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SOME QUESTIONS FOR CIVIL SOCIETY-REVIVALISTS

LINDA C. MCCLAIN* AND JAMES E. FLEMING**

[Civil society is] a concept rich in historical resonances; a concept where a good part of the appeal is the sense of many levels and layers of meaning, deposited by successive generations of thinkers. With it, as most of its uses clearly testify, we are in the realm of the normative, if not indeed the nostalgic. "Civil society" sounds good; it has a good feel to it; it has the look of a fine old wine, full of depth and complexity. Who could possibly object to it, who not wish for its fulfillment? Fine old wines can stimulate but they can also make you drunk, lose all sense of discrimination and clarity of purpose. What is the case for reviving the concept of civil society?¹

I. THE CALLS FOR REVIVING OR RENEWING CIVIL SOCIETY

In this article, we raise some questions for proponents of reviving civil society as a cure for many of our nation's political, civic, and moral ills (whom we designate as "civil society-revivalists").² Calls to

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** Professor of Law, Fordham University School of Law; Faculty Fellow in Ethics, Harvard University Center for Ethics and the Professions, 1999-2000. We are grateful to William Galston for helpful correspondence concerning the arguments in this article. We also have learned from discussing the arguments with Sot Barber, Mike Dorf, Martin Flaherty, Bob Gordon, Abner Greene, Steve Macedo, Michael McConnell, Frank Michelman, and Ben Zipursky. We would like to thank Jessica Givelber, Melissa Lawton, and Connie Lenz for valuable research assistance. Finally, we are grateful to Steve Heyman for inviting us to organize a symposium on civil society. We presented drafts of the article at the 1999 Communitarian Summit and the Georgetown University Law Center Discussion Group on Constitutional Law, as well as at faculty workshops at Boston University School of Law, Fordham University School of Law, and Hofstra University School of Law, and we benefited from comments at those sessions. Harvard, Hofstra, and Fordham provided generous financial support.

1. Krishan Kumar, *Civil Society: An Inquiry into the Usefulness of an Historical Term*, 44 BRIT. J. SOC. 375, 376 (1993).

2. We appreciate that "civil society-revivalist" is a broad, omnibus category that is both over and underinclusive. But it does seem to us, based on studying the literature about civil society, that a number of scholars, public commentators, and political figures have called for reviving or renewing civil society. It is possible to find some common themes among those who have done so and we needed a general term to capture these currents of thought. We certainly do not intend to suggest that all proponents of reviving or renewing civil society think the same things, or that they are a monolithic group. Finally, we do not mean the term "civil society-revivalist" to be a derogatory term. We find support for our usage of the term "revival" in the title of a book that includes essays by a number of persons whose ideas we analyze in this article. See COMMUNITY WORKS: THE REVIVAL OF CIVIL SOCIETY IN AMERICA (E.J. Dionne,

revive or renew civil society are increasingly prominent in political and legal discourse, and such revival has been the subject of intense study and major organizational effort.³ The erosion or disappearance of civil society is a common diagnosis of what underlies all manner of discontent, disorder, and divisiveness in America, and its renewal features prominently as a cure for such problems. First Lady Hillary Clinton, inspired by Vaclav Havel, calls for building up civil society (i.e., a realm between the individual and the state that includes "our churches, our families, our civic associations") in order to inculcate values in "our children," rather than leaving such education to the mass media and "the consumer culture."⁴ She also characterizes civil society as "one of the most important zones of existence" and as a "pillar" between the other "two pillars of modern life," the marketplace and the government.⁵ President Bill Clinton and other political figures invoke a strengthened civil society to address problems that government alone cannot solve.⁶ In the widely-discussed article, *Bowling Alone*, Robert Putnam finds evidence of the disappearance of civil society and loss of social capital in such phenomena as the decline of bowling leagues (a disappearance that he subsequently has attributed to television).⁷ And a central premise

Jr., ed., 1998). We find support for our usage of "renewal" in the title of a commission, the National Commission on Civic Renewal, whose report we discuss, *see infra* note 10, and in the title of a book edited by the research director of that commission. *See CIVIL SOCIETY, DEMOCRACY, AND CIVIC RENEWAL* (Robert K. Fullinwider ed., 1999). We have spoken of calls for the "revival" of civil society in preference to "the revivification of civil society," a formulation used by Jean Bethke Elshtain, who is Chair of the Council on Civil Society, *see infra* note 11, because the former is simpler and is more commonly used in the discourse on civil society. *See JEAN BETHKE ELSHTAIN, DEMOCRACY ON TRIAL* 16 (1995).

3. *See* Elizabeth Norell, *Civil Society, Studied*, FOUND. NEWS & COMMENTARY, Sept.-Oct. 1997, at 15 (detailing the proliferation of groups studying civil society).

4. John M. Broder, *For Hillary Clinton at 50, Yet Another Beginning*, N.Y. TIMES, Oct. 26, 1997, § 1, at 20.

5. Hillary Rodham Clinton, *Civil Society: The Space That Matters Most*, NEW PERSP. Q., Spring 1998, at 12, 12.

6. *See, e.g.*, Todd S. Purdum, *Clinton Calls for Volunteers in Communities and Schools*, N.Y. TIMES, May 11, 1996, § 1, at 8.

7. *See* Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, J. DEMOCRACY, Jan. 1995, at 65 [hereinafter Putnam, *Bowling Alone*]; Robert D. Putnam, *The Strange Disappearance of Civic America*, AM. PROSPECT, Winter 1996, at 34. Putnam has also published a well-received scholarly book, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993). The claims that civil society is in decline and that social capital has eroded raise difficult empirical questions, including how to sort out causation and correlation, as well as evaluative questions, such as what "counts" as civil society and what measures indicate and explain its decline. We do not seek to venture into, or contribute anything new to, the ever-increasing scholarly literature concerning the empirical questions, spawned largely by Putnam's essay, *Bowling Alone*, concerning the decline of civil society. *See, e.g.*, William A. Galston & Peter Levine, *America's Civic Condition: A Glance at the Evidence*, in *COMMUNITY WORKS*, *supra* note 2, at 30 (reviewing the available data); Caroline Hodges Persell, *The Interdependence*

of a recent book, *Seedbeds of Virtue*, is that America's most serious long-term problem is the weakening of child-raising families—said to be first and most basic among the seedbeds of virtue, or institutions of civil society—and that, accordingly, the challenge of shoring up those seedbeds should be at the “front and center of American public deliberation.”⁸

Broadly speaking, there are two strands of civil society-revivalists, which a leader in the civil society movement recently characterized as the civic revivalists and the moral revivalists.⁹ These two strands are illustrated by two recent reports. The first, written by the National Commission on Civic Renewal, is entitled *A Nation of Spectators: How Civic Disengagement Weakens America and What We Can Do About It*.¹⁰ The second, issued by the Council on Civil Society, is entitled *A Call to Civil Society: Why Democracy Needs Moral Truths*.¹¹ The two reports are thoughtful, programmatic, and constructive documents, and they embody in disciplined form many of the themes that have pervaded the more rhetorical, polemical literature about reviving or renewing civil society that preceded them.

of Social Justice and Civil Society, 12 SOC. F. 149 (1997) (questioning Putnam's explanation of the decline of civil society and evaluating many causes of such decline). Based on our assessment of that literature, it seems reasonably clear that it is unhelpful to speak about civil society, as a monolithic entity, in decline. There do appear to be generational shifts in both the nature and quantity of participation in civic life and various forms of association, but there are also important differences between women and men and among racial and ethnic groups in these respects. Moreover, civil society today may encompass forms of community and connection unavailable in earlier generations (e.g., “virtual communities” in cyberspace, electronic town meetings, and the like). Elsewhere, one of us has touched upon these matters. See Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 WM. & MARY L. REV. 759 (1999).

8. Mary Ann Glendon, *Introduction: Forgotten Questions*, in SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY 1, 2 (Mary Ann Glendon & David Blankenhorn eds., 1995).

9. See Don Eberly, *Civic Renewal or Moral Renewal*, J. AM. CITIZENSHIP POL'Y REV., Sept.-Oct. 1998, at 44.

10. NATIONAL COMM'N ON CIVIC RENEWAL, *A NATION OF SPECTATORS: HOW CIVIC DISENGAGEMENT WEAKENS AMERICA AND WHAT WE CAN DO ABOUT IT* (1998) [hereinafter *A NATION OF SPECTATORS*]. William J. Bennett and Senator Sam Nunn are Co-Chairs of the Commission. Professor William A. Galston, who is Executive Director of the Commission, has contributed a response to this symposium, *Civil Society, Civic Virtue, and Liberal Democracy*, 75 CHI.-KENT L. REV. 603 (2000). Copies of this report are available through the National Commission on Civic Renewal, 3111 Van Munching Hall, University of Maryland, College Park, Md. 20742; (301) 405-2790 (phone); (301) 314-9346 (fax); <<http://www.puaf.umd.edu/civicrenewal>>.

11. COUNCIL ON CIVIL SOC'Y, *A CALL TO CIVIL SOCIETY: WHY DEMOCRACY NEEDS MORAL TRUTHS* (1998) [hereinafter *A CALL TO CIVIL SOCIETY*]. Professor Jean Bethke Elshtain, Chair of the Council, has contributed a response to this symposium, *Will the Real Civil Society Advocate Please Stand Up?*, 75 CHI.-KENT L. REV. 583 (2000). Copies of this report are available through the Institute for American Values, 1841 Broadway, Suite 211, New York, N.Y. 10023; (212) 246-3942 (phone); (212) 541-6665 (fax); iav@worldnet.att.net (email).

