its survival as a distinct entity); Spinner, supra note 68, at 108-112; Gutmann, Religion and State, supra note 68, at 133-134.}

The situation depicted here is liable to become graver still because, as aforementioned, it is now likely that there will be a significant increase in the number of pupils attending religious schools, and some of these pupils will hence be exposed to non-democratic values. Regrettably, the \textit{Zelman} Court made no reference to the diminishing effect which voucher programs might have on the level of commitment to democratic values amongst future citizens and thus on the stability of democracy. Like the dissenting Justices, we too feel that the \textit{Zelman} Court’s ruling that the voucher program “is entirely neutral with respect to religion”,\footnote{Chief Justice Rehnquist's opinion in \textit{Zelman}, 536 U.S. at. 2473.} exhibits a formal treatment of the establishment clause.\footnote{Justice Souter's opinion in \textit{Zelman}, id, at 2486.} Even though the state does not transfer public funds to religious institutions directly, but does so rather by means of a 'detaching factor' in the form of the parents’ choice, the end result is that very large sums of money will eventually come into the possession of religious schools. This was well expressed by Justice Breyer who commented that the Court’s willingness in the past to permit a certain overspill of funds to religious institutions was "at worst the camel's nose, while the litigation before us is the camel itself."\footnote{Justice Breyer's opinion in \textit{Zelman}, id, at 2507.}
The Majority’s ruling, that the vouchers program is neutral between religious and secular outlooks because it "provides assistance directly to a broad class of citizens", assumes that the establishment clause permits neutrality between religious and secular outlooks. We are of the opinion that the establishment clause implies the taking of a non-neutral stand in favor of secularity. Accordingly, the state should not be permitted to fund the activities of religious institutions even if it funds the activities of non-religious institutions. We support Sullivan’s position on the Establishment Clause. Sullivan states that "the negative bar against establishment of religion implies the affirmative 'establishment' of a civil order for the resolution of public moral disputes. Agreement on such a secular mechanism was the price of ending the war of all sects against all." And "the bar against an establishment of religion entails the establishment of a civil order – the culture of liberal democracy – for resolving public moral disputes."

Indeed, only widespread citizen commitment to the principle, that the public sphere must not be administered in accordance with an outlook not shared by all of the citizenry, will ensure that the majority group will not consider it legitimate to utilize its power so as to act intolerantly towards minority groups. Such a commitment will thus prevent social strife between different sects. Commitment to the principle that the public sphere should not be governed by a particular outlook derives from an internalization of the values of equal liberty, tolerance and respect for the other. As we asserted in the previous part, in

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97 Cass F. Sunstein, *The Partial Constitution* 307 (1993) ("The establishment clause creates a secular, liberal democracy in a way that is intended to minimize religious tensions")


99 Stephen Holmes thus conceives the Establishment Clause as imposing a "gag rule" on religious issues in the public sphere. As he notes, "the government must gag itself (i.e., its functionaries) on religious questions to avoid conveying a message that the state endorses or approves any sectarian practices". See, Stephen Holmes, "Gag rules" in *Constitutionalism and Democracy* 19, 43 (Jon Elster & Rune Slagstad eds., 1988). Many liberals follow John Rawls' argument that a government in a liberal democracy should base its actions on "evidence and ways of reasoning acceptable and accessible to all". See *Rawls, A Theory of Justice*, supra note 19, at 213. Also see Thomas Nagel, "Moral conflict and political legitimacy" *Phil. & Pub.Aff.* 215 (1987); Kent Greenawalt, "Religious convictions and lawmaking" *Mich.L.Rev.* 352 (1985). But see Michael W. McConnell "Five reasons to reject the claim that religious arguments should be excluded from democratic
order for such an internalization to occur it is essential that democratic values be taught in schools.\textsuperscript{100}

In opposition to our approach, critics might assert that it constitutes an establishment of secularism and humanism; that it grants primacy to the secular outlook and favors it over competing religious outlooks. Critics would argue that our suggestion itself does not meet the demand to administrate the public sphere in a manner independent of any outlook which is not common to all citizens, since there are citizens who do not hold the values of tolerance and equal liberty.\textsuperscript{101} We admit that our approach is not completely neutral, as it promotes a number of values. However, as we explained in the previous part, widespread citizen commitment to a minimal core of democratic values is crucial for the stability of democracy. Our suggestion represents what Rawls termed “Political Liberalism”.\textsuperscript{102} We do not advocate education for a comprehensive liberal outlook positing the ideals of individualism and humanism,\textsuperscript{103} but instead argue for minimal liberalism epitomized in the recognition that the public sphere must not be administrated in accordance with disputed outlooks. Our suggestion indeed is not neutral; however its non-neutrality is minimal. A similar non-neutrality exists in the establishment clause, whose purpose is to establish a civil order for the resolution of moral disputes in the public sphere.

As we stated above, the Court did not consider the repercussions that the transition to a vouchers system might have on education for democracy or on the stability of democracy. It is interesting to note that while the Justices in minority did ground their

\begin{itemize}
\item \textit{Supra} at 25-26.
\item See generally, Rawls, Political Liberalism, \textit{supra} note 3. Also see Macedo, \textit{supra} note 68.
\item For prominent supporters of a comprehensive liberalism see Dewy, \textit{supra} note 83; Mill, \textit{supra} note 83; Raz, \textit{supra} note 24.
\end{itemize}
opposition to the vouchers system on an apprehension from religious strife, the concern they had before them differed from that which guides us in our suggestion. The minority Justices feared that different sectors of the community might fall into dispute over the allocation of funds for educational institutions.\textsuperscript{104} They also expressed concern that the establishment of conditions for the allocation of funds for educational institutions, such as the requirement that schools participating in the voucher program refrain from teaching hatred, might produce severe disputes concerning the implementation and interpretation of such conditions.\textsuperscript{105} Our concern, by contrast, is that a transition to the vouchers system might lead to erosion in the commitment of future citizens to democratic values. The lack of such commitment has the danger of causing religious majority groups to seek to force minority groups to succumb to a way of life to which they are opposed. Such an occurrence would likely lead to conflict and endanger the stability of democracy.

In order to illustrate the danger, which the funding of religious schools threatens to present before democracy, we will broadly describe the Israeli experience. In Israel funding was given to religious education and this brought about a substantial decline in education for democratic values.

\textbf{B.2. Test case: funding of ultra-orthodox schools in Israel}

Estimates as to the number of ultra-orthodox, Haredi, Jews in Israel vary between half a million to a quarter million citizens, i.e. between 9%-4% of the Israeli population.\textsuperscript{106} This religious community has fundamentalist characteristics, epitomized in its assertive and uncompromising attachment to what its adherents view as authentic and, hence,

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\textsuperscript{104} Justice Breyer’s opinion in \textit{Zelman}, 536 U.S. at 2504-2505.
\textsuperscript{105} \textit{Id} at 2505.
\textsuperscript{106} According to high estimates the Haredi community represents between 8.8%-9% of the Israeli population and about 11.5% of Israeli Jews, i.e. between 530,000 to 545,000 persons. The low estimate has the Haredi population at 250,000, i.e. 5% of the state’s Jewish population. See Shachar Ilan, \textit{Ultra-Orthodox Jews Inc.} 316-318 (2000) (Hebrew).
\end{flushright}
fundamental tenets of the faith. As such, the Haredi community does not perceive the democratic way of life as desirable, but rather as a threat to its own way of life. Research on attitudes towards democracy reveals that 90% of Haredis expressed support for non-democratic ideas, three times the percentage of support for such views expressed by secular respondents; amongst all the different factions within Israeli society, the Haredis exhibit the most acute mistrust of the various state institutions, especially with regards to the Supreme Court; almost two thirds of the Haredi population in Israel believe that Israel should become a Theocracy; and Haredis reveal the lowest level of tolerance towards other social groups.

Haredis in Israel are not a closed community such as the Amish, but are instead active participants in Israeli politics. Haredis have political representation in the form of Haredi political parties. The voting percentage amongst Haredis is very high, reaching approximately 90%. Their voting patterns do not reveal autonomous thought. They tend to vote as the rabbi instructs and en masse. Thus, for example, in the 1996 elections the level of support for the right wing candidate in Haredi neighbourhoods reached 98%. This high level of support was obtained following a direct instructive from the rabbis’ courts to vote for the right wing candidate. Furthermore, movements representing Haredis of Eastern extraction make use of amulets, blessings, threats of curses and other religious aids in order to influence voters to support the Haredi parties. During the last

108 According to the leader of the Haredi community in Israel, Rabbi Sach, Democracy is a terrible disease spreading and putrefying from soul to flesh. See, Ilan, supra note 106, at 38.
111 Weiss, id.
112 Ithamar Gruenwald, "Misticism and politics in the State of Israel" in Religion and Political Order 95 (Jacob Neusener ed., 1996). In order to limit the use of such means in election campaigns legislative
20 years Haredi parties have greatly increased their political representation in Israel’s parliament, the Knesset.\textsuperscript{113} From 4 representatives (out of 120) in the 1981 Knesset the Haredi representation rose to 22 representatives in the 1999 elections and decreased to 16 in the 2003 elections.\textsuperscript{114}

The Haredi parties actively promoted their sector’s interests. Unlike other minorities, which are discrete and insular (such as the Israeli Arabs), the Haredis did not suffer from minority abuse in the democratic process. Quite the opposite: because of their decisive function in the balance of power between Israel’s political left and right, they received budgets greater than what their relative proportion within the populace entitled them to.\textsuperscript{115} Thus, they succeeded in leading the Knesset to legislate laws enforcing religious norms, intervention was required. See §122(6) of \textit{The Election to the Knesset Act, 1969} [Combined Version], as amended in 2000.

\textsuperscript{113} The increase in the political representation of the Haredi parties relates to demographic developments in Israel. Firstly, on average Haredi women give birth to almost three times more children than the average Israeli woman. Secondly, in recent years there has been a process of “return to religion” in Israel.

\textsuperscript{114} See \url{http://www.knesset.gov.il/description/heb/heb_mimshal_res.htm}. The decrease in the power of Haredi parties in the 2003 elections can be attributed to a number of factors, including, inter alia, the change of the voting system from a double ballot vote (for Prime-Minister and for parties) to a single ballot vote (for party alone).

\textsuperscript{115} The central rift splitting the Israeli political map is the varying degree of willingness to relinquish the occupied territories in the interest of obtaining peace with the Arab states. The religious parties were willing to support both the right wing and the left wing governments’ policies regarding the peace process, but in return for this support they demanded that these governments promote Haredi interests in matters of state and religion. Consequently, despite the fact that both of Israel’s two major political parties are predominately secular, the result of the political process was such that it did not reflect the will of the large majority of the Israeli population. Since both major parties looked for the support of the Haredi parties in order to establish a government, and in view of their concern that the Haredi parties might join a government formed by the opposing party, they were effectively trapped in a Prisoner’s Dilemma. As a result they acted in contrast to their common interest. See, Eyal Benvenisti, “Party primaries as collective action with constitutional ramifications: Israel as a case study” 3 \textit{Theoretical Inquiries in Law} 13 (2002), available in \url{http://www.bepress.com/tiil/default/vol3/iss1/art8}. 

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such as the law prohibiting the import of non-kosher meat or the display of “chametz” (unleavened bread and related products) during the Jewish Passover.\textsuperscript{116} They also made use of their political clout within regional authorities to bring about the closure of religious neighborhood roads during the Sabbath.\textsuperscript{117} The Haredis endeavored to obtain exemptions from the directives of general laws, such as the law establishing obligatory military service.\textsuperscript{118}

Israeli law distinguishes between four types of education systems. The State Education Law, 1953, established two public education systems that are under full state control and are fully funded by the state. The central system is the public education system, in which mainly secular students are taught, and the smaller system is the public religious-education system, in which non-Haredi religious students are taught. The objectives of Public Education (both secular and religious) in Israel are established in the law and include, inter alia, (a) The provision of basic knowledge in the various disciplines of thought and science and fundamental learning skills; (b) the developing of a respectful attitude towards human rights, basic liberties, democratic values, lawful behavior, the culture and views of others, and the developing of a spirit of striving for peace and tolerance in the relations between peoples and nations; (c) the encouraging of a spirit of criticism and judgment and the nurturing of intellectual curiosity, independent thought and initiative.\textsuperscript{119}

\textsuperscript{116} Pig Raising Prohibition Act, 1962; The Mazza Act (Hamech Prohibition), 1986.
\textsuperscript{117} H.C. 516/96 Horev v. Minister of Transportation, 51(4) P.D. 1 (1996) (an English translation available in \url{http://62.90.71.124/eng/verdict/framesetSrch.html}.
\textsuperscript{118} H.C. 3267/97, Rubenstein v. Minister of Defense, 52(5) P.D. 481 (Hebrew). For general observations over these issues see Shimon Shetreet, "Resolving the controversy over the forms and legitimacy of constitutional adjudication in Israel: A blueprint for redefining the role of the Supreme Court of Israel and the Knesset" 77 Tul. L.Rev. 659, 723-724 (2003); Gidon Sapir, "Religion and state in Israel: The case for reevaluation and constitutional entrenchment" 22 Hastings Int'l & Comp. L.Rev. 617, 624-625 (1999)
\textsuperscript{119} §2 of \textit{The State Education Law}, 1953.
The third type of school consists of private schools recognized by the state. The State Education Law grants the Minister of Education the authority to recognize private schools. The significance of such recognition is that it entitles the schools thus recognized to state funding. Along with this, however, the schools must also meet certain state requirements, including the requirement to teach a core curriculum. In accordance with regulations established under the Law, the recognition of a school for the purpose of state support is conditioned upon the fact that the school operates the core curriculum, and that this curriculum comprises 75% of the total amount of hours taught in public education systems.\textsuperscript{120} It must be noted that the state (as well as the local authority) has no legal obligation to support the budgets of recognized private education institutes, although in practice the majority of such institutes are supported, to one extent or another, by public funding.\textsuperscript{121} This category is comprised of secular private schools, and, for the most part, of the majority of Haredi schools.

The fourth type of schools consists of private schools, which are not recognized by the state.\textsuperscript{122} The activity of these schools is considered lawful, because they meet minimal requirements such as the existence of teachers and a structure to house the school. This category is comprised of extreme Haredi schools,\textsuperscript{123} or long-standing Church schools. These institutes have no direct obligation to teach parts of the core curriculum.\textsuperscript{124} They

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\item \textsuperscript{120} §3 of \textit{The State Education Regulation (Recognized institutions)}, 1953.
\item \textsuperscript{121} H.C. 8437/99 \textit{Chabad Kindergarten Network v. the Minister of Education} paragraph, 44(3) P.D. 69 (2000); H.C. 4363/00 \textit{Porialh Elite Committee v. the Minister of Education}, 56(4) P.D. 203 (2000).
\item \textsuperscript{122} §4(a) of \textit{The Compulsory Education Law}, 1949.
\item \textsuperscript{123} Stephen Goldstein, "Multiculturalism, parental choice and traditional values: A comment on religious education in Israel" in \textit{Children's Rights and Traditional Values} 118, 125 (Gillian Douglas & Lessley. Sebba eds., 1996).
\item \textsuperscript{124} This notwithstanding, the legislator may have nonetheless left the State a degree of supervision even over the "exempt institutes". §28 of \textit{The Schools' Supervision Act}, 1969 grants the Minister of Education the authority to guarantee that education in these schools will be consistent with the principles of section 2 of the State Education Act, 1953 (the section describing the goals of the public education system). For a discussion of this point see, Leslie Sabba and Varda Shiffer, "Tradition and the right to education: The case of the ultra-orthodox community in Israel" in \textit{Children's Rights and Traditional Values} (Gillian Douglas & Lessley Sebba eds., 1996) 160, 167.
\end{enumerate}
generally enjoy much autonomy in determining curriculum content, and the state refrains from exercising any form of supervision over them.\textsuperscript{125} Despite the fact that the law does not grant these institutes the right to receive state support, in practice they do receive support, albeit less so than the recognized institutes of education.

Since the law did not specify rules regarding the scale of funding to be given to private educational institutes, The Ministry of Education has recently established a committee to examine the system of financing for educational institutes in Israel.\textsuperscript{126} The committee’s report, whose recommendations were adopted in full by the Minister of Education, recommends that: (a) public institutes of education receive 100\% public funding; recognized private institutes of education receive maximum funding of 85\%; and unrecognized private institutes receive up to 60\% funding. (b) a necessary condition for state funding is the teaching of the core curriculum established by the Minister of Education.\textsuperscript{127}

The reality in Israel is therefore such that the state is willing to fund private education, including Haredi education, in return for the teaching of democratic values and basic capabilities.\textsuperscript{128} However, while both the spirit of the law and the committee recommendations indicate that Haredi education should receive proportionately less funding then public education, statistics shows that the funding per pupil in Haredi

\textsuperscript{125} Thus, for example, in the Jabarin case the Supreme Court addressed the question whether the Church schools of the Arab Israeli minority should be forced to respect the freedom of religion of a Muslim pupil who was forbidden to wear her head covering. The Court refrained from applying the duty to respect the pupil’s freedom of religion, explaining that the Church school has a large degree of autonomy because of its status as an unofficial, unrecognized institute of education. H.C. 4298/93 

\textsuperscript{126} The committee was established following a petition submitted to the Israeli High Court of Justice in H.C. 1614/00 
\textit{Ha-Reali School v. the Ministry of Education} (decision from June 24, 2001).


\url{http://www.adva.org/ivrit/haredi1.htm}. 

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primary schools is in actual fact higher than the funding given for each pupil in the public education primary schools. This state of affairs is, as explained, a product of the increasing political clout of the Haredi parties.

Data assembled indicates that the state funding for Haredi education is proportionately dozens of percents higher than the funding the state provides for pupils in the public education system.\(^{129}\) The large-scale funding given to the Haredi education system has made it attractive for traditional parents from low-income families.\(^ {130}\) Moreover, the Haredi schools for Eastern Jews (i.e. Jews originating from Arab States) appealed to traditional Eastern parents because of an upsurge in the politics of identity and difference in Israel and the waning power of the notion of a melting-pot and inter-group integration.\(^ {131}\) Recently published statistics indeed show a dramatic increase in the number of pupils attending the Haredi education system. During the last decade there has been a dramatic rise of 220% in the number of pupils attending Haredi primary school

\(^{129}\) This data shows the Haredi education to be more appealing in a number of aspects: Firstly, the average number of pupils in each class in public schools is higher than the average for the Haredi communities schools. Secondly, the average pupil to teacher ratio in public schools is higher than in Haredi schools. Thirdly, Haredi schools provide more hours of schooling than public schools. See Shiffer, \textit{id}, at 16.

\(^{130}\) This phenomenon became particularly apparent in settlements with a concentration of populace of a low socioeconomic level. Towards the school year of 1999-2000, various local authorities reported that more than 114 pre-schools would be closing down due to a lack of applicants, and that 96 Haredi kindergartens would be opening in their place. In the township of Offakim 600 pupils enlisted to the kindergartens in a network of educational institutes for Haredis of Eastern origin, as apposed to 850 who enlisted for the public education kindergartens. One of the factors contributing to this transition is the payment which parents are required to pay to public education pre-schools. For similar education in the Haredi network they would be obliged to pay only a symbolic payment, in return for which they would be granted a longer school day and warm meals. See Ilan, \textit{supra} note 106, at 253.

\(^{131}\) Regarding these developments see Gershon Shafir & Yoav Peled, \textit{Being Israeli: The Dynamics of Multiple Citizenship} (2002); Multiculturalism in a Democratic and Jewish State (Menachem Moutner et al eds, 1998) (Heberw); Uri Davidson "From tribalism to statehood and back – Zionism and post-Zionism in Israel" 29 \textit{Mifneh} 9 (1999) (Hebrew).
frameworks. Today, one of every five Jewish primary school pupils attends a Haredi school.\textsuperscript{132}

The Haredi education system was designed to insulate the Haredi community from secular society. As Shalhav and Friedman describe, from the age of twelve:

"the Haredi youngster is almost completely detached from the technological and professional studies which could prepare him for obtaining a position in the diverse array of professional possibilities that modern society has to offer (not to mention its wealth of ideas), devoting himself solely to the study of torah. The function of this intensive distinctly indoctrinating curriculum is to entrench in the young Haredi an utterly positive opinion of the Haredi society’s ideals and mental readiness for the realization of these ideals, whilst negating the values of modern-secular society. At the same time, the curriculum to which the Haredi youth is exposed can serve to extensively block his chances of finding a place, like others his age, in the professional setup of modern technological society. In this respect, the young Haredi therefore becomes very much dependant upon the Haredi social system".\textsuperscript{133}

Haredi education thus negates modern-secular social values and, what's more, it strives to deny Haredi students the opportunity to fit into the professional framework of general society. These two goals stand in complete opposition to the targets of the core curriculum, which is supposed to apply to Haredi schools as well. According to the core curriculum, every school which receives state funding must teach the following subjects: English, Mathematics, Geometry, National Heritage, Society, Civics and Democracy, Geography, History, science and technology, physical education and computer studies.\textsuperscript{134}

These requirements are perceived by the state as minimum requirements, which are

\textsuperscript{132} In 1989-1990 the proportion of students in Haredi primary schools was 7.6\% of the general student population in the Jewish sector. By 1999-2000 the proportion has risen to 20.4\%. see www.cbs.gov.il/shnaton53/download/st08_15.xls.


\textsuperscript{134} The core curriculum for secondary schools was set in \textit{Special Directives of General Director of the Ministry of Education}, No. 20, 1996. The core curriculum for elementary schools was published in March 2000 by the Minister of Education (available at http://www.knesset.gov.il/mmm/doc.asp?doc=m00557&type=pdf).
supposed to qualify every pupil to integrate into Israeli professional and public life. It would be reasonable to assume that the contradiction between these requirements and the perceptions of Haredis regarding the aims of education would make it very difficult to enforce curriculum content upon Haredi educational institutes. For it is hard to imagine how Haredi teachers might go about teaching value contents, which stand in contrast to their religious beliefs. Moreover, as we will shortly explain, even if such a teacher were to teach the value contents contained in the core curriculum, the structure of the Haredi education system is such that one can assume that Haredi pupils will have difficulty internalizing values such as tolerance and respect towards women or towards members of other social groups. In reality the Haredi education system indeed does not fulfill the requirements established in the core curriculum, while the state appears to turn a blind eye to this fact.\(^{135}\)

Supervision of the contents taught in the Haredi education system is conducted by requiring school principals to declare which subjects are taught in their schools.\(^{136}\) In addition, the Ministry of Education exercises a supervisory apparatus to ascertain whether Haredi educational institutes meet the requirement to teach the core curriculum. The difficulty in enforcing the core curriculum results from the combination of a number of factors: firstly, the curriculum contents are the polar opposites of Haredi beliefs and it is thus impractical to assume that a Haredi teacher would expose pupils to values which he no doubt finds unworthy, or even dangerous. Secondly, even when the system does try to force Haredi schools to teach the core curriculum, the Haredis make use of their political clout and upset such attempt.\(^{137}\) Thirdly, even if the pupils in the Haredi education system

\(^{135}\) Shiffer, *supra* note 128, at 31-33; Ilan, *supra* note 106, at 159;

\(^{136}\) Ilan, *id.*, at 246.

\(^{137}\) Varda Shiffer (*supra* note 128, at 31-32), a researcher who examined the operation of the Ministry of Education’s enforcement apparatus, describes the state of affairs thus: “Sometimes the political leaders of the Haredi population are called upon to prevent, for example, the enforcement of regulations in the field of teachers training. During a conversation with a senior Ministry of Education official it was revealed that the independent [Haredi] education system would not permit intervention in curriculum content, and that, in the past, when they thought that the requirements
were exposed to the core democratic values, true internalization of these values would not be achieved because of the distinctive nature of Haredi education. Students in Haredi educational institutes do not benefit from the hidden curriculum, the messages transferred in an integrative school environment, as a result of direct contact with children from other social groups.

B.3. Three ways of attempting to ensure education for Democracy after Zelman

The Israeli example demonstrates the possible ramifications of the funding of private religious schools. Such funding increases the number of students attending religious schools, while some of these are not taught democratic values. The Zelman decision to permit the funding of private school education does not take into account these detrimental effects upon citizen commitment to democracy. The purpose of the establishment clause is, as we explained, to establish a secular public sphere; that is to say, a public sphere that is not run in accordance with a religious outlook to which some citizens do not subscribe. Such a public sphere is meant to prevent religious strife and ensure the stability of democracy. As we emphasized above, the commitment to the idea that the public sphere should be conducted independently of any particular outlook stems from an internalization of values of equal liberty, tolerance and respect towards the other, and for such internalization to occur it is necessary to teach democratic values in schools. The Zelman decision could have a detrimental effect on the stability of democracy and it therefore frustrates the realization of the goal of the establishment clause.

Thus we hope that the decision in Zelman will be overruled. This is not an unlikely prospect. Commenting on Zelman, Charles Fried makes a distinction between 'oppositional' and 'collaborative' dissents.\textsuperscript{138} An 'oppositional' dissent "rejects the majority's opinion as the basis of further development of the law. It would take the law

right back to where it was before the wrong turn. ... The oppositional dissent, then, is a potential vote for overruling.¹³⁹ Fried shows that the dissent in Zelman is 'oppositional', that the dissenters are committed to overruling the Court's decision.¹⁴⁰ Thus it is possible that this decision will be overruled in the future.

We now wish to examine three possible courses of action, which might be taken in an attempt to ensure democracy after Zelman. We will evaluate each of these courses of actions for its effectiveness in promoting democratic education and with regard to its constitutional merits.

¹³⁹ Id. at 182
¹⁴⁰ Id. at 191
B.3.1. Non-funding of private schools

The first way which might be taken in attempting to ensure education for democratic values is to refrain from financing private schools. A lack of funding for private schools increases the relative cost of education in such schools as opposed to the cost of public school education. As a result, the number of pupils attending private schools – some of which, as aforesaid, do not teach democratic values – should decrease. In this manner it would be possible to ensure that most students will be taught democratic values within public schools. In fact, this possibility reflects the situation that existed in the United States prior to the Zelman decision.

It is important to note that the Zelman decision rules only that the adoption of a vouchers plan permitting public funds to reach religious private schools does not contradict the establishment clause. The Zelman Court did not rule that there is a constitutional duty to fund education in private schools alongside the funding of public schools. In other words, Zelman permits public funds to reach private schools, but it does not obligate the state to transfer funds to such schools. In view of this and in view of the threat to the stability of democracy, we believe that the States should refrain from adopting the vouchers program. It might however be claimed that such desistance is not defensible on constitutional grounds, and that after Zelman the States must fund private school education. The constitutional grounds for the existence of such a duty will vary according to the identity of the private school, i.e., whether the school is religious or non-religious.

According to the ruling of the Pierce Court, parents have a constitutional right to send their children to private schools, including religious schools. Consequently, parents who wish to send their children to private schools might argue that by refraining from funding private education the state substantially hinders their ability to realize this right. Religious parents could argue in addition that the right to provide religious instruction to one's children is included in the right to free exercise of religion and that refusal to fund religious school education hinders their ability to provide religious instruction to their

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children and therefore constitutes a violation of their right to free exercise of religion.\textsuperscript{142} They could also argue that since the majority of private schools are religious, such desistance represents a bias against religion amounting to a violation of the free exercise clause of the First Amendment. Parents arguing this could refer to \textit{Hialeah}, where the Court ruled that: "at a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs."\textsuperscript{143}

It must be noted that the limitation through non funding upon parents’ ability to realize their right to send their children to private schools is not produced through the positing of a penal prohibition. The limitation on the realization of the right is indirect. It is less drastic, in the sense that it leaves parents with the choice to send their children to private schools, religious or non-religious. From the \textit{Harris}\textsuperscript{144} ruling it can be ascertained that the state has extensive discretion in determining which activities to fund and which not to fund. In that case the Supreme Court ruled that the state has the right to refrain from funding medically essential abortions, even though it financed births. The Court did not find the state’s decision to be unconstitutional, because the decision represents a "refusal to subsidize" rather then a “penalty” against the realization of the constitutional right to have an abortion. The application of the line of thought expressed in \textit{Harris} to the issue now before us should lead to the conclusion that the state may refrain from funding private education even though it funds public education. Such a decision should not be viewed as an unconstitutional limit upon the realization of parents’ right to send their children to private schools. Having said this, we feel that the Court’s position in \textit{Harris} is excessive. It might lead to arbitrary impediments to the realization of constitutional rights. We agree with Sunstein that it is worth examining the justifications given by the


\textsuperscript{143} \textit{Church of Lukumi Babalu Aye v. City of Hialeah}, 508 U.S. 520, 532 (1993)

\textsuperscript{144} \textit{Harris v. McRea}, 448 U.S. 297 (1980).
state when it selectively funds activities. In the matter before us, there is good justification for a policy of not funding private schools, in light of the legitimate and important state interest to ensure that future citizens will be taught democratic values. In the case of the non-funding of religious private schools, additional justification can be derived from the establishment clause whose object, as aforesaid, is to ensure that decisions in the public sphere will not be made on the basis of comprehensive conceptions.

It should also be noted that the goal behind a policy of non-funding for private schools is to ensure that more students will be educated to internalize democratic values rather than to offend against the freedom of religion. Moreover, the non-funding policy in the matter at hand is neutral in the sense that it applies to all private schools, religious and non-religious alike. According to Smith, an arrangement which is neutral and generally applicable will not be considered unconstitutional even if its practice presents an impediment to the realization of certain religious groups' freedom of religion. This approach complies with the position of the mainstream liberal trend we described in the first part of the article. According to that position, the state must refrain from action

145 Sunstein, supra note 97, at 306-308, criticizes two other approaches towards this matter. The first is the libertarian 'unconstitutional conditions' doctrine, which asserts that the State may not limit rights not only by means of direct prohibitions but even by indirect means, such as deciding to refrain from funding. The second is the position that can be found in Justice Rehnquist’s ruling in Harris, according to which the State can reach almost any decision when it is funding activities. In Sunstein’s opinion the first approach stands in contrast to the Supreme Court’s current post-Lochner position, which does not require state neutrality in matters of redistribution. The second opinion is problematic, Sunstein argues, because it might lead to arbitrary decisions in matters of funding. Consequently, he supports an examination of the constitutional validity of a decision not to fund a particular activity by means of examining the justifications given for such decision.

146 Employment Division Department of Human Resources v. Smith, 494 U.S. 872 (1990). This decision substantially limited the scope of religious exemptions and accommodations supposedly required by the free exercise clause of the first amendment. In support of Smith see, William P. Marshal, "In defense of Smith and free exercise revisionism" 58 U.Chi.L.Rev. 308 (1990); for criticism thereof see, Michael W. McConnell, "Free exercise revisionism and the Smith decision" 57 U.Chi.L.Rev. 1109 (1990).
intending to promote a particular ethical outlook, but it is legitimate that the state should act in order to promote crucial social interests, even if such action has non-neutral results.\(^\text{147}\)

Another argument which might be raised against the suggestion that no funding be granted to private schools, relates to parents’ freedom of speech. In relation to this issue Gilles claims, that "the speech of parentally-chosen schools and teachers is simply indirect educative speech running from parents to children through the parents' agents and intermediaries".\(^\text{148}\) If such a claim is accepted, then it could be argued that the decision not to fund private education whilst funding public education represents unconstitutional viewpoint discrimination. As known, such limitations offend against the very heart of the first amendment and there is a strong presumption against their constitutionality.

In our view the messages that parents, either directly or indirectly, convey to their children should not be considered a realization of the constitutional right for freedom of speech. We will develop this view in section B.3.3. Even if one assumes that the messages which parents convey to their children do constitute a realization of the right to freedom of speech, it must be noted that when the state seeks to promote a certain outlook by means of selective funding it is perceived by the Court as a speaker and is permitted to regulate the content of what is or is not expressed.\(^\text{149}\) Even though the Supreme Court did in some cases prohibit selective funding based on content, its reason for doing so was that in those cases the state had not attempted to express an opinion but rather had tried to

\(^{147}\) Compare Norwood v. Harrison, 93 S.Ct. 2804 (1973) (state need not provide assistance to private schools equivalent to that which it provides to public schools without regard to question of whether private schools discriminate on racial grounds); Bob Jones University v. United States, 103 S.Ct. 2017 (denial of tax-exempt status to a university that engaged in racial discrimination in admission).


provide a public forum for the expression of diverse viewpoints,\textsuperscript{150} or to provide legal aid for citizens in the realization of their welfare rights by means of social organizations.\textsuperscript{151} But, we argue, the funding of public education and the non-funding of private education is a clear expression of governmental speech by which the state seeks to convey public values and thus it is constitutionally permissible.\textsuperscript{152} It should be further noticed that selective funding of education does not deny parents the possibility of expressing views which stand in contradiction to a view conveyed by the public education system. For even if they are forced to send their children to public schools, they can still express such views at home or within their congregations.\textsuperscript{153}

**B.3.2. Funding of private schools with strings attached**

A second way of attempting to ensure education for democratic values is to condition the funding of private school education upon the fulfillment of conditions relating to education to these values. Thus, for example, the vouchers program in Cleveland prohibited participating schools to discriminate in admission on the basis of race, religion or ethnic background,\textsuperscript{154} and to teach "hatred of any person or group on the basis of race, ethnicity, national origin or religion".\textsuperscript{155} Similarly, the Milwaukee vouchers program required participating religious schools to allow vouchers children to opt-out from any religious activity conducted in the school.\textsuperscript{156}

\begin{itemize}
\item \textsuperscript{150} \textit{Rosenberger}, id.
\item \textsuperscript{151} \textit{Legal Services Corp. v. Valazquez}, 531 U.S. 533 (2001).
\item \textsuperscript{152} Kathleen Sullivan, "Parades, public squares and voucher payments: Problems of government neutrality" \textit{28 Conn. L.Rev.} 243 (1996) (mentioning that the Court has held repeatedly that the public educational curriculum is a form of government speech through which it need not carry messages by students or teachers antithetical to its mission). See also, \textit{Choper}, supra note 142, at 248; \textit{Sunstein}, supra note 97, at311.
\item \textsuperscript{154} Ohio Rev. Code Ann. § 3313.976(A)(4).
\item \textsuperscript{155} § 3313.976(A)(6)
\item \textsuperscript{156} 1995 Wis. Act 27, §4008(e).
\end{itemize}
This option may be deemed more appealing than the first option of non-funding for private schools. Firstly, the funding of private school education would allow non-wealthy parents to send their children to schools which reflect their culture, and therefore would increase those parents’ freedom of choice in the area of education. Such funding is likely to lead to a flourishing of private schools and would serve to increase cultural pluralism. Secondly, the interest of democracy to secure commitment to democratic values would be better served in the sense that the number of children who will receive an education for democracy would be greater than their number under the first option. This is likely to be the case because, as Sullivan states, private schools are placed in a prisoners’ dilemma: "When the government puts money on the table, any given sect might prefer to abstain from taking it if the sect knows that all other sects will do the same. Absent this cooperation, however, a sect might think that accepting the money is important for its survival, and there will be a competition of all sects against all over the money."\textsuperscript{157}

Thirdly, it is possible that this option might have the beneficial consequence of turning non-tolerant communities into more tolerant communities. For example, it is reasonable to assume that a religiously diverse classroom (resulting from a duty not to discriminate in admission) will have the effect of increasing religious toleration. Thus, such requirements will make the private religious institutions more compatible with democratic public values.\textsuperscript{158}

However, we are concerned that this second option will not ensure that the majority of future citizens in the democratic state will be committed to democratic values. It is difficult to believe that teachers will teach contents which stand in sharp contrast to their beliefs and values. Can one expect that a teacher belonging to the Southern Baptist Church, which holds that women should obey their husbands, teach the value of equality between human beings? Similarly, can an ultra orthodox Jewish teacher be expected to teach students that democracy is preferable to theocracy? Moreover, even if pupils in


private schools are exposed to an overtly democratic curriculum, there is basis to fear that the “hidden curriculum” will lead pupils to form anti-democratic views. As Salomone explains, students’ views are heavily influenced not only by the messages conveyed, but also by the manner in which they are conveyed.\(^{159}\) Indeed it is likely that the teacher’s intonation and body language convey subtle messages to pupils, which stand in contrast to the content of his speech.

The major drawback of the ‘strings attached’ option lies in the difficulty of enforcing the requirement for an education to democracy. While pupils’ knowledge can be ascertained by means of an exam, it is impossible to determine what values they are committed to by such means. It is therefore necessary to establish a supervisory mechanism to verify that the requirement for an education to democracy is fulfilled. Yet the existence of such a mechanism is not, in itself, sufficient to ensure effective enforcement, if it is not accompanied by a will to enforce on the part of the government.\(^{160}\) The absence of such a will could stem from a lack of governmental commitment to the values in question. Thus, for example, the degree of enforcement of the Civil Rights Act by the Equal Employment Opportunity Commission (EEOC) was dependant upon the incumbent President’s commitment to the antidiscrimination principle. A lack of desire to enforce the requirement for an education to democracy might also be related to the political sensitivity of such enforcement. Justice Breyer in \textit{Zelman} notes that "it is difficult to imagine a more divisive activity than the appointment of state officials as referees to determine whether a particular religious doctrine 'teaches hatred or advocates lawlessness'".\(^{161}\) It would therefore not be unreasonable to assume that governments would prefer to refrain from enforcing such requirements. Moreover, even when there is a will to enforce the requirement for an education to democracy, the required supervision entails significant difficulties. As Guttman argues, it is very difficult to look behind the


\(^{160}\) Sullivan, \textit{supra} note 157, at 1417-1418, 1421.

\(^{161}\) \textit{Zelman}, 536 U.S. at 2506.
walls of a private school.\textsuperscript{162} Certainly, effective supervision over private schools would necessitate the allocation of many resources. The Israeli experience in attempts to enforce an education for democracy in ultra-orthodox educational institutes demonstrates the difficulties mentioned. Any attempt on the part of the professional organs in the Israeli Ministry of Education to intervene with the Haredi education system’s curriculum was blocked by political pressure.\textsuperscript{163} As a result, the Ministry of Education now turns a blind eye to the failure to implement the demand to teach the core curriculum in these educational institutes.\textsuperscript{164}

Because of the significant difficulty entailed in forcing private schools to comply with the requirement to teach democratic values, we believe that refraining from funding private schools would better ensure a commitment to democracy than the funding of private schools with strings attached. Although the second option is not ideal, it would nonetheless better protect democracy than the funding of private schools without strings attached. Accordingly, we shall now turn to examine the constitutionality of this course of action.

It might be argued that conditioning the funding of private schools by requiring them to teach democratic values places 'unconstitutional conditions' on the realization of the constitutional rights to free exercise of religion and free speech.\textsuperscript{165} Conceptually, the conditional funding of private schools is equivalent to the policy of funding public schools whilst not providing any funding for private schools. Both these instances constitute selective funding. In light of this, the answers we put forth in the previous section regarding the possibility of not funding private schools at all also apply with

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\textsuperscript{162} Gutmann, \textit{supra} note 68, at 135.
\textsuperscript{163} Shiffer, \textit{supra} note 128, at 32.
\textsuperscript{164} Ilan, \textit{supra} note 106, at 159.
\end{flushleft}
regards to the option of conditional funding. However, with regards to the claim that when the state performs selective funding it discriminates on the basis of viewpoint, there is a difference between the two cases. The Supreme Court’s rulings on this issue reveal a distinction between situations in which the state wishes to convey a message by funding private organizations and between situations in which it wishes to provide a service and not convey a message.  

When the state refrains from funding private schools whilst funding public schools, it would be easier for it to argue that the purpose of the selective funding is to express public values, including democratic values. By contrast, when the state conditionally funds private schools it might be argued that the state’s goal is to provide better educational services and that in such case it is not acting as a speaker. However, in our opinion if the state adopts a policy of conditional funding of private schools it would be correct to interpret its objective as twofold: the desire to secure better educational services and the desire to ensure the stability of democracy by creating a commitment to democratic values amongst future citizens. In view of the fact that the constitutional validity of an arrangement which grants conditional funding is dependent upon the purpose of the arrangement, it is recommended that States deciding to adopt such an arrangement make a point of declaring that one of the objectives of the arrangement is to deepen the commitment to democratic values.  

166 Lupu & Tuttle, *supra* note 153, at 979. See *supra* at p. 49-50.  
167 Thus in the *Rosenberger* case the Court relied on a document which detailed the goals of the funding of various students enterprises by the university. In the same affair the court ruled that the purpose of the funding was to provide a public forum in which to voice a variety of views and not to express the university’s position. Therefore the Court ruled that the non-funding of the newspapers of religious student organizations constitutes impermissible viewpoint discrimination. See, *Rosenberger*, 515 U.S. 819 at 2522.
B.3.3. Obligating private schools to educate for democratic values

A third course of action might be to require all schools, public and private alike, by means of legislation, to educate for democratic values. Such a requirement could be accompanied by a decision to fund private school education or not to do so. As we have already discussed the practical and constitutional repercussions of the issue of funding, we will now only address the implications of a legal duty to educate for democratic values. Along with its recognition of parents’ right to send their children to private schools, the Pierce Court also emphasized the state’s right to regulate these schools so as to ensure its interest in promoting good citizenship.\(^\text{168}\) In Pierce the Court did not discuss the grounds for such a course of action nor did it discuss the possible objections, and it is to this that we now turn.

Clearly the positing of a legal obligation to educate for democratic values would serve the state interest in nurturing a commitment to democratic values amongst future citizens. It might be argued, however, that such an obligation violates parents’ freedom of speech and freedom of religion. While a policy of not funding private schools places an indirect limit on these rights, the establishment of a legal obligation to educate for democratic values limits them directly.

With regards to the claimed violation of parents’ freedom of speech, we refer to Gilles’s claim that "the speech of parentally-chosen schools and teachers is simply indirect educative speech running from parents to children through the parents’ agents and intermediaries". In our opinion, Gilles’s argument is confused. The mere fact that a person speaks does not entitle his words to protection under the First Amendment. One

\(^{168}\) In Pierce, 268 U.S. at 534, the Court stated as follows: "No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."
can distinguish between different expressions on the basis of their contribution to the
realization of the ends for which we value the freedom of speech. The central value of the
freedom of speech does not lie in the speaker’s interest to speak freely and to obtain self-
fulfillment through speech. Its central importance lies rather in its contribution to the
realization of the public interest in a debate in the public sphere in which various views
are voiced, so that people can form opinions on personal and public issues by rationally
sifting through the various arguments. Such debate allows for optimal deliberation, which
realizes the democratic ideal of self-rule. In view of this, the educative speech of
parents is of no value or, at the most, of low value with respect to the interests served by
the free speech principle. Since children have not yet reached rational maturity, the
contribution of parental expressions to the child’s ability to form rational opinions is
marginal. What must be decided then is not the parents’ freedom of speech, but rather the
extent of their right to transfer values on to their children.

Shiffrin has recently argued that the question of the extent of parents’ free speech right to
pass on values to their children by means of private schools depends on the extent of
parents’ right to direct the upbringing of their children. As he puts it, "if the parents' right
to direct the upbringing of their children is not absolute, if they have no right to seal their
children off from opposing perspectives, then their free speech or association rights are
not infringed by compulsory public education". What Shiffrin claims here is correct if

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169 For the argument that the importance of the freedom of speech does in fact lie in its propensity to afford the speaker with an opportunity to achieve self realization, see, e.g., C. Edwin Baker, *Human Liberty and Freedom of Speech* 47-69(1989); Martin H. Redish, "The value of free speech" 130 *U.Pa.L.Rev.* 591 (1982).

170 See, e.g., Alexander Meiklejohn, *Political Freedom* (1960); Mill, supra note 83, Ch. 2. *Sunstein*, supra note 37, demonstrates that this attitude has also found expression in the rulings of the Supreme Court.

171 In the first part we stated that this issue involves the interests of three elements: The State, the child and the parents. We stated that in our opinion none of these elements ought to have exclusive rights as to the child’s education.

one assumes that parents’ educational speech has no value or little value in terms of the fundamental goals of the First Amendment. If not for this assumption parents could argue that even if certain restriction of their right to direct the upbringing of their children is legitimate, that restriction may not be legitimate with regards to their constitutional right to freedom of speech. But as we argued, the assumption that parents’ educational speech is not protected by the First Amendment seems correct.

Should the Court reject our line of argument, it will be difficult to constitutionally defend a legal obligation to teach democratic values in private schools. Since this course of action involves a direct restriction of free speech rather than indirect restriction by means of selective funding, it will be classified as "viewpoint discrimination" rather than "governmental speech". In such a case, the government must demonstrate that the restriction serves a 'compelling state interest' and that the means chosen are narrowly tailored to achieve this interest. In our view the government's interest in preserving the stability of democracy constitutes a compelling state interest. Furthermore, additional justification for such policy can be found in the establishment clause whose objective, as aforesaid,173 is to ensure that decisions in the public sphere are not made on the basis of comprehensive conceptions. This notwithstanding, we are not convinced that it is possible to show that the positing of a legal obligation to educate for democratic values is a necessary means for realizing these goals. A policy of not funding private schools, which is the policy that was practiced prior to Zelman, assures that the number of pupils attending private schools remains low, and thereby ensures that the decisive majority of pupils will receive an education for democratic values. Therefore the positing of an obligation in law to educate to democratic values is not the least drastic measure to achieve the compelling state interest of ensuring the stability of democracy.174

173 Supra at 33-34.
174 The situation whereby by denying funding for private schools the vast majority of students receive an education for democratic values does perhaps satisfy those who wish to secure the stability of democracy, but it does not satisfy those who wish to protect the interest of every child to be educated to develop critical thought and to be exposed to a variety of ideas. See, Dwyer, supra note 84, at 50-54; Brighouse, supra note 45, at 731.
As for the claim that the positing of a legal obligation to educate to democratic values constitutes a violation of the freedom of religion, it should be noted that, as we said already, the goal of such policy is not to offend against the free exercise of religion but to protect democracy. The said legal obligation equally applies to religious and non-religious schools and therefore it is neutral. According to Smith, such a neutral and generally applicable arrangement will not be considered unconstitutional even if its effect will be to burden for certain groups their exercise of freedom of religion.\textsuperscript{175}

Our analysis reveals that the option of positing a legal obligation to educate for democratic values may be constitutionally problematic, insofar as the parents' educative speech will be considered protected speech. We mentioned above that the positing of a legal duty binding private schools to educate for democratic values might accompany a decision either to fund education in private schools or not to fund it. As for the option of obligating private schools to educate for democratic values but at the same time refraining from funding them, we suggest that while such an option might indeed serve the interests of the state in maintaining the stability of democracy (as it does not entail the difficulties involved in enforcing values) it may still be problematic from the perspective of constitutional law. Regarding the option of requiring private schools to educate for democratic values and funding them, it seems that this option is very problematic. It is problematic as a matter of constitutional law. In addition, it is problematic in light of the increase in the number of children who would then attend private schools and the difficulty of enforcing an education for democratic values in such schools.

\textsuperscript{175} Smith, 494 U.S. 872.
Conclusions

In this article we presented an argument from democracy against vouchers programs. We argued that the adoption of such programs is liable to increase the number of pupils who are not educated for democratic values and thus to endanger the stability of democracy. We believe that the Zelman court erroneously ignored the detrimental effects which the permit it granted for vouchers programs might have on future citizens’ commitment to democratic values. In our view, the establishment clause establishes a civil order for the resolution of public moral disputes, and its correct interpretation should therefore prohibit a situation in which public funds reach private religious schools.

We have seen that after Zelman, in which the Court permitted the adoption of vouchers programs but did not require it, three courses of actions are open before somebody who wishes to ensure education for democratic values: non-funding of private schools, funding of private schools conditioned on the fulfillment of a requirement to educate for democratic values, and the creating of a legal obligation requiring private schools to educate for democratic values (accompanied or not accompanied by a decision to fund such schools). In order to evaluate which of these three options the law should adopt, we take into account two criteria: a. the effectiveness of each course of action in ensuring democratic stability; b. the constitutional merits of each course of action. Each of these two criteria is a necessary but insufficient condition for the attainment of democratic stability. It is clear that if a particular course of action is effective in obtaining democratic stability but lacks constitutional merits, then it is not endorsable. Similarly, if a particular course of action is not constitutionally faulty, but does not ensure democratic stability, then it should not be endorsed.

As for the first course of action, the positing of a legal obligation to teach democratic values in private schools, there appears to be a strong case for its unconstitutionality since, as we said earlier, it involves coercion. Thus this course of action does not seem promising. In comparison to this course of action, the second course of action (the conditioning of funding for private school education on an education for democracy) has
greater constitutional merits, since it involves only an indirect burden on the exercise of constitutional rights. However, this course of action is ineffective in achieving the important goal of securing the stability of democracy, in light of the great difficulty involved in enforcing the conditions.

The third course of action, refraining from funding private school education, meets both criteria. It has strong constitutional merits since it involves indirect burden on the exercise of constitutional rights, and it is effective in obtaining democratic stability as it reduces the number of pupils attending private schools.