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Responsible Republicanism: Educating for Citizenship

Suzanna Sherry†

"Liberty means responsibility. That is why most men dread it."¹

"The extent to which we take the commitment to democracy seriously is measured by the extent to which we take the commitment to education seriously. In these days, saying these words fills me with shame for the state of democracy at the end of the twentieth century."²

The United States Supreme Court has long recognized what none of us can doubt: education is vital to citizenship in a democratic republic. Moreover, because the Court has left open the question whether there might be a constitutional right to a minimally adequate education,³ scholarly commentary has speculated for at least the last decade on possible constitutional bases for such a right. No one, however, has much explored the possible content of a right to education. In particular, there has been little examination of the concrete relationship between education and citizenship. What are the appropriate contours of an education for citizenship?

† Earl R. Larson Professor of Civil Rights and Civil Liberties Law, University of Minnesota. I would like to thank Bruce Ackerman, Paul Edelman, Richard Eldridge, Richard Epstein, Daniel Farber, Barry Feld, Amy Gutmann, Sandy Levinson, and Linda McClain for their comments on earlier drafts of this article. I am also grateful for the thoughtful reactions of participants in the NYU Constitutional Theory Colloquium, and of faculty members at the University of Chicago, Northwestern, and Vanderbilt law schools, where I presented earlier versions of this paper. Amy Schmitz provided invaluable research assistance. This Article is dedicated to Hannah and Joshua, who made its completion both more difficult and more important.

¹ George Bernard Shaw, *Man and Superman* 252 (Penguin, 1981) (originally published in 1903).

² Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S Cal L Rev 1671, 1697 (1990).

³ *San Antonio School District v Rodriguez*, 411 US 1, 37 (1973).

Of course, asking such a question raises even more difficult questions about citizenship itself. There is no dearth of literature on the *rights* of citizens, but it seems disingenuous (and maybe circular) to argue that one needs an education to exercise the rights of citizenship. After all, despite some claims that illiteracy is inevitably disenfranchising, one *can* vote—as well as earn a living, own property, raise a family, and do whatever else might be suggested as a right of citizenship—without an education. Millions do. The core of the claim that education is necessary to citizenship must instead be that education is necessary to the thoughtful or responsible exercise of citizenship rights.

But focusing on how a right is exercised changes the nature of the argument. Citizens are no longer simply rights-bearing individuals. They are, rather, rights-bearing individuals with responsibilities. If what is important is not that one has a right to vote but that one is able to (and does) use it wisely, we have moved our vision of citizenship from rights alone to rights and duties, or rights and responsibilities. We have, in a word, added virtue to the mix.

Once we introduce virtue into our concept of citizenship, we can draw on another vast body of literature: that of the neo-republican revival. But if the literature on rights suffers from an inattention to virtue, the most telling weakness of the neo-republican revival is its neglect of rights. Scholars in both camps have begun to recognize the complementary nature of their theories, and there is now a growing group of legal academics trying to reconcile rights and republicanism.

Such attempts at reconciliation cannot succeed without greater attention to an element of historical republicanism that tends to be neglected by the revivalists: individual responsibility. Our preoccupation with rights, even when diluted by a neo-republican focus on deliberation and community, leaves us bereft of any substantive notion of the responsibilities of citizenship. And it is the *responsibilities* of citizenship that implicate education and provide a bridge between selfish, rights-bearing individuals and their deliberative republican community. To put it another way, one can reconcile rights and republicanism only by suggesting that a republican citizen needs an education that will enable her to exercise both the rights and the responsibilities of citizenship.

What I will here call an education for republican citizenship, however, is very different from the right to an education for its own sake or for the benefit of the individual. Moreover, the idea

of responsibility changes the nature of the education itself: an education is no longer something merely provided by the government and consumed by the individual. It is, rather, an ongoing lesson in responsible citizenship that requires participation and dedication on the part of present and future citizens.

In this Article, I hope to weave all these strands together into a concrete examination of the substantive legal implications of an education for republican citizenship. In Part I, I will survey the current state of the literature on rights and republicanism and elaborate the concept of responsibility. In Part II, I will sketch the substantive outlines of an education for republican citizenship based on the ideas explored in Part I. Finally, in Part III, I will turn to Supreme Court cases on constitutional questions arising in the context of elementary and secondary schools, analyzing them in light of the proposed education for republican citizenship.

I. RESPONSIBLE REPUBLICANISM

A. A Republic of Rights?

After almost two hundred years, Thomas Jefferson has apparently been proven right: We are all republicans now.⁴ If you have not yet encountered the newly recycled concepts of republicanism and civic virtue, you have not been reading the law reviews—nor the journals of history or philosophy.⁵ From relatively modest beginnings among a handful of philosophers, the concept of civic republicanism as a powerful explanatory paradigm spread unchecked through historians of both eighteenth- and nineteenth-century America, and then came to the attention of

⁴ Thomas Jefferson, *First Inaugural Address* (Mar 4, 1801), in Paul L. Ford, ed. 9 *The Works of Thomas Jefferson* 193, 195 (Putnam's Sons, 1905).

⁵ For those who have *not* been reading the law reviews (or whose eyes have glazed over at the thought of yet another article on civic republicanism), a brief introduction might be in order. At least as portrayed by legal academics, civic republicanism is a political philosophy—with an arguable early-American pedigree—that deemphasizes individual rights in favor of deliberative participation by citizens in their civic communities. Republicans tend, therefore, to focus on citizenship, community, and civic virtue rather than pluralism and individual rights. I will suggest in this Article that true civic republicanism also demands an attention to individual responsibility, which has not been prominent in the modern civic republican literature.

The uninitiated might also appreciate a word on terminology: “republican” refers to civic republicans, not to the GOP, and, unless modified by “political” or some similar adjective, “liberal” is used as the antithesis of “civic republican” rather than in its more modern meaning of progressive. “Liberal” thus denotes a political philosophy of individualism in which community plays at best a minor role.

legal academics, especially those on the political left. It was, as historian Daniel Rodgers has recognized, a paradigm shift that was an almost inevitable response to the widespread dissatisfaction with both liberalism and its existing alternatives.⁶ Civic republicanism—with its emphasis on communities rather than individuals—held out the promise of a non-Marxist, authentically American, achievable alternative to the rampant individualist excesses of late-twentieth-century liberalism. Not surprisingly, it failed to live up to its promise, and today we are seeing articles with titles such as “The Unfortunate Revival of Civic Republicanism.”⁷ How did we get here?

Since its inception, the central ideas of the republican paradigm have been in dispute. Virtue, deliberation, and community mean different things to different interpreters. The first neo-republicans were philosophers who disagreed about both the derivation and the scope of human virtue. Many of the earliest virtue theorists—sometimes labelled “communitarians”—saw virtue and community as an alternative to liberal Kantian theories. As Michael Sandel suggested, “the communitarian critics of modern liberalism question the claim for the priority of the right over the good.”⁸ Other philosophers have rejected that dichotomy, arguing that Kant also has a theory of virtue and of the good.⁹ Nevertheless, while Kantians seem to view virtue as a moral duty, Aristotelians see it as constitutive of human flourishing.¹⁰ There are, moreover, significant differences even among the Aristotelians. Some—who might be labelled traditionalists—see virtue as particular and local, not amenable to reasoned deduction. Alasdair MacIntyre, for example, rejects even the possibility of any universal moral principles, relying instead on local traditions and hierarchies.¹¹ Others, with a more univer-

⁶ Daniel Rodgers, *Republicanism: The Career of a Concept*, 79 J Am Hist 11, 12-13 (1992).

⁷ Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U Pa L Rev 801 (1993).

⁸ Michael J. Sandel, *Introduction*, in Michael J. Sandel, ed, *Liberalism and Its Critics* 5 (NYU, 1984).

⁹ See, for example, Richard Eldridge, *On Moral Personhood: Philosophy, Literature, Criticism, and Self-Understanding* 34-63 (Chicago, 1989); Richard Eldridge, “Reading For Life”: Martha C. Nussbaum on Philosophy and Literature, *Arion J Humanities & Classics* 187, 193 (Winter 1992).

¹⁰ See, for example, Ronald Beiner, *The Moral Vocabulary of Liberalism*, 34 *Nomos* 145, 156 (1992); George Sher, *Knowing About Virtue*, 34 *Nomos* 91, 98 (1992); Martha Nussbaum, *Virtue Revived*, *Times Literary Supp* 9, 9-11 (July 3, 1992).

¹¹ Alasdair MacIntyre, *After Virtue* 260-80 (Notre Dame, 1981); Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, 1988). See also Philippa Foot, *Virtues*

alist perspective, suggest that a true interpretation of the Aristotelian tradition does not entail rejecting either reason or universality. Human reason can indeed identify some universal human needs and thus some universal human virtues.¹² The trend today seems to be toward reconciliation; as Martha Nussbaum puts it, we need not “choose between virtue and enlightenment.”¹³

For their part, neo-republican historians could not even agree initially on appropriate terms: “republicanism” eventually won out over “country ideology,” but not without a struggle.¹⁴ Virtue—one of the few terms common to republicans of all stripes but consequently among the most poorly defined—has been variously defined as selfless dedication to the public good, a proper balance between private and public needs, or even a purely private manifestation of an inner state of being.¹⁵ As a matter of history, moreover, neither “republican” nor “country” was used in the eighteenth century to describe the tradition that twentieth-century historians now mean by the terms. When “republic” and “republican” were used in the eighteenth century, they were at least as ill defined as they are in the twentieth: John Adams wrote that “there is not in lexicography a more fraudulent word” than republican.¹⁶ Historians, too, now seem to be moving be-

and Vices and Other Essays in Moral Philosophy 130-31 n 6 (California, 1978).

¹² See, for example, Bernard Williams, *Moral Luck: Philosophical Papers 1973-1980* (Cambridge, 1981); Martha C. Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (Cambridge, 1986); Martha C. Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, 13 *Midwest Stud in Phil* 32 (1988); Martha Nussbaum, *Valuing Values: The Case for Reasoned Commitment* (session paper delivered at AALS Convention, Jan 10, 1993) (on file with U Chi L Rev); Beiner, 34 *Nomos* at 150 (cited in note 10).

¹³ Nussbaum, *Times Literary Supp* at 11 (cited in note 10). See also Eldridge, *On Moral Personhood* at 26-67 (cited in note 9); Michael J. Perry, *Virtues and Relativism*, 34 *Nomos* 117, 120 (1992); Gertrude Himmelfarb, *On Looking into the Abyss: Untimely Thoughts on Culture and Society* 98-103 (Knopf, 1994) (noting that Mill stressed virtue and restraint as well as liberty).

¹⁴ Compare J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, 1975) (“country party”); Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 74-80 (Kansas, 1985) (“country party”); with Gordon S. Wood, *The Creation of The American Republic 1776-1787* 65-70 (North Carolina, 1969) (“republicanism”); Robert H. Horwitz, *John Locke and the Preservation of Liberty: A Perennial Problem of Civic Education*, in Robert H. Horwitz, ed, *The Moral Foundations of the American Republic* 129 (Virginia, 1977) (“republicanism”); Lance Banning, *The Jeffersonian Persuasion: Evolution of a Party Ideology* 79-90 (Cornell, 1978) (“republicanism”). Republicanism appears to be the currently favored term. See, for example, Rodgers, 79 *J Am Hist* at 12-13 (cited in note 6).

¹⁵ See Rodgers, 79 *J Am Hist* at 11 (cited in note 6). See also Shelley Burt, *The Politics of Virtue Today: A Critique and Proposal*, 87 *Am Pol Sci Rev* 360, 365-67 (1993).

¹⁶ Letter from John Adams to Samuel Adams (Oct 18, 1790), in Charles Francis

yond conflict into consensus, recognizing that republicanism and liberalism coexisted easily and un-self-consciously in the eighteenth century, and that neither is a "paradigm" that fully defines American thought of that time.¹⁷

Legal academics, as is their wont, muddied the waters further. Civic republicanism became the darling of the academic left during the 1980s.¹⁸ In the process, however, it acquired new characteristics—emphases on tolerance and deliberation prominent among them—and lost some of its less savory historical aspects, especially those associated with elitism and exclusionary limits on citizenship.¹⁹

Two aspects of legal neo-republicanism have been especially prominent: opposition to a somewhat caricatured version of the previously dominant liberal, rights-oriented ideology, and a focus on deliberative citizens making value-conscious choices.²⁰ Like

Adams, ed, 6 *The Works of John Adams* 415 (Little, Brown, 1851).

¹⁷ See Rodgers, 79 *J Am Hist* at 34-38 (cited in note 6); Joyce Ableby, *Liberalism and Republicanism in the Historical Imagination* (Harvard, 1992); Ralph Ketcham, *Publius: Sustaining the Republican Principle*, 44 *Wm & Mary Q* 576, 579-80 (1987). For another review of the historiography of republicanism, see J. David Hoeveler, Jr., *Original Intent and the Politics of Republicanism*, 75 *Marq L Rev* 863, 868-75 (1992).

¹⁸ For an interesting analysis of this phenomenon, see G. Edward White, *Reflections on the "Republican Revival": Interdisciplinary Scholarship in the Legal Academy*, 6 *Yale J L & Humanities* 1, 13, 22 (1994).

¹⁹ See, for example, Cass R. Sunstein, *Beyond the Republican Revival*, 97 *Yale L J* 1539, 1564-65 (1988); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *Stan L Rev* 29, 30-31 & n 8 (1986) ("A revival of republicanism must attempt to eliminate these [unattractive] elements."). See also White, 6 *Yale J L & Humanities* at 25 (neo-republicans "refashioned republican ideology to make it appear less archaic and thereby more palatable"); Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 *Mich L Rev* 685, 750-51 (1992) (suggesting that neo-republicans ultimately tried to purge unattractive elements); H. Jefferson Powell, *Reviving Republicanism*, 97 *Yale L J* 1703, 1707 (1988) (neo-republicans select only those aspects of republicanism that conform to their own political ideals); Keuneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* 28, 31 (Yale, 1989) (American "civic culture" includes "individualism, egalitarianism, democracy, nationalism, and tolerance of diversity"); Hoeveler, 75 *Marq L Rev* at 878-81 (neo-republicans try to fashion a "usable republicanism" with "progressive applications").

²⁰ See, for example, Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (Harvard, 1988); Sunstein, 38 *Stan L Rev* at 30-31; Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 *Harv L Rev* 4, 27 (1986); Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 *Wm & Mary L Rev* 57 (1987); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 *Va L Rev* 543, 548-50 (1986); Linda R. Hirshman, *The Virtue of Liberty in American Communal Life*, 88 *Mich L Rev* 983, 988-98 (1990); Joan C. Williams, *Virtue and Oppression*, 34 *Nomos* 309 (1992). See also Bruce Ackerman, *We the People: Foundations* 85-86 (Harvard, 1991) (citizen deliberation pivotal to constitutional theory); Bruce Ackerman, *Social Justice in the Liberal State* 70-80 (Yale, 1980) (participation in dialogue is condition of citizenship); Stephen M. Feldman, *The Persistence of Power and*

the philosophers and historians, however, legal neo-republicans have begun to realize—sometimes with help from their critics—that there is common ground between liberals and republicans.²¹ Reconciling liberalism and republicanism—or rights and virtue—is thus the newest cottage industry among constitutional law professors.

Some critics have wondered whether such a reconciliation is either possible or desirable.²² It is not my purpose to rehash, or even to evaluate, those critiques. Instead, I take as a given that some form of civic republicanism can and should be integrated into our liberal regime and question only whether the current attempts are likely to be successful.²³ The remainder of this Section will explore the problematic nature of these attempts at reconciliation.

Extant attempts to integrate liberalism and republicanism suffer from two problems, one derived from each of the most prominent aspects of neo-republicanism identified above. First, the neo-republican ideal of deliberative democracy borders on the utopian. The vast majority of Americans are neither inclined nor equipped to engage in the kind of sustained, reasoned delibera-

the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism, 81 Georgetown L J 2243, 2246-51 (1993) (charting Michelman's focus on dialogue).

²¹ See, for example, Sunstein, 97 Yale L J at 1561 (cited in note 19); Frank Michelman, *Law's Republic*, 97 Yale L J 1493, 1503-04 (1988); Symposium, *Conceptions of Democracy: The Case of Voting Rights*, 41 U Fla L Rev 409 (1989); Richard H. Fallon, Jr., *What Is Republicanism, and Is It Worth Reviving?*, 102 Harv L Rev 1695, 1696 (1989); James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 Colum L Rev 1463, 1552 & n 395 (1990); David A. Strauss, *The Liberal Virtues*, 34 Nomos 197 (1992); Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* 254 (Oxford, 1990); William A. Galsten, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* 43 (Cambridge, 1991).

²² See, for example, Gey, 141 U Pa L Rev at 845-55 (cited in note 7); Burt, 87 Am Pol Sci Rev at 361-62 (cited in note 15); Richard A. Epstein, *Modern Republicanism—Or the Flight From Substance*, 97 Yale L J 1633, 1636-39 (1988); Kathryn Abrams, *Law's Republicanism*, 97 Yale L J 1591, 1599-1602 (1988); Michael A. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 Yale L J 1651, 1652 (1988); Burt Neuborne, *Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech*, 27 Harv CR-CL L Rev 371, 371-77 (1992). See generally Terrance Sandalow, *A Skeptical Look at Contemporary Republicanism*, 41 U Fla L Rev 523 (1989).

²³ Much of my own prior scholarship has in fact been devoted to exploring and justifying the republican revival. See "Without Virtue There Can Be No Liberty," 78 Minn L Rev 61 (1993); *Rights Talk: Must We Mean What We Say?*, 17 L & Soc Inquiry 491 (1992); *Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech*, 75 Minn L Rev 933 (1991); *Outlaw Blues*, 87 Mich L Rev 1418 (1989), reviewing Tushnet, *Red, White, and Blue* (cited in note 20); *Republican Citizenship in a Democratic Society*, 66 Tex L Rev 1229 (1988); *An Essay Concerning Toleration*, 71 Minn L Rev 963 (1987); 72 Va L Rev 543 (cited in note 20).

tion contemplated by the republicans.²⁴ Moreover, republican suggestions for promoting rational deliberation may actually have the effect of “undermining public political participation, especially among poorer groups.”²⁵ The republican revival will not go beyond a small corps of elite law professors if it does not face up to the citizenry’s lack of interest. However, neither of the two most promising ways of coming to terms with that problem is politically acceptable to most neo-republicans: either we could acknowledge that real political participation will necessarily be limited to the few because only the few are civic minded enough to participate, or we might attempt to change the values of the many so that they too are interested in participating in our rational political discussions. The first solution conflicts with the egalitarianism of modern republicans, and the second with their unwillingness to abandon the ethical relativism of modern liberalism.²⁶

The crux of the problem is that most neo-republicans are just that: *neo*-republicans. They have abandoned the very aspects of republicanism that made it a coherent doctrine. The new republicans are simultaneously liberal (and postmodern) in their ultimate denial of even the possibility of any abstract and universal ethical truths,²⁷ and republican in their wish to impose communi-

²⁴ See Burt, 87 Am Pol Sci Rev at 365 (cited in note 15); Philip J. Weiser, *Ackerman’s Proposal for Popular Constitutional Lawmaking: Can It Realize His Aspirations for Dualist Democracy?*, 68 NYU L Rev 907, 925-35 (1993); Rebin West, *Progressive Constitutionalism: Reconstructing the Fourteenth Amendment* 288-89 (Duke, 1994); Sherry, 78 Minn L Rev at 75 (cited in note 23). See also Suzanna Sherry, *The Ghost of Liberalism Past*, 105 Harv L Rev 918, 930 & n 35 (1992).

²⁵ Fitts, 97 Yale L J at 1652 (cited in note 22). See also Neuborne, 27 Harv CR-CL L Rev at 389-90 & n 92 (cited in note 22). Neo-republicans, who are generally very egalitarian, would find this result a serious drawback to their theories. Eighteenth-century American republicans would have been more sanguine about such a consequence, and indeed might have expected it; republicanism was originally rather elitist and exclusionary by twentieth-century standards.

²⁶ One scholar has suggested that both Sunstein and Michelman initially accepted the original republican notion that only the few would possess the virtues of republican citizenship, but that both have more recently tried to democratize their theories by making them more procedural and less substantive. Gardbaum, 90 Mich L Rev at 750-51 (cited in note 19).

²⁷ See, for example, Michelman, 97 Yale L J at 1504 (cited in note 21) (“I do not know what is good for the soul. I do not know in what (if anything) personal freedom essentially consists. I do not know whether citizenship is a fundamental human good.”). Sunstein has hinted that he does not subscribe to this sort of postmodern skepticism. Cass R. Sunstein, *On Analogical Reasoning*, 106 Harv L Rev 741, 773 n 113 (1993) (disagreement over correct answers in law or ethics does not mean there are no correct answers); id at 779-80 n 130 (rejecting postmodernist denial of the possibility of normativity). However, most of his republican scholarship seems to imply that law and morality are largely a matter of

ty values on individuals.²⁸ The moral skepticism of traditional liberals led them to endorse government neutrality; traditional republicans, by contrast, preferred normative government decision making because of their certainty that objectively correct moral values could be identified. The new republicans, on the other hand, simultaneously endorse both ethical relativism and normative government decision making. This amalgamation of liberal epistemology and republican political philosophy seems to generate either unfettered majoritarianism or totalitarianism (depending on whose contingent values are imposed), but neo-republicans deny that either is an acceptable form of government. They have failed to recognize that republicanism—especially the particularist version, which is all that is available to relativist neo-republicans—is, at base, a thoroughly conservative doc-

societally influenced “preferences.” See, for example, Sunstein, 38 *Stan L Rev* at 82-84 (cited in note 19); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 *U Chi L Rev* 1129, 1135-36 (1986). This in turn suggests that morality is historically contingent. Moreover, Sunstein seems to concede that even if there are objective moral truths, they are unknowable by mere mortals. Sunstein, 106 *Harv L Rev* at 773 n 113.

Ackerman presents a more complex picture of liberal neutrality, in which only public dialogue about public questions need be neutral. See, for example, Bruce A. Ackerman, *What Is Neutral About Neutrality?*, 93 *Ethics* 372, 388-90 (1983). Although this leaves individuals free to adopt more substantive philosophies, it still rules many substantive arguments out of bounds in public debate. More recently, Ackerman has reaffirmed the basic liberal principle that no vision of the good life is better than any other. See Bruce A. Ackerman, *Political Liberalisms* 91 *J Phil* 364, 365 (1994). See also text accompanying note 113.

Other scholars have noted the neo-republican rejection of substantive values. See, for example, Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 *Cal L Rev* 331, 357 (1994) (neo-republicans “question the significance of absolute or transcendent standards for distinguishing correct from incorrect moral and political judgments”); Hirshman, 88 *Mich L Rev* at 985 (cited in note 20) (“civic republicanism stops short of articulating the ends to which the community should aspire”); Nomi Maya Stolzenberg, *“He Drew a Circle that Shut Me Out”: Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 *Harv L Rev* 581, 665 (1993) (neo-republicans, like liberals, are committed to “subjectivist and historicist” attitudes, which treat “truth” as historically and culturally contingent).

²⁸ Some scholars would ascribe the contradiction between value-neutrality and value-imposition to all post-Enlightenment republicans, including the eighteenth-century ones. See MacIntyre, *After Virtue* (cited in note 11); John Patrick Diggins, *The Lost Soul of American Politics: Virtue, Self-Interest, and the Foundations of Liberalism* 31 (Chicago, 1984).

trine.²⁹ It is no wonder that attempts to appropriate it for the political left have been conspicuously unsuccessful.

Virtue-based theories in their original form depended on a known, natural, and unquestioned hierarchy of values. To modern, left-leaning neo-republicans, however, the existence of such a hierarchy is untenable. Shorn of that base, a theory of virtue then becomes nothing more than the embodiment of its author's own predilections. As MacIntyre pointed out, liberalism and its attendant emphasis on government neutrality and toleration are inevitable responses to the loss of faith in a human *telos* and objective ethical truths.³⁰ Neo-republicans cannot have it both ways.