There is overlap between these reports' goals,¹² diagnoses, and prescriptions—just as there is some overlap in their signatories¹³—but the former emphasizes “civic renewal” and reinvigorating civic character, the capacity for citizenship, and engagement in shared civic purposes,¹⁴ while the latter stresses “moral renewal,” nurturing “the seedbeds of virtue,” and “rediscovering” the “moral truths” of “the public moral philosophy that makes our democracy possible.”¹⁵

The two reports, taken as illustrating civic and moral revivalists, share several premises. First, civil society—understood broadly as “families, neighborhood life, and the web of religious, economic, educational, and civic associations”¹⁶—plays a vital role in fostering and nurturing the capacity for democratic citizenship.¹⁷ Second, despite great prosperity and freedom, America faces serious problems of civic and moral decline (a diagnosis they support with appeals to public opinion polls), and family “breakdown” is a key indicator of crisis.¹⁸ Third, a renewed and strengthened civil society is an important—if not the most important—means to civic and moral renewal. Accordingly, individuals, communities, and various levels of

12. *A Nation of Spectators* proclaims that “[t]he goals of civic renewal are straightforward: to strengthen the institutions that help form the knowledge, skills, and virtues citizens need for active engagement in civic life; to remove the impediments to civic engagement wherever they exist; and to multiply the arenas for meaningful and effective civic action.” *A NATION OF SPECTATORS*, *supra* note 10, at 12. *A Call to Civil Society* identifies three major goals: (1) “to increase the likelihood that more children will grow up with their two married parents”; (2) “to adopt a new ‘civil society model’ for evaluating public policies and solving social problems”; and (3) “to revitalize a shared civic story informed by moral truth.” *A CALL TO CIVIL SOCIETY*, *supra* note 11, at 18.

13. There are three persons who signed both reports: Jean Bethke Elshtain, William A. Galston, and Mary Ann Glendon.

14. *See A NATION OF SPECTATORS*, *supra* note 10, at 5-12.

15. *A CALL TO CIVIL SOCIETY*, *supra* note 11, at 3, 6, 7-13, 13-16. Professor Elshtain objects to our drawing a distinction between civic renewal and moral renewal, and she asks: “Why not simply speak of civic renewal?” Elshtain, *supra* note 11, at 587. We do not understand why she objects to also speaking of moral renewal. Indeed, *A Call to Civil Society* speaks repeatedly of “moral renewal.” *See, e.g.*, *A CALL TO CIVIL SOCIETY*, *supra* note 11, at 15, 16, 18, 21. It also contends that civic renewal is not enough and that moral renewal is necessary. *See id.* at 14-15. Furthermore, we do not understand the basis for Professor Elshtain’s statement that “It is hard to understand how this concern [for how good citizens come into being] implicates *A Call to Civil Society* in shirking civic matters, as McClain and Fleming suggest.” Elshtain, *supra* note 11, at 589.

16. *A CALL TO CIVIL SOCIETY*, *supra* note 11, at 6.

17. *See id.*; *A NATION OF SPECTATORS*, *supra* note 10, at 8.

18. Manifestations of such decline include growing distrust of government, decreasing civic and political engagement, breakdown of families and neighborhoods, increasingly coarse and uncivil popular culture and politics, and growing economic inequality. *See A CALL TO CIVIL SOCIETY*, *supra* note 11, at 5-6; *A NATION OF SPECTATORS*, *supra* note 10, at 5-6. For the reports’ appeals to public opinion polls, *see, e.g.*, *A CALL TO CIVIL SOCIETY*, *supra* note 11, at 4-5; *A NATION OF SPECTATORS*, *supra* note 10, at inside cover, 5.

government should commit themselves to the renewal of civil society.¹⁹ Finally, each report expresses the conviction that, because America is a religious nation, “faith-based institutions” should play an important role in such renewal and thus in civic and moral renewal.²⁰

Notwithstanding these shared premises, there is an important distinction between the two reports, and between civic and moral revivalists, concerning the relationship among religion, a shared morality, and civic and moral renewal. *A Nation of Spectators* states that “civic renewal unquestionably rests on a moral foundation,” but identifies it as “the constitutional faith we share—in the moral principles set forth in the Declaration of Independence, and the public purposes set forth in the Preamble to the Constitution.”²¹ In contrast, *A Call to Civil Society* contends that moral truths underwrite civic truths as well as the rationale for democratic civic engagement.²² Thus, a vital “seedbed of virtue” is a “public moral philosophy” consisting of “a larger set of shared ideas about human virtue and the common good.”²³ Indeed, the report contends that “our democracy depends upon moral truths,” and further states that “the moral truths that make possible our experiment in self-governance” and “authorize the possibility of our democracy” are “in large part biblical and religious.”²⁴ Thus, according to the latter report, civic renewal is not enough; moral renewal, resting upon “independent moral truths,” including a particular conception of the human person and the essential conditions for human flourishing, is what is called for.²⁵ This

19. *A Nation of Spectators* finds encouraging evidence of stirrings of a “new movement of citizens acting together to solve community problems” and argues that it should be strengthened. A NATION OF SPECTATORS, *supra* note 10, at 9. *A Call to Civil Society* advances “the civil society proposition,” that civil society is “the best—not perfect, but best—conceptual framework for understanding and responding to the most urgent challenge facing our society: the moral renewal of our democratic project.” A CALL TO CIVIL SOCIETY, *supra* note 11, at 6.

20. A NATION OF SPECTATORS, *supra* note 10, at 12 (“[B]ecause we remain a strongly religious nation, faithful citizens and faith-based institutions are pivotal to any American movement for civic renewal.”); *see also* A CALL TO CIVIL SOCIETY, *supra* note 11, at 21 (“The *sina qua non* for American renewal is the renewal of a common moral life,” and “[s]uch a renewal will not take place unless faith communities and religious institutions play a leading role, since vigorous communities of faith are vital to the discernment and transmission of moral truth.”).

21. A NATION OF SPECTATORS, *supra* note 10, at 12.

22. A CALL TO CIVIL SOCIETY, *supra* note 11, at 13.

23. *Id.* at 14.

24. *Id.* at 12.

25. *Id.* at 14-16. Don Eberly, a signatory to *A Call to Civil Society* and Director of the Civil Society Project, describes (and advocates) this as the “civil society plus” approach: that the current movement to revive civil society “be grounded in a deeper foundation of objective moral principles,” because “America, since its inception, has operated on both a civic creed and

difference between civic truths or constitutional faith and moral truths or public moral philosophy sets the two reports apart and makes *A Nation of Spectators* more appropriate, and *A Call to Civil Society* more problematic, in our morally pluralistic constitutional democracy.

Civil society-revivalists carry forward themes sounded nearly a decade ago in prominent critiques of rights and “rights talk” in maintaining that there is an imbalance between rights and responsibilities, and that the responsible exercise of rights that makes “ordered liberty” possible requires that persons possess certain virtues and traits of character.²⁶ (And some of the earlier critics of rights talk are prominent voices in the calls to revive civil society.) For example, Mary Ann Glendon has analyzed the erosion of civil society and the seedbeds of virtue as a consequence of a paradox inherent in liberal democracy, and some revivalists have contended that an excess of liberal virtues, such as tolerance taken too far, are “lethal” to those seedbeds.²⁷ On this view, the American experiment of liberal democracy presupposes certain traits of character that make “ordered liberty” possible—here the frequently-invoked text is *The Federalist* No. 55²⁸—but liberalism cannot create or sustain those virtues. This American experiment “leaves it primarily up to families, local governments, schools, religious and workplace associations, and a host of other voluntary groups to teach and transmit republican virtues and skills from one generation to the next.”²⁹ Because the

a transcendent creed, and both are required to sustain a healthy republic.” DON E. EBERLY, *AMERICA’S PROMISE: CIVIL SOCIETY AND THE RENEWAL OF AMERICAN CULTURE* 5 (1998); see also Christopher Beem, *Civil Is Not Good Enough*, *RESPONSIVE COMMUNITY*, Summer 1996, at 47, 56-57 (“There is more to our cultural and moral devastation than even a vibrant civil society can solve”; “the renewal of American society requires that we attend not only to our institutions” but also to reinvigorating a “democratic moral consensus.”).

26. See, e.g., AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY* (1993); WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* (1991); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991); *The Responsive Communitarian Platform: Rights and Responsibilities*, *RESPONSIVE COMMUNITY*, Winter 1991-1992, at 4. Elsewhere, one of us has criticized these critiques of rights and “rights talk.” See Linda C. McClain, *Rights and Irresponsibility*, 43 *DUKE L.J.* 989 (1994). For Professor Elshstain’s contribution to such critiques, see, e.g., *ELSHTAIN*, *supra* note 2.

27. Glendon, *supra* note 8, at 12.

28. *THE FEDERALIST* No. 55, at 346 (James Madison) (Clinton Rossiter ed., 1961) (“As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.”). Both reports refer to Madison’s formulation regarding the virtues needed for self-government. See *A CALL TO CIVIL SOCIETY*, *supra* note 11, at 7; *A NATION OF SPECTATORS*, *supra* note 10, at 4, 12.

29. Glendon, *supra* note 8, at 2.

founders took the seedbeds of virtue, including the institutions of civil society, for granted as a virtually inexhaustible resource, indeed, a natural resource, there was no apparent need for a Constitution that exacted virtue (e.g., through a Bill of Duties or Responsibilities).³⁰ Nor did the founders establish a regime of government that provided for a national project of character formation. The paradox is that liberal democracy depends upon civil society for orderly social reproduction, or the creation of good citizens, but it contains the seeds of its own destruction.

The argument seems to be that the “absolutist” nature of American “rights talk,” the inattention in law and politics to intermediate associations between the individual and the state, and the ascent of a liberal ethic of “expressive individualism” (in contrast with an ethic of self-sacrifice, responsibility, and mutual obligation) have eroded the seedbeds of virtue, undermined civil society, and imperiled our liberal democracy.³¹ Both reports sound these claims and themes.³² Some revivalists further claim that commitment to liberal virtues such as toleration “slides all too easily into the sort of mandatory value neutrality that rules all talk of character and virtue out of bounds”³³ and thus bars government from shaping character and favoring those seedbeds that foster it.

In this article, we pose some questions for civil society-revivalists and raise doubts about some of their claims. What lies behind many of the calls to revive civil society is a concern to generate trust and social solidarity in a diverse polity. This concern sometimes goes hand in hand with a somewhat nostalgic longing for the vibrant civil society that Alexis de Tocqueville observed in America in the 1830s and described as central to making our democracy work.³⁴ But the

30. See GLENDON, *supra* note 26, at 116-20.

31. See generally SEEDBEDS OF VIRTUE, *supra* note 8; GLENDON, *supra* note 26.

32. See A CALL TO CIVIL SOCIETY, *supra* note 11, at 6, 16, 18; A NATION OF SPECTATORS, *supra* note 10, at 6-8.

33. Glendon, *supra* note 8, at 12. *But see* GALSTON, *supra* note 26, at 222 (rejecting the interpretation of toleration as implying relativism or neutrality).

34. For example, Putnam writes: “When Tocqueville visited the United States in the 1830s, it was the Americans’ propensity for civic association that most impressed him as the key to their unprecedented ability to make democracy work.” Putnam, *Bowling Alone*, *supra* note 7, at 65. He continues, quoting a passage from Tocqueville that is often invoked by civil society-revivalists: “Americans of all ages, all stations in life, and all types of disposition are forever forming associations. There are not only commercial and industrial associations in which all take part, but others of a thousand different types—religious, moral, serious, futile, very general and very limited, immensely large and very minute . . .” *Id.* at 65-66 (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 513-14 (J.P. Mayer ed. & George Lawrence trans., 1969) (1835)). Within the literature about reviving civil society, some have cautioned about

cure is not a communitarian revival of the civil society of Tocqueville's day, which excluded entire categories of persons from membership in civil society and from equal citizenship in the polity. The better approach is to develop a synthesis of liberalism, feminism, and civic republicanism that has a place for civil society—recognizing that it can be a good thing while realizing that it is not a panacea—but that focuses on our deeper commitments to equal citizenship and to securing the preconditions for democratic and personal self-government (what we have elsewhere called deliberative democracy and deliberative autonomy),³⁵ which will require placing certain limits on civil society. Ultimately, we plan to offer such a normative conception of civil society as a realm of the constitution of selves and citizens under our Constitution and in our constitutional democracy. Here, we shall raise some questions, issue some cautions, and express some doubts about whether the revival of civil society can reasonably be expected to accomplish what its proponents hope for it.

At the outset, we wish to make clear that we are not “anti-civil society.” In fact, we largely believe that it would be a good thing to revive or renew civil society. Nonetheless, we believe (as we say below) that much of the value of doing so relates as much to securing what we call “deliberative autonomy”—enabling people to decide how to live their own lives—as to promoting “deliberative democracy”—preparing them for participation in democratic life. To deny the importance of civil society, including families and voluntary associations, as a generative source of human goods would run contrary to many people's experiences of their own lives, and it would conflict with our own normative conception of the proper roles of civil society in our morally pluralistic constitutional democracy. Nor do we deny that there is an important reciprocal relationship between civil society and democracy, although we believe that the relationship is far more complex and indeterminate than many civil society-revivalists evidently maintain or assume. The civil society-revivalists usefully put on the table a serious issue, how a liberal democratic society produces citizens capable of engaging in responsible self-

avoiding the “nostalgia trap.” See generally *COMMUNITY WORKS*, *supra* note 2. Moreover, one of the reports specifically denies that it “want[s] to ‘roll back the clock,’” “[r]eturn to the 1950s,” “[r]everse the gains made by women and minorities,” or “‘go back’ to some earlier era.” *A CALL TO CIVIL SOCIETY*, *supra* note 11, at 5.

35. See James E. Fleming, *Constructing the Substantive Constitution*, 72 *TEX. L. REV.* 211 (1993) [hereinafter Fleming, *Constructing*]; James E. Fleming, *Securing Deliberative Autonomy*, 48 *STAN. L. REV.* 1 (1995) [hereinafter Fleming, *Securing*]; see also James E. Fleming & Linda C. McClain, *In Search of a Substantive Republic*, 76 *TEX. L. REV.* 509 (1997).

government and thus reproduces itself.

Although we are skeptical and critical concerning many of the claims of the civil society-revivalists, our aims here are not merely cautionary and critical. We also begin to sketch our own views concerning the proper roles and regulation of civil society in our pluralistic polity. Many of our points apply to both the civic renewal strand and the moral renewal strand of civil society-revivalism, and some apply more to one than the other. For what it is worth, we are quite sympathetic with the goals of the civic revivalists, and thus with *A Nation of Spectators*, despite our serious reservations about that report's discussion of families and religion or "faith-based institutions" and our skepticism about the extent to which revival of civil society will bring about civic renewal and strengthen bonds of citizenship. We have similar reservations about the discussion of these matters in *A Call to Civil Society*, as well as fundamental and pervasive criticisms of many of the moral revivalists' goals, diagnoses, and prescriptions.

II. SOME QUESTIONS FOR CIVIL SOCIETY-REVIVALISTS

A. *How Does Civil Society Serve as Seedbeds of Virtue and Foster Self-Government?*

1. The Claim That Civil Society Is a School for Citizenship

Many civil society-revivalists contend that the institutions of civil society are "seedbeds of virtue"—our foundational sources of competence, character, and citizenship³⁶—and that they foster self-government.³⁷ (We use the general term "self-government" rather than "democratic self-government," for there is an ambiguity in the civil society literature between self-government as "government of the self" and self-government as government of and by a people³⁸ and, in any event, it is unclear exactly how the virtues supposedly generated in civil society contribute to democratic self-government, as

36. A CALL TO CIVIL SOCIETY, *supra* note 11, at 7.

37. See A CALL TO CIVIL SOCIETY, *supra* note 11, at 7-13; A NATION OF SPECTATORS, *supra* note 10, at 8, 12-19; SEEDBEDS OF VIRTUE, *supra* note 8.

38. See A CALL TO CIVIL SOCIETY, *supra* note 11, at 7 ("[S]elf-government begins with governing the self."); A NATION OF SPECTATORS, *supra* note 10, at 8 ("We believe that the essence of democracy is self-government, that self-government begins with the government of the self and moves to the public efforts of citizens whose need for the restraint of law is mitigated by their capacity to restrain themselves.").

discussed below.) But what is their conception of virtue and how does civil society serve these purposes? The moral revivalists seem practically to conflate civic virtue with traditional morality and personal virtues (or “standards of personal conduct”) such as “honesty, trust, loyalty, cooperation, self-restraint, civility, compassion, personal responsibility, and respect for others,”³⁹ to say nothing of “respect for moral law, and neighbor-love, or concern for others.”⁴⁰ It is no accident that the word “civic” does not appear in the title of the book *Seedbeds of Virtue*.⁴¹ Such revivalists give considerably less attention to civic virtue in the sense of the disposition to care about the common good of the whole polity and the capacity to deliberate about it than to virtue in the sense of traditional morality and personal virtues. (They may assume the unity of the virtues without justifying this view.) And although some moral revivalists invoke such liberal virtues as toleration of and respect for diversity, many evince considerable ambivalence toward those virtues and even suggest that an excess of them has been “lethal” for the seedbeds of virtue in civil society.⁴² By contrast, civic revivalists typically have a stronger conception of civic virtue and greater respect for diversity.⁴³

How does civil society foster self-government? Civil society-revivalists commonly claim that civil society creates good citizens who possess the virtues and traits of character necessary for self-government: It prepares children to be good citizens, and it equips citizens, through participation in associations, with the arts and habits of self-government. We take up these two claims in turn.

First, many civil society-revivalists claim that one of the primary functions of civil society is preparing children to be good citizens, and that the family is “the first and most basic” seedbed of virtue, “cradle of citizenship,” or school for citizenship.⁴⁴ Let us grant that families (putting to one side until later the contested questions of family form and injustice within the family) play a vital role in social reproduction

39. A CALL TO CIVIL SOCIETY, *supra* note 11, at 7.

40. *Id.* at 8.

41. *A Call to Civil Society* elaborates upon twelve “seedbeds of virtue,” *id.* at 7-13, but it also refers to them at one point as “seedbeds of civic virtue.” *Id.* at 7.

42. See GLENDON, *supra* note 26; SEEDBEDS OF VIRTUE, *supra* note 8.

43. See, e.g., A NATION OF SPECTATORS, *supra* note 10, at 8, 12; GALSTON, *supra* note 26 (developing a substantive conception of liberal democratic virtues for a diverse society).

44. See, e.g., A CALL TO CIVIL SOCIETY, *supra* note 11, at 6-7; A NATION OF SPECTATORS, *supra* note 10, at 8-13; David Blankenhorn, *Conclusion: The Possibility of Civil Society*, in SEEDBEDS OF VIRTUE, *supra* note 8, at 271, 275.

and should play an important role in democratic education. But the case still has to be made concerning whether and how they do so. Glendon, for example, extols “household table talk” as an exemplary discourse countering America’s individualist public rhetoric and containing seeds for the renewal of civil society. But how does “table talk,” with its “recollection and retelling of the family’s concrete experiences, and . . . the household’s fund of stories about relationships, obligations, and the long-term consequences of present acts and decisions,”⁴⁵ shape family members for democratic self-government? It may well build family solidarity, and strengthen the family as a community of “memory and mutual aid,” but does it foster a broader sense of social solidarity and citizenship? Glendon also notes the special role of women as transmitters of family lore and values, but she gives only passing attention to the gender inequality in traditional households and to how such households will be schools for citizenship rather than teachers of inequality. More generally, there is nothing about families and their moral discourses that insures that they will be seedbeds of virtue rather than seedbeds of vices such as parochialism, prejudice, and intolerance (as discussed below in connection with incivility and the problem of “bad seeds”).⁴⁶ Nor is there any guarantee that they will inculcate *civic* virtues needed for democratic self-government rather than simply teaching personal virtues helpful for governing the self. In short, families may well help children develop into good people without helping them to become good citizens.

Second, many civil society-revivalists claim that participation in voluntary associations within civil society fosters the arts and habits of self-government.⁴⁷ Let us concede that participation in such associations can be and generally is a good thing. Nonetheless, as Yael Tamir observes, “[t]here is no reason to believe that, left on their own, associations will serve as a seedbed of democracy.”⁴⁸ For example, it is hardly self-evident how participation in bowling leagues nourishes the habits and skills of citizenship, much less civic virtue

45. GLENDON, *supra* note 26, at 174.

46. For a variation on this theme, see Beem, *supra* note 25, at 50 (“What of the family, the ‘seedbed of civic virtue?’ Surely many families positively exemplify the most deleterious tendencies of our materialistic, individualistic culture.”).

47. See, e.g., A CALL TO CIVIL SOCIETY, *supra* note 11, at 6-9, 14; A NATION OF SPECTATORS, *supra* note 10, at 8-11, 40-42.

48. Yael Tamir, *Revisiting the Civic Sphere*, in FREEDOM OF ASSOCIATION 214, 219-20 (Amy Gutmann ed., 1998).

and democratic self-government.⁴⁹ As communitarian thinker Amitai Etzioni suggests, such associations may foster some sort of social bonds, or even strong, though extremely narrow, shared culture. But how, he asks, do people in bowling leagues, chess clubs, and choirs develop a commitment to shared values?⁵⁰ John Rawls usefully suggests that virtues that are characteristic of certain forms of association in civil society are distinguishable from political virtues.⁵¹ And as with families, nothing about associations as such assures that they will be generators of civic virtues rather than vices. Many associations, such as white supremacist groups, gangs, and organized crime families, offer opportunities for solidarity and shared values, but these are inimical to civic virtues and democratic self-government.

Moral revivalists acknowledge this problem of distinguishing between “good” civil society and “bad” civil society (“such as private militias or efforts to exclude racial minorities”)⁵² and attempt to address it by recourse to a shared public moral philosophy as a guiding force in associational life. They reject civic participation as an “independent imperative,” because it is “more about process than substance,” and it is “ultimately a means, not an end in itself.”⁵³ For, they argue: “Effective civic engagement requires a public moral philosophy. Absent a guiding set of shared moral truths, voluntary civic associations can be just as harmful to human flourishing as any big government bureaucracy or big business bureau.”⁵⁴ Their approach triggers a number of questions. What generates the public moral philosophy? Do the associations in question have the capacity to determine the content of that philosophy or is it handed down, for example, through the efforts of religious leaders to discern and transmit moral truth? If this is the ideal of how civil society should function, how would moral revivalists move actual civil society,

49. Katha Pollitt incisively asks, “[F]or whom the ball rolls” in those bowling leagues, or “Why should you care about the leagues?” Katha Pollitt, *For Whom the Ball Rolls*, NATION, Apr. 15, 1996, at 9, 9 (discussing Putnam, *Bowling Alone*, *supra* note 7). She continues: “Because, says Putnam, they bowl for thee: A weak civil society means less ‘trust’ in each other, and that means a less vigorous democracy, as evidenced in declining voter turnouts.” *Id.* For a cautionary, comical tale of virtue and vice in bowling leagues, see the Coen brothers’ 1998 film *The Big Lebowski*.

50. See AMITAI ETZIONI, *THE NEW GOLDEN RULE* 96 (1996).

51. JOHN RAWLS, *POLITICAL LIBERALISM* 194-95 (1993).

52. A CALL TO CIVIL SOCIETY, *supra* note 11, at 14.

53. *Id.*

54. *Id.*; see also Beem, *supra* note 25, at 50 (arguing that “in many instances, the active, dynamic expression of civil society in contemporary America not only does not alleviate our society’s moral failings, it manifests and reinforces them”).

replete with attitudes and beliefs that do not conform to the public moral philosophy, toward this ideal? To put the question in Etzioni's terms, are the moral revivalists not seeking the "good society" rather than civil society as such?⁵⁵

Civic revivalists appeal to "shared civic principles" and also believe that certain attitudes (e.g., self-sacrifice, responsibility, and sense of obligation to the common good) make democracy possible, while their degeneration imperils it. But how does participation in civil society inculcate such principles or foster such attitudes? One strategy is to restructure the institutions of civil society better to generate and transmit such values. For example, *A Nation of Spectators* affirms the important role of schools in fostering "the knowledge, skills, and virtues our young people need to become good democratic citizens," and offers the specific prescription that schools "reorganize their internal life to reinforce basic civic virtues."⁵⁶ It also endorses civic education as a part of the school curriculum.⁵⁷ (We share such a commitment to civic education.)⁵⁸

But what of voluntary associations, particularly those in which adults participate? Do such associations generate democratic values? *A Nation of Spectators* acknowledges that some democratic values are "not the goals of associational life, but byproducts."⁵⁹ Furthermore, the report asks: "[W]hy should there be such an obvious linkage between free associations and political democracy?" and concedes the possibility that "[t]he goods various groups seek to produce might, in principle, be hostile to the flourishing of other groups and contemptuous of democratic values."⁶⁰ Yet, its conclusion is simply to note inconclusiveness on this difficult issue: "Commentators on civil society find themselves in sharp conflict over 'congruence'—the idea that the internal structures and norms of voluntary associations should (or must) be democratic, participatory, and civil if they are to promote broader societal aims of political democracy."⁶¹ We take up the issue of "congruence" in the next section.

55. Amitai Etzioni, *Law in Civil Society, Good Society, and the Prescriptive State*, 75 CHI.-KENT L. REV. 355 (2000).

56. A NATION OF SPECTATORS, *supra* note 10, at 14.

57. *See id.*

58. We largely agree with the arguments regarding civic education in Stephen Macedo's new book. *See* STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY (2000).

59. A NATION OF SPECTATORS, *supra* note 10, at 40.

60. *Id.* at 41.

61. *Id.*

2. The Personal and Political Uses of Pluralism

Nancy Rosenblum's extensive study of the morality of association and of membership in groups, *Membership and Morals: The Personal Uses of Pluralism in America*,⁶² is quite helpful in assessing the relationship between civil society and liberal democracy. Rosenblum deploys the terms "liberal anxiety" and "liberal expectancy" to capture the conflicting set of attitudes that political and legal theorists sometimes adopt concerning this relationship. On the one hand, some accounts of liberal democracy view it as capable of sustaining itself even without civic virtue. For example, one might think of models of interest group pluralism or of the founders' notion that separation of powers and limitations upon government, rather than virtue, would curb excesses of self-interest. On the other hand, there is "liberal expectancy" of "congruence" between civil society and democracy—that is, that the values cultivated in civil society will be liberal democratic values and thus will undergird liberal democracy, as "seedbeds of civic virtue"—along with "liberal anxiety" that such congruence may not exist or develop over time.⁶³ As a number of civil society-revivalists argue, the founders seemed to assume that such a relationship would exist and that a national governmental project of inculcating civic virtue would be unnecessary. But what if, as Rosenblum argues, the virtues of associations are not necessarily congruent with democratic values? Should government seek to achieve such congruence through democratic education and other forms of persuasion to cultivate only those associations which instill and sustain democratic values, and to weed out those associations which do not? Answering this question involves addressing the fundamental question of whether the values of associational life must be congruent with those of political life in order to sustain a healthy polity, a question to which we return below (in discussing the problem of "bad seeds").

An alternative conception of civil society does not insist upon congruence, but stresses the mediating functions of civil society between individuals and the state, or the "dense networks" of

62. NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* (1998). Strictly speaking, Rosenblum is not a civil society-revivalist, though she was on one of the advisory panels to the National Commission on Civic Renewal, see *A NATION OF SPECTATORS*, *supra* note 10, at 66, and she contributed an essay to a book produced for the Commission. See Nancy L. Rosenblum, *The Moral Uses of Pluralism*, in *CIVIL SOCIETY, DEMOCRACY, AND CIVIC RENEWAL*, *supra* note 2, at 255.

63. See ROSENBLUM, *supra* note 62, at 10-15, 36-41.

associational life. Here, the point is that associations may not generate explicitly democratic values, but instead may cultivate a “whole range of moral dispositions, presumptively supportive of political order,” such as cooperation or social trust.⁶⁴ To use a current term, associations generate “social capital.”⁶⁵ This, Rosenblum observes, is a “more capacious approach to the moral uses of association than the logic of congruence,” because “[t]he business of instilling habits of responsibility, reciprocity, cooperation, or trust is compatible with a variety of political orientations and substantive values.”⁶⁶ This approach is more pluralistic and tolerant, the argument goes, because associations need not be obviously liberal to generate such values; after all, those values themselves are not exclusively liberal. Yet this mediating approach must grapple with hard questions about the proper scope of freedom of association for illiberal groups that may foster anti-democratic values and indeed may advocate or lead to internal secession of groups and individuals from the polity.

Both the congruence approach and the mediating approach to civil society, Rosenblum argues, rest upon an “airy ‘liberal expectancy.’”⁶⁷ Both lack an adequate foundation of psychological realism concerning the moralizing or socializing power of groups upon those who join them and the contribution, if any, of such group membership to liberal democracy.⁶⁸ These accounts also fail, in her view, to capture an important aspect of civil society, “the personal uses of pluralism.”⁶⁹ The reason that the existence of a dense array of associations matters, she contends, is that associations facilitate the experience of pluralism in people’s lives: “[w]e must be able to exploit, willfully and inadvertently, the moral possibilities of membership in diverse associations.”⁷⁰ Rather than emphasizing the role of civil society in sustaining democratic self-government, she stresses its role in facilitating personal self-government. She argues that government should secure the conditions for freedom of association, including protecting rights to exit as well as to enter

64. *Id.* at 41.

65. See, e.g., Robert K. Fullinwider, *Introduction, in CIVIL SOCIETY, DEMOCRACY, AND CIVIC RENEWAL*, *supra* note 2, at 1, 2 (discussing the term “social capital” with reference to the work of Robert Putnam and Francis Fukuyama).

66. ROSENBLUM, *supra* note 62, at 42.

67. *Id.* at 45.

68. See *id.* at 47-50.

69. *Id.*

70. *Id.* at 46.

associations.⁷¹ She has characterized her work as a “corrective” to “the logic of congruence.”⁷²

We find persuasive Rosenblum’s appeal to psychological realism and her conclusion that the relationship between group membership and liberal democratic values, beyond the cultivation of a disposition to cooperate, is indirect and indeterminate.⁷³ And we think that her account lends support to an important point that is often overlooked or insufficiently appreciated in the work of the civil society-revivalists: We should avoid a “flight from the political,” that is, the temptation to think that civil society practically can exist independently of the state, or that it can be virtually self-sustaining without the state.⁷⁴ Furthermore, to the extent that revivalists contemplate that civil society can substitute for or supplant the state, we believe that skepticism is in order (as we discuss below).

We also embrace Rosenblum’s conclusion that associational life may have vital importance for personal development or self-government (or, as we put it, deliberative autonomy). Her analysis confirms our own intuitions that civil society is at least as important for securing deliberative autonomy—enabling people to decide how to live their own lives—as for promoting deliberative democracy—preparing them for participation in political life. Rosenblum also finds that the disposition to cooperate, formed in associations, can further the important good of self-respect.⁷⁵ This self-respect, she suggests, can be a form of “compensation” for disappointed social, political, or economic expectations.⁷⁶ Such disappointments, she argues, are inevitable in a pluralistic democracy in which economic

71. *See id.* at 350.

72. Nancy L. Rosenblum, Remarks at the Panel on Nancy L. Rosenblum’s *Membership and Morals*, the Communitarian Summit (Feb. 27, 1999).

73. In her conclusion, Rosenblum uses the phrase “the requisites of democracy in everyday life” to capture her view as to “what we *do* owe one another in everyday life,” the virtues of “treating people identically and with easy spontaneity” and “speaking out against ordinary injustice.” ROSENBLUM, *supra* note 62, at 350. She concludes that associations contribute in varying degrees to fostering such democratic virtues. *Id.*

74. Robert W. Hefner, *Civil Society: Cultural Possibility of a Modern Ideal*, SOCIETY, Mar.-Apr. 1998, at 16, 16. Among the proponents of reviving civil society, the civic revivalists generally are probably less likely than the moral revivalists to be tempted to think that civil society practically can exist independently of the state. Indeed, *A Nation of Spectators* does not express such a view. *See infra* text accompanying notes 223-24. Nor does Galston. Galston, *supra* note 10, at 2. We do, however, believe that some moral revivalists, especially conservative ones, sometimes talk as if they believe this (just as some conservative economists and law and economics scholars talk as if they believe markets are self-sustaining in the absence of the state).

75. ROSENBLUM, *supra* note 62, at 62-63.

76. *See id.*

and other forms of inequality exist.⁷⁷ Finally, Rosenblum concludes that some associations, although they may not cultivate virtue, serve an important function of containing vice: Groups “provide relatively benign outlets for ineradicable viciousness, intolerance, or narrow self-interests,” and help in containing anti-democratic dispositions, even if they cannot be corrected.⁷⁸

We generally endorse Rosenblum’s argument concerning the importance of civil society for personal self-government, and we largely agree with her position regarding congruence.⁷⁹ We interpret her not as rejecting the idea that associations *can* contribute to democratic self-government and to civic virtue, but rather as calling for greater precision about claims concerning such contribution.⁸⁰ To that end, we believe that a more complete account would include two correctives concerning the links between civil society and democratic

77. *See id.* Undeniably, given the dynamic of inclusion and exclusion, associations themselves “mirror, reinforce, and actively create social inequalities,” while they offer antidotes to the “vicious effects of pluralism.” *Id.* at 63. Similarly, associations can be a source of reparation of injury. *See id.* at 64, 69-70.

78. *Id.* at 48. This claim may seem counterintuitive, or counterfactual, but Rosenblum claims, in her study of secessionist or white supremacist groups, that membership in such groups, however disconcerting it may be in a liberal democracy, can provide an outlet or safety valve for anti-democratic attitudes, and it can sometimes avoid dangerous spillover into violence. *See id.* at 9.

79. We do not, however, endorse Rosenblum’s thoroughgoing criticism of the Supreme Court’s treatment of freedom of association in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). *Id.* at 158-76. Professor Galston notes of us that “[w]hile [they] endorse Rosenblum’s overall position, they reject her critique of the *Roberts* decision.” Galston, *supra* note 10, at 605. He contends: “They cannot have it both ways. Rosenblum’s general stance leads directly to her specific conclusions about the inappropriateness of government intervention to enforce gender equality throughout civil society. To reject her conclusion is necessarily to reject the premises on which it rests.” *Id.* With all due respect, we submit that one can believe that *Roberts* was rightly decided as a matter of constitutional law on the ground that prohibiting gender discrimination in places of “public accommodation” like the *Jaycees* is a compelling governmental interest without thinking that it is appropriate for the government to intervene to enforce gender equality “throughout civil society”; the former view does not necessarily “lead directly to” the latter view. For one thing, most institutions within civil society are not “public accommodations” as a matter of constitutional law and therefore they are beyond the reach of the *Roberts* decision. For another, it is appropriate and justifiable in some circumstances for the government to regulate freedom of association in order to attempt to secure equal citizenship for all, including women and racial minorities. Rosenblum herself has acknowledged that the workplace is an important exception to the autonomy of group life and fully endorsed, e.g., Title VII. Rosenblum, *supra* note 72. And so, to reject Rosenblum’s conclusion regarding *Roberts* is not necessarily to reject her overall position regarding “the logic of congruence.” *See infra* note 138 (discussing some of the ways in which it is justifiable for government to take measures to attempt to secure equal citizenship for women, short of insisting upon “congruence” between all institutions of civil society and democratic values).

80. Thus, in her contribution to this symposium, Rosenblum explores the potential of political parties, at the invitation of her colleagues to “identify the associations that stand out as qualitatively most valuable for democratic public life and political virtue.” Nancy L. Rosenblum, *Primus Inter Pares: Political Parties and Civil Society*, 75 CHI.-KENT. L. REV. 493, 493 (2000).

self-government. First, it should reckon with the vital function performed by civil society in affording a space for, as Jane Mansbridge puts it, “deliberative enclaves of resistance” or “counterpublics.”⁸¹ Second, it should recognize that civil society can offer a multiplicity of spaces in which deliberative democracy, or public deliberation, can take place. In this sense, we believe that civil society indeed does offer the opportunity for “personal uses of pluralism,” but that it also has political “uses” that pertain to democratic life.

Our first corrective to Rosenblum’s account draws upon Mansbridge’s contention that democracies, in practice, can produce at best a “rough” or “good enough” legitimacy, and that they need “ways short of civil disobedience and the breakdown of normatively based mutual cooperation to recognize and fight the ongoing injustice of their procedures and their outcomes.”⁸² Moreover, she argues, “even the most just societies need . . . enclaves of protected discourse and action,” because “no democracy ever reaches the point at which justice is simply done.”⁸³ As she characterizes such enclaves or “counterpublics”:

The goals of these counterpublics include understanding themselves better, forging bonds of solidarity, preserving the memories of past injustices, interpreting and reinterpreting the meanings of those injustices, working out alternative conceptions of self, of community, of justice, and of universality, trying to make sense of both the privileges they wield and the oppressions they face, understanding the strategic configurations for and against their desired ends, deciding what alliances to make both emotionally and strategically, deliberating on ends and means, and deciding how to act, individually and collectively.⁸⁴

The various phases of the women’s movement offer one example of such a counterpublic. The many forms of “identity politics,” however problematic, provide another. Such grass roots movements as the National Welfare Rights Organization are yet another. Some scholars describe an “oppositional civic culture” characteristic of African-Americans’ civic life, in which institutions of civil society have both nurtured “norms that legitimized the civic order” and “served as sources of opposition to white supremacist practices and

81. Jane Mansbridge, *Using Power/Fighting Power: The Polity*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 46, 55 (Seyla Benhabib ed., 1996).

82. *Id.* at 46, 47, 55.

83. *Id.* at 58.

84. *Id.*

discourse.”⁸⁵ All of these groups may seek change through political and legal channels, but they may also engage in battles to transform cultural understandings. (Think of efforts of gay men and lesbians in these respects.) This dimension of civil society fortifies the argument for governmental fostering of civil society. And it is consistent with an evidently paradoxical feature of pluralist constitutional democracy: Government fosters associations, even though they may be “oppositional” to the state and they certainly offer multiple sites of power distinct from the state.⁸⁶ What is more, this dimension of civil society focuses upon individual and group agency, for example, the efforts of social movements, to transform both civil society and the polity better to realize certain ideals of equal citizenship, justice, and community.⁸⁷

Our second corrective, that an adequate account of civil society should recognize that it can provide a multiplicity of sites outside formal political channels in which public deliberation can take place, derives from Seyla Benhabib’s work on deliberative democracy and

85. Frederick C. Harris, *Will the Circle Be Unbroken?: The Erosion and Transformation of African-American Civic Life*, in *CIVIL SOCIETY, DEMOCRACY, AND CIVIC RENEWAL*, *supra* note 2, at 317, 323.

86. Mark Tushnet has suggested that “[a] paradox lies at the heart of this interest in revitalizing the institutions of civil society as a check on government: Those institutions are themselves constituted by government, not in the sense that they are called into being by government, but in the sense that their boundaries are defined by the government.” Mark Tushnet, *The Constitution of Civil Society*, 75 *CHI.-KENT L. REV.* 379, 379 (2000). Abner Greene, however, has challenged Tushnet’s claim of a paradox. Abner S. Greene, *Civil Society and Multiple Repositories of Power*, 75 *CHI.-KENT L. REV.* 477, 477 (2000). For valuable analysis of multiple sites of norms and power distinct from the state, see *id.*; Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 *COLUM. L. REV.* 1 (1996). For an interpretation of Justice Brennan’s judicial opinions and other writings as reflecting a “romantic liberalism,” which includes an attraction to “the idea of the endless contestability of just about every social-normative constraint,” a solicitude for agitators and disturbers, and a tolerance for disrupting order, see FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 72-83 (1999).

87. One of the reports notes that “a key function of civil society is to defend freedom against external threats—including the power of the state.” *A NATION OF SPECTATORS*, *supra* note 10, at 41. The report continues: “But these civil conversations can also merge into ongoing political debates about social justice and the common good. Social movements frequently arise within civil society, giving voice to new publics and promoting new causes and political identities.” *Id.* The report here acknowledges Jean Cohen’s observation that the “purportedly ‘uncivic’ generation” that came of age in the 1960s and 1970s

created the first consumers’ movement since the 1930s, the first environmental movement since the turn of the century, public health movements, grassroots activism and community organizing, the most important feminist movement since the pre-World War I period, the civil rights movement, and innumerable transnational nongovernmental organizations and civic movements—all of which have led to unprecedented advances in rights and social justice.

Id. at 43 n.12 (quoting Jean L. Cohen, *American Civil Society Talk*, in *CIVIL SOCIETY, DEMOCRACY, AND CIVIC RENEWAL*, *supra* note 2, at 55, 69).

the problem of democratic legitimacy.⁸⁸ Her account of deliberative democracy operates within a model of discourse ethics, and our own approach derives from Rawls's framework of political liberalism, but we find a number of her basic assumptions cogent and instructive (and largely compatible with political liberalism).⁸⁹ Contending that "[t]he fiction of a general deliberative assembly in which the united people expressed their will belongs to the early history of democratic theory," she finds that "today our guiding model has to be that of a medium of loosely associated, multiple foci of opinion formation and dissemination which affect one another in free and spontaneous processes of communication."⁹⁰ A plurality of forms of association can contribute to such deliberation, ranging from "political parties, to citizens' initiatives, to social movements, to voluntary associations, to consciousness-raising groups, and the like."⁹¹ As Benhabib puts it:

It is through the interlocking net of these multiple forms of associations, networks, and organizations that an anonymous "public conversation" results. It is central to the model of deliberative democracy that it privileges such a public sphere of mutually interlocking and overlapping networks and associations of deliberation, contestation, and argumentation.⁹²

Such norms as "universal moral respect and egalitarian reciprocity" should guide these processes.⁹³ This, on Benhabib's view, is how deliberative democracy attempts to satisfy the problem of

88. Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, in DEMOCRACY AND DIFFERENCE, *supra* note 81, at 67. For another useful account of the "civil public sphere," inspired by discourse ethics, see Cohen, *supra* note 87, at 70-71 (charging that American "civil society talk" leaves out the public sphere, which is "[f]rom the point of view of democratic theory . . . the only possible setting in which all concerned can participate in the discussion of contested norms and policies").

89. Benhabib assumes that value pluralism, i.e., disagreement about the highest goods of human existence and the proper conduct of a morally righteous life, is a fundamental and persisting feature of modern life. Benhabib, *supra* note 88, at 73. (Rawls speaks of this feature in terms of the "fact of reasonable pluralism." RAWLS, *supra* note 51, at 36.) She maintains that deliberative democracies must find procedures, and employ some form of practical rationality, by which to reach binding agreement about certain issues of the common good. See Benhabib, *supra* note 88, at 72-73. (Rawls would speak in terms of public reason. RAWLS, *supra* note 51, at 212-54; John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).)

90. Benhabib, *supra* note 88, at 74. She concludes that "the chief institutional correlate of such a model of deliberative democracy is a multiple, anonymous, heterogeneous network of many publics and public conversations" and that, "[i]n other domains of social life as well," this model "can inspire the proliferation of many institutional designs." *Id.* at 87.

91. *Id.* at 73. Rosenblum takes up the issue of political parties in her contribution to this symposium. See Rosenblum, *supra* note 80.

92. Benhabib, *supra* note 88, at 73-74. See Rawls, *supra* note 89, at 775 n.28 (stating that what Benhabib calls the "public sphere," *Political Liberalism* calls the "background culture of civil society").

93. Benhabib, *supra* note 88, at 79.

democratic legitimacy. Although such deliberation, contestation, and argumentation certainly will take place in political bodies such as legislatures, she cautions against an overly sharp distinction between public and private institutions.⁹⁴ For instance, she draws upon Nancy Fraser's distinction between "opinion-making" and "policy-making" public bodies, observing that "opinion-making" bodies such as social movements "can lead us to reconsider and rethink very controversial issues about privacy, sexuality, and intimacy" and that general legislation by "policy-making" bodies may not be the only or even the most desirable consequence of such processes of public deliberation.⁹⁵

Both Mansbridge and Benhabib stress an important dimension of civil society: the public sphere need not be homogeneous and suppress difference; instead, "heterogeneity, otherness, and difference can find expression in the multiple associations, networks, and citizens' forums" that make up public life.⁹⁶ Moreover, within the deliberative process itself, norms of universal moral respect and egalitarian reciprocity would "allow minorities and dissenters both the right to withhold their assent and the right to challenge the rules as well as the agenda of the public debate."⁹⁷

To recapitulate our critique of the claim that civil society serves as "seedbeds of virtue" or directly undergirds liberal democracy: (1) it is not obvious that civil society, and the groups or associations within it, contribute directly to democratic values; some associations may do so, but the relationship between civil society and democracy, beyond the cultivation of the disposition to cooperate, is indirect and indeterminate; (2) there are reasons to protect civil society other than its supposed contribution to democratic values or support of the state; conversely, there are reasons to resist efforts by the state to achieve congruence between civil society and the state; (3) civil society contributes to liberal democracy by affording oppositional space to "enclaves of protected discourse and action," which allow social actors to seek to correct the injustices of an ongoing democracy by

94. Benhabib points out that the institutions of civil society are often subject to public regulation and scrutiny, that institutions, individuals, and movements in civil society attempt to influence the public-political process, and that civil society and its associations "are not public in the sense of always allowing universal access to all, but they are public in the sense of being part of that anonymous public conversation in a democracy." *Id.* at 76.

95. *Id.* at 84 (citing Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in *HABERMAS AND THE PUBLIC SPHERE* 123 (Craig Calhoun ed., 1992)).

96. *Id.*

97. *Id.* at 79.

bringing about social change; and (4) civil society provides a multiplicity of sites in which public deliberation can take place.

B. Have Liberal Conceptions of the Person Corroded Civil Society and Undermined Self-Government?

Understanding the revivalists' diagnosis of the breakdown in the capacities necessary for the "government of the self,"⁹⁸ and their conception of how civil society nurtures those capacities, requires an examination of their underlying conception of the person. Indeed, *A Call to Civil Society* suggests that "defining the human person may be where America's civil society debate is ultimately headed."⁹⁹ Moral revivalists, more clearly than civic revivalists, reject as "fundamentally flawed" a model of the person that they attribute, in part, to the liberalism of John Rawls. *A Call to Civil Society* describes this flawed model as follows: "We are *self-originating* sources of valid claims, essentially unencumbered self-owning and auto-teleological. For short, call it a philosophy of expressive individualism, or a belief in the sovereignty of the self—a kind of modern democratic equivalent of the old idea of the divine right of kings."¹⁰⁰

Having set up this caricature of a liberal conception of the person as an "unencumbered" self, *A Call to Civil Society* offers an alternative conception: human beings are "intrinsically social beings, not autonomous creatures who are the source of their own meaning and perfection."¹⁰¹ Persons are "free, reasonable, and therefore responsible beings with a basic drive to question in order to know," further, "our capacity for reasonable choosing and loving is what allows us to participate in a shared moral life, an order common to us all."¹⁰²

We will sketch several points in response. First, the report's contrasting accounts of the person set up false dichotomies between autonomous beings and social beings, as well as between autonomy and responsibility. As we have explained elsewhere, in elaborating forms of Rawlsian political liberalism, a commitment to a principle of autonomy does not entail a commitment to atomism, or to the idea

98. See *A CALL TO CIVIL SOCIETY*, *supra* note 11, at 7; *A NATION OF SPECTATORS*, *supra* note 10, at 8.

99. *A CALL TO CIVIL SOCIETY*, *supra* note 11, at 16.

100. *Id.* (citing John Rawls, *Kantian Constructivism [sic] Moral Theory*, 77 J. PHIL. 515, 543 (1980)).

101. *A CALL TO CIVIL SOCIETY*, *supra* note 11, at 16.

102. *Id.* (citing Rawls, *supra* note 100, at 543).

that persons can or do exist independently of a web of social relations or social influences.¹⁰³ Rawls himself speaks of the various institutions of civil society as part of the “background culture” and contends that they play a vital role in nurturing and forming citizens.¹⁰⁴ And political liberalism further conceives of persons as social and situated selves, rather than “unencumbered” selves. For it envisions citizens as “normal and fully cooperating members of society” who “want to be, and to be recognized as, such members,” that is, as members who are capable of respecting and exercising, not merely the rights, but also the duties, of citizenship.¹⁰⁵

Second, the report’s analysis sloppily reduces a Rawlsian form of liberalism to an “expressive individualism,” and perhaps even to an “anything goes” moral relativism.¹⁰⁶ But to recognize, as Rawls does, that “reasonable moral pluralism” concerning comprehensive moral views is a fact of life in a modern constitutional democracy adhering to a principle of toleration¹⁰⁷ does not equate with such views. Granted, Rawls does not argue for a particular comprehensive moral view as a shared basis for public justification, or as a shared public moral philosophy. But he does posit that persons with differing comprehensive views can reach an overlapping consensus concerning a political conception of justice and, so doing, endorse fair terms of social cooperation on the basis of mutual respect.¹⁰⁸

Third, Rawls’ political liberalism does not rest upon the conception of the person that *A Call to Civil Society* attributes to it. Rawls puts forward a political conception of the person as having two moral powers, a capacity for a conception of justice and a capacity for a conception of the good,¹⁰⁹ which correspond roughly with the capacity for democratic self-government (or deliberative democracy) and the capacity for personal self-government (or deliberative autonomy). Both of us have advanced forms of political liberalism that justify securing the preconditions for the development and

103. See Fleming, *Securing*, *supra* note 35, at 37, 43-46; Linda C. McClain, “Atomistic Man” Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1204-06 (1992).

104. RAWLS, *supra* note 51, at 14.

105. *Id.* at 18, 84.

106. *A Nation of Spectators* also criticizes an understanding of individual liberty that stresses self-expression, self-realization, and personal choice, A NATION OF SPECTATORS, *supra* note 10, at 6-7, but it does not specifically link such an understanding to a conception of the person attributed to Rawls.

107. RAWLS, *supra* note 51, at 36-37, 144.

108. See *id.* at 133-72.

109. See *id.* at 19, 81, 302, 332.

exercise of these two moral powers.¹¹⁰ In that respect, political liberalism does not rule out, but rather supports, a project of fostering the capacities of citizens for democratic and personal self-government. To that extent, it does not deny that government has a basic responsibility to help foster the “conditions for human flourishing.”¹¹¹ But the preconditions for democratic and personal self-government that political liberalism would secure are more appropriate to a constitutional democracy characterized by reasonable moral pluralism than are the conditions for human flourishing that the moral revivalists would foster.

A Call to Civil Society states that “pluralism is a fact and freedom is a birthright,”¹¹² but it intimates that moral disagreement may be largely avoided or overcome through recourse to reason and moral truths.¹¹³ Of course, it does acknowledge the likelihood of continuing moral disagreement, but mainly on the ground that “our access to truth is imperfect,” not because reasonable moral disagreement is inevitable or desirable in a pluralistic society.¹¹⁴ This moral revivalist view appears to differ notably from leading accounts of deliberative democracy, which attribute such disagreement not only to “incomplete understanding” (similar to imperfect access to truth), but also to, among other things, “incompatible values” and “scarcity of resources.”¹¹⁵ It also seems to differ from Michael Sandel’s civic republican conception of a process more “clamorous” than “consensual,” one that suggests ways of conducting political argument, not transcending it.¹¹⁶

A Call to Civil Society makes recurring recommendations that religious institutions should play a “leading role” in moral renewal because “vigorous communities of faith are vital to the discernment

110. See Fleming, *Constructing*, *supra* note 35, at 287-89; Fleming, *Securing*, *supra* note 35, at 18-20; Fleming & McClain, *supra* note 35, at 511-12, 548-50; Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond “Empty” Toleration to Toleration As Respect*, 59 OHIO ST. L.J. 19, 23-24, 40-42, 106-15 (1998).

111. A CALL TO CIVIL SOCIETY, *supra* note 11, at 16; see McClain, *supra* note 110, at 40-42, 106-31 (advancing a feminist form of political liberalism that entails affirmative governmental responsibility to promote capacity for living good, self-governing lives).

112. A CALL TO CIVIL SOCIETY, *supra* note 11, at 12.

113. *Id.* at 27.

114. *Id.* at 27 (including, among the “summary propositions”: “because our access to truth is imperfect, most moral disagreement calls for civility, openness to other views, and reasonable argument in the service of truth”).

115. AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 26 (1996) (another factor they discuss is limited human generosity).

116. See MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 320 (1996).

and transmission of moral truth.”¹¹⁷ In this respect, the report seems premised, not upon a deliberative democracy model—in which citizens vigorously and respectfully engage with one another to deliberate over public matters and to attempt to find common ground—but instead upon a theological model—in which transcendent truth comes to individuals through revelation, meditation, or mediation through wise, discerning, and uplifting religious leaders.¹¹⁸ To be sure, some civil society-revivalists (including some moral revivalists) urge that debate over public moral principles need not (and even should not) attempt to ground a consensus on truths gleaned from “revealed religion.”¹¹⁹ A model of deliberative democracy that would allow room for appeals to religious beliefs, as well as to other comprehensive moral views, so long as citizens attempt also to appeal to public values and to offer some sort of reasonable justification for their arguments, seems more acceptable for a polity characterized by reasonable moral pluralism.¹²⁰

Finally, it is striking that, although many civil society-revivalists offer civil society as an antidote to individual autonomy and excessive individualism, some scholars have suggested that the defining feature of civil society in America is precisely its focus on the autonomous individual, or “agentic” person, rather than on the community.¹²¹ If

117. A CALL TO CIVIL SOCIETY, *supra* note 11, at 21.

118. Beyond specific references in *A Call to Civil Society* to the role of religious leaders in discerning and transmitting moral truths, there is the cover of the report and the interpretation of it. The cover is a Thomas Cole portrait, *The Voyage of Life: Youth*. The report explains the choice of painting in terms that confirm this revelatory, rather than deliberative, approach to truth:

Cole here presents America as a land of Edenic beauty and limitless vitality, often animated by the impetuosity of youth. We also see the tension between the young Voyager’s longing for worldly success, as represented by the imaginary palace in the sky, and his ultimate dependence upon transcendent truth, as represented by the guardian Angel of which, as young man, the Voyager is still unaware.

Id. at back inside cover (emphasis added).

119. See, e.g., EBERLY, *supra* note 25, at 205-10 (urging that “the debate over the relationship of religion to politics and the state should not set back the search for a moral framework that joins secular and religious adherents” and exploring a number of foundations for moral life and for restoring society beyond “revealed religion”); Beem, *supra* note 25, at 47, 57 (arguing that “in an atmosphere of religious pluralism . . . a moral consensus that rests on explicit theological claims appears simply impossible” and unnecessary; “moral beliefs about human rights and equality can be grounded in the universal features of human existence”).

120. For a discussion of the role of religious beliefs, see, e.g., GUTMANN & THOMPSON, *supra* note 115, at 55-69; Rawls, *supra* note 89, at 776, 783-84.

121. See ADAM B. SELIGMAN, THE IDEA OF CIVIL SOCIETY 109-10 (1992). But see EBERLY, *supra* note 25, at 201-02 (acknowledging that “the United States has always placed a premium on the individual, perhaps more so than any civilization,” but arguing for a “moral” conception of individualism, “ultimately grounded in religion” rather than “utilitarian individualism”).

so, and the commitment to the primacy of the individual moral agent has deep roots in American soil, then the revivalists need to reckon with this feature of our “ecology” more than they have. Moreover, as feminist critiques of communitarian quests for communities of place, or involuntary bonds, suggest, such quests lack an adequate critique of the problem of domination within such communities.¹²²

In this regard, it is instructive to consider the evolution in the thinking of Sandel. In his first book, *Liberalism and the Limits of Justice*, he criticized liberalism for its conception of persons as “unencumbered selves.”¹²³ Yet in his recent book, *Democracy’s Discontent*, he speaks not of “encumbered selves” in thickly constitutive associations and communities but of “multiply-situated selves” claimed by “multiple loyalties.”¹²⁴ He suggests: “The civic virtue distinctive to our time is the capacity to negotiate our way among the sometimes overlapping, sometimes conflicting obligations that claim us, and to live with the tension to which multiple loyalties give rise.”¹²⁵ Here Sandel’s civic republicanism comes to resemble both liberal notions of the revisability of the self and feminist concerns for the ability to exit oppressive communities.¹²⁶

C. Does the Revivalist Focus on the Family Focus on the Right Problems?

Because the family features as first and foremost among the seedbeds of virtue in much of the revivalists’ discourse about civil society, the endangered state or crisis of America’s families prompts great concern.¹²⁷ The signs of this crisis include high divorce rates and the high incidence of single-parent (usually fatherless) families. A subsidiary claim is that the other institutions of civil society on which the family depends are also failing or weakening and that we face a fraying “moral fabric” and a weakened “social ecology.”¹²⁸ Moral and civic revivalists share this concern over family “breakdown” and the prescription of shoring up the two-parent, marital family as a core goal in moral and civic renewal. Indeed, *A Call to Civil Society*

122. See *infra* text accompanying notes 196-97.

123. MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 175, 182 (1982).

124. SANDEL, *supra* note 116, at 350.

125. *Id.*

126. See Fleming & McClain, *supra* note 35, at 532.

127. See generally DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* (1995); *SEEDBEDS OF VIRTUE*, *supra* note 8.

128. GLENDON, *supra* note 26, at 110-20; Glendon, *supra* note 8, at 9.

diagnoses “the steady break-up of the married couple child-raising unit as the leading propeller of our overall social deterioration and the necessary starting point for any strategy aimed at recovery.”¹²⁹ Revivalists’ rhetoric about the need for a particular family form to pursue moral and civic renewal continues the discourse of the 1990s over family forms, played out in debates over the appropriate societal response to families headed by single mothers (“fatherless” families), welfare reform, and same-sex parenting.¹³⁰

We already have summarized the basic revivalist arguments about the importance of families in rearing good citizens. We accept the premise that families, as a part of the basic structure of society, play a central role in social reproduction: that is, in attending to “the raising of and caring for children, ensuring their moral development and education into the wider culture,” so that, as citizens, they “have a sense of justice and the political virtues that support political and social institutions.”¹³¹ Our questions about the focus on the family include whether the revivalists take seriously enough the import of the so-called “war over the family” (that is, the debate over family forms), the implications of feminist critiques of the traditional family and of traditional marriage, and the calls by feminists and others to instantiate care as a public value.

Feminist analysis of the family offers a more cautious assessment of its potential as a seedbed of civic virtue, for that work suggests that, often, the family thwarts women’s own self-constitution and fails to foster their free and equal participation in political and civic life. To put the point dramatically, some feminist work suggests that the institution of the family is instead too often a “hellhole” of oppression for women and children.¹³² How can the family serve as a school for citizenship when it is a realm of unequal power in which men exercise

129. A CALL TO CIVIL SOCIETY, *supra* note 11, at 18; see A NATION OF SPECTATORS, *supra* note 10, at 13 (“As a nation, we must commit ourselves to the proposition that every child should be raised in an intact two-parent family whenever possible, and by one caring and competent adult at the least.”); see also SEEDBEDS OF VIRTUE, *supra* note 8, at 3 (“The simultaneous weakening of child-raising families and their surroundings and supporting institutions constitutes our culture’s most serious long-term problem.”).

130. In fact, key voices in those earlier debates are also prominent voices in the ongoing civil society discourse. For example, William Bennett is a Co-Chair of the Commission issuing *A Nation of Spectators*. William Galston is the Executive Director of *A Nation of Spectators* and a signatory to *A Call to Civil Society*. David Blankenhorn, author of the book *Fatherless America*, is a signatory to *A Call to Civil Society* and an editor of *Seedbeds of Virtue*. Mary Ann Glendon is a signatory to both reports and is the other editor of *Seedbeds of Virtue*.

131. Rawls, *supra* note 89, at 788.

132. See Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991).

dominance over women and children and the latter are subject to violence and abuse?¹³³ Moreover, Susan Moller Okin's critique of leading accounts of liberalism poses the question: How can the family serve as a school for moral education when it is unjust, that is, when there is a sexist and unjust division of labor between men and women with respect to the burdens of child-rearing and household work?¹³⁴ Too often, a characteristic feature of women's experience in the family has been care at the expense of self. Some feminists contend that such female self-sacrifice, far from being a virtue, should be regarded as a gender-based injury.¹³⁵ We mention these critiques, not fully to endorse them, but to raise some questions about family that most civil society-revivalists have not adequately addressed.

From the vantage point of such critiques, revivalists give insufficient attention to the problem of unequal power in civil society and the consequences for women's own self-constitution and ultimately for their status as free and equal citizens in our constitutional democracy. Rights of privacy, religious freedom, and freedom of association, which revivalists assume foster civil society by protecting a realm of freedom for individual and associative activity, may thwart women's agency by keeping the state out of the "private" realm.¹³⁶ We disagree with this line of feminist critique to the extent that it regards such a state of affairs as a necessary feature of liberalism or of liberal constitutionalism.¹³⁷ Although we reject any wholesale insistence upon "congruence" between civil society and democratic values, we believe that it is justifiable for government to take measures to attempt to secure equal citizenship for women.¹³⁸

133. See, e.g., ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* (1994).

134. SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989). For Rawls' sympathetic response to Okin, see Rawls, *supra* note 89, at 787-94.

135. See ROBIN WEST, *CARING FOR JUSTICE* (1997). Carol Gilligan identified an "ethic of care" as characteristic of women's moral reasoning, but also noted the risk of the equation of care with female self-sacrifice. See CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

136. This is a familiar line of feminist argument. See, e.g., WEST, *supra* note 133; Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453 (1992); Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657 (1997).

137. See McClain, *supra* note 7; McClain, *supra* note 110.

138. For example, in addition to protecting against private violence and abuse within the home (e.g., the Violence Against Women Act), a government committed to securing equal citizenship for women may seek to provide democratic education, promote public values of equality, toleration, and respect, and prohibit various forms of "private" discrimination. Such measures may serve to promote norms of gender justice and gender equality that are critical of, and may counter, the internal norms inculcated through families and other associations. See McClain, *supra* note 110, at 110-15. Also, to the extent that Rosenblum is correct about the

Nonetheless, this line of feminist critique issues an important challenge to revivalists to focus upon the problems of domination and inequality in civil society and to consider the proper degree of governmental regulation of civil society to address those problems. It is troubling that when civic and moral revivalists set forth their programs to strengthen families and to stem family fragmentation, problems due to family violence and domination receive virtually no attention.¹³⁹

At the same time, feminist work on the family highlights women's particular role in sustaining civil society and generating social capital: Women's histories reveal the prominence of care and connection in their lives and in their moral thinking and theory. Law and politics afford inadequate attention to or support for those values, such work contends, and our public life should be transformed by the insights gained from women's experience as caretakers, and especially as mothers.¹⁴⁰

Now, in the discourse on reviving civil society, there is often recognition that it is women, and particularly mothers, who have done the heavy lifting when it comes to moral education of children and preparation of them for citizenship, not only within the family but

"personal uses of pluralism," if government fosters the conditions for such use, it promotes the possibility through "shifting involvements" of personal and institutional revision, or reconstitution of the institutions within civil society. For example, if the family is one among many associations, it is possible that a woman raised in a household with a traditional division of labor may, through membership in associations, come to a revised self-understanding, expectation, and desire, which may lead her to try to reconstruct or to exit from that family.

139. Both reports are silent on the issue. Glendon acknowledges that the presence of violence and abuse within some families leads some people to be skeptical about the role of families as seedbeds of virtue. GLENDON, *supra* note 26, at 182. Galston states that "[d]omestic violence is not a private matter, and it cannot be condoned." Galston, *supra* note 10, at 607.

140. See Jane Mansbridge, *Feminism and Democratic Community*, in DEMOCRATIC COMMUNITY 339 (John W. Chapman & Ian Shapiro eds., 1993); WEST, *supra* note 135. What could women's experience in the family contribute to political theory? Some feminists suggest that: (1) the mother-child paradigm offers a more promising model for social relationships than do models of social contract or economic man; (2) a focus on the mother-child paradigm offers a good basis for establishing trust and the idea of obligations toward dependent persons; and (3) women's caretaking experiences suggest that not all obligations are voluntary or the result of contract, and thus could help to secure acceptance of binding obligations to help the vulnerable. See Virginia Held, *Non-Contractual Society: A Feminist View*, in FEMINISM AND COMMUNITY 209 (Penny A. Weiss & Marilyn Friedman eds., 1995); Mansbridge, *supra* at 339. Internal feminist critiques have raised some instructive concerns, such as whether mothering—a hierarchical, nonreciprocal relationship of dependency—can usefully serve as a model for relationships among citizens, in which principles of equality, reciprocity, and justice should feature centrally. See Carol C. Gould, *Feminism and Democratic Community Revisited*, in DEMOCRATIC COMMUNITY, *supra* at 396, 405-06. Both of us support the general proposition that women's experience in the family can contribute to political theory, although we are skeptical about the particular foregoing propositions, and elsewhere one of us has criticized them. See McClain, *supra* note 103, at 1196-1203, 1263-64.

also through volunteer work in their communities.¹⁴¹ For example, Glendon speaks of women's special role in the family and suggests the transformative potential for politics and public life of women's traditions of care and nurturing connections.¹⁴² What is less common in such revivalist discourse is recognition of the problems of domination and inequality as identified by feminist work. As Mansbridge puts it: "Among women, the experience of unequal power is as universal as the experience of connection."¹⁴³ Although there are occasional nods in this direction in revivalist work, overall there is little attention to the extent to which women, at the time of the founding and subsequently, were simultaneously regarded as transmitters of virtue and excluded from full citizenship (virtue being defined in masculine terms within republicanism) or the extent to which law and culture narrowly prescribed married women's rights and responsibilities. Instead, to the extent that the contemporary academic treatment of marriage echoes feminist recognition of the dangers of marriage for women and of the acceptability of alternative family forms, some revivalists complain of a "textbook assault on marriage."¹⁴⁴

But just what is the potential of the family as a seedbed of civic virtue or as a model for democracy? A striking feature of some feminist work on the family is the attempt simultaneously to hold onto the mother-child relationship as a helpful model of the benign side of connection and to criticize the male-female sexual and marital relationships as the malignant side of connection.¹⁴⁵ Taken together, these two dimensions of feminist work suggest the challenge of formulating a useful feminist conception of the proper role of families

141. See GLENDON, *supra* note 26, at 174; William A. Galston, *Won't You Be My Neighbor?*, AM. PROSPECT, May-June 1996, at 17; see also Kathryn Kish Sklar, *A Historical Model of Women's Voluntarism*, in CIVIL SOCIETY, DEMOCRACY, AND CIVIC RENEWAL, *supra* note 2, at 185 (discussing how traditions of voluntarism and of limited government led women's voluntary organizations in the Progressive Era to address many social problems).

142. GLENDON, *supra* note 26, at 174.

143. Mansbridge, *supra* note 140, at 362.

144. Norval Glenn, *A Textbook Assault on Marriage*, RESPONSIVE COMMUNITY, Fall 1997, at 56, 56 (describing the findings of a study by the Institute for American Values, a co-sponsor (with the University of Chicago Divinity School) of the Council on Civil Society, which issued the report, *A Call to Civil Society*, see *supra* note 11). This is not to deny that, although influential studies of marriage have concluded that marriage has significant costs for women (more than for men), some more recent social scientists have found that marriage has benefits for women as well as men. For discussion, see Linda C. McClain, *The Liberal Future of Relational Feminism: Robin West's Caring for Justice*, 24 L. & SOC. INQUIRY 477, 508-09 (1999).

145. See WEST, *supra* note 135, at 1-2. For a critique of West's account that is otherwise sympathetic, see McClain, *supra* note 144; see also Held, *supra* note 140, at 228-29.

in a liberal democracy. For even though such accounts value care and connection, they recognize the problem that unequal distribution of responsibility for such care imposes costs on women and burdens their equal participation in society. It is in this approach toward connection within the family that such feminists diverge most sharply from most revivalists. Fatherless families are viewed by most revivalists as the leading indicator (and a cause) of the crisis in civil society.¹⁴⁶ Yet on some feminist views, fatherless families might seem to offer an alternative to patriarchy. Indeed, Martha Fineman argues against the sexual dyad