Analogously, it is difficult if not impossible to reconcile the radical egalitarianism of most neo-republicans with a political theory that values individual virtue. Any theory that purports to value virtue requires us to reward the virtuous over the unvirtuous. Unless one believes that all humans possess and effortlessly exercise exactly the same amount of virtue, a system that values virtue will result in significant differentials among citizens in both tangible and intangible rewards. As one commentator put it: "Some people are better than others. They deserve more of society's rewards, of which money is only one small part."³¹ Equality of opportunity is consistent with such a theory; equality of outcome is not. Even a cursory reading of the scholarship of most neo-republicans, however, suggests quite strongly that they support the latter. Akhil Amar, for example, endorses a form of republicanism that includes mandatory redistribution of property.³²

²⁹ See Gey, 141 U Pa L Rev at 804 (cited in note 7); Linda K. Kerber, *Making Republicanism Useful*, 97 Yale L J 1663, 1667 ("A reader of Sunstein's essay cannot help but ask what a progressive like himself is doing in republican company."); id at 1668-71. The interactions between liberal politics and conservative political theory provide a fascinating sidelight on the modern debate over republicanism and its close cousin, communitarianism. MacIntyre, one of the earliest neo-republicans, is a one-time neo-Marxist with strong Thomist inclinations. For evidence of MacIntyre's neo-Marxist beginnings, see, for example, Alasdair MacIntyre, *Marxism and Christianity* vii (Schocken Books, 1968); Alasdair C. MacIntyre, *Marxism: An Interpretation* (SCM, 1953). For evidence of his more recent Thomist leanings, see MacIntyre, *Whose Justice?* at 183-208, 402-03 (cited in note 11). See also Stephen Holmes, *The Anatomy of Antiliberalism* 89 (Harvard, 1993) (MacIntyre "has traveled, basically, from Christianity to Marxism and back."). Several of the nonlegal scholars on whom I rely in this Article have impeccable leftist credentials but have more recently been producing scholarship that many in academia view as quite conservative.

³⁰ MacIntyre, *After Virtue* (cited in note 11).

³¹ Charles Murray, *Losing Ground: American Social Policy 1950-1980* 234 (Basic Books, 1984).

³² Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 Harv J L & Pub Policy 37, 37 (1990). See also Cass R. Sunstein, *The*

Recent attempts to integrate republicanism and liberalism similarly founder on the question of what to do about liberalism's focus on rights and government neutrality. Some neo-republicans simply recast virtue in terms of liberal neutrality, defining it as equal respect for all individual visions of the good life.³³ This coopts the language of civic republicanism but misses the main point: most neo-republicans (to say nothing of most original republicans) find an explicit contrast between liberal value-neutrality and republican virtue. A republicanism that makes no distinctions between virtuous and unvirtuous lives is hardly worthy of the name: it is merely traditional liberalism masquerading as a republican reconciliation.

The more typical republican emphasis on value-conscious choices has problems too. As some critics have noted, a preference for community (or majority) value choices shades too easily into totalitarianism.³⁴ Many neo-republicans try to avoid this by (in the words of one critic) heroically "concentrat[ing] on process and deliberation to the exclusion of substantive concerns."³⁵ Such a project is inevitably doomed because there is neither a justification for any particular process (even a process that encourages deliberation) without an attachment to substantive values, nor any way to deal with the problem of "bad" outcomes (except to deny that they could ever occur if we adopt the right procedures—a naive assumption at best and a dangerous one at worst).³⁶ The naivete of this position reflects an unwillingness to

Partial Constitution 78-79, 149-51, 156-57, 331-32, 344 (Harvard, 1993) (supporting affirmative action beyond equal opportunity).

³³ See, for example, Liebman, 90 Colum L Rev at 1554-57 (cited in note 21). This kind of neutrality is a hallmark of liberalism. See, for example, John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 Phil & Pub Aff 223, 230 (1985); John Rawls, *Kantian Constructivism in Moral Theory*, 77 J Phil 515, 521 (1980).

³⁴ See, for example, Gey, 141 U Pa L Rev at 875 (cited in note 7):

Although they do not acknowledge the affinity, Sunstein and Michehnan have a compatriot in Rebert Bork. The civic republicans share with Bork the following premise: "Truth is what the majority thinks it is at any given moment precisely because the majority is permitted to govern and to redefine its values constantly."

See also authorities cited in Stolzenberg, 106 Harv L Rev at 658 n 404 (cited in note 27); Don Herzog, *Some Questions for Republicans*, 14 Pol Theory 473, 487-90 (1986).

³⁵ Epstein, 97 Yale L J at 1633 (cited in note 22). See also James E. Fleming, *Constructing the Substantive Constitution*, 72 Tex L Rev 211, 249-50 (1993) (suggesting that Sunstein's more recent work is still oriented toward process rather than substance). Notably, although Epstein and Fleming agree that Sunstoin's work neglects substance, they disagree about why that is wrong. See *id* at 249-52.

³⁶ For a somewhat different account of how republicanism takes insufficient account of the possibility that deliberation might fail to reach correct results, see William N.

believe that genuine moral conflicts exist, a position in stark contrast to the thoroughgoing relativism of most neo-republicans. Again, neo-republicans are trying to legislate a morality that, at bottom, they believe is completely historically and culturally contingent.

The neo-republican fascination with community values as the antidote to liberal individualism also creates a related problem: how to deal with individual rights. Rights are the traditional liberal bulwark against totalitarianism, and most neo-republicans recognize, with Frank Michelman, that republicanism cannot reject rights entirely: "Theorizing a comfortable place for individual legal rights within a republican constitutional vision is a task that has never been completed. No republican revival in American constitutional law is likely to last very long without major progress in that task."³⁷ Despite this purported recognition of the importance of individual rights, neither the theoretical nor the doctrinal work of neo-republicans fits comfortably with a jurisprudence of rights. As one critic concluded after an extensive review of the literature, "Sunstein's skepticism about rights . . . casts doubt on many, if not most modern constitutional rights."³⁸ And although he uses Sunstein as an example, he finds the same tendency in other republicans, no matter how much they deny it.³⁹

This inability to accommodate rights without retreating back into liberalism is, I believe, endemic to neo-republicanism for the same reason that republicans can neither accommodate citizen apathy nor adequately draw a line between communitarianism and totalitarianism: the moral skepticism of the new republicans. If there are no universal ethical truths, then democracy needs a mediating device to avoid totalitarianism. Traditionally, that device has been the protection of individual rights, especially rights of speech and conscience. But the new republicans, because of their paradoxical adherence to liberal epistemology and republican politics, are caught in a double trap when they try to account for rights. First, republican politics makes many rights (especially speech rights) inconvenient because they can interfere with the formation and maintenance of the political community

Eskridge, Jr., *Gaylegal Narratives*, 46 *Stan L Rev* 607, 625, 637-44 (1994).

³⁷ Michelman, 100 *Harv L Rev* at 43 n 229 (cited in note 20).

³⁸ Gey, 141 *U Pa L Rev* at 855 (cited at note 7).

³⁹ *Id.* at 842, 872-73 & n 245. See also Martin H. Redish and Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 *Cal L Rev* 267, 268-72 (1991).

that is necessary for a republican polity.⁴⁰ On the other hand, liberal epistemology yields an almost infinite diversity of values. This leads neo-republicans to create new rights protective of that diversity (especially group rights).⁴¹ These new rights, however, are themselves in conflict with a republican political community since they are likely to lead to exclusion and balkanization.

The only approach to rights that might have some success—other than the standard liberal approach which I (and most republicans) reject for reasons that will become clear in the next Section—is one that recognizes that there are right and wrong answers to moral questions. As religion scholar Steven Rockefeller puts it: “No idea of the good is above criticism, but this does not lead to a directionless relativism. Through experience with the aid of experimental intelligence, one can find ample grounds for making objective value judgments in any particular situation.”⁴² Such an approach, because it abandons the relativism of liberalism and returns to at least a mild version of the moral certitude of older virtue theories, avoids the paradox I identified as inherent in neo-republican theories. Thus, what I will call responsible republicanism can offer principles by which to judge both claims of right and governmental decisions designed to affect individual behavior, about which liberals and tolerant neo-republicans can make no moral judgments.

It is much easier to suggest that we ought to have such a theory than to construct one. The moral certitude of the earlier republican eras is irretrievably lost; we no longer have the faith in God, natural law, or even a human *telos* that lent virtue its

⁴⁰ See generally Sunstein, *The Partial Constitution* at 243-53, 261-70 (cited in note 32); Cass R. Sunstein, *Words, Conduct, Caste*, 60 U Chi L Rev 795, 802 (1993); Cass R. Sunstein, *Preferences and Politics*, 20 Phil & Pub Aff 3, 31-32 (1991); Cass R. Sunstein, *Free Speech Now*, 59 U Chi L Rev 255, 259-63 (1992); Frank I. Michelman, *Universities, Racist Speech and Democracy in America: An Essay for the ACLU*, 27 Harv CR-CL L Rev 339, 343-45 (1992); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 Tenn L Rev 291, 295-96 (1989).

⁴¹ See, for example, Sunstein, 97 Yale L J at 1580-81, 1585-88 (cited in note 19); Frank I. Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 Va L Rev 1261, 1297-1306 (1991). Michelman denies that affirmative action necessarily implicates group rights, 77 Va L Rev at 1284-96, but as long as membership in a particular group is sufficient to entitle an individual to the benefits of affirmative action—regardless of whether she has ever suffered or been discriminated against because of her group membership—then group rights are implicated.

⁴² Steven C. Rockefeller, *Comment*, in Charles Taylor, *Multiculturalism and “The Politics of Recognition”* 87, 92 (Princeton, 1992).

incontestability in the past. "[I]t looks as if we are all we have. . . . God help us."⁴³

But all is not lost. If we can use the pragmatists' tools⁴⁴ to construct situated, not abstract, truths that we are nevertheless comfortable labelling (at least tentatively) "universal," perhaps we can move forward. This approach is neither a return to relativism⁴⁵ nor an endorsement of MacIntyre's purely particularist virtues.⁴⁶ Nor need it be monistic or in conflict with diverse forms of human flourishing.⁴⁷ Finally, it need not be authoritarian, for that would "give us order at the price of reason."⁴⁸ As the philosopher Martha Nussbaum suggests, we need not adopt the philosophy—common to such otherwise different thinkers as Robert Bork and Stanley Fish—that "if not the heavens, then the abyss."⁴⁹ Pragmatism allows us to function without either absolute moral certitude or absolute moral skepticism. A pragmatist view of morality is, in Jack Balkin's words, "concerned with those indeterminate values or urges located in the human soul, which human beings articulate through positive morality and cultural conventions, and which nevertheless always escape this articulation."⁵⁰ Pragmatism is a particularly appropriate way to approach the dilemmas of neo-republicanism because pragmatism and republicanism have much in common, including an emphasis on community traditions and independent rational deliberation.⁵¹

⁴³ Arthur A. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 Duke L J 1229, 1249. An alternative account links the loss of authority to opposition to traditional rights and the waning importance of principles and conviction. See generally Robert Nisbet, *Twilight of Authority* (Oxford, 1975).

⁴⁴ See, for example, Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 Minn L Rev 1331, 1334-56 (1988); Symposium, *The Renaissance of Pragmatism In American Legal Thought*, 63 S Cal L Rev 1569 (1990); Daniel A. Farber and Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 Stan L Rev 807, 820-24 (1993).

⁴⁵ See Martha Minow and Elizabeth V. Spelman, *In Context*, 63 S Cal L Rev 1597, 1634-39 (1990).

⁴⁶ See Putnam, 63 S Cal L Rev at 1678-80 (cited in note 2).

⁴⁷ Beiner, 34 Nomos at 149-50 (cited in note 10). See also Perry, 34 Nomos at 121-22 (cited in note 13); Sher, 34 Nomos at 106-12 (cited in note 10).

⁴⁸ Martha Nussbaum, *Recoiling from Rawls*, NY Rev of Books 36, 41 (Dec 7, 1989), reviewing MacIntyre, *Whose Justice?* (cited in note 11).

⁴⁹ Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and in the Law*, 107 Harv L Rev 714, 730 (1994).

⁵⁰ J.M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 Mich L Rev 1131, 1139 (1994) (describing his own version of deconstruction, which is close to the pragmatist approach I am advocating here).

⁵¹ See generally Daniel Farber, *Reinventing Brandeis: Legal Pragmatism for the 21st Century*, 1995 U Ill L Rev (forthcoming). Republicanism and pragmatism also have, in

The pragmatist approach to virtue asks, with Nussbaum, "What are the most common problems of human life and what is a good way to face them?"⁵² It then crafts answers through contemporary and historical observation, reflection, reason, and judgment. To the extent that we are focusing on *common* human dilemmas, our answers will be universal. But because we derive both the questions and the answers from actual human existence rather than abstract principles, our truths are situated or contextual. One can be an ethical objectivist without necessarily being a Platonist.

There is, of course, no guarantee of success. Any answers we come up with will be contested. All we can do—and all I hope to do in the next Section—is to marshal the best available evidence in support of a particular vision of virtue and open the floor to challengers.⁵³

B. Responsibility

In crafting a vision of virtue, we need not (nor can we) specify every detail of a virtuous life or a virtuous nation. Indeed, I believe that we can make significant progress toward reinvigorating republicanism and reconciling it with liberalism by focusing on only one virtue: responsibility. In particular, responsibility can serve as a much-needed counterweight to the liberal focus on rights, without denying or displacing our proud heritage of individual rights.

If the neo-republicans have trouble with individual rights, they are not alone. Despite all the benefits of our jurisprudence of individual rights, the American obsession with rights has gotten out of hand. Individual rights are now a shibboleth, invoked indiscriminately and often inappropriately to shield citizens from every real and imagined slight, from their own folly, and from life's inevitable hardships. Mary Ann Glendon nicely summarizes the ills that result from our tendency to treat rights as absolute, individual, and divorced from responsibilities:

Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue

Aristotle, a common ancestor. See generally Galston, 82 Cal L Rev 331 (cited in note 27).

⁵² Nussbaum, Times Literary Supp at 10 (cited in note 10). For a similar approach to a theory of judicial review, see Fleming, 72 Tex L Rev at 252-60 (cited in note 35).

⁵³ Isn't that what scholarship is all about? See Farber and Sherry, 45 Stan L Rev at 849-54 (cited in note 44).

that might lead toward consensus, accommodation, or at least the discovery of common ground. In its silence concerning responsibilities, it seems to condone acceptance of the benefits of living in a democratic social welfare state, without accepting the corresponding personal and civic obligations. In its relentless individualism, it fosters a climate that is inhospitable to society's losers, and that systematically disadvantages caretakers and dependents, young and old. In its neglect of civil society, it undermines the principal seedbeds of civic and personal virtue. In its insularity, it shuts out potentially important aids to the process of self-correcting learning. All of these traits promote mere assertion over reason-giving.⁵⁴

When smokers and nonsmokers square off by claiming opposing rights; when groups claim rights for animals, polluters, embryos, (pick your own favorite); when the American flag is said to stand for "the right to do what we want";⁵⁵ when a lawyer argues in court that birth parents have "a God-given constitutional right to a meaningful relationship" with a fourteen-year-old daughter they did not raise and who wants nothing to do with them;⁵⁶ when a prominent law professor publishes a book suggesting that employers have a natural right to discriminate,⁵⁷ we have too many rights. This exaggerated focus on *individual* rights seems to be a peculiarly American (or Anglo-American, by some accounts) phenomenon: cross-cultural studies show that "by a va-

⁵⁴ Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* 14 (Free Press, 1991). See also Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 Yale L J 293, 294-97 (1988); Beiner, 34 Nomos at 147-48 (cited in note 10); Charles Moskos, *A Call to Civic Service: National Service for Country and Community* 4-8 (Free Press, 1988); Digby Anderson, *Introduction and Summary of Contents*, in Digby Anderson, ed., *The Loss of Virtue: Moral Confusion and Social Disorder in Britain and America* xvii, xviii-xix (Social Affairs Unit, 1992); Thomas L. Pangle, *The Ennobling Democracy: The Challenge of the Postmodern Era* 158 (Johns Hopkins, 1992). Glendon's argument is that the problems stem from our *discourse* about rights, rather than our actual beliefs. *Rights Talk* at 14-17. Beiner suggests instead that "the resort to the language of rights as the dominant moral and political vocabulary is merely a symptomatic expression of" our underlying social beliefs. Beiner, 34 Nomos at 147 (cited in note 10).

⁵⁵ Glendon, *Rights Talk* at 8.

⁵⁶ *Final Arguments Are Heard at Adoption Trial in Florida*, NY Times A10 (Aug 11, 1993). It is interesting to contrast this claim with Katharine Bartlett's proposal that "we re-direct the law applicable to parental status toward a view of parenthood based on responsibility," and "focus on parental responsibility rather than reciprocal 'rights.'" Bartlett, 98 Yale L J at 295.

⁵⁷ Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 24-27, 133-35 (Harvard, 1992).

riety of measures, typical contemporary Americans place a higher value on individual fulfillment and personal equality than citizens of any other nation.⁵⁸

Political scientist Ronald Beiner describes the consequences of our unthinking reliance on rights by asking the reader to imagine two contrasting discussions: first, a discussion “between two individuals of differing political persuasions concerning whether it would be *good* (for the society as a whole) for the state to make available a certain social service (say, universal state-funded daycare)”; second, a “contest between, on the one side, the *right* of one of the parties to receive the service in question, and, on the other side, the *right* of the other party not to be burdened by the higher taxes necessary to supply the service.”⁵⁹ Which scenario is more likely to result in compromise, or at least in constructive suggestions about common ground?⁶⁰ Rights have become both too trivialized to do the real work of protecting individuals against government tyranny and too absolute and adversarial to allow for any further discussion. As Glendon puts it, American discourse about rights is “the language of no compromise. The winner takes all and the loser has to get out of town. The conversation is over.”⁶¹

⁵⁸ Edward A. Wynne and Kevin Ryan, *Reclaiming Our Schools: A Handbook on Teaching Character, Academics, and Discipline* 14 (1993). Wynne and Ryan describe one particularly interesting study that illustrates how Americans compare to other cultures in balancing individual rights and responsibilities:

In one study, Americans working together on group projects were asked to estimate their contribution (in percentages) to their project. When the figures are summed up, they typically total more than 100%. In other words, Americans believe they do more than their share. . . . Conversely, in other societies, the study found, team members underestimate their individual contributions. The sum of estimates is usually less than 100%. Presumably, these respondents do not believe they are doing enough for the group.

Id. As Wynne and Ryan point out, this is likely to lead many Americans to feel that they are being exploited. Id. It is easy to see how such feelings of doing more than one's share and not being appropriately recognized can lead to a rather unbalanced view of rights versus responsibilities.

⁵⁹ Beiner, 34 *Nomos* at 147-48 (cited in note 10).

⁶⁰ For an example of how setting aside rights talk and working for common ground might work in practice, see Kurt Chandler, *Abortion Talks Are Calm Eye of the Storm*, *Minneapolis Star Trib* 1B (Aug 2, 1993) (pro-life and pro-choice activists meeting privately to explore common ground).

⁶¹ Glendon, *Rights Talk* at 9 (cited in note 54). This tendency toward absolutes and away from dialogue seems to have infected even a genre of scholarship far removed from “rights talk”: storytelling. See Farber and Sherry, 45 *Stan L Rev* at 851 & n 233 (cited in note 44).

A concomitant of our fascination with rights is the loss of any notion of responsibility.⁶² Everyone now has rights, but no one has responsibilities. This form of radical individualism is a twentieth-century innovation.⁶³ Traditionally, citizenship carried both rights and responsibilities. Individuals were expected to work hard and to take responsibility for themselves, their families, and their community. Failure to do so—or to strive to do so even if one ultimately failed—was seen as irresponsible and immoral. Work and other responsible behavior were expected even of the very poor, and irresponsible behavior marked one as undeserving.⁶⁴ Citizenship was so intertwined with responsibility that working—and earning a living—was considered a necessary prerequisite for full citizenship.⁶⁵ Even today, the most successful immigrant groups prize work. Among Indochinese refugee families, for example, “[h]aving a job and being able to provide for the family is integral to family pride. Shame is felt by Asian families on welfare.”⁶⁶

We have lost that assumption of individual responsibility and with it, our virtue. Someone or something else is always to blame: everyone is a victim. “For the Left the villain is capitalism and for the Right it is welfare; both are ways of avoiding the conclusion that wicked and irresponsible choices are made by wicked and irresponsible individuals.”⁶⁷ But, as Harvey

⁶² One British writer notes a telling example: “When I entered the word ‘DUTY’ into the University’s on-line catalogue the screen responded with the phrase ‘DUTY FREE’.” This is perhaps as accurate a comment on contemporary attitudes to the notion of duty as we are likely to find.” Jon Davies, *Duty and Self-Sacrifice For Country: The New Disparagement of Public Ideals*, in Digby Anderson, ed., *The Loss of Virtue: Moral Confusion and Social Disorder in Britain and America* 69, 71 (Social Affairs Unit, 1992).

⁶³ For excellent general discussions of the older tradition of limited individualism, see William J. Novak, *Public Economy and the Well-ordered Market: Law and Economic Regulation in 19th-Century America*, 18 L & Soc Inquiry 1 (1993); William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 Hastings L J 1061 (1994).

⁶⁴ See, for example, Theodore R. Marmor, Jerry L. Mashaw, and Philip L. Harvey, *America’s Misunderstood Welfare State: Persistent Myths, Enduring Realities* 23-25, 86 (Basic Books, 1990); Murray, *Losing Ground* at 180 (cited in note 31). See also Frederick P. Close, *The Case For Moral Education, Responsive Community Rts & Responsibilities* 23, 24 (Winter 1993-94) (“Americans in the 1830s viewed criminal activity as the result of willful actions of individuals who lacked self-control and good character.”).

⁶⁵ Judith Shklar, *American Citizenship: The Quest for Inclusion* (Harvard, 1991); Lawrence M. Mead, *Beyond Entitlement: The Social Obligations of Citizenship* 242-44 (Free Press, 1986); Linda R. Hirshman, *Nobody in Here But Us Chickens: Legal Education and the Virtues of the Ruler*, 45 Stan L Rev 1905, 1919-21 (1993).

⁶⁶ Nathan Caplan, Marcolia H. Choy, and John K. Whitmore, *Indochinese Refugee Families and Academic Achievement*, Scientific Am 36, 41 (Feb 1992).

⁶⁷ Christie Davies, *Moralization and Demoralization: A Moral Explanation for Crime*,

Mansfield has pointed out, “[v]ictims do not behave as citizens.”⁶⁸ Moreover, absolving an individual of responsibility on the basis of victimhood essentially denies that the individual is a rational actor capable of self-governance.⁶⁹ Though victimhood may confer power,⁷⁰ it also implies that the individual lacks the basic capacities for republican citizenship. We cannot reclaim our virtue or shed our socially impoverishing obsession with rights unless we return to a notion of individual responsibility.⁷¹

Nor can we regain our virtue unless we reinvigorate the concept of community responsibility, which also has diminished in recent years. The two lapses are connected in several ways. To the extent that members of a community fail to take responsibility for one another, they increase the need for weaker or more vulnerable members to demand—to claim as a right—that which the society ought, but fails, to give them. The loss of community responsibility thus leads us to blur the important distinction between a community obligation to give charity (or anything else of value) and an individual right to receive it, encouraging misplaced reliance on the latter.⁷² Moreover, when a community abdicates its responsibilities, it sets a poor example for its individual members.

It is almost a truism that we have lost the language of responsibility, both individual and community. Others have canvassed the evidence for, and the consequences of, that loss. Glendon’s careful analysis shows how American law focuses on rights to the exclusion of responsibility.⁷³ Charles Sykes docu-

Disorder, and Social Problems, in Digby Anderson, ed, *The Loss of Virtue: Moral Confusion and Social Disorder in Britain and America* 3, 7 (Social Affairs Unit, 1992).

⁶⁸ Harvey C. Mansfield, Jr., *America’s Constitutional Soul* 86 (Johns Hopkins, 1991).

⁶⁹ For an enlightening exploration of this idea in the context of the battered woman defense, see Anne M. Coughlin, *Excusing Women*, 82 Cal L Rev 1 (1994). For a discussion of the relationship between responsibility, excuse, and rationality, see Stephen J. Morse, *Culpability and Control*, 142 U Pa L Rev 1587 (1994).

⁷⁰ See, for example, Shelby Steele, *The Content of Our Character: A New Vision of Race in America* 5-15 (St. Martin’s, 1990). See also Richard Rodriguez, *Days of Obligation: An Argument With My Mexican Father* 70 (Viking, 1992) (“Without the myth of victimization—who are we? We are no longer Mexicans.”).

⁷¹ This is not to say that we ought to abandon the idea of rights altogether. Indeed, as Linda McClain has noted, rights and responsibility are inextricably connected, not least because “the freedom that rights provide makes possible the exercise of responsibility.” Linda C. McClain, *Rights and Irresponsibility*, 43 Dake L J 989, 994 (1994). I contend only that the balance between rights and responsibility has gone awry.

⁷² See, for example, Mark Almond, *Discretion: Quietly Discriminating Between the Deserving and the Undeserving Poor*, in Digby Anderson, ed, *The Loss of Virtue: Moral Confusion and Social Disorder in Britain and America* 203, 209 (Social Affairs Unit, 1992).

⁷³ Glendon, *Rights Talk* (cited in note 54). For a contrary view, which suggests that

ments how large segments of the population try to claim victimhood and to shift responsibility to others,⁷⁴ while Martha Minow shows how focusing on victimhood diminishes the capacity for both responsibility and choice.⁷⁵ Shelby Steele notes that clinging to victimhood is a way of avoiding personal accountability.⁷⁶ Steele and Jim Sleeper both argue that the culture of victimhood has poisoned race relations and harmed the cause of equality.⁷⁷ And even a cursory review of recent legal academic work suggests that most scholars—republican or not—reject any notion of holding individuals accountable for their own choices.⁷⁸ The *Stanford Law Review* recently published an article on Afrocentric schools that blames educational failures on everyone except the students themselves (who may be at least partly at fault).⁷⁹ A recent issue of the *Yale Law Journal* contains an article that disparages welfare reforms designed to encourage marriage, education, medical care, and birth control as penalizing those who do not “conform to majoritarian middle-class values.”⁸⁰ Such reforms, claims the author, are based on “the myth that social problems . . . are caused by the deviant behavior of welfare recipients.”⁸¹ Even some of the scholarship on

any decline in responsibility is due to social causes unrelated to rights, see McClain, 43 Duke L J at 989-94 (cited in note 71).

⁷⁴ Charles J. Sykes, *A Nation of Victims: The Decay of the American Character* 11-15 (St. Martin's, 1992). Sykes points out that one of the consequences of so many people claiming victim status is that *real* victims are neglected. Id at 18-20, 128-34.

⁷⁵ Martha Minow, *Surviving Victim Talk*, 40 UCLA L Rev 1411, 1427-31 (1993). As she eloquently notes, “[v]ictimhood is a cramped identity.” Id at 1432.

⁷⁶ Steele, *The Content of Our Character* at 23-35 (cited in note 70).

⁷⁷ Id at 26, 127-48; Jim Sleeper, *The Closest of Strangers: Liberalism and the Politics of Race in New York* 201-02, 206 (Norton, 1990). See also Glenn C. Loury, *Free At Last?*, 94 Commentary 30, 32-33 (1992).

⁷⁸ There are, of course, admirable exceptions. Although Kenneth Karst's thoughtful book on citizenship stresses the rights of citizenship, it also links those rights to responsible behavior by citizens. See, for example, Karst, *Belonging to America* at 51, 129, 132-33, 140-41 (cited in note 19).

⁷⁹ Michael John Weber, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 Stan L Rev 1099, 1100-02, 1128-31 (1993). The article focuses on schools exclusively for boys and never wonders why it is that African-American girls, although they suffer under the *double yoke* of racism and sexism, seem to achieve better than boys. Id at 118-21. This failure illustrates our blindness to individual responsibility.

⁸⁰ Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 Yale L J 719, 720-21 (1992).

⁸¹ Id at 727. Professor Williams makes this claim despite overwhelming evidence that some of these nonconforming behaviors—especially single parenthood—have a devastating effect on the children's life chances. See Gerald David Jaynes and Robin M. Williams, Jr., eds, *A Common Destiny: Blacks and American Society* 525 (National Academy, 1989) (“[A]s compared with children of two-parent families, children from one-parent families have lower scores on standardized tests of IQ and educational achievement, lower educa-

scholarship denies that there is any such thing as individual merit, and consequently argues that we should not make judgments about scholarship.⁸²

Rights have also displaced the sense of social responsibility we once possessed. Individuals are no longer expected to take responsibility for either their communities or other community members. It is, for example, commonplace among many economists to observe that, as Milton Friedman put it, "[f]ew trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible."⁸³ Because the stockholders have a right to their earnings and the community at large no right to be free of whatever unethical practices are being challenged, these economists conclude that the answer is clear cut: the presence or absence of rights pretermits any discussion of responsibility. Similarly, neither private individuals nor government officials are generally required to render aid to fellow citizens—no matter how dire the

tional attainment, lower occupational status and income, and higher rates of early marriage, births to unmarried women, and marital dissolution."). See also *id* at 290, 523-25, 546; William Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* 71-72 (Chicago, 1987); Mead, *Beyond Entitlement* at 36-37 (cited in note 65); Murray, *Losing Ground* at 130-33 (cited in note 31); Marian Wright Edelman, *Families in Peril: An Agenda for Social Change* 3-6 (Harvard, 1987) ("The crux of the problem facing the black family today is that young black women who become pregnant do not marry nearly as often as they used to."); *id* at 52-53, 56-57; Amitai Etzioni, *The Spirit of Community: Rights, Responsibilities, and the Communitarian Agenda* 62 (Crown, 1993) (children of unmarried or divorced parents are more at risk educationally); Douglas J. Besharov, *The Moral Voice of Welfare Reform, Responsive Community Rts & Responsibilities* 13 (Spring 1993); Mary Jo Bane and David T. Ellwood, *One Fifth of the Nation's Children: Why Are They Poor?*, 245 *Science* 1047, 1051 (Sept 8, 1989) ("the large and growing proportions of children born to unmarried mothers . . . represent the greatest long-term threat to our children's economic security"); Richard J. Herrnstein and Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life* 138-39 (Free Press, 1994) (white mothers without a husband are three to ten times more likely to be in poverty than married white mothers). The children of single-parent families are also at higher risk for dropping out of school or delinquency, thus ensuring another generation of poverty. See Jaynes and Williams, *A Common Destiny* at 543; James S. Coleman, *The Creation and Destruction of Social Capital: Implications for the Law*, 3 *Notre Dame J L Ethics & Pub Policy* 375, 380 (1988).

⁸² See, for example, authorities cited in Farber and Sherry, 45 *Stan L Rev* at 841-42 (cited in note 44). See also T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 *Colum L Rev* 1060, 1067-68 (1991); Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 *Vand L Rev* 1, 8-9 (1991); Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 *Harv CR-CL L Rev* 295, 364-68, 380-85 (1988).

⁸³ Milton Friedman, *Capitalism and Freedom* 133 (Chicago, 1962). See also Richard A. Posner, *Economic Analysis of Law* 419-21 (Little, Brown, 4th ed 1992).

situation nor how easy the offer of aid.⁸⁴ This abdication of community responsibility is most often justified by denying that the recipient has a *right* to the aid, with nary a mention of the possibility that there may be a responsibility to act even if there is no corresponding right.⁸⁵

The economic policies of the last two decades have contributed to the flight from social responsibility. Members of the "me generation,"⁸⁶ encouraged by a weakening of laws protecting the weak, the poor, and the powerless from predatory economic actions,⁸⁷ have come to believe that what matters most is making money. "Whoever dies with the most toys wins," the Wall Street slogan of the 1980s, is a crystalline description of the moral vacuum spawned by the Reagan-Bush years.⁸⁸

The loss of individual and community responsibility has been much lamented. What has not been so widely noted is that the neo-republicans, for all their emphasis on virtue and community responsibility, are similarly unwilling to hold individuals accountable.⁸⁹ Sunstein's recent book, for example, is a condemnation of what he calls "status quo neutrality," on the ground that it fails to take into account prior injustice.⁹⁰ A more "responsible republican" position might at least address the question of

⁸⁴ For an excellent discussion of this at both the individual and state level, see Glendon, *Rights Talk* at 87-98 (cited in note 54). For a suggestion that the absence of a duty to rescue is in fact inconsistent with earlier traditions, see Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 Vand L Rev 673, 682-85 (1994).

⁸⁵ See, for example, Richard Epstein, *Rights and Rights Talk*, 105 Harv L Rev 1106, 1118-20 (1992), reviewing Glendon, *Rights Talk* (cited in note 54). For a slightly more nuanced treatment of this question, see Judith Jarvis Thomson, *A Defense of Abortion*, 1 Phil & Pub Aff 45, 60-61 (1971). Thomson suggests that when one refuses to give another what the latter has no "right" to, the former is "callous," but is not acting "unjustly." Perhaps Thomson means only to equate "justice" with the proper respect for the rights of others. Her analysis sidesteps but does not necessarily exclude the possibility that one might have a responsibility to give even things to which others have no right.

⁸⁶ See Robert Wuthnow, *Acts of Compassion: Caring for Others and Helping Ourselves* 18 (Princeton, 1990) (characterizing the 1970s as the "me generation," and the 1980s as the "decade of greed").

⁸⁷ See, for example, Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 Mich L Rev 465, 485-86 (1987); Gene R. Nichol, Jr., *Liberalism, Public Virtue, and JFK*, 30 Win & Mary L Rev 893, 894 (1989), reviewing Theodore C. Sorenson, ed., *Let the Word Go Forth: The Speeches, Statements, and Writing of John F. Kennedy* (Delacorte, 1988).

⁸⁸ Paradoxically, the government may simultaneously have been encouraging individuals to abdicate responsibility for themselves. See Murray, *Losing Ground* (cited in note 31).

⁸⁹ Indeed, at least some avowedly liberal theorists have been more willing than the neo-republicans to focus on the responsible exercise of rights. See McClain, 43 Duke L J at 998-1013 (cited in note 71).

⁹⁰ Sunstein, *The Partial Constitution* at 3-7 (cited in note 32).

whether even those who have been victims in the past ought to assume some responsibility for their future behavior.⁹¹

This modern tendency to blame everyone but the individual runs through the neo-republican literature. Evidence of the republican refusal to hold individuals responsible can be as obvious as Frank Michelman's insistence on a "right" to welfare⁹²—an entitlement that asks nothing of the rights-bearer—or Cass Sunstein's explicit condemnation of the concept of individual responsibility as "blaming the victim."⁹³ It can be as foundational as Sunstein's suggestion that private preferences are socially constructed rather than endogenous,⁹⁴ which in turn implies that we should not hold the *individual* responsible for her own choices. It can be as traditional to the political left as the doctrine of "false consciousness": surrogacy agreements are troubling, according to Sunstein, because "notwithstanding what the woman may think before the fact, the process of selling reproductive capacities can be harmful for her."⁹⁵ It can be as subtle as the neo-republican writing on voting rights: although much of that literature stresses the importance of full participation⁹⁶—even to the point of proportional representation of minorities⁹⁷—it never deals with the basic problem that many people, especially minorities, simply don't vote.⁹⁸ The standard response

⁹¹ See, for example, Murray, *Losing Ground* at 234 (cited in note 31) ("People—all people, black or white, rich or poor—may be unequally responsible for what has happened to them in the past, but all are equally responsible for what they do next."). Or, as a successful Asian academic noted, "Asians succeed in part because they don't waste time complaining about discrimination but rather work extra hard in case outside forces are holding them back." Dinesh D'Souza, *Illiberal Education: The Politics of Race and Sex on Campus* 45 (Free Press, 1991), paraphrasing Chia-Wei Woo, former president of San Francisco State University. See also Daniel Goldman, *Probing School Success of Asian-Americans*, NY Times C1 (Sept 11, 1990).

⁹² Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 Wash U L Q 659. See generally Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv L Rev 7 (1969). It may be slightly unfair to hold Michelman to what he wrote in 1969, well before the republican revival. But the 1979 piece is two years after his first foray into republicanism: Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 Ind L J 145 (1977-78). See Daniel A. Farber, *Richmond and Republicanism*, 41 U Fla L Rev 623, 623 & n 3 (1989).

⁹³ Sunstein, *The Partial Constitution* at 188 (cited in note 32). See also *id* at 189, calling poverty a form of "intense social disability," which suggests that those in poverty are neither responsible for their condition nor expected to function adequately despite it.

⁹⁴ *Id* at 162-94; Sunstein, 53 U Chi L Rev at 1129 (cited in note 27).

⁹⁵ Sunstein, *The Partial Constitution* at 287 (cited in note 32).

⁹⁶ See, for example, Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 U Fla L Rev 443, 485-90 (1989).

⁹⁷ Sunstein, 97 Yale L J at 1585-89 (cited in note 19).

⁹⁸ See, for example, Jaynes and Williams, *A Common Destiny* at 235 (cited in note

to this problem is to propose majority-minority districts that are more heavily minority than otherwise would be necessary to elect minority candidates if minorities voted at the same rate as whites.⁹⁹ Neo-republicans neither reject nor explicitly accept this solution. A "responsible republican" approach would confront the voter apathy directly as a failure of individual virtue and would surely not excuse it by deliberately constructing districts that benefit the very individuals who refuse to exercise their civic responsibilities. The neo-republicans, then, are much like their liberal colleagues in avoiding confrontation with individual irresponsibility.¹⁰⁰

The neo-republican scholarship thus reflects a more general trend away from the traditional assumption that all citizens, regardless of their personal or economic resources, are responsible adults (or are under the care of responsible adults).¹⁰¹ Under the traditional assumption, it is the community's obligation to provide individuals with "access either to adequately remunerative occupations or directly to adequate levels of resources," but "[t]he use individuals make of this access is not a matter of further collective concern."¹⁰² An individual who irresponsibly squanders her share of the resources "does not generate any additional need claims that society is obliged to honor."¹⁰³ The new assumptions are that no one is responsible because everyone is a victim of circumstances and that the only solution is a proliferation of rights. Neo-republicans recognize quite clearly that we have lost the idea of social responsibility,¹⁰⁴ but their inability to separate individual entitlements from community obligations

81).

⁹⁹ See, for example, Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 *Cardozo L Rev* 1135 (1993).

¹⁰⁰ I hope my writing on republicanism is an exception to this generalization. See Sherry, 72 *Va L Rev* at 600-01 (cited in note 20) (praising Justice O'Connor's willingness to allow states to discriminate in order to reward individual virtue). Ackerman's earlier work similarly suggests that he finds dialogue and deliberation to be a responsibility of citizenship, see Ackerman, *Social Justice* at 70-80 (cited in note 20), but his virtuous suggestion is ultimately undermined by his endorsement of liberal value-neutrality in education. See text accompanying note 113.

¹⁰¹ The role of the family in a responsible republican polity is complex and largely beyond the scope of this Article. For one interesting view—although not explicitly labelled republican—see Nisbet, *Twilight of Authority* at 252-60 (cited in note 43). I do discuss the role of the family briefly where it is directly relevant to the question of education.

¹⁰² Mead, *Beyond Entitlement* at 185 (cited in note 65).

¹⁰³ *Id.*

¹⁰⁴ For this reason, much of the focus of the remainder of this Article will be on reinvigorating concepts of individual responsibility, which is most lacking from the current republican literature.

leads them to endorse a one-sided solution. Moreover, they will be unable to give substance to their vision of a deliberative and virtuous community until they begin to reintroduce the concept of *individual* responsibility. Irresponsible citizens can neither deliberate rationally nor behave virtuously.¹⁰⁵

In some ways, the foregoing analysis leaves more questions than it answers. It is all very well to suggest that any successful republican approach must incorporate notions of individual responsibility, but we are still stuck with the citizenry that we have. Others have suggested ways to move adult members of the underclass—and perhaps all adult Americans—toward greater responsibility.¹⁰⁶ In the remainder of this Article, I will focus instead on our best hope for permanent change: the education of children for responsible republican citizenship.

A focus on children is particularly appropriate in a discussion of responsible republicanism. Not only are children future citizens who need to be taught the habits of responsible citizenship, they also are the ones who have suffered most from the loss of both individual and community responsibility. In some families, children suffer because of their parents' irresponsible behavior;¹⁰⁷ in others, they suffer because of the diminution of community responsibility for its youngest members and the consequent devaluing of children—for example, when social norms create almost irresolvable conflicts between work and parenting.¹⁰⁸

¹⁰⁵ The consequences of the general abdication of responsibility have been widely noted and need not be reviewed here. See generally Edelman, *Families in Peril* at 23-29 (cited in note 81); Jaynes and Williams, *A Common Destiny* at 302-03, 335-37, 352-54, 528-29 (cited in note 81); Mickey Kaus, *The End of Equality* 109-20 (Basic Books, 1992); Marmor, Mashaw, and Harvey, *America's Misunderstood Welfare State* at 114-15 (cited in note 64); Mead, *Beyond Entitlement* at 7-8 (cited in note 65); Murray, *Losing Ground* (cited in note 31); Sleeper, *The Closest of Strangers* at 188-92 (cited in note 77); Greg J. Duncan, Martha S. Hill, and Saul D. Hoffman, *Welfare Dependence Within and Across Generations*, 239 *Science* 467, 468 (Jan 29, 1988); Robert Moffitt, *Welfare Reform: An Economist's Perspective*, 11 *Yale L & Policy Rev* 126, 133 (1993).

¹⁰⁶ See, for example, Murray, *Losing Ground* (cited in note 31); Mead, *Beyond Entitlement* at 10-17 (cited in note 65); Galsten, *Liberal Purposes* at 241-89 (cited in note 21); Kaus, *The End of Equality* at 121-35; James Q. Wilson, *On Character* 11-23 (American Enterprise Institute, 1991).

¹⁰⁷ See note 81.

¹⁰⁸ See, for example, Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 *Ariz L Rev* 431, 446-51, 493-95 (1990); Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 *Harv CR-CL L Rev* 79, 83-110 (1989); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 *Vand L Rev* 1183, 1220-26 (1989); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 *NYU L Rev* 1559, 1594-1608

Finally, focusing on education for citizenship provides natural limits to the demands that republican virtue can make on rights-bearing individuals. My intent is to accommodate rights and responsibilities, not to eliminate rights altogether. Under a mixed regime of both rights and responsibilities, irresponsible behavior is not always subject to regulation. Nevertheless, irresponsible behavior that affects future generations presents the clearest conflict between rights and responsibilities. Thus, the need to balance rights and responsibilities is most compelling and the choices are most stark in the context of educating future citizens.

II. AN EDUCATION FOR CITIZENSHIP

Almost everyone agrees that our schools are failing. Achievement is down, violence is up, and no amount of money seems to insulate schools from these trends.¹⁰⁹ Students—even college-bound students—often cannot read, add, identify within a century when the American Civil War occurred, or locate Canada on a map. Among a group of seventy high school student leaders from all over the country, only seven had even *heard* of the *Federalist Papers*.¹¹⁰ Put simply, many students are neither equipped nor inclined to participate as citizens.

(1991); Etzioni, *The Spirit of Community* at 70-73 (cited in note 81). For another account of the undervaluation of children, see Myron Lieberman, *Public Education: An Autopsy* 25-29 (Harvard, 1993).

¹⁰⁹ A striking illustration of the problem lies in the following comparison:

Top Problems in Public Schools, According to Teachers

<u>1940</u>	<u>1992</u>
Talking out of turn	Drug abuse
Making noise	Alcohol abuse
Cutting in line	Pregnancy
Littering	Suicide
Chewing gum	Rape
Running in halls	Robbery
Dress code infraction	Assault

2 Cong Q Researcher 787, 797 (Sept 11, 1992). Despite the fact that this list may be apocryphal, see Barry O'Neill, *The History of a Hoax*, NY Times Mag 46 (Mar 6, 1994), its widespread acceptance suggests that it resonates with what most Americans believe is wrong with elementary education.

For general discussions of the failure of our schools, see The National Commission on Excellence in Education, *A Nation At Risk: The Imperative for Educational Reform* 8-11 (US GPO, 1983); Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 Tex L Rev 777, 785-94 (1985).

¹¹⁰ William J. Bennett, *To Reclaim a Legacy: A Report on the Humanities in Higher Education* 21 (National Endowment for the Humanities, 1984).

An education for republican citizenship must integrate the various notions discussed in the preceding Sections. Specifically, it must prepare children to become *responsible* and *deliberative* citizens in a *diverse* republic of *rights*. To that end, children need to learn three things:¹¹¹ moral character, critical thinking, and cultural literacy (that is, a knowledge of and attachment to their own culture). Neither the need for these three things nor their content is uncontroversial, of course. In this Part, I will define and defend each item as part of an education for responsible republican citizenship.

A. Cultural Literacy

Cultural literacy is perhaps the most controversial of my three proposals for responsible republican education. In a purely liberal state, where each individual defines her own vision of the good life and then pursues it as best she can, imbuing children with cultural literacy verges on the sacrilegious. The liberal credo is that education should not “bias the choices of children toward some disputed or controversial ways of life and away from others.”¹¹² Bruce Ackerman eloquently describes the appropriately neutral stance of education in a liberal state:

We have no right to look upon future citizens as if we were master gardeners who can tell the difference between a pernicious weed and a beautiful flower. A system of liberal education provides children with a sense of the very different lives that could be theirs—so that, as they approach maturity, they have the cultural materials available to build lives equal to their evolving conceptions of the good.¹¹³

¹¹¹ I consciously pass over the need to learn and teach basic skills—which now must include computer literacy as well as the traditional “three Rs”—since it is uncontroversial, and the methods by which those skills may best be taught is beyond the scope of this Article. One reason that basic skills education is uncontroversial may be that it is necessary to prepare children to become self-sufficient and economically productive individuals, regardless of how citizenship is defined or whether particular children are or will become citizens. See Gerald L. Neuman, *Rhetorical Slavery, Rhetorical Citizenship*, 90 Mich L Rev 1276, 1285-87 (1992). However, it is important to note as well that the responsibilities of citizenship can include being self-sufficient and economically productive citizens and that basic skills are also a prerequisite to the critical thinking I advocate in the text.

¹¹² Amy Gutmann, *Democratic Education* 34 (Princeton, 1987) (describing the liberal state, but not advocating it).

¹¹³ Ackerman, *Social Justice* at 139 (cited in note 20). Ackerman, like many others, tries to reconcile this with a parental or community “right to try to impress our children with the things that are most important to us,” *id* at 140, but he never explains how we can do so without violating the liberal ethos of neutrality.

Just as liberal politics must remain neutral among competing visions of the good life, so must liberal education.

But educational neutrality is neither possible nor desirable. Debates about how to structure a curriculum—*any* curriculum—without inculcating values have filled the pages of law reviews for over a decade, with no sign of a resolution.¹¹⁴ Whatever we include in our curriculum; whatever we leave out; whatever comments teachers do or do not make about the materials; whether we require children to sit in straight rows at their desks, in a circle on the floor, or tell them to sit where they want, we convey to children that convention and authority are behind a particular value. The liberal values of neutrality, tolerance, and rationality are themselves non-neutral: other value systems may be based on believing in a “faith that is innocent of alternatives” rather than adherence to particular views that are seen as “subjective, contestable matters of opinion.”¹¹⁵ It is simply not possible to eliminate values from education. As Miriam Galston has noted, in recognizing that liberal curricula are not neutral, “The question is not whether contemporary legal theory will tolerate coercive or exclusionary doctrines and practices, but rather *which* coercive or exclusionary doctrines and practices we as a nation consider preferable.”¹¹⁶

None of this is new, and most commentators recognize that deciding how much to inculcate values (and which ones) is a delicate exercise in line drawing: “Society must indoctrinate children so they may be capable of autonomy. They must be socialized to the norms of society while remaining free to modify or even abandon those norms.”¹¹⁷ Nevertheless, the visceral reaction against value inculcation remains, and the result is that liberal education writers tend to minimize reliance on substantive value inculcation.

¹¹⁴ See, for example, Stephen Arons and Charles Lawrence, III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 Harv CR-CL L Rev 309 (1980); Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 Tex L Rev 197 (1983); Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 Yale L J 1647 (1986); Stanley Ingber, *Socialization, Indoctrination, or the “Pall of Orthodoxy”: Value Training in the Public Schools*, 1987 U Ill L Rev 15; Gregory Gelfand, *Of Monkeys and Men—An Atheist’s Heretical View of the Constitutionality of Teaching the Disproof of a Religion in the Public Schools*, 16 J L & Educ 271 (1987); Stephen E. Gettlieb, *In the Name of Patriotism: The Constitutionality of “Bending” History in Public Secondary Schools*, 62 NYU L Rev 497 (1987).

¹¹⁵ Stolzenberg, 106 Harv L Rev at 587 n 26 (cited in note 27).

¹¹⁶ Galston, 82 Cal L Rev at 384 (cited in note 27).

¹¹⁷ Ingber, 1987 U Ill L Rev at 19 (cited in note 114).

An educational program that is minimally value laden, in the sense that the only values it inculcates are value-neutrality and nonjudgmental tolerance of other visions of the good life, is dangerous to republican citizenship, however. As Amy Gutmann, one of the foremost modern philosophers of education, has pointed out, "Treating every moral opinion as equally worthy encourages children in the false subjectivism that 'I have my opinion and you have yours and who's to say who's right?'"¹¹⁸ Such a subjectivist stance is incompatible with the republican ideal of responsible citizenship: certain ways of behaving or believing are irresponsible and unvirtuous and ought to be discouraged or prohibited. An educational philosophy that does not recognize such moral differences is not republican in any sense and cannot contribute to the integration of the liberal and republican traditions.

But conceding that schools must and should inculcate values only makes the issue more difficult, since the question remains: whose values? Several writers have suggested that the choice of values should be left almost entirely to the democratic process.¹¹⁹ That course is problematic for several reasons. First, of course, there must be side constraints to prevent the majority from denying children with different values the opportunity to become productive adult citizens.¹²⁰ Such a constraint ultimately leads to a command to inculcate tolerance, which in turn reduces the amount of democratic control. Thus, the more sophisticated proponents of democratic control recognize that educational values cannot be chosen wholly by democratic processes. Since I am not suggesting that *no* values should be chosen democratically—only that an educational scheme influenced by republicanism does not favor democratic control as the primary strategy—we

¹¹⁸ Gutmann, *Democratic Education* at 56 (cited in note 112). And for those who are tempted to stick to their liberal guns and agree that all the opinions are equally worthy, Gutmann offers the following cautionary illustration: "If children come to school believing that 'blacks, Jews, Catholics, and/or homosexuals are inferior beings who shouldn't have the same rights as the rest of us,' then it is criticism, not just clarification, of children's values that is needed." *Id.*

¹¹⁹ See, for example, *id.* at 64. Gutmann does recognize two restraints on the majority's control over the content of education: it must not operate so as to exclude any educable children from ultimately becoming full citizens, and it must not prevent children from learning to engage in critical thinking. See *id.* at 44-45.

¹²⁰ Gutmann adopts such a restraint, calling it the principle of nondiscrimination. *Id.* at 45. This denial of opportunity can take the form either of excluding the children from an adequate education, or of imposing on them values that are both unnecessary to republican citizenship and in conflict with their own cultural or familial values. I discuss the interrelationship between national and familial cultural values at text accompanying note 171.

are then arguing simply over *how much* should be left to democratic control. One point of this Section is to show that a constraint of nondiscrimination (even when coupled with a requirement that children be given the ability to think critically and the opportunity to develop moral character) is still insufficient to produce truly virtuous republican citizens. Thus, just as individual rights place a limit on majoritarian decision making in other contexts, the goal of producing responsible republican citizens ought to limit majority choices in education.

Another possibility is to make value inculcation a private rather than a public matter, leaving the choice of values up to individual parents.¹²¹ There are, of course, serious practical obstacles to implementing such a system. If, as I suggest, it cannot be accomplished directly by making the schools value-neutral and leaving all responsibility for value inculcation to the family, then it must be accomplished indirectly by allocating more decisions about school curricula to parents. This will likely lead to impasse as parents in the same community fail to agree. Where they do agree,¹²² or where communities are able to support separate schools (whether public or private) for separate value systems, the resulting educational system will mirror the flaws of a primarily democratic system. Again, I am not arguing that parents should have no control over their children's education, but simply that a reliance on parental choices in the first instance is unlikely to produce responsible republican citizens.

One reason that leaving most educational choices to parents or the democratic process is not likely to produce virtuous republican citizens is that this policy shares the same flaw that besets the neo-republican reliance on process: it assumes, probably erroneously, that parents, whether individually or as a voting majority, will not make serious, virtue-threatening, education-stifling

¹²¹ The Supreme Court endorsed this view in *Meyer v Nebraska*, 262 US 390, 399 (1923), and *Pierce v Society of Sisters*, 268 US 510, 535 (1925). See Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 *Wm & Mary L Rev* 995 (1992), for an interesting discussion of this aspect of *Meyer* and *Pierce*. See also Gutmann, *Democratic Education* at 28-33 (cited in note 112) (describing but not espousing the view that parents should be able to make all educational choices for their children).

¹²² For examples of parental communities that seem to agree, see *Wisconsin v Yoder*, 406 US 205, 209-12 (1972); *Board of Education of Kiryas Joel Village School District v Grumet*, 114 S Ct 2481, 2485 (1994). See also *Mozert v Hawkins County Board of Education*, 827 F2d 1058 (6th Cir 1987) (seven families, forming a potential community, agreeing on curriculum). As I discuss later, in each case the parental choice deprived the children of an adequate education for citizenship.

mistakes. That risk is especially acute in a diverse society, where individual groups with local control over education might press their own agendas to the detriment of a national education for citizenship. Such balkanization will undermine *both* cultural literacy—since each group of children will learn only a distorted version of the common culture—and critical thinking—since no group of parents will have any incentive to give children the tools with which to question the received wisdom. Ackerman's description of the dangers of excess parental control over education is apt here: it "legitimizes a series of petty tyrannies in which like-minded parents club together to force-feed their children without restraint."¹²³ Proponents of democratic control over the content of education must either accept such a result or propose further constraints. The latter solution will, I suggest, inevitably lead to so many constraints as to approximate a substantive value system. The former solution is really just a return to a form of liberal neutrality, as illustrated by William Galston's suggestion that an unexamined life is also worth living.¹²⁴ Not to a republican, it's not. Or at least it is not in the public interest to educate children to lead unexamined lives.

If we cannot avoid the issue by leaving the choice of values to the democratic process, how can we choose such values? Here is where both republican educative purposes and pragmatist approaches can help. There are certain abilities, character traits, and inclinations that are likely to be conducive to responsible deliberation in a diverse republic of rights, and others that are not. I leave for the next two Sections the question of abilities and character traits and here focus on inclinations.

Republican virtue is not easy. Aristotle characterized the virtues inherent in political participation as "natural" only in the sense that they reflected humanity's highest nature. In fact, attaining "natural" republican virtue takes work.¹²⁵ Whether one relies on the aspirational language of John Adams, Frank Michelman, or Bruce Ackerman, the effort required of republican citizens is momentous. Adams suggested that "[m]en must be ready, they must pride themselves, and be happy to sacrifice

¹²³ Ackerman, *Social Justice* at 160 (cited in note 20). Ackerman is in fact talking about voucher systems, although he does not adequately distinguish such systems from our current system of allowing wealthy parents the same complete control. The problem is more accurately described as allowing any group to control education by mere fiat (including majority vote).

¹²⁴ Galston, *Liberal Purposes* at 254 (cited in note 21).

¹²⁵ See Galston, 82 Cal L Rev at 345-54 (cited in note 27).

their private pleasures, passions, and interests, nay, their private friendships and dearest connections, when they stand in competition with the rights of society."¹²⁶ Ackerman expects that during the occasional few years of "constitutional politics," "[a]pathy will give way to concern, ignorance to information, selfishness to serious reflection on the country's future."¹²⁷ Michelman asks us to engage in "a process of personal self-revision under social-dialogic stimulation."¹²⁸ With all the competing demands on citizens' time and energy, what will induce them to expend the effort required for the responsible, rational deliberation of republican citizenship?¹²⁹

The best bet is an emotional attachment to the polity and one's fellow citizens.¹³⁰ Out of favor as it may be, this sort of attachment encourages citizens to behave toward their country and its citizens as they do toward their families: proud, protective, and willing to make sacrifices. Such attachment is the "spiritual cement [of] the political community."¹³¹ Cultivating such an attachment to one's nation depends in turn on both knowledge and assimilation: to feel that she is an *American*, a child must learn about America's cultural and political heritage and accept it as her own. In other words, to produce American citizens we must

¹²⁶ Letter from John Adams to Mercy Warren (Apr 16, 1776), in Adrienne Koch and William Peden, eds, *The Selected Writings of John and John Quincy Adams* 57, 58 (Greenwood, 1981).

¹²⁷ Ackerman, *We the People* at 287-88 (cited in note 20).

¹²⁸ Michelman, 97 *Yale L J* at 1528 (cited in note 21). See also *id.* at 1504, quoting Hanna Pitkin, *Justice: On Relating Private and Public*, 9 *Pol Theory* 327, 344 (1981) ("Only in public life can we jointly, as a community, exercise the human capacity 'to think what we are doing,' and take charge of the history in which we are all constantly engaged by drift and inadvertance.").

¹²⁹ Most neo-republicans reject James Madison's solution of finessing the problem by rigging the system so that the country will prosper even as most individual citizens focus only on their own private concerns. (Cass Sunstein may be an exception to this generalization, but his reading of Madison is *sui generis*. See Robert W. Bennett, *Of Gnarled Pegs and Round Holes: Sunstein's Civic Republicanism and the American Constitution*, 11 *Const Commentary* 395, 418-19 (1994), reviewing Sunstein, *The Partial Constitution* (cited in note 32); John O. McGinnis, *The Partial Republican*, 35 *Wm & Mary L Rev* 1751, 1776-77 n 90 (1994), reviewing Sunstein, *The Partial Constitution* (cited in note 32).) The premise of the whole neo-republican movement is that Madison's solution has not been very successful.

¹³⁰ One author has called the dual commitment to one's community and members of that community a "social duty." Heyman, 47 *Vand L Rev* at 680 (cited in note 84). As I discuss later, citizens also need sufficient moral character to motivate them to fulfill their emotional commitment to their community. See Part II.C.

¹³¹ See Nisbet, *Twilight of Authority* at 64 (cited in note 43).

cultivate an American "civic identity."¹³² A shared cultural identity makes possible "a shared future" and "forge[s] a nation."¹³³

Advocating this type of cultural literacy is not merely controversial; it is also in stark conflict with what is actually taught in our schools. One newspaper reporter, documenting and lamenting American children's appalling ignorance of their own country, concluded that "[t]he kids I saw . . . are not mentally prepared to continue the society because they basically do not understand the society well enough to value it."¹³⁴ The high school and college students he talked to did not know that Nevada and Oregon have the same number of senators as California (and only some knew how many that was); could not date the Civil War, World War I, or World War II; could not locate Chicago, Washington, D.C., or Toronto on a map; and could not identify Thomas Jefferson or give the year of the Declaration of Independence.¹³⁵ Other reports convey a similarly dismal picture: we are not educating our children to be culturally literate.

Especially in a society as ethnically and religiously diverse as our own, a common culture is crucial to republican citizenship. First, of course, the common culture serves as the background against which rational deliberation can take place. Moreover, part of the American common culture is the act of assimilation itself: as many commentators, from Crèvecoeur to Frankfurter, have recognized, the immigrant and multi-ethnic nature of America means that the choice to be an American is a large part of the glue that holds our society together.¹³⁶ While this does not necessarily entail abandoning one's original ethnic culture, it does require an emotional allegiance to the new, common culture. Otherwise, as Richard Rodriguez has noted, Americanization can

¹³² See Weiser, 68 NYU L Rev at 949-52 (cited in note 24). See also Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 NYU L Rev 961, 968-81 (1992) (using appeals to a shared identity to teach).

¹³³ Rodriguez, *Days of Obligation* at 163 (cited in note 70).

¹³⁴ Benjamin J. Stoin, *The Cheerful Ignorance of the Young in L.A.*, Wash Post A15 (Oct 3, 1983).

¹³⁵ *Id.* See also examples gathered in D'Souza, *Illiberal Education* at 14-15 (cited in note 91).

¹³⁶ For Crèvecoeur's classic statement, see Hector St. John de Crèvecoeur, *Letters From an American Farmer* 69-70 (Penguin, 1981) (originally published in 1792). For one illustration of Frankfurter's views, see Sanford Levinson, *Constituting Communities Through Words That Bind: Reflections on Loyalty Oaths*, 84 Mich L Rev 1440, 1440-41 (1986). See generally Kenneth L. Karst, *Paths To Belonging: The Constitution and Cultural Identity*, 64 NC L Rev 303, 363-65 (1986) (without common ancestry or religion, what holds Americans together is belief in the "American civic culture"); *id.* at 312-13 (includes a cautionary tale of how assimilationism can be distorted into "racist nativism").

only be described "as loss": "America is the country where one stops being Italian or Chinese or German."¹³⁷ As I will suggest below, the two cultures can coexist. Learning about a common culture is also important as a prerequisite to the critical deliberation of republican citizens: "mastering [] other people's reflection" is necessary "to give access and context to original inquiry."¹³⁸

In particular, our own cultural tradition ought to be given what James Boyd White calls presumptive authority: we "should meditate long before exercising [critical judgment] against the texts that have behind them the authority of our tradition,"¹³⁹ lest we succumb to the vanity of believing that we now stand at the pinnacle of cultural progress. Or, as Anthony Kronman has so eloquently put it, we must reach a new "understanding [of] what has, for us, become so nearly unintelligible: the inherent authority of the past and the directness of the claim it has upon us."¹⁴⁰

Of course, as I will suggest in the next Section, neither should we unquestioningly accept our tradition as binding. As Rebecca Brown points out, too strong an emphasis on tradition "overlooks (or undervalues) another equally essential attribute of humanity: the capacity of discernment and judgment," and risks the complacency of believing that "where we have been is where we want to be."¹⁴¹ Nevertheless, a prudent regard for tradition favors incremental over radical change.¹⁴² A presumption in favor of tradition, mediated by reason, is consistent with both the

¹³⁷ Rodriguez, *Days of Obligation* at 164 (cited in note 70).

¹³⁸ Eva T.H. Brann, *Paradoxes of Education in a Republic* 16-17 (Chicago, 1979). See also Nisbet, *Twilight of Authority* at 116 (cited in note 43) ("Genuinely creative work . . . never cuts itself off from tradition.").

¹³⁹ James Boyd White, *Introduction: Is Cultural Criticism Possible?*, 84 Mich L Rev 1373, 1382 (1986).

¹⁴⁰ Anthony T. Kronman, *Precedent and Tradition*, 99 Yale L J 1029, 1048 (1990). Kronman follows the tradition of Edmund Burke and Alexander Bickel. See also Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 Yale L J 1567, 1575-79 (1985).

¹⁴¹ Rebecca L. Brown, *Tradition and Insight*, 103 Yale L J 177, 213, 204 (1993).

¹⁴² See Kronman, 94 Yale L J at 1602-10. At least one commentator has identified Bruce Ackerman as a Burkean, insofar as both Ackerman's and Burke's theories are "evolutionary, historicist theories of political development." Eben Moglen, *The Incomplete Burkean: Bruce Ackerman's Foundation for Constitutional History*, 5 Yale J L & Humanities 531, 548 (1993), reviewing Ackerman, *We the People* (cited in note 20). Since at least one commentator has also identified Ackerman as a republican, see Feldman, 81 Georgetown L J at 2243 n 3 (cited in note 20), the connection between republicanism and Burkeanism—for which I argue in this Article—is at least arguably made by Bruce Ackerman (as interpreted by his commentators). However, Ackerman in general suffers from the problems I identified in Part I; moreover, it is not clear whether he views himself as either a republican or a Burkean (he pretty clearly denies the latter).

republican and the pragmatist focuses of this Article. For deliberative republicanism, a common tradition must be one of the foundations of common citizenship. Pragmatists similarly value tradition as "the essential foundation for intellectual and social progress."¹⁴³

Finally, a common culture is most important in our diverse society as a means of maintaining connections among citizens and between citizens and the polity. In an America that consists of separate and individual cultures with no common bond, citizens will have no reason to act on behalf of either the common good or members of other groups.¹⁴⁴ We need only look to the former Yugoslavia to see the ultimate consequences of a failure of common culture. Domestic examples of the negative consequences of abandoning a common culture in favor of a multiplicity of individual cultures also abound,¹⁴⁵ but one of the more telling may be found within the confines of the legal profession. No republican revival is possible where ethnic identity so defines individuals that one well-respected law professor can summarize the work of two others by saying that, because of their race, "they both are members of the oppressor class."¹⁴⁶ If the cream of the legal profession, traditionally among the keepers and conveyors of the common culture,¹⁴⁷ has become so balkanized, what hope is there for the rest of society?

To many proponents of the new multiculturalism, both the existence of a common culture and the assimilationist ideal I have just described are heresy. The standard charge is that our "common culture" is in fact a Eurocentric one and that the

¹⁴³ Farber, 72 Minn L Rev at 1344 (cited in note 44).

¹⁴⁴ Diane Ravitch makes the latter point in *Multiculturalism: E Pluribus Plures*, 59 Am Scholar 337, 353 (1990).

¹⁴⁵ For some examples in academia, see D'Souza, *Illiberal Education* at 2-12, 46-48, 124-25 (cited in note 91). See also Sleeper, *The Closest of Strangers* at 172 (cited in note 77), describing an affirmative action manual distributed to some New York state employees in 1987 that read in part: "All White individuals in our society are racist. Even if a White is totally free of all conscious racial prejudice, he remains a racist, for he receives benefits distributed by a White racist society through its institutions."

¹⁴⁶ Derrick Bell and Preeta Bansal, *The Republican Revival and Racial Politics*, 97 Yale L J 1609, 1620 (1988). A related example is the attempt to intimidate and silence Rendall Kennedy, a black scholar who dared to question the received wisdom of cultural separatism. See Charles Rothfeld, *Minority Critic Stirs Debate on Minority Writing*, NY Times B6 (Jan 5, 1990).

¹⁴⁷ See, for example, Glendon, *Rights Talk* at 87 (cited in note 54); Robert Ferguson, *Law and Letters in American Culture* 273-90 (Harvard, 1984); Larry Alexander, *What We Do, and Why We Do It*, 45 Stan L Rev 1885, 1902 (1993).

assimilationist approach simply imposes it on all of the other cultures present in the American population.

As a matter of history, there is some truth to the charge of Eurocentrism. For many years, textbooks of American history and culture ignored the experiences and contributions of non-European Americans (and nonmale Americans, as well).¹⁴⁸ Even as recently as 1987, E.D. Hirsch's recipe for "cultural literacy" was disproportionately skewed toward European and classical cultures.¹⁴⁹ The multicultural movement toward broader inclusion—and toward the recognition that, as Patricia Williams puts it, "people of color have always been part of Western Civilization"¹⁵⁰—is a much-needed correction. To the extent that multiculturalism is inclusive in this way, it is not only compatible with a responsible republican education, it is also necessary if republicanism is to survive in an ethnically diverse and democratic society.¹⁵¹ The common culture that should be taught in our schools *is* a diverse and multi-ethnic one:

Although our nation does include many diverse cultures, we are not simply a collection of diverse cultures. We are bound together as a people by a common commitment to the political ideas and values contained in the Constitution and the Bill of Rights and elaborated by those (like Thomas Jefferson, Abraham Lincoln, and Martin Luther King, Jr.) who have extended and articulated the definition of our civic culture in each generation. . . . [O]ur national heritage is larger than its Anglo-Saxon roots. It has been shaped, enriched, redefined, and transformed by many others who do not trace their ancestry to England.¹⁵²

As Richard Rodriguez has emphasized: "To argue for a common culture is not to propose an exclusionary culture or a static culture. The classroom is always adding to the common text, be-

¹⁴⁸ See Henry Louis Gates, *Loose Canons: Notes On the Culture Wars* 108-11 (Oxford, 1992); Ravitch, 59 *Am Scholar* at 338 (cited in note 144).

¹⁴⁹ E.D. Hirsch, Jr., *Cultural Literacy: What Every American Needs to Know* (Houghton Mifflin, 1987). For critiques of Hirsch as Eurocentric, see, for example, Rick Simonson and Scott Walker, *Multicultural Literacy* (Graywolf, 1988).

¹⁵⁰ Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 *Mich L Rev* 2128, 2136 (1989).

¹⁵¹ The historical version of republicanism did not need to confront this particular problem. Eighteenth-century American society was both less diverse and less democratic; those who were not part of the "official" culture simply did not count as republican citizens.

¹⁵² Diane Ravitch, *A Response to Auster*, 4 *Academic Questions* 85, 86 (Fall 1991).

cause America is a dynamic society."¹⁵³ It is also an imperfect society. Thus, we must also teach, as Diane Ravitch has pointed out, "a warts-and-all history"¹⁵⁴ to show children that their own culture (whether common or individual) is far from perfect.

But some multiculturalists go much further than demanding inclusion or an accurate, multi-ethnic description of the common culture. Ravitch distinguishes between pluralistic multiculturalism, which seeks inclusion, and particularistic multiculturalism, which "insist[s] that no common culture is possible or desirable" and promotes ethnocentric curricula that stress differences among the various cultures.¹⁵⁵ I find the particularists' claims incomprehensible and the consequences dangerous.

The claim that there is no common culture is a version of the broader philosophical claim—sometimes made by the same individuals—that truth is subjective and reality constructed.¹⁵⁶ As I argued earlier, this type of relativism creates an impassable obstacle for those neo-republicans who cling to it despite its inconsistency with the rest of republican thought. It is also incoherent in the context of debates about cultural education. As many others have noted about analogous indeterminacy theories, cultural relativism leaves its adherents defenseless against charges that their own cultural views are just as contingent and indefensible as any others. There is no way to say whether an Afrocentric or Eurocentric curriculum is better, truer, or more valid, and the debate will quickly degenerate into a futile cacophony of conflicting claims.¹⁵⁷

¹⁵³ Rodriguez, *Days of Obligation* at 170 (cited in note 70).

¹⁵⁴ Ravitch, 59 *Am Scholar* at 340 (cited in note 144).

¹⁵⁵ *Id.* at 340-41. Henry Louis Gates draws a similar distinction. See Gates, *Loose Canons* at 176-78 (cited in note 148). See also Rockefeller, *Comment* (cited in note 42).

There is a related phenomenon in higher-education hiring these days. Proponents of "diversity" are no longer satisfied with having people of color on university faculties: "the ends of diversity are not served by persons who look black and think White." Ian Haney-Lopez, *Community Ties, Race, and Faculty Hiring: The Case for Professors Who Don't Think White*, 1 *Reconstruction* 46, 49 (No 3, 1991), quoting Derrick Bell. For a biting critique of this mentality, see Paul D. Carrington, *Diversity!*, 1992 *Utah L Rev* 1105, 1110-14.

¹⁵⁶ For a description and critique of this version of social constructivism, see Amy Gutmann, *Introduction*, in Charles Taylor, *Multiculturalism and "The Politics of Recognition"* 3, 18-19 (Princeton, 1992). For a critique of one form of social constructivism currently popular among legal academics, see Daniel A. Farber and Suzanna Sherry, "Posner's List": *An Essay on Merit, Social Constructivism, and Anti-Semitism*, 83 *Cal L Rev* (forthcoming May 1995).

¹⁵⁷ For a matched set of such claims, compare the polemics of Professors Leonard Jeffries and Michael Levin, both at City University of New York. For a brief review of their hate-filled claims, see Maria Newman, *CUNY Violated Speech Rights of Department*

To respond, as particularists are likely to do, that neither curriculum is better in the abstract but that African-American children should be given an Afrocentric curriculum is to highlight the dangers inherent in the particularist approach. Even if it were possible for every child to be given a curriculum tailored to her own ethnic (or religious) ancestry, such a course would endanger the welfare of both the community and the child. Where citizens' education has differed so fundamentally and so widely,¹⁵⁸ a republican community is impossible and a liberal state unlikely. Some common ground is necessary to maintain the tolerance, respect for justice, and law abidance that keep the liberal state from degenerating into a war of all against all. As one scholar suggests in a slightly different context, "We can live together in deep disagreement about abortion, but not if we also disagree about the propriety of using force on our opponents."¹⁵⁹ In the specific context of education, the National Commission on Excellence in Education concluded that "[a] high level of shared education is essential to a free, democratic society and to the fostering of a common culture, especially in a country that prides itself on pluralism and individual freedom."¹⁶⁰

The other problem with curricula tailored to a child's ethnicity is that it prevents the child from developing her own potential. Ravitch describes the limiting message conveyed by an ethnocentric curriculum:

It teaches children that their identity is determined by their "cultural genes." That something in their blood or their race memory or their cultural DNA defines who they are and what they may achieve. That the culture in which they live is not their own culture, even though they were born here. That American culture is "Eurocentric," and therefore hostile to anyone whose ancestors are not European. Perhaps the most invidious implication of particularism is that racial and ethnic minorities are not and should not try to be part of

Chief, Jury Says, NY Times A1 (May 12, 1993).

¹⁵⁸ Many of the proposals for various ethnocentric curricula are fundamentally different from any curriculum we have seen or imagined. See Ravitch, 59 *Am Scholar* at 344-48 (cited in note 144); Arthur Schlesinger, *The Disuniting of America* 73-99 (Norton, 1991).

¹⁵⁹ John Gray, *Toleration: And the Currently Offensive Implication of Judgement*, in Digby Anderson, ed, *The Loss of Virtue: Moral Confusion and Social Disorder in Britain and America* 33, 40 (Social Affairs Unit, 1992).

¹⁶⁰ The National Commission on Excellence in Education, *A Nation at Risk* at 7 (cited in note 109).

American culture; it implies that American culture belongs only to those who are white and European; it implies that those who are neither white nor European are alienated from American culture by virtue of their race or ethnicity; it implies that the only culture they do belong to or can ever belong to is the culture of their ancestors, even if their families have lived in this country for generations.¹⁶¹

This message is clearly not valid. As W.E.B. Du Bois eloquently pointed out, literature knows no color: "I sit with Shakespeare, and he winces not. Across the color line I move arm in arm with Balzac and Dumas. . . . I summon Aristotle and Aurelius and what soul I will, and they come all graciously with no scorn nor condescension."¹⁶²

Moreover, studies suggest that black achievement on intelligence tests—which correlates with economic and social success—is "directly related to greater proximity to a white middle-class cultural standard."¹⁶³ Depriving black children of the norms and knowledge of the culture in which they will live thus condemns them to a life of marginality and segregation. Arthur Schlesinger has aptly summarized the overall effect of Afrocentrism: "If some Kleagle of the Ku Klux Klan wanted to devise an educational curriculum for the specific purpose of handicapping and disabling black Americans, he would not be likely to come up with anything more diabolically effective than Afrocentrism."¹⁶⁴ The racial polarization that develops from racial politics in education is not good for blacks or whites. As Cornel West notes, "[A]s long as racial reasoning regulates black thought and action, Clarence Thomases will continue to haunt black America—as Bush and other conservatives sit back, watch, and prosper."¹⁶⁵

Finally, by suggesting that the purpose of education is "to instill in children a pride in their ancestral pasts," particularist

¹⁶¹ Ravitch, 59 *Am Scholar* at 341 (cited in note 144).

¹⁶² Gates, *Loose Canons* at 111 (cited in note 148), quoting W.E.B. Du Bois, *The Souls of Black Folk* (McClurg, 1904). See also Gates, *Loose Canons* at 21 (cited in note 148), describing Gates's own love of literature as stemming from early exposure to Dickens, Austen, Hugo, and de Maupassant, in addition to James Baldwin.

¹⁶³ Jaynes and Williams, *A Common Destiny* at 370 (cited in note 81). See also Signithia Fordham, *Racelessness as a Factor in Black Students' School Success: Pragmatic Strategy or Pyrrhic Victory?*, 58 *Harv Educ Rev* 54, 80 (1988).

¹⁶⁴ Schlesinger, *The Disuniting of America* at 94 (cited in note 158).

¹⁶⁵ Cornel West, *Race Matters* 25 (Beacon, 1993).

multiculturalism is “condescending,” as Richard Rodriguez recognizes:

Did anyone attempt to protect the white middle-class student of yore from the ironies of history? Thomas Jefferson—that great democrat—was also a slaveowner. Need we protect black students from complexity? Thomas Jefferson, that slaveowner, was also a democrat. American history has become a pageant of exemplary slaves and black educators. Gay studies, women’s studies, ethnic studies—the new curriculum ensures that education will be flattering. But I submit that America is not a tale for sentimentalists.¹⁶⁶

At bottom, then, particularist multiculturalism is a political, not an educational, strategy. As Charles Taylor perceptively notes, it is one thing to expect that the intellectual products of all cultures be equally *considered* for inclusion in the canon; it is quite another to demand that they be equally *included*, regardless of their actual worth.¹⁶⁷ I have suggested that the first claim serves both educational and political goals: treating all cultures with equal respect—presuming that they have much to offer us—is likely to further the education of all children and to increase the political and economic power of previously excluded cultures. But the latter claim is, as Taylor recognizes, a demand that “we come up with a final concluding judgment that their [actual] value is great.”¹⁶⁸ Such a claim is not only poor educational policy, it is, in Taylor’s view, “nonsense.”¹⁶⁹

My call for cultural literacy, in the form of both knowledge and assimilation, does not entail either mindless exercises of obeisance—such as daily flag salutes—or the sacrifice of ethnic or religious identity. As one scholar notes, we need both a “common bond as citizens of the United States and . . . differing identities as members of specific ethnic and religious groups.”¹⁷⁰ Assimilation need not mean annihilation: one can simultaneously value both commonalities with the larger society and the differences that make each subculture unique.

¹⁶⁶ Rodriguez, *Days of Obligation* at 169 (cited in note 70).

¹⁶⁷ Charles Taylor, *Multiculturalism and “The Politics of Recognition”* 42-43, 65-71 (Princeton, 1992).

¹⁶⁸ *Id.* at 69.

¹⁶⁹ *Id.* at 70.

¹⁷⁰ James Nickel, *Equal Opportunity in a Pluralistic Society*, 5 Soc Phil & Policy 104, 109 (1987).

Neither the state nor parents should have a monopoly on socializing the next generation. Recognizing that children belong to both the larger American culture and smaller subcultures allows parents and schools each a role in inculcating values. Families can, and do, promote the values of their own subculture, but "schools exist to teach children the general skills and knowledge that they need to succeed in American society, and the specific skills and knowledge that they need in order to function as American citizens."¹⁷¹ It is only where parental (or subculture) values might undermine a child's opportunity to become a functioning, participating, republican citizen that a conflict arises. My proposal of education for republican citizenship affords a justification for resolving that particular conflict in favor of the state.

Even the question of identifying the basic aspects of the common culture that should be passed on to the young turns out to be fairly simple: they are the same abilities, inclinations, and character traits that prepare children for a future as republican citizens. No culture has a monopoly on hard work, honesty, careful thought, individual responsibility, treating others with respect and tolerance, or expecting that others will follow the same precepts. All are part of the American creed, however, in part because they have been so successful in producing a vibrant, productive, wealthy, multicultural nation. To suggest that deviance from these norms is simply part of a subculture that deserves our equal respect, or that these norms are Eurocentric and should be rejected, is either to deny the power of contemporary and historical observation or to retreat into a relativism that approaches nihilism. Neither response is consistent with the kind of pragmatist approach to a republican vision that I am advocating here; both are exaggerated forms of the distorted individualist rights mentality that has grown out of modern liberalism set loose from republican responsibility.

In summary, a responsible republican education would give children both the knowledge and the inclination to act in accordance with the common culture. That culture would be depicted as broadly inclusive but not infinitely forgiving. It is a culture of expectations and responsibilities as well as rights and tolerance. Most important, these cultural norms should be inculcated in the child so that she takes them as her own and resists changing

¹⁷¹ Ravitch, 59 *Am Scholar* at 351 (cited in note 144). See also Ravitch, 4 *Academic Questions* at 87 (cited in note 152).

them. As Martha Nussbaum paraphrases Aristotle: "change should not be too easy."¹⁷²

B. Critical Thinking

An education that merely inculcated cultural norms might be suitable for a totalitarian state, where the citizen's major responsibility is to conform. But in a diverse republic, where citizenship consists in rational deliberation and dialogue about the good life for individuals and the nation as a whole, and where citizens disagree about both, cultural literacy is not enough. Mature citizens must "develop a certain degree of autonomy and capacity for independent judgment while still appreciating the value to be gained from the wisdom and experiences of prior generations."¹⁷³ Thus, as Amy Gutmann puts it, "Children must learn not just to *behave* in accordance with authority but to *think* critically about authority if they are to live up to the democratic ideal of sharing political sovereignty as citizens."¹⁷⁴ Similarly, Bruce Ackerman suggests that parents have an obligation to provide their children "with cultural equipment that permits the child to criticize, as well as affirm, parental ideals."¹⁷⁵ Republican citizens need both the common background provided by an education in cultural literacy and the ability to "deliberate critically among a range of good lives and good societies."¹⁷⁶ Without the ability to think critically, citizens can do nothing but accept social norms as authoritative. Republican deliberation will be impossible because there will be neither the capacity to deliberate nor anything about which to deliberate.

Recognizing that citizens must be equipped to choose among different visions of the good life and the good society does not

¹⁷² Nussbaum, NY Rev of Books at 36 (cited in note 48).

¹⁷³ Brown, 103 Yale L J at 180 (cited in note 141). See also *id* at 212, quoting Immanuel Kant, *An Answer to the Question: 'What is Enlightenment?'*, in Haus Reiss, ed, *Kant's Political Writings* 54 (University Press, 1970) (H.B. Nisbet, trans) ("Immaturity is the inability to use one's own understanding without the guidance of another."); Feldman, 81 Georgetown L J at 2278 (cited in note 20).

¹⁷⁴ Gutmann, *Democratic Education* at 51 (cited in note 112). Like the neo-republican legal scholars, Gutmann believes that virtue in our modern democracy consists in "the ability to deliberate, and hence to participate in conscious social reproduction." *Id* at 46. Gutmann acknowledges that she is following John Dewey in recommending an education in critical thought as vital to democracy. *Id* at 13. Other proponents of a critical education similarly credit Dewey. See, for example, Putnam, 63 S Cal L Rev at 1696-97 (cited in note 2).

¹⁷⁵ Ackerman, *Social Justice* at 117 (cited in note 20).

¹⁷⁶ Gutmann, *Democratic Education* at 44 (cited in note 112).

entail a return to the relativism of liberal neutrality. The key to a *republican* education that avoids authoritarianism is the desirability of instilling some predispositions toward particular visions of the good. Gutmann's scheme does this by permitting the democratic process to determine the content of the curriculum (subject to two constraints designed to guarantee both inclusiveness and training in critical thought), thus ensuring that a majority of families can reproduce their own values to some extent.¹⁷⁷ For reasons already discussed, I do not believe that leaving educational value choices to the democratic process is likely to produce republican citizens; my explorations of cultural literacy and moral character try to specify more directly the values that ought to be instilled. Under either method of making educational value choices, however, the basic tenet of liberalism—that there are a multiplicity of good lives—is tempered by an insistence that citizens in a particular society be predisposed to choose one of the good lives valued by and valuable to their own society, rather than cast adrift to choose indiscriminately from an infinite number of possible lives.

Conversely, the liberal notion that there are diverse forms of human flourishing informs responsible republican education in two ways. First, it allows for a pluralist multicultural approach to education, as suggested in the previous Section. Second, it demonstrates the need for critical thinking in either a liberal or republican regime. Critical or rational thinking, moreover, is a basic tenet of pragmatism as well. Dewey championed rationality and the scientific method as “the method of intelligence itself in action.”¹⁷⁸ Pragmatist approaches, like the responsible republicanism I am advocating, depend on an interaction between tradition and critical, rational thought.

Like cultural literacy, however, an emphasis on critical thinking is neither uncontroversial nor in accord with what is generally taught in American elementary and secondary schools. In Amherst, Massachusetts, a relatively wealthy center of higher education with a respected and progressive public school system, the “predominant values” of the public schools are, according to one writer, nevertheless “conformity, anti-intellectualism, passivity, alienation, classism, and hierarchy.”¹⁷⁹ Amherst is far from

¹⁷⁷ Id at 64-65.

¹⁷⁸ John Dewey, *Liberalism and Social Action* 46-47 (Capricorn, 1963). See also Margaret Jane Radin, *A Deweyan Perspective on the Economic Theory of Democracy*, 11 *Const Commentary* (forthcoming Dec 1994).

¹⁷⁹ Stephen Arons, *Compelling Belief: The Culture of American Schooling* 78 (McGraw

unique. The proliferation of courses that are designed to be "relevant" and to build students' self-esteem has necessarily diminished the ability of schools to teach rigorous courses requiring critical thought.¹⁸⁰ Textbooks, and therefore courses, are often sanitized to avoid controversy, but consequently deprive students of role models or material for critical thought.¹⁸¹

Republicans are not alone in recognizing the need for critical capacity. Stephen Macedo, for example, suggests that *liberal* virtues include "developing the self-conscious, self-critical, reflective capacities that allow one to formulate, evaluate, and revise ideals of life and character, to bring these evaluations to bear on actual choices and on the formulation of projects and commitments."¹⁸² In light of the liberal emphasis on individual choice and governmental neutrality, it is not surprising that a liberal education includes cultivating the ability to make deliberative, reasoned choices through critical thinking. But the liberal consensus on the need for a critical education masks the fact that critical thinking is, like cultural literacy, educationally controversial.

In particular, the staunchest opponents of an education in critical thinking are certain religious fundamentalists who wish their children to remain unexposed to the skepticism of critical rational thought. As one sympathetic observer notes, the disagreement between such fundamentalist parents and more traditional school boards is "over whether to consider the cultivation of individual reason, objective judgment and rational, critical thought . . . as a form of indoctrination."¹⁸³ Those who believe that truth lies in faith rather than in reason find an education in critical thought offensive to their basic belief systems. One such parent testified that, "she did not want her children to make critical judgments and exercise choices in the areas where the Bible provides the answer."¹⁸⁴ In fundamentalist schools, "[i]f some matter falls within the scriptural domain of truth, it is

Hill, 1983).

¹⁸⁰ See, for example, James S. Coleman, Thomas Hoffer, and Sally Kilgore, *High School Achievement: Public, Catholic, and Private Schools Compared* 193 (Basic Books, 1982). See generally Dennis O'Keeffe, *Diligence Abandoned: The Dismissal of Traditional Virtues in the School*, in Digby Anderson, ed., *The Loss of Virtue: Moral Confusion and Social Disorder in Britain and America* 181 (Social Affairs Unit, 1992).

¹⁸¹ Gottlieb, 62 NYU L Rev at 504-12 (cited in note 114); Toni Massaro, *Constitutional Literacy* 134 (Duke, 1994).

¹⁸² Stephen Macedo, *Charting Liberal Virtues*, 34 Nomos 204, 217 (1992).

¹⁸³ Stolzenberg, 106 Harv L Rev at 611 (cited in note 27).

¹⁸⁴ *Mozert v Hawkins County Board of Education*, 827 F2d 1058, 1069 (6th Cir 1987).

incumbent upon teachers to present that matter as uncontestably, unequivocally true. . . . What is deemed to be true . . . will never be taught as though it might be open to question.¹⁸⁵ It is not only the religious right that opposes an education that will equip children to question the beliefs of their parents; some of the more extreme multicultural particularists seem to advocate a similar blind faith.¹⁸⁶

The liberal tradition, because of its emphasis on government neutrality, individual rights, and multiple visions of the good life, cannot resolve the kind of conflict that arises between those who trust in faith and those who trust in reason.¹⁸⁷ Only a tradition that endorses particular substantive values, rather than advocating neutrality among values, can coherently argue that rationality and critical thinking are virtues. And, as I have suggested, rationality and critical thinking *are* virtues in a republican polity, as prerequisites for both reasoned deliberation and individual and social choice. A responsible republican approach can easily reject the fundamentalist challenge by suggesting that children educated not to question authority (whether biblical or other) are unlikely to be able to engage in the sort of reasoned dialogue crucial in a diverse democracy. Hence, they will never become citizens who can fully participate in republican dialogue and deliberation. Republicanism can thus offer a more satisfying justification for an insistence that citizens be educated in critical thinking. But, as the next Section suggests, neither cultural literacy nor critical thinking is sufficient to produce responsible republican citizens.

¹⁸⁵ Alan Peshkin, *God's Choice: The Total World of a Fundamentalist Christian School* 59 (Chicago, 1986).

¹⁸⁶ The best—and most sympathetic—article on the antirational, antiliberal aspects of the fundamentalist educational battles recognizes the analogies between fundamentalists and multiculturalists in this context. Stelzenberg, 106 Harv L Rev at 666 & n 433 (cited in note 27).

¹⁸⁷ See id at 655-57. Stolzenberg argues that republicanism also values rationality and is thus similarly unable to resolve the conflict. Id at 641-46, 651-60. This is true of the neo-republicanism she describes. My argument that neo-republicans are caught in a paradox because they endorse both ethical relativism and governmental value choices, see text accompanying notes 27-43, echoes her suggestion that “both civic republicanism and liberalism are torn between a disinclination to judge or to undermine diverse ways of life and the conflicting assumption of an objective-critical perspective that brackets the truth question and renders ‘belief-systems’ as subjective, historical data.” Id at 660. The modified republicanism I am advocating in this Article, however, values both assimilation and rationality independently as substantive goods and therefore has no problem resolving the conflict between faith and reason. Although there may be reasons to allow those who reject reason to do so, a basic education for citizenship must give children the tools with which to choose as adults.

C. Moral Character

Both cultural literacy and rational thinking are, in a sense, forms of knowledge. "But to know is not good enough. Even given full knowledge, it remains to act virtuously. As with the good, virtue has to do with action."¹⁸⁸ Republicanism will not succeed even with citizens who are *capable* of acting virtuously if they are not also *inclined* to do so. As one writer perceptively notes, an education that "chiefly tends to shape the habits of the mind" is "an incomplete education," for we also need to "shape the habits of the heart."¹⁸⁹ Thus, education must instill good moral character in children.

The most basic moral requirement of republican citizens, of course, is an inclination to participate in their republic, to engage in rational deliberation. I can give no better description of this type of moral character required of republican citizens than Gutmann's: Citizens must be "morally serious people . . . [who] can be trusted to defend and to respect laws that are not in their self-interest, at the same time as they can be expected to oppose laws that violate democratic principles."¹⁹⁰ Thus, the sort of deliberation engaged in by republican citizens of good character distinguishes them from "both sophists, who use clever argument to elevate their own interests into self-righteous causes, and traditionalists, who invoke established authority to subordinate their own reason to unjust causes."¹⁹¹ For Gutmann, moral character is the inclination to engage in moral reasoning (or, in a more neo-republican dialect, reasoned deliberation).

I would go further than Gutmann, however, in specifying the moral character necessary for republican citizenship. Just as I have argued that responsibility and cultural literacy are necessary elements of republican citizenship, I would suggest that the inclination to act responsibly and in accord with basic cultural norms is part of the moral character conducive to republican citizenship. Citizens should not only know how they are supposed to behave, they should actually behave that way most of the time. Moral reasoning, whether individual or communal, may occasionally lead one to the conclusion that *in a particular in-*

¹⁸⁸ Jean Baechler, *Virtue: Its Nature, Exigency, and Acquisition*, 34 *Nomos* 25, 47 (1992). For a thorough discussion of Aristotle's insistence on moral character for republican citizenship, see Galston, 82 *Cal L. Rev.* at 372-78 (cited in note 27).

¹⁸⁹ Wilson, *On Character* at 108 (cited in note 106).

¹⁹⁰ Gutmann, *Democratic Education* at 52 (cited in note 112).

¹⁹¹ *Id.*

stance, it is better to act contrary to cultural norms, or even in a manner that might appear to be irresponsible. But republican citizens—full members of a constituted and functioning community—should be predisposed to act responsibly and in accord with community norms, justifying departures through critical thought and dialogue. Otherwise, moral reasoning becomes pure sophism, driven solely by the desire to reach particular results.

My suggestion that moral character includes the inclination to act in accordance with cultural norms is, of course, intimately related to my discussion of cultural literacy. Again, I want to stress that I am talking about only the most basic sorts of cultural norms, which are, I hope, relatively uncontested (although not always emphasized): individual responsibility, honesty, hard work, tolerance, and so on. I am specifically *not* talking about contested norms on such things as sexuality, religious beliefs, or gender roles. Some of those norms may be specified by the underlying vision of the good life in a mixed liberal-republican regime: an examined life in both individual and citizen capacities. Otherwise, a republican polity deliberates about whether to leave such decisions entirely to individuals, and if not, about what norms ought to be imposed or encouraged.¹⁹²

The best definition of the sort of moral character I mean comes from James Q. Wilson:

[T]o have a good character means at least two things: empathy and self-control. Empathy refers to a willingness to take importantly into account the rights, needs, and feelings of others. Self-control refers to a willingness to take importantly into account the more distant consequences of present actions; to be in short somewhat more future oriented rather than wholly present oriented.¹⁹³

¹⁹² Obviously, our nation has already made some of these decisions. The Free Exercise Clause of the First Amendment, for example, makes clear that decisions about religious beliefs *are* to be left to individuals. If we had adopted the Equal Rights Amendment, by contrast, it might be viewed as a decision to mandate particular norms about gender roles.

¹⁹³ Wilson, *On Character* at 5 (cited in note 106). See also *id.* at 22 (“By virtue, I mean habits of moderate action; more specifically, acting with due restraint on one’s impulses, due regard for the rights of others, and reasonable concern for distant consequences.”). Similarly, Amitai Etzioni (speaking for the Communitarian movement), notes that children should be taught both character and core values:

We mean by *character* the psychological muscles that allow a person to control impulses and defer gratification, which is essential for achievement, performance, and moral conduct. The *core values* . . . [include:] hard work pays, even in an unfair world; treat others with the same basic dignity with which you wish to be treated (or

There are other qualities that go into good character, but my emphasis on responsibility—for oneself and toward others—is well captured in Wilson's description.

Educating for moral character faces an obstacle that my two previous injunctions do not. Teaching critical thinking and cultural literacy may be controversial and infrequent, but there is little question that teaching both subjects is possible. Whether schools can teach moral character, however, is an open question. I cannot possibly resolve that question in this Article, but I can note what seems almost universally agreed upon: if it is possible to teach moral character, it must be done at least partly by example.¹⁹⁴

Even advocating that children be taught moral character by example is controversial, however. One aspect of responsibility, as I suggested earlier, is avoiding single teenage parenthood. Single parenthood, especially among poor teenagers, is irresponsible and severely jeopardizes the potential for future republican citizenship of both parent and child by lowering educational, economic, and social opportunities. Single teachers who become pregnant (or cause a pregnancy¹⁹⁵) and choose to bear and keep the child are setting a very poor example for their charges. Nev-

face the consequences); you feel better when you do what is right than when you evade your moral precepts.

Etzioni, *The Spirit of Community* at 91 (cited in note 81). Miriam Galsten more fully develops a list of similar character traits necessary for republican citizenship:

First, there are those character traits that are observable in people who are deliberative in their own lives: moderation in acquisitiveness and certain kinds of ambition; purposefulness; carefulness; attention to detail; perseverance; the willingness to defer immediate gratification; confidence that progress is possible and that human action can shape events; respect for, although not slavishness to, rules and traditions; and the ability to distinguish the speaker from the speech in order to take seriously ideas and arguments regardless of one's degree of affinity with their advocates. The second category would consist of character traits that tend to create or reinforce our bonds with others: loyalty to others; concern about and responsibility for the well-being of others; and honesty in our dealings with others.

Galston, 82 Cal L Rev at 381 (cited in note 27).

¹⁹⁴ See, for example, Gutmann, *Democratic Education* at 57 (cited in note 112); Baechler, 34 Nomos at 47-48 (cited in note 188); Coleman, Hoffer, and Kilgore, *High School Achievement* (cited in note 180); Wynne and Ryan, *Reclaiming Our Schools* at 113 (cited in note 58); Theodore R.Sizer, *Horace's Compromise: The Dilemma of the American High School* 123-25 (Houghton Mifflin, 1984).

¹⁹⁵ While causing a pregnancy in these circumstances is equally irresponsible, it is not equally detectable. For that reason, I focus—as have the cases—on pregnant teachers. Nevertheless, the reasoning in the text should apply as well to single men who cause a pregnancy, although the question is somewhat clouded by the greater choice of the woman in determining whether to bear the child.

ertheless, at least one federal court of appeals has consistently prohibited school districts from firing unwed pregnant teachers.¹⁹⁶

Even private organizations have been challenged for their attempts to provide role models. One educational organization that worked mostly with poor, black, teenage girls tried to encourage them not to become pregnant because it reduced their opportunities. When one of its single staff members became pregnant, she was fired. Although the firing was ultimately upheld by the courts,¹⁹⁷ there was a protracted lawsuit, a dissent by one member of the court of appeals who found that the firing was a violation of Title VII,¹⁹⁸ and a law review article by a University of Pennsylvania professor arguing that the action was racist and sexist.¹⁹⁹

The arguments on behalf of the pregnant teachers are considerable, but are all based on considering rights devoid of responsibility. A more balanced approach would recognize that, while mature adults should have the right to procreate when and as they choose, it is irresponsible to do so under conditions so detrimental to both parent and child. Reconciling rights and responsibilities in this context is exactly the sort of difficult balancing exercise that a mixed liberal-republican regime requires. Our current rights-oriented liberalism tends too much toward protecting the right and ignoring the responsibility, especially where the government is involved. A purely republican approach might jettison procreative rights and penalize the bearing of illegitimate children under all circumstances.²⁰⁰ My approach tries to accommodate both the right and the responsibility by suggesting that the right must yield if, and only if, there is an additional factor counseling responsible behavior: the potential interference with education for citizenship. Thus, while most

¹⁹⁶ *Avery v Homewood City Board of Education*, 674 F2d 337, 341-42 (5th Cir 1982); *Andrews v Drew Municipal Separate School District*, 507 F2d 611, 615-16 (5th Cir 1975). See also *Ponton v Newport News School Board*, 632 F Supp 1056, 1062-64 (D Va 1986) (forcing pregnant unmarried teacher to take leave of absence violates Constitution and Title VII).

¹⁹⁷ *Chambers v Omaha Girls Club*, 629 F Supp 925, 951-52 (D Neb 1986), aff'd 834 F2d 697, 704 (8th Cir 1987).

¹⁹⁸ *Chambers*, 834 F2d at 705-09 (McMillian dissenting). See also *Chambers v Omaha Girls Club*, 840 F2d 583, 583 (8th Cir 1988) (Lay dissenting in denial of reh'g en banc) (arguing that action was a per se violation of Title VII).

¹⁹⁹ Regina Austin, *Sapphire Bound!*, 1989 Wis L Rev 539, 555.

²⁰⁰ See, for example, Nathaniel Hawthorne, *The Scarlet Letter* (Ticknor, Reed, and Fields, 1850).

adults have the freedom to procreate irresponsibly, those whose irresponsibility redounds to the detriment of both their own offspring *and* other children whose virtue they are charged with forming are subject to a different balancing of rights and responsibilities.²⁰¹

Another way to instill moral character in children is to give them responsibility and let them exercise moral choices—with real consequences—during the course of their education.²⁰² “The choice to act morally is self-reinforcing, creating momentum for acting morally on the next occasion, and the next, and strengthening the foundation upon which future moral actions will be based.”²⁰³ The most obvious way to accomplish this is to reward the moral behaviors we want to encourage and punish those we want to discourage. In other words, children should learn that hard work begets rewards, and that dishonesty, laziness, and interference with other children’s educational opportunities lead to punishment. It is worth noting that a number of scholars have made concrete suggestions for implementing schemes that reward effort and punish the lack of it. These include treating academic performance the way we do athletic performance,²⁰⁴ establishing entrance tests for all courses,²⁰⁵ increasing both expecta-

²⁰¹ Similarly, although a married pregnant teacher may provide some perverse role models for her charges—they may emulate her motherhood without also emulating her marital status—the very fact that her behavior is not in itself irresponsible should insulate her from any penalty. Thus, just as neither discriminatory effect nor discriminatory intent can alone make out a violation of the Equal Protection Clause, see *Washington v Davis*, 426 US 229, 239 (1976) (discriminatory effect), and *Palmer v Thompson*, 403 US 217, 224 (1971) (discriminatory intent), procreative rights need not yield unless the act of procreating is irresponsible *and* sets a poor example.

²⁰² Although Aristotle said it first, Thomas Jefferson said it best: “The moral sense, or conscience, is as much a part of man as his leg or arm. . . . It may be strengthened by exercise, as may any particular limb of the body.” Letter from Thomas Jefferson to Peter Carr (Aug 10, 1787), in Paul L. Ford, ed, 5 *The Works of Thomas Jefferson* 322, 323 (Putnam’s Sons, 1905). Others have also noted in more concrete and practical terms that exercising moral choices develops and strengthens moral character. See, for example, Wynne and Ryan, *Reclaiming Our Schools* (cited in note 58).

²⁰³ Bartlett, 98 Yale L J at 301 (cited in note 54).

²⁰⁴ Wynne and Ryan, *Reclaiming Our Schools* at 46-49 (cited in note 58). Their suggestions include public rewards, high standards, summary dismissal from desired programs for rules infractions, emphasizing loyalty to teammates, and using pride rather than fun as motivation.

²⁰⁵ Murray, *Losing Ground* at 225-27 (cited in note 31). Students would be permitted to take any entrance test any number of times. Murray outlines five lessons that would be taught by his system: “Effort is often rewarded with success. Effort is not *always* rewarded with success. Failure in one instance does not mean inability to succeed in anything else. Failure in one try does not mean perpetual failure. The better the preparation, the more likely the success.” *Id* at 226. He summarizes the difference between the current educational system and his own as that the current system “does not teach . . . stu-

tions and discipline,²⁰⁶ and including public service as part of educational requirements.²⁰⁷ Unfortunately, some attempts at requiring responsibility have invited challenge from a rights-oriented perspective. One school district in Pennsylvania was sued for requiring high school students to perform community volunteer work as a condition for graduation.²⁰⁸

One thing that all the suggestions for fostering moral character seem to have in common is a recognition that children are not naturally hardworking and responsible, and that education is hard work that is not always fun. Hegel's criticism of Rousseau's theory of education is similar and accurate:

The play theory of education assumes that what is childish is itself already something of inherent worth and presents it as such to the children; in their eyes it lowers serious pursuits, and education itself, to a form of childishness for which the children themselves have scant respect. The advocates of this method represent the child, in the immaturity in which he feels himself to be, as really mature and they struggle to make him satisfied with himself as he is. But they corrupt and distort his genuine and proper need for something better²⁰⁹

Although a shift from emphasizing play to emphasizing learning is probably useful in all aspects of education, it is most useful in encouraging the habits of diligence and perseverance that are necessary parts of the moral character of republican citizens. Stressing the development of moral character rather than following the natural inclinations of the child does not mean that schooling must return to the days of silent rote learning and corporal punishment, however. There are many ways to teach children that everything is not relative and that effort is necessary and rewarded—and some ways can also be fun. Learning to produce music, for example, teaches children to respect the fundamental unchangeability of some things (a note is either flat or

dents . . . *how to fail*." Id at 226-27.

²⁰⁶ Coleman, Hoffer, and Kilgore, *High School Achievement* at 105, 120-21, 178, 185, 192 (cited in note 180); Murray, *Losing Ground* at 174 (cited in note 31); Ratner, 63 Tex L Rev at 802-03 (cited in note 109).

²⁰⁷ Etzioni, *The Spirit of Community* at 113-15 (cited in note 81).

²⁰⁸ *Steirer v Bethlehem Area School District*, 987 F2d 989, 992 (3d Cir 1993) (upholding constitutionality of requirement).

²⁰⁹ George Wilhelm Friedrich Hegel, *Hegel's Philosophy of Right* ¶ 175 at 118 (Oxford, 1945) (T.M. Knox, trans). See also Putnam, 63 S Cal L Rev at 1696-97 (cited in note 2); O'Keefe, *Diligence Abandoned* at 183 (cited in note 180).

not, a C or not, and so on) and to expect a joyous reward (the correctly played music itself) for diligent effort.

Unfortunately, both an emphasis on character and abandonment of the play theory of education are inconsistent with what one author has accurately called "public education's current fascination with 'self-esteem' rather than achievement," which "puts feelings ahead of actual learning."²¹⁰ In other words, the most important part of an education today seems to be that the students have "a good experience."²¹¹ Moreover, because Americans are suspicious about teaching moral values,²¹² "[t]he fundamental tragedy of American education today is not that we are turning out ignoramuses, but that we are turning out savages."²¹³ As with cultural literacy and critical thinking, then, my admonition to teach moral character is neither uncontroversial nor in accord with current educational practice.

III. EDUCATIONAL POLICY

So far, I have suggested that an education for responsible republican citizenship should stress familiarity with and allegiance to American culture, the ability to think critically about issues (including cultural norms), and character traits such as diligence and honesty that promote responsible behavior in both private and public life. I turn now to a more specifically legal question: what aspects of Supreme Court doctrines on schools and schooling encourage or inhibit this type of education?

A. General Considerations

While it is not my purpose in this Article to examine specific educational strategies, it is useful to provide an overview of the types of schools and school environments that have been shown to produce academically and socially successful students. A survey of the literature helps confirm and justify my argument that increasing emphasis on individual and family responsibility for education will improve performance.

The two most influential bodies of literature on this subject are the studies done by James Coleman and others,²¹⁴ and the

²¹⁰ Sykes, *A Nation of Victims* at 244 (cited in note 74).

²¹¹ See Hirsch, *Cultural Literacy* at 122-25 (cited in note 149).

²¹² Miriam Galston insightfully explores and refutes some of the primary intellectual reasons for this suspicion. See Galston, 82 Cal L Rev at 386-96 (cited in note 27).

²¹³ Close, *Responsive Community Rts & Responsibilities* at 23 (cited in note 64).

²¹⁴ The two most comprehensive studies are James Coleman, et al, *Equality of Educa-*

writings of the "effective schools" movement which grew up largely in reaction to Coleman's 1966 study.²¹⁵ There is a great deal of controversy about whether schools can affect student performance at all: later researchers disagree over the validity of Coleman's original finding that family factors, rather than school factors, are largely responsible for variations in student performance.²¹⁶ A review of the literature, however, suggests that the dispute is less substantive than the participants make it out to be. Several conclusions seem generally agreed upon, and I will rely primarily on those less controversial conclusions.

Most of the studies conclude that differences in achievement are *not* due to easily measurable (and easily, if expensively, remediable) differences between schools, such as facilities, libraries, teacher qualifications, teacher salaries, or class size.²¹⁷ Most of the researchers also agree that there are less-tangible differences between effective and ineffective schools. The factors most commonly identified as producing effective schools are good discipline and high teacher expectations for all students (including, for example, the assignment of significant amounts of homework).²¹⁸ More recent cross-cultural studies have suggested that students who believe that diligence rather than innate ability governs school success are likely to achieve more.²¹⁹ Thus, success is

tional Opportunity (US GPO, 1966); and Coleman, Hoffer, and Kilgore, *High School Achievement* (cited in note 180).

²¹⁵ See Jaynes and Williams, *A Common Destiny* at 358 (cited in note 81).

²¹⁶ Compare J. Behrman, P. Taubman, and T. Wales, *Controlling For and Measuring the Effects of Genetics and Family Environment in Equations for Schooling and Labor Market Success*, in Paul Taubman, ed, *Kinometrics: Determinants of Socioeconomic Success Within and Between Families* 35, 70 (North-Holland, 1977); Eric A. Hanushek, *Throwing Money at Schools*, 1 *J Policy Analysis & Mgmt* 19 (1981); Brian Rowan, Steven T. Bossert, and David C. Dwyer, *Research on Effective Schools: A Cautionary Note*, *Educ Researcher* 24, 24 (Apr 1983); Renald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 *Harv J Legis* 465, 467-68 (1991); with Wilbur Brookover, et al, *School Social Systems and Student Achievement: Schools Can Make a Difference* 2-4 (Praeger, 1979); Ronald Edmonds, *Characteristics of Effective Schools*, in Ulric Neisser, ed, *The School Achievement of Minority Children: New Perspectives* 93, 94-95 (Lawrence Erlbaum, 1986).

²¹⁷ See, for example, Jaynes and Williams, *A Common Destiny* at 355 (cited in note 81); Stewart C. Purkey and Marshall S. Smith, *Effective Schools: A Review*, 83 *Elementary Sch J* 427, 427-30 (1983); Eric A. Hanushek, *The Economics of Schooling: Production and Efficiency in Public Schools*, 24 *J Econ Lit* 1141, 1141-42 (1986).

²¹⁸ See, for example, Coleman, Hoffer, and Kilgore, *High School Achievement* at 105, 120, 160-63, 178, 185, 192-93 (cited in note 180); Jaynes and Williams, *A Common Destiny* at 356-57, 359-61 (cited in note 81); Purkey and Smith, 83 *Elementary Sch J* at 431 (cited in note 217); Harold W. Stevenson, *Learning from Asian Schools*, *Scientific Am* 70 (Dec 1992).

²¹⁹ See Caplan, Choy, and Whitmore, *Scientific Am* at 36 (cited in note 66); Stevenson,

most often achieved in orderly classrooms in which both teachers and students believe that all the students can do well, and act accordingly. This accords with my suggestion that schools ought to begin with a presumption that students and their parents bear significant responsibility for taking advantage of the educational opportunities offered.

The recent tendency to avoid holding children (or, in the case of younger children, their families) accountable for their own shortcomings—one aspect of the more general shift away from individual responsibility²²⁰—undermines efforts to provide a successful classroom environment. The more that teachers, administrators, and educational theorists—and, by extension, students—blame external factors for students' failures, the less likely it is that students or teachers will expect high performance. If failure is caused by discrimination, poverty, family circumstances, or poor teaching, why should a student afflicted by one of these misfortunes even bother trying? And why would a teacher believe that any particular student could overcome such an outcome-determinative handicap? Moreover, the stereotype of poor, minority students as necessarily low achievers is as untrue as it is disabling: "Research of the past decade or so has noted that highly motivated youths are a frequent output of black family socialization processes."²²¹

Shifting responsibility back to the individual and away from society allows us to recognize and reward these high achievers and to address more directly the *individual* problems of low achievers. For example, a focus on individual responsibility makes it more acceptable to condemn and counter minority students who ostracize their classmates for "acting white" ("speaking standard English, studying long hours, [and] striving to get good grades").²²² Moving the emphasis from societal to individual responsibility also refocuses the debate in a way that highlights what Charles Murray calls "noneconomic transfers": policies that inadvertently penalize industrious students in order to avoid blaming less industrious ones.²²³

Scientific Am at 70 (cited in note 218). See also Goldman, NY Times at C1 (cited in note 91).

²²⁰ For further documentation that the trend extends into educational theory, see Sykes, *A Nation of Victims* at 233-35 (cited in note 74).

²²¹ Jaynes and Williams, *A Common Destiny* at 542 (cited in note 81).

²²² *Id.* at 372.

²²³ Murray, *Losing Ground* at 199-201 (cited in note 31).

This is not to say that the state bears no responsibility for educational failures. Any educational policy that deliberately marks some children as destined for failure, or deprives them of any of the three elements of an education for republican citizenship, is unacceptable. The most extreme of these unacceptable policies, of course, is *de jure* racial segregation. We can argue for another four decades about whether *Brown v Board of Education*²²⁴ was correctly reasoned or adequately enforced, but its conclusion was unequivocally right. A law that says that some children are not fit to go to school with others simply because of their race is the very antithesis of an education for responsible republican citizenship. Not only does it generate among black students "a feeling of inferiority as to their status in the community," decreasing their motivation to learn,²²⁵ it also fails to treat them as future responsible citizens. Further, it sends a message that the state does not expect them to succeed—one of the surest guarantees that they will not.

On the other hand, recent research suggests that teacher expectations of students, especially of minority students, vary by the teacher's socioeconomic status, not her race.²²⁶ Thus, *Wygant v Jackson Board of Education*,²²⁷ though castigated for ignoring children's educational needs by preventing the school board from firing more senior white teachers instead of laying off newly hired black teachers,²²⁸ may also be correctly decided: it is the teacher's expectations, not her race, that matter. Moreover, since many studies stress parental involvement in a child's schooling as a vital factor in her academic success,²²⁹ policies that interfere with parental access and involvement should be open to question. One such policy is busing in urban school dis-

²²⁴ 347 US 483 (1954).

²²⁵ *Id* at 494.

²²⁶ Karl Alexander, Doris Entwistle, and Maxine Thompson, *School Performance, Status Relations, and the Structure of Sentiment: Bringing the Teacher Back In*, 52 *Am Socio Rev* 665, 679-80 (1987). To the extent that race matters, it seems to have a perverse effect: these researchers found that among high-status teachers, white teachers had low expectations for black student behavior but not for their cognitive abilities, while black teachers had low expectations of black students generally. *Id* at 674.

²²⁷ 476 US 267 (1986).

²²⁸ See *id* at 307 (Marshall dissenting) ("As a matter of logic as well as fact, a hiring policy achieves no purpose at all if it is eviscerated by layoffs.").

²²⁹ See, for example, David L. Stevenson and David P. Baker, *The Family-School Relation and the Child's School Performance*, 58 *Child Development* 1348, 1348-49 (1987); Joyce L. Epstein, *Parent Involvement: What Research Says to Administrators*, 19 *Educ & Urban Soc* 119, 119-20 (1987); Joan L. Herman and Jennie P. Yeh, *Some Effects of Parent Involvement in Schools*, 15 *Urban Rev* 11, 11-12 (1983).

tricts: parents, especially poor parents dependent on public transportation, are much less likely to become involved in school activities or attend parent-teacher conferences if their children's schools are located far from home. Recent cases that rely less on busing as a remedy for segregated schools may therefore also be on the right track.

A theory of responsible republican education thus has some general utility in evaluating legal doctrine on a broad range of educational topics, including questions of race. But the two areas that might benefit most from the change of focus offered by my theory are specific to education: school policies (especially curricular policies) that are challenged or justified as value inculcation, and school financing. The remainder of this Article will therefore focus on current doctrine in those two areas and on how a theory of responsible republicanism might reshape those doctrines or their justifications.

It might be helpful at the outset to state the limits of my proposals. I am not suggesting that an education for republican citizenship is constitutionally mandated, nor that there is necessarily a constitutional right to such an education.²³⁰ Rather, I am arguing that our constitutional doctrine *about* education ought to be influenced by our republican heritage, both as a matter of history²³¹ and as a matter of policy. In other words, what might the constitutional guarantees of freedom of speech or equal protection of the laws mean in the context of an education for republican citizenship? In the preceding Parts, I have tried to describe and justify a particular moral focus and a concomitant educational approach as more likely to produce responsible republican citizens. This Part is an attempt to evaluate existing legal doctrine in light of that description.

²³⁰ Others have proposed a constitutional right to education. See, for example, Amar, 13 Harv J L & Pub Policy at 40 (cited in note 32); Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 Nw U L Rev 550, 574-630 (1992); Julius Chambers, *Adequate Education for All: A Right, an Achievable Goal*, 22 Harv CR-CL L Rev 55, 67-72 (1987); R. George Wright, *The Place of Public School Education in the Constitutional Scheme*, 13 SIU L J 53, 72-80 (1988).

²³¹ For overviews of the historical influence of republicanism, see generally Suzanna Sherry, *The Intellectual Origins of the Constitution: A Lawyers' Guide to Contemporary Historical Scholarship*, 5 Const Commentary 323 (1988); Sherry, 78 Minn L Rev 61 (cited in note 23).

B. School Policies

The import of my suggestions for school policies, especially curricular decisions, is obvious at one level: schools should teach cultural literacy, critical thinking, and moral character. Application of that principle to concrete situations, however, takes some care. Indeed, the Supreme Court, which has paid lip service to the idea of education for citizenship for many years, has an inconsistent and unpredictable record on school policies. Thus, this Section is intended largely to be clarifying and corrective: if the Supreme Court means what it says about education for citizenship, some of its decisions need to be reevaluated in light of the actual educational needs of future citizens.

Perhaps the first case in the United States to recognize the importance of education for citizenship was *Trustees of the University of North Carolina v Foy*, decided in 1805 by the North Carolina Supreme Court.²³² In the course of deciding that the state legislature did not have the power to deprive the university of property, the court described education as “a right highly esteemed in all civilized nations . . . a right of acquiring knowledge and good morals, which have always been deemed most conducive to the happiness and prosperity of a people.”²³³ The court’s statement reflected a wealth of American republican thinking on education and citizenship. Under this view, a nation cannot prosper, nor can liberty be protected, without a good and virtuous citizenry, which in turn depends on an education stressing both knowledge and virtue.²³⁴

The concept that education is vital to citizenship has carried forward into modern Supreme Court cases. The most eloquent (and most frequently quoted) illustration of the Supreme Court’s view of the essential nature of education is from *Brown*. The Court described education as “the very foundation of good citizenship,” and “a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”²³⁵ In fact, as the Court noted in 1973, “an abiding respect for the vital role of education in a free society may be found in numerous opinions of Justices of this Court writing both before and after

²³² 5 NC (1 Mur) 58 (1805).

²³³ *Id.* at 84.

²³⁴ For an elaboration of the historical pedigree of this concept, see Sherry, 78 Minn L Rev at 68 (cited in note 23).

²³⁵ 347 US at 493.

Brown was decided.²³⁶ As early as 1923²³⁷ and as recently as 1990,²³⁸ the Court has stressed that education prepares children for citizenship by transmitting and inculcating values, and by giving children the knowledge and skills necessary to participate in a democratic polity.

In particular, the Court has at different times focused on, and explicitly or implicitly recognized as legitimate, all three of my suggested bases of an education for republican citizenship: the transmission of cultural values, the fostering of habits of critical thought, and the development of good character.²³⁹ Its application of these principles, however, is uneven. In part, this is because the actual cases involve different constitutional provisions with different histories and doctrines. A Court that regulates public education through the blunt instruments of the religion clauses, the Free Speech Clause, and the various versions of the Equal Protection Clause is unlikely to hit upon a coherent educational theory except by accident. Indeed, viewed in this light, the Court's record is quite good. As I will suggest, the results are justifiable in all but a few of the cases, although the reasoning is often less than illuminating.

The larger part of the problem, which the Court shares with many commentators who have tried to balance inculcation of values against freedom of speech and inquiry, is that value inculcation—whether in teaching cultural literacy or in the formation of moral character—is frequently thought to conflict with the teaching of critical thinking. It need not be.²⁴⁰ As I hope my substantive discussion of republican education made clear, a citizen needs to be able both to understand and internalize the norms of her society and to judge those norms against rational attack. A predisposition to adopt certain values, coupled with the

²³⁶ *San Antonio Independent School District v Rodriguez*, 411 US 1, 30 (1973).

²³⁷ See *Meyer v Nebraska*, 262 US 390, 400 (1923).

²³⁸ See *Board of Education v Mergens*, 496 US 226, 265 (1990).

²³⁹ On transmission of cultural values, see, for example, *Ambach v Norwick*, 441 US 68, 76, 77, 80 (1979); *Board of Education v Pico*, 457 US 853, 864 (1982); *Plyler v Doe*, 457 US 202, 222 n 20 (1982); *Brown*, 347 US at 493; *West Virginia Board of Education v Barnette*, 319 US 624, 631 & n 11 (1943). On critical thinking, see, for example, *Pico*, 457 US at 866, 868; *Barnette*, 319 US at 637; *Tinker v Des Moines Independent Community School District*, 393 US 503, 511-12 (1969). On character, including by role modeling, see, for example, *Wisconsin v Yoder*, 406 US 205, 233 (1972); *Bethel School District v Fraser*, 478 US 675, 681, 683 (1986); *Hazelwood School District v Kuhlmeier*, 484 US 260, 272 (1988).

²⁴⁰ Toni Massaro has suggested that, indeed, the critical and assimilationist ideals represent "competing parts of the American personality." Massaro, *Constitutional Literacy* at 101 (cited in note 181).

knowledge and critical skills necessary for citizenship, is likely to yield slow but careful changes that jeopardize neither the stability of the polity nor the liberties of its citizens. In other words, to the extent that republican citizens must engage in "considered judgment"²⁴¹ in their public lives, such an act requires both a *willingness* and a *reluctance* to alter the status quo. Both unthinking adherence to tradition and an overeagerness for change for its own sake, with hasty and irrational decisions, are likely to do damage. On the other hand, both the assimilationist and critical approaches I advocate have a tendency to guard against these twin perils.

In the end, it is not difficult to translate these principles into doctrine, although it is not the doctrine of any particular provision of the Constitution. My approach to questions touching on educational policies is quite simple. In each case, I ask whether the policy at issue undermines any of the three bases of a responsible republican education: cultural literacy, critical thinking, and moral character. A brief review of some of the more important or controversial decisions of the last half-century should illustrate this standard.

The most contested dispute is over school censorship of student speech. As John Marshall once observed in a rather different context, the controversy is "deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest."²⁴² The cases usually pit student claims of independent, critical speech against the school's purported need to keep order and transmit values. But this is a false dichotomy. Most student speech, like the armbands worn by the high school students in *Tinker v Des Moines Independent Community School District*,²⁴³ is rational, civil, and a model of reasoned republican dialogue. Where the student speech is irrational or uncivil, as the Court found young Matthew Fraser's sexual innuendo to be,²⁴⁴ there is no harm in suppressing it. There may even be an educational benefit in doing so. Critical dialogue need not be uncivil; indeed,

²⁴¹ The particular phrase is Ackerman's, *We the People* at 272 (cited in note 20), but the idea is common to all the neo-republicans.

²⁴² *Marbury v Madison*, 5 US (1 Cranch) 137, 176 (1803).

²⁴³ 393 US 503, 508 (1969).

²⁴⁴ *Fraser*, 478 US at 683 (description of student government candidate in an "elaborate, graphic, and explicit sexual metaphor" at a high school assembly). The hardest question in cases like these is determining whether the speech is in fact sufficiently lewd or uncivil that it violates basic community norms. I would generally leave that judgment up to school officials.

civility—especially in its concern for the sensibilities of others—is a moral value that is particularly useful in a diverse democracy. Thus, permitting students to criticize authority if they do so civilly and rationally teaches all the right lessons: some ways of behaving are irresponsible and wrong, but moral reasoning and dialogue never are.

On this view, the Supreme Court probably got it wrong in *Hazelwood School District v Kuhlmeier*.²⁴⁵ Student articles on teen pregnancy and divorce, however controversial, should not be censored if they are responsible pieces of journalism.²⁴⁶ One important caveat here is that I would apply this limit on speech only to children, and only in order to teach them to exercise responsibly the full rights of free speech that they will inherit as adults. As one judge put it, “[T]he First Amendment gives a high school student the classroom right to wear Tinker’s armband, but not Cohen’s jacket.”²⁴⁷ Thus, hate speech regulations, for example, while intolerable if imposed on adults, may be appropriate to teach young children tolerance and sensitivity.²⁴⁸

The flip side of the student speech question is curricular and library decisions. Just as some student speech is alleged to interfere with the transmission of cultural norms or the development of moral character, schools often defend curricular choices as a way of furthering those goals. The Court, however, has fairly consistently invalidated efforts to inculcate values if—and only if—such efforts attempt to prescribe political orthodoxy or to insulate it from principled or critical opposition.

A series of cases spanning more than forty years exemplifies the Court’s jurisprudence in this area. In *West Virginia Board of Education v Barnette*, the Court struck down mandatory flag salutes.²⁴⁹ In the process, it recognized a difference between the sort of role modeling and predisposition that characterize responsible republican value-inculcation on the one hand, and prescribed political orthodoxy that brooks no opposition on the other: “National unity as an end which officials may foster by persua-

²⁴⁵ 484 US 260, 270 (1988).

²⁴⁶ There are some hints in the opinion that the articles were not responsible journalism, but the principal’s action and testimony suggest that that charge was manufactured. See *id.* at 284-85 (Brennan dissenting).

²⁴⁷ *Thomas v Board of Education*, 607 F2d 1043, 1057 (2d Cir 1979) (Newman concurring), quoted in *Fraser*, 478 US at 682.

²⁴⁸ Such regulations would be inappropriate, however, if they were applied in such a way as to interfere with legitimate, rational, and civil debate on matters of public importance.

²⁴⁹ 319 US at 624, 642 (1943).

sion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement."²⁵⁰ *Barnette* is, in fact, an excellent model of the responsible republican approach to education that I am advocating. In addition to drawing the distinction just noted, the *Barnette* Court recognized the importance of teaching history and civics in order to "inspire patriotism and love of country,"²⁵¹ while simultaneously rejecting policies that might "strangle the free mind at its source."²⁵² There is, as the Court implicitly accepted, no conflict between the two.

In *Board of Education v Pico*, the Court similarly struck down an attempt to protect orthodoxy,²⁵³ although its reasoning was less exemplary. The Court in *Pico* allowed a challenge to a school board's attempt to remove objectionable books from the school library. A majority of the Court, however, found the practice potentially unconstitutional because of both the removal's *purpose* (rather than its effects)²⁵⁴ and the students' right to receive information.

The focus on purpose is doubly problematic. First, as the dissent in *Pico* points out, the students' right to receive information is equally infringed whatever the reasons behind the removal.²⁵⁵ Moreover, since the removal of politically objectionable books both constricts the students' ability to learn critical thinking by example and comparison and sends a message to students that orthodoxy is required, it undermines the teaching of critical thinking. The motivation of the school board, while perhaps important from a First Amendment standpoint, is irrelevant to a responsible republican analysis: if the goal is to produce responsible republican citizens, any interference with learning to think critically is suspect, no matter how well-intentioned.

What is really at stake in the Court's opinions in *Pico*, as Richard Pildes has noted, is achieving the right balance between critical thought and value inculcation: "*Pico* must rest on a constitutional distinction between public education designed to develop critical, rational, and democratic capacities, and education designed to ensure that students conform to currently prevailing community perceptions of 'correct' ideas."²⁵⁶

²⁵⁰ Id at 640.

²⁵¹ Id at 631.

²⁵² Id at 637.

²⁵³ 457 US 853 (1982).

²⁵⁴ See id at 872 (plurality opinion); id at 877 (Blackmun concurring).

²⁵⁵ Id at 895 (Powell dissenting).

²⁵⁶ Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in*

More subtle examples of the Court's willingness to invalidate curricular decisions that protect orthodoxy by undermining critical thought are *Epperson v Arkansas*, in which the court invalidated Arkansas's ban on the teaching of evolution,²⁵⁷ and *Edwards v Aguillard*, in which the Court struck down Louisiana's attempt to mandate the teaching of creationism.²⁵⁸ Again, while the Establishment Clause jurisprudence that the Court utilized in each case focused primarily on the purpose of the statute, the two laws would be equally invalid under the effects test I am proposing here. Creationism is not science: rather than open-mindedly seeking the truth, it imposes a single, authoritarian answer to the question of human origins, derived not from critical inquiry but from the Bible. Thus, either prohibiting the teaching of legitimate science, or requiring the teaching of religion in the guise of science, undermines critical inquiry.²⁵⁹ Such an attempt is the antithesis of an education for republican citizenship, for it deprives children of both the knowledge that they may challenge authority and the skills that enable them to do so.

In one case, however, the Court failed to recognize a threat to critical thinking. In *Wisconsin v Yoder*, the Court allowed Amish parents to deprive their children of an otherwise-mandatory high school education.²⁶⁰ The Court's sympathetic rendering of Amish life and values, and its suggestion that high school's emphasis on "intellectual and scientific accomplishments" was unnecessary and even inimical to the Amish way of life,²⁶¹ cannot disguise the fact that the Court's ruling prevented Amish children from acquiring the capabilities they need to become full citizens of the broader republic. What the Court said about the absolute denial of education in *Plyler v Doe* is equally apt with regard to the denial of an adequate education for citizenship: "By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."²⁶²

Constitutional Law, 45 Hastings L J 711, 734 (1994).

²⁵⁷ 393 US 97, 107 (1968).

²⁵⁸ 482 US 578, 587 (1986).

²⁵⁹ For an alternative view of how creationism is inconsistent with critical thought, see Gutmann, *Democratic Education* at 101-04 (cited in note 112).

²⁶⁰ 406 US 205, 234 (1972).

²⁶¹ *Id.* at 211-12.

²⁶² 457 US 202, 223 (1982). Douglas's dissent in *Yoder* made a similar point: "If a parent keeps his child out of school beyond grade school, then that child will forever be barred from entry into the new and amazing world of diversity that we have today." 406

If the Court has largely been willing, nevertheless, to invalidate attempts to instill cultural literacy or foster moral character when those attempts undermine the equally important educational task of teaching critical skills, it has also been willing to allow fairly heavy-handed cultural inculcation where there is no threat to critical thought. In *Ambach v Norwick*, the Court upheld New York's decision to exclude aliens who had no desire to become United States citizens from teaching in public schools.²⁶³ The plaintiffs in *Ambach* were in fact eligible for citizenship but refused to apply.²⁶⁴ The Court relied on two assumptions that are perfectly congruent with responsible republican education: that schools are important in "the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests,"²⁶⁵ and that "a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values."²⁶⁶ Thus, a teacher who deliberately chooses to place her primary loyalty and confidence elsewhere (and who may therefore intentionally or inadvertantly communicate to her charges the values on which that choice is based) is a poor role model for future *American* citizens. The basic assimilationist underpinning of my approach is broad enough to encompass *Ambach*.

In conclusion, if the Court's record on broad educational policy questions is evaluated from the standpoint of a responsible republican education, it has seriously erred only twice (in *Yoder* and *Kuhlmeier*).²⁶⁷ Beginning with a premise that the purpose of education is to produce responsible republican citizens can

US at 245. *Yoder* appears to be an anomaly. More recent attempts by religious groups to insist on governmental assistance in isolating their children from the general culture have failed. See, for example, *Mozert v Hawkins County Board of Education*, 827 F2d 1058, 1070 (6th Cir 1987) (denying parents the right to withdraw their children from particular classes that conflicted with parents' religious beliefs); *Board of Education of Kiryas Joel Village School District v Grumet*, 114 S Ct 2481, 2494 (1994) (striking down establishment of separate school district for children of Hasidic Jews).

²⁶³ 441 US 68, 80-81 (1979).

²⁶⁴ *Id* at 71. The challenged statute exempted from the ban aliens who manifested a desire to become citizens, whether or not they were actually eligible for citizenship at the time. Only those who unilaterally chose not to become citizens were prohibited from teaching in the public schools. *Id* at 70 & nn 1-2.

²⁶⁵ *Id* at 76.

²⁶⁶ *Id* at 78-79.

²⁶⁷ Moreover, the Court has navigated these difficult shoals without obvious influence by political factors: of the correctly decided cases, some are castigated by the left and some by the right. On the other hand, of the two I have suggested are incorrectly decided, one (*Kuhlmeier*) is the bane and the other (*Yoder*) the darling of many politically liberal academics.

thus shed light on an otherwise rambling and uncertain area of the law. It can also, I hope, illuminate what has become *the* modern educational controversy: school financing.

C. School Financing

Since the Supreme Court threw the issue of financial inequities between school districts back to the state courts in 1973,²⁶⁸ the courts of at least twenty-nine states have ruled on the question, some of them several times.²⁶⁹ The New Jersey Supreme Court alone has invalidated five different legislative schemes.²⁷⁰ There is little consistency in analysis or outcome; similar or identical constitutional provisions have often yielded opposite deci-

²⁶⁸ *San Antonio School District v Rodriguez*, 411 US 1, 54-55 (1973).

²⁶⁹ See *Alabama Coalition for Equality v Hunt*, 1993 WL 204083, *62-63 (Ala Cir); *Shofstall v Hollins*, 110 Ariz 88, 515 P2d 590 (1973); *Dupree v Alma School District*, 297 Ark 340, 651 SW2d 90, 95 (1983); *Serrano v Priest*, 5 Cal 3d 584, 96 Cal Rptr 601 (1971) ("*Serrano I*"); *Serrano v Priest*, 18 Cal 3d 728, 135 Cal Rptr 345 (1977) ("*Serrano II*"); *Lujan v Colorado Board of Education*, 649 P2d 1005, 1018-19 (Colo 1982); *Horton v Meskill*, 172 Conn 615, 376 A2d 359, 374-75 (1977); *Sheff v O'Neill*, 42 Conn Supp 172, 609 A2d 1072, 1076 (Conn Super 1992); *McDaniel v Thomas*, 248 Ga 632, 285 SE2d 156, 168 (1981); *Thompson v Engelking*, 96 Idaho 793, 537 P2d 635, 651-52 (1975); *Idaho Schools for Equal Educational Opportunity v Evans*, 123 Idaho 573, 850 P2d 724, 732-34 (1993); *Rose v Council for Better Education*, 790 SW2d 186, 206-09 (Ky 1989); *Hornbeck v Somerset County Board of Education*, 295 Md 597, 458 A2d 758, 785-86 (1983); *McDuffy v Executive Office of Education*, 415 Mass 545, 615 NE2d 516, 552-54 (1993); *Milliken v Green*, 389 Mich 1, 203 NW2d 457, 471-72 (1972), vacated, 390 Mich 1, 212 NW2d 711, 721 (1973); *E. Jackson Public Schools v State*, 133 Mich App 132, 348 NW2d 303, 306 (1984); *Skeen v State*, 505 NW2d 299, 318 (Minn 1993); *Helena Elementary School District v State*, 236 Mont 44, 769 P2d 684, 690 (1989); *Gould v Orr*, 244 Neb 163, 506 NW2d 349, 353 (1993); *Robinson v Cahill*, 67 NJ 473, 303 A2d 273, 295 (1973); *Abbott v Burke*, 119 NJ 287, 575 A2d 359 (1990); *Reform Education Financing Inequality Today v Cuomo*, 152 Misc 2d 714, 578 NYS2d 969, 975-76 (Sup Ct 1991); *Britt v North Carolina Board of Education*, 86 NC App 282, 357 SE2d 432, 437 (1987); *Board of Education of Cincinnati v Walter*, 58 Ohio St 2d 368, 390 NE2d 813, 822 (1979); *Fair School Finance Council of Oklahoma, Inc. v State*, 746 P2d 1135, 1150 (Okla 1987); *Olsen v State*, 276 Or 9, 554 P2d 139, 147 (1976); *Coalition for Equitable School Funding Inc. v State*, 311 Or 300, 811 P2d 116, 127 (1991); *Danson v Casey*, 484 Pa 415, 399 A2d 360, 367 (1979); *Richland County v Campbell*, 294 SC 346, 364 SE2d 470, 472 (1988); *Tennessee Small School Systems v McWhorter*, 851 SW2d 139, 156 (Tenn 1993); *Edgewood Independent School District v Kirby*, 777 SW2d 391, 397 (Tex 1989); *Edgewood Independent School District v Kirby*, 804 SW2d 491, 497 (Tex 1991); *Carrollton-Farmers Branch Independent School District v Edgewood Independent School District*, 826 SW2d 489, 503 (Tex 1992); *Seattle School District v State*, 90 Wash 2d 476, 585 P2d 71, 104 (1978); *Pauley v Kelly*, 162 W Va 672, 255 SE2d 859, 879-80 (1979); *Buse v Smith*, 74 Wis 2d 550, 247 NW2d 141, 155 (1976); *Kukor v Grover*, 148 Wis 2d 469, 436 NW2d 568, 585 (1989); *Washakie County School District v Herschler*, 606 P2d 310, 332 (Wyo 1980).

²⁷⁰ For a review of the first four court cases, see Jerry Gray, *Ruling Puts New Jersey in Eye of School Financing Issue*, NY Times B6 (Sept 2, 1993). The New Jersey Supreme Court invalidated the legislature's latest attempt in July 1994. *Abbott v Burke*, 136 NJ 444, 643 A2d 575, 576 (1994).

sions.²⁷¹ One state has essentially given up: the Michigan legislature recently repealed the state's only source of public school funding without enacting any new legislation.²⁷² Commentators have had a field day.²⁷³

With no resolution of this thorny issue in sight, can a responsible republican approach add anything? I believe that it can. In particular, the concept that education should be designed to produce functioning citizens and the recognition that individual students and their parents have an important role to play in education can yield two insights that are not prominent on the surface of the current debate. First, there is a difference between an adequate education and a financially equal one. Second, guaranteeing even an adequate education is not solely the responsibility of the state; thus the appropriate remedy for failures is not necessarily to force the state to fund schools more equally. I deal with each of these propositions in turn.

1. Throwing money at education.

In all the states in which school financing has been challenged, the problem is that, because school districts generally finance education partly out of local property taxes, inequalities arise between property-rich and property-poor or financially overburdened school districts. Some courts have responded by requiring the legislature to equalize per-pupil spending between dis-

²⁷¹ Compare *Robinson*, 303 A2d at 295 (constitutional requirement of "thorough and efficient" public school system requires "equal educational opportunity," and funding system invalid), with *Walter*, 390 NE2d at 822 (constitutional requirement of "thorough and efficient" public school system gives legislature almost unlimited discretion, and funding system valid). See generally Note, *State Constitutional Analyses of Public School Finance Reform Cases: Myth or Methodology?*, 45 Vand L Rev 129, 153 (1991).

²⁷² Michael deCourcy Hinds, *Drastic Start From Scratch on Financing for Schools*, NY Times A15 (July 28, 1993). The Michigan teachers union immediately filed a lawsuit challenging the legislation. *Michigan Drops Property Taxes for Schools, Prompting Lawsuit*, NY Times A5 (Aug 21, 1993). Some months later, the legislature decided to rely on an increased sales tax for educational funding.

²⁷³ See, for example, Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 Temple L Rev 1325, 1326-29 (1992); Patricia F. First and Louis F. Miron, *The Meaning of an Adequate Education*, 70 Educ L Rptr 735, 737-39 (1992); Edward N. Fadeley, *Determining the Scope of State Constitutional Education Guarantees: A Preliminary Methodology*, 28 Willamette L Rev 333, 334-35 (1992); William H. Clune, *New Answers to Hard Questions Posed by Redriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 Conn L Rev 721, 723-32 (1992); John C. Pittenger, *Equity in School Finance: The Federal Government's Role?*, 24 Conn L Rev 757, 758-63 (1992); William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 Educ L Rptr 19 (1993).

tricts (or at least to narrow the gap). Some commentators have suggested that even equal spending is insufficient: poorer school districts should be given sufficiently more money than richer ones to ensure that the student outcomes are equal.²⁷⁴ The validity of such solutions across the board (rather than in individual cases) depends on two assumptions that are questionable under a responsible republican approach: that an education cannot be adequate unless it is equal, and that equalizing financial resources will remove the differences among school districts.

From the standpoint of responsible republicanism, all students are entitled to the opportunity to obtain an education that will equip them to exercise the rights and responsibilities of citizenship. Obviously, some school districts are so poor that they cannot provide such an education. The New Jersey court, for example, described the conditions at poor urban schools in some districts:

[I]n 1986 in Paterson a gymnasium floor collapsed in one school, and in another school the entire building was sinking. . . .

In an elementary school in Paterson, the children eat lunch in a small area in the boiler room area of the basement; remedial classes are taught in a former bathroom. In one Irvington school, children attend musical classes in a storage room and remedial classes in converted closets. At another school in Irvington a coal bin was converted into a classroom. In one elementary school in East Orange, there is no cafeteria, and the children eat lunch in shifts in the first floor corridor. In one school in Jersey City, built in 1900, the library is a converted cloakroom; the nurse's office has no bathroom or waiting room; the lighting is inadequate; the bathrooms have no hot water . . . ; there is water damage inside the building because of cracks in the facade; and the heating system is inadequate.²⁷⁵

In the face of evidence like this, it is hard to disagree with the New Jersey court's holding that the state was not providing a constitutionally adequate education to all of its children. Even

²⁷⁴ See, for example, Liebman, 90 Colum L Rev at 1647-48 (cited in note 21); Charles S. Benson, *Definitions of Equity in School Finance in Texas, New Jersey, and Kentucky*, 28 Harv J Legis 401, 402 (1991).

²⁷⁵ *Abbott v Burke*, 119 NJ 287, 575 A2d 359, 397 (1990). For a chilling description of the inadequacy of other schools, see Jonathan Kozol, *Savage Inequalities: Children in America's Schools* (Crown, 1991).

the Supreme Court has recognized that the absolute deprivation of an adequate education is constitutionally impermissible.²⁷⁶ Moreover, it is clear that all of the problems identified by the New Jersey court could be easily remedied with an infusion of money into the poorer districts.

But some courts have required legislatures to remedy much less glaring disparities, and others have invalidated funding schemes without any showing that the students in poorer districts were receiving an inadequate (as opposed to an unequal) education. For example, the Wyoming Supreme Court invalidated a legislative scheme simply because it produced funding disparities, on the ground that "[e]quality of dollar input is manageable [and] [t]here is no other viable criterion or test" for determining the quality or adequacy of education.²⁷⁷ The Washington Supreme Court similarly invalidated a system that relied on local funding because it did not produce "dependable and regular" income,²⁷⁸ despite an uncontested finding that the plaintiff school district had teacher salaries above and student-teacher ratios close to the statewide average.²⁷⁹ Neither court could point to specific deficiencies that interfered with the provision of an adequate education.²⁸⁰

Focusing on education for republican citizenship changes the approach from asking whether the education is unequal to asking whether it is inadequate. In Wisconsin, for example, the state supreme court refused to invalidate funding disparities because it found that all children were receiving what it believed to be an adequate education.²⁸¹ Thus, although a school district's poverty, combined with the amount of the financing burden borne by local property taxes under a particular state's scheme, will usually result in disparities between that district and wealthier districts, it will not always result in an *inadequate* education. Certainly the deficiencies noted by the New Jersey court persuasively established that children in the poorer districts were receiving

²⁷⁶ See *San Antonio School District v Rodriguez*, 411 US 1, 23-24 (1973); *Plyler*, 457 US at 223.

²⁷⁷ *Washakie County School District v Herschler*, 606 P2d 310, 334 (Wyo 1980).

²⁷⁸ *Seattle School District v State*, 90 Wash 2d 476, 585 P2d 71, 99 (1978).

²⁷⁹ Id at 121 (Rosellini dissenting).

²⁸⁰ The Washington court noted only that the funding system required some school districts to reduce the amounts allocated to various general categories, without discussing whether the education remained adequate. Id at 98.

²⁸¹ *Kukor v Grover*, 148 Wis 2d 469, 436 NW2d 568, 579 (1989). Although I am endorsing the approach of the *Kukor* court, it is not possible to tell from the opinion whether their conclusion of adequacy was in fact correct.

an inadequate education. But the deficiencies relied on by some courts are of doubtful importance to overall education for citizenship. For example, the Tennessee Supreme Court invalidated a funding scheme in part because it created disparities in “advanced foreign language courses, music and art courses, drama and television courses,”²⁸² and “extracurricular athletic teams.”²⁸³

I suggest that only gross deficiencies should be held to deprive children of an adequate education for three reasons. First, as almost every court has recognized, the complexities of school funding are much better suited to legislative than judicial resolution.²⁸⁴ Thus, courts should be loath to disturb legislative attempts to balance all the factors that affect school funding schemes, including school equity, local control, voter willingness to support schools, and disincentives to engage in waste or mismanagement.

More importantly, only the very grossest deficiencies—for example, the unsafe buildings and missing facilities found in New Jersey—are likely to make a difference in outcome. As noted earlier, virtually all of the researchers in this area conclude that most financially remediable factors make little or no difference to whether a school performs effectively.²⁸⁵ Thus, the standard judicial remedy—equalizing funding—probably will not provide a better education to those in weak or inadequate schools unless the inadequacy is patent and debilitating.

Finally, even if the wealthier districts do provide a “better” education in some sense, a responsible republican approach suggests limits to the egalitarianism behind some of the state court rulings. A republican approach sees the purpose of education as preparation for citizenship: as long as it is adequate to that task, all children’s education need not be equal. The republican emphasis on virtue and responsibility necessarily leads to a higher tolerance for inequalities than is currently acceptable under an individual rights model. Some parents who can afford better

²⁸² *Tennessee Small School Systems v McWherter*, 851 SW2d 139, 144 (Tenn 1993). See also *Helena Elementary School District v State*, 236 Mont 44, 769 P2d 684, 687-88 (1989) (evidence of unconstitutional disparities included “richer and expanded curricula,” especially in “specialty areas of physical education, music, and art”; no finding of inadequate education at poorer schools).

²⁸³ *McWherter*, 851 SW2d at 146.

²⁸⁴ See generally Note, *Education Finance Reform Litigation and Separation of Powers: Kentucky Makes Its Contribution*, 80 Ky L J 309 (1990-91).

²⁸⁵ See text accompanying notes 214-17.

schools (whether by moving to wealthier districts or purchasing a private education) may be unwilling to make the sacrifices to do so, and some parents may be unable to do so in part because of earlier unvirtuous choices regarding their own education or diligence. Some children will take advantage of the educational opportunities offered, however large or small, and some will not. The approach I am advocating in this Article, with its endorsement of a strong sense of individual (and familial) responsibility, suggests that such differences are inevitable in a heterogeneous society and should not be suppressed.²⁸⁶ Just as guaranteeing that no one will starve does not guarantee that everyone will eat caviar, guaranteeing an education adequate to citizenship does not mean that some parents may not choose to purchase an even better education for their children. The current obsession with equality, moreover, often serves to distract attention from the real problem: very few children today are receiving an education adequate to citizenship, regardless of their family's financial situation.

If the problem is not inequality but inadequacy, a problem that the usual solution of increasing funding will not solve, how can we guarantee an education for citizenship to our children, especially those in the poorest districts? The answer turns on the much neglected proposition that citizens have responsibilities as well as rights. While it is the responsibility of the state to provide an adequate education, it is the responsibility of the individual student (or the student's parents) to take advantage of it. In the next Section, I explore the ramifications for school financing of the republican notion of individual responsibility.

2. Individual responsibility and individual choice.

Courts are invalidating schemes that fund schools out of local property taxes, state legislatures are increasingly pressed for funds, and doubts are rising about the effectiveness of the current public school system. As a result, some states have begun looking for alternative methods of financing effective schools. Wisconsin has implemented a pilot program of parental choice, subsidizing private school attendance for some low-income Milwaukee students.²⁸⁷ A measure to permit education vouchers

²⁸⁶ See text accompanying note 31.

²⁸⁷ See Wis Stat § 119.23 (1991 & Supp 1993). For discussions of the Wisconsin plan, see, for example, Note, *Milwaukee Parental Choice Program Upheld*, 75 Marq L Rev 673, 673-76 (1992); Comment, *The Constitutional Implications of School Choice*, 1992 Wis L

(which would allow parents to use state money to send their children to schools of their own choosing, including private schools) was on the ballot in California in 1993, although it lost by a large margin. As one commentator notes, "Choice proposals for educating children have been around for centuries."²⁸⁸ Although the idea of using state-funded vouchers to subsidize parental choice is not new, it seems to be gaining favor. The best-known modern proponents of choice are Milton Friedman,²⁸⁹ John Coons and Stephen Sugarman,²⁹⁰ and John Chubb and Terry Moe.²⁹¹ Their proposals vary in detail, but all agree that the government should encourage market competition among both public and private schools by subsidizing tuition costs for private school attendance, thus increasing parental choice about education.²⁹²

In the remainder of this Article, I will suggest that, despite its potential shortcomings, a voucher (or choice) system is in accordance with the basic principles of responsible republican education. I will also respond to the most common criticisms of a voucher system. It is important to note at the outset, however, that my arguments in favor of choice are quite different from the usual liberal or libertarian justifications offered by most choice proponents. Neither individual freedom nor economic efficiency is a sufficient justification under a republican vision of education; instead, we must examine whether voucher plans are superior to the current system in terms of both educating children for responsible citizenship and reinvigorating the lost assumption of individual responsibility in society.

Giving parents the financial means to choose where their children will be educated promotes responsible republican citizen-

Rev 459, 469-71.

²⁸⁸ James S. Liebman, *Voice, Not Choice*, 101 Yale L J 259, 277 (1991), reviewing John E. Chubb and Terry M. Moe, *Politics, Markets, and America's Schools* (Brookings, 1990) (citing, inter alia, Thomas Aquinas, Thomas Paine, John Stuart Mill, and Adam Smith).

²⁸⁹ Milton Friedman, *The Role of Government in Education*, in Robert A. Solo, ed, *Economics and the Public Interest* 123 (Rutgers, 1955).

²⁹⁰ John E. Coons and Stephen D. Sugarman, *Education By Choice: The Case for Family Control* (California, 1978); John E. Coons and Stephen D. Sugarman, *Family Choice in Education: A Model State System for Vouchers*, 59 Cal L Rev 321 (1971); John E. Coons and Stephen D. Sugarman, *The Scholarship Initiative: A Model State Law for Elementary and Secondary School Choice*, 21 J L & Educ 529 (1992).

²⁹¹ John E. Chubb and Terry M. Moe, *Politics, Markets, and America's Schools* (Brookings, 1990).

²⁹² I am using "choice" and "voucher" interchangeably, and I am intentionally omitting the versions of "choice" that give parents a choice only among public schools. See, for example, Minn Stat § 120.062 (1993 & Supp 1994).

ship in several ways. First, of course, to the extent that it improves education for at least some future citizens, it will further the basic goals of an education for citizenship. Proponents of choice argue generally that a market in educational services will necessarily improve the quality of those services by increasing competition among providers. We need not rely solely on speculation, however: at least one study strongly suggests that private schools are in fact more effective at educating their students than are public schools, even when race, socioeconomic status, and other family factors are held constant.²⁹³ Moreover, to the extent that the quality of education depends primarily on discipline and teacher expectations, the *public* nature of public education—including, for example, the power wielded by teachers' unions,²⁹⁴ the protections accorded by civil servant status, the hierarchical and bureaucratic organization of the schools,²⁹⁵ and the process due before a student can be expelled²⁹⁶—might interfere with attempts to improve the quality of education. Thus, it is at least plausible to suggest that increased access to private schools—coupled with regulation to ensure that voucher schools as well as public schools teach the three aspects of education for citizenship outlined earlier—would improve the quality of education for those who formerly lacked such access. Whether that improvement might come at too high a cost is a question I will defer until my discussion of the pitfalls of voucher plans.²⁹⁷

The uniquely republican advantage to a choice system, however, is that it rewards and encourages individual responsibility. Families who are forced into unresponsive public schools by economic circumstances, and commentators who bemoan those schools' dismal statistics, will inevitably tend to blame the schools when students do not do well. Indeed, the students' failure may be due in part to poor schools which have little or no incentive to improve and in part to the lack of choice itself. Removing the compulsion removes the crutch that allows individu-

²⁹³ See Coleman, Hoffer, and Kilgore, *High School Achievement* at 178-79 (cited in note 180).

²⁹⁴ See, for example, Lieberman, *Public Education* at 47-66 (cited in note 108).

²⁹⁵ See, for example, Sizer, *Horace's Compromise* at 206-09 (cited in note 194); Chubb and Moe, *Politics, Markets, and America's Schools* at 18-20, 66-69 (cited in note 291).

²⁹⁶ On due process, see *Goss v Lopez*, 419 US 565, 577-84 (1975).

²⁹⁷ Another advantage to a system of choice is that it avoids all of the thorny problems associated with school funding disparities. Once schools depend on student-borne funds rather than on local property taxes, *Rodriguez* problems no longer arise: all school districts compete equally for the same funds. If parents are judging the minimal adequacy of schools, courts don't have to.

als and families to claim this type of victim status. A well-designed choice plan tells families that they are responsible for their children's education, and that even the very poor will be rewarded—with superior schooling and the subsequent economic and social advantages it confers—if they act responsibly. Thus, the very act of choosing an education is itself educational, in a republican sense, for the parents and children involved.

There are, of course, a number of criticisms of a voucher system. Two related criticisms are that such a system would increase racial and economic segregation,²⁹⁸ and that it would benefit only the wealthy, leaving the poorest students in public schools that deteriorate even further as those with greater choice abandon them.²⁹⁹ Both existing research and common sense suggest that these criticisms are unwarranted.

The only comprehensive study to evaluate the question of segregation reaches exactly the opposite conclusion: that because private schools are on average less segregated than public schools, increasing the percentage of children (especially the percentage of poor and minority children) attending private schools would most likely decrease racial and economic segregation.³⁰⁰ Since wealthy parents already have a choice of schools, it is reasonable to expect that a voucher system will primarily increase the power of the disproportionately minority poor who cannot currently afford to opt out of the public schools.³⁰¹ Indeed, one critic of choice plans implicitly recognizes this when he suggests that the best way to improve inner-city public schools is to eliminate the exit options that wealthy parents currently have.³⁰²

²⁹⁸ See, for example, Donald Fisher, *Family Choice and Education: Privatizing a Public Good*, in Michael E. Manley-Casimir, ed, *Family Choice in Schooling: Issues and Dilemmas* 199, 202-03 (Lexington, 1982); Richard M. Merelman, *Knowledge, Educational Organization, and Choice*, in William H. Clune and John F. Witte, eds, 1 *Choice and Control in American Education: The Theory of Choice and Control in Education* 79, 82-85 (Falmer, 1990); Liebman, 101 Yale L J at 284-86 (cited in note 288); Kaus, *The End of Equality* at 156 (cited in note 105); Center for the Study of Public Policy, *Education Vouchers: A Report on Financing Elementary Education by Grants to Parents* 6, 29 (1970).

²⁹⁹ See, for example, Liebman, 101 Yale L J at 293-98 (cited in note 288); Jomills Henry Braddock, II, *The Issue Is Still Equality of Educational Opportunity*, 51 Harv Educ Rev 490, 495 (1981); Center for the Study of Public Policy, *Education Vouchers* at 30-31.

³⁰⁰ Coleman, Hoffer, and Kilgore, *High School Achievement* at 36-41, 68-70, 177, 182-84 (cited in note 180).

³⁰¹ See, for example, Stephen Arons, *Educational Choice as a Civil Rights Strategy*, in Neal E. Devins, ed, *Public Values, Private Schools* 63 (Falmer, 1989); John E. Coons, *As Arrows in the Hand*, in William H. Clune and John F. Witte, eds, 1 *Choice and Control in American Education: The Theory of Choice and Control in Education* 319, 320-22 (Falmer, 1990).

³⁰² Liebman, 101 Yale L J at 299-302, 308-14 (cited in note 288).

Finally, at least some poor minority parents themselves believe that choice represents an improvement over the current system: the relief they sought in their equal protection suit for educational discrimination was city reimbursement for attendance at private schools.³⁰³

Arguments that choice plans would restrict educational opportunities for the poor ultimately rest on a paternalistic view of poor and minority parents. No one seems to deny that at least some poor and minority students would be better off—those whose parents actually used the vouchers in a way that improved the education of their children. The problem, according to one critic, is that a voucher system “assumes that all parents and students are capable of making rational, positive choices.”³⁰⁴ As another critic notes, only “educational connoisseurs” are willing to make the effort necessary to obtain a better education for their children, and increasing their exit options necessarily diminishes the quality of the schools they leave behind.³⁰⁵ The case against choice thus rests on an acceptance and accommodation of individual irresponsibility: because some poor parents will not fulfill their duties to their children responsibly, we should deny them the choice that is already available to wealthier parents. A responsible republican approach exposes the fallacy of this stragem at its roots. All parents should be expected to behave responsibly, and public policy should assume that they will do so. Thus, a choice plan is better public policy because it, unlike opposition to choice, assumes that parents will behave responsibly.

But what of parents who in fact do not act responsibly? Any proponent of choice must confront the problem that children whose parents do not use their educational vouchers responsibly may in fact be left in a worse position than they are in now, as they and their schools are abandoned by classmates who possess one of the most important advantages—parents who care about education. It seems incontrovertible that “kids will learn more math and speak clearer English if they’re surrounded by kids who care about learning math and who speak clear English.”³⁰⁶

³⁰³ See *Rivarde v Missouri*, 930 F2d 641, 642 (8th Cir 1991) (denying the requested relief). See also Deborah E. Beck, *Jenkins v. Missouri: School Choice as a Method for Desegregating an Inner-City School District*, 81 Cal L Rev 1029, 1047-57 (1993).

³⁰⁴ Mary Jane Guy, *The American Common Schools: An Institution At Risk*, 21 J L & Educ 569, 572 (1992).

³⁰⁵ Liebman, 101 Yale L J at 295-98 (cited in note 288).

³⁰⁶ Kaus, *The End of Equality* at 108-09 (cited in note 105). See also Liebman, 101 Yale L J at 293-95 (cited in note 288).

How do we protect children whose parental irresponsibility deprives them of an education adequate to citizenship?

There are two possible solutions, depending on how firmly committed we are to encouraging individual responsibility. First, we can do what Mickey Kaus suggests in another context. Kaus argues that all welfare ought to be terminated, but that every single mother should be guaranteed a job and day care. What happens to those who refuse?

The short answer is that nothing happens. There's no penalty. Also no check. Perhaps she will discover some other, better way of feeding herself and her family. If, on the other hand, her children are subsequently discovered living in squalor and filth, then she has neglected a basic task of parenthood. She is subject to the laws that already provide for removal of a child from an unfit home.³⁰⁷

A parent who refuses to exercise her responsibility to provide her children with an adequate education—when the state, through vouchers, is offering her the means to do so—is similarly neglecting a basic task of parenthood. And perhaps her children will be better off with the state as surrogate parent. Those who view the poor as incompetent to choose schools are already requiring the state to exercise one important parental responsibility, so why not concede defeat and let the state do the whole job?³⁰⁸ Moreover, the implicit or explicit threat that their children might be taken away (together with a careful system of warnings, hearings, and other mechanisms designed to provide incentives for change rather than immediate punishment) might induce more parents to become concerned about their children's education.

If that approach still seems unduly harsh, Susan Rose-Ackerman has offered a more sophisticated solution. She proposes "proxy shopping," which "makes use of the market choices of unsubsidized clients to ensure high quality for the needy."³⁰⁹ In other words, the state can purchase education for those whose

³⁰⁷ Kaus, *The End of Equality* at 126-27 (cited in note 105).

³⁰⁸ Indeed, a number of states already have child welfare statutes that include educational neglect within the definition of parental neglect. See, for example, Minn Stat § 260.015.2a(3) (1992 & Supp 1994); Mo Rev Stat § 210.110(5) (1983 & Supp 1994); NY Family Ct Act § 1012(f)(i)(A) (McKinney 1994). See generally Eric W. Johnson, *Educational Neglect as a Proper Harm to Warrant a Child Neglect Finding*: In re B.B., 76 Iowa L Rev 167 (1990).

³⁰⁹ Susan Rose-Ackerman, *Rethinking the Progressive Agenda: The Reform of the American Regulatory State* 97-98 (Free Press, 1992). See generally id at 97-117.

parents are unable or unwilling to make the choices themselves, based on the choices of those motivated to do so. Rose-Ackerman herself does not believe that proxy shopping will work in the educational setting,³¹⁰ but her reasons for this negative assessment are not persuasive as to *all* choice plans. She suggests that proxy shopping will not work in education for two reasons: there are no "paying customers," and high-income parents in fact prefer to segregate their children from poor children. This ensures that every time the state uses high-income parents as proxies to place poor children in the same schools, those parents will exit the schools.³¹¹

The solution to these problems is provided by Rose-Ackerman herself: if all schools are required to "accept a share of the needy," or the wealthy are compensated for giving up their prejudices, an educational voucher system has more potential.³¹² And indeed, some choice proposals contain various provisions designed both to attract the wealthy and to entice or compel schools to take the least desirable students.³¹³ Moreover, those who argue that the wealthy will be the only ones who benefit from a voucher plan must believe that the benefit is some compensation of the sort to which Rose-Ackerman alludes. While designing a specific plan that takes account of Rose-Ackerman's difficulties may not be easy, neither should it be impossible. It is also possible that proxy shopping might be unnecessary: consumer and producer behavior in other market contexts suggests that in order to compete, all schools would adopt the improvements desired by the most concerned parents, thus benefitting the children of unconcerned parents as well.³¹⁴

One final criticism of choice plans is worthy of note. Several commentators have suggested that using vouchers would interfere with the transmission of a common culture by "encouraging separation and stratification of students according to parental

³¹⁰ Id at 114-16.

³¹¹ Id at 115. Although this does not affect the validity of her criticism, I believe she is mistaken about the motivations of high-income parents. It is not poor children per se they seek to avoid, but the children of parents who do not care enough about education. See Kaus, *The End of Equality* at 108-20 (cited in note 105). Nevertheless, since I am suggesting proxy shopping as a solution to the irresponsibility of those parents, it is likely that high-income parents will similarly seek to avoid schools in which the state places the children of the irresponsible.

³¹² Rose-Ackerman, *Rethinking the Progressive Agenda* at 115 (cited in note 309).

³¹³ See, for example, Coons and Sugarman, 21 *J L & Educ* at 533-36 (cited in note 290).

³¹⁴ See Lieberman, *Public Education* at 94-113 (cited in note 108).

commitments and orientations and by tailoring curricula to appeal to and reinforce these parental concerns.³¹⁵ Since this goes to the heart of a republican education, such a criticism, if valid, would seriously undermine my claim that responsible republicanism is compatible with a voucher plan. There are two reasons why the criticism is wrong. First, of course, some parents already have such a choice, and few would wish to deprive them of it. The "cultural transmission" critics must either concede that private schools are also transmitting a common culture (and perhaps doing so more effectively³¹⁶), or be willing to abandon the children of the wealthy to educational failure. More importantly, adoption of a voucher system need not entail abandonment of state involvement in the curriculum. While some proposals would prohibit the state from regulating private schools that take vouchers,³¹⁷ a *republican* voucher plan necessarily incorporates the educational basics laid out in Part II. Thus, although private schools would remain private in many ways,³¹⁸ the state could still ensure that their curricula are adequate to produce responsible republican citizens. Indeed, this would be an improvement over the current system, under which neither public nor private schools are required to meet this standard.

Amy Gutmann has suggested a more sophisticated criticism of vouchers from a republican perspective. She argues that regulating voucher schools has two flaws. If the regulation is minimal, "[v]oucher plans attempt to avoid rather than settle our

³¹⁵ Henry M. Levin, *Educational Vouchers and Social Policy* 16 (Institute for Research on Educational Finance and Governance, 1979). For criticism along the same lines, see Guy, 21 *J L & Educ* at 578-81 (cited in note 304); Amy Gutmann, *Democratic Schools and Moral Education*, 1 *Notre Dame J L Ethics & Policy* 461, 476-80 (1985).

³¹⁶ See Coleman, Hoffer, and Kilgore, *High School Achievement* at 144 (cited in note 180).

³¹⁷ See, for example, Arons, *Compelling Belief* at 213 (cited in note 179).

³¹⁸ The two most troubling issues, which are beyond the scope of this Article, are religion and racial discrimination. It seems clear that the government could continue to prohibit private schools from discriminating, whether or not the schools accept vouchers. And as to religious schools, while the wisdom of state subsidies to parochial schools may be questionable, after *Lee v Weisman*, 112 S Ct 2649, 2660-61 (1992), and *Zobrest v Catalina Foothills School District*, 113 S Ct 2462, 2469 (1993), the constitutionality is not. See Suzanna Sherry, *Lee v Weisman: Paradox Redux*, 1992 S Ct Rev 123, 131-33. See generally Michael Stekes Paulsen, *Lemon Is Dead*, 43 *Case W Res L Rev* 795, 843-61 (1993). See also *Mueller v Allen*, 463 US 388, 401-04 (1983). The finer points of regulation, including student discipline, teacher protections, whether schools could charge more than the voucher amount, and so on, are details that must await a more appropriate article. Other issues will also arise, such as questions about how to accommodate students with disabilities. See Mei-lan E. Wong, *The Implications of School Choice for Children With Disabilities*, 103 *Yale L J* 827 (1993).

disagreements over how to develop democratic character through schooling.³¹⁹ On the other hand, if the regulation is pervasive, it erroneously assumes a “single self-evident set of regulations” as opposed to a variety of ways to inculcate democratic character.³²⁰ Thus, no voucher plan can successfully incorporate the notion of education for citizenship.

My proposal is somewhere between minimal and pervasive regulation: it is pervasive as to what, generally, must be taught, but minimal as to how it is to be taught and how the schools are to be run. Thus, as to curriculum, I have tried to specify a general set of “regulations” which, while not self-evident, I have tried to justify persuasively. Nevertheless, the particulars that Gutmann mentions as useful variations—including civics courses, democratically run schools, graduation or promotion requirements, and busing—are still options under my proposal. The difference between a voucher plan and the current scheme, then, is that parents are permitted to diverge rather than being forced to submit to the majority’s view on these particulars. In short, I disagree with Gutmann over whether “avoid[ance]” or “settle[ment]” is the best solution to the problem of disagreements over education. It is unlikely that all parents will ever agree on educational strategy, so we should allow all parents the choices that a few parents have under the current system. In addition, forcing parents to settle their differences is likely to lead to controversy over details and side issues and, consequently, to dilute the commitment to—and the effectiveness of—the basic education for citizenship outlined in this Article.

Funding schools through a voucher plan, with state enforcement of republican educational policy, is thus consistent with responsible republicanism. Moreover, a voucher system has an additional advantage under a republican approach in that it rewards individual responsibility and avoids holding the state—and productive citizens—responsible for individual failures of will.

CONCLUSION

Our schools are failing, and the basic tenets of liberal individualism are under attack. I have tried to suggest that the two phenomena may be related, both in their causes and in their

³¹⁹ Gutmann, *Democratic Education* at 68 (cited in note 112).

³²⁰ *Id.* at 69.

remedies. Because we have lost our own virtue, we are corrupting the next generation. That is neither just nor inevitable. An emphasis on individual responsibility, especially as played out in the educational context, may reclaim our republican heritage and rescue liberalism from its own excesses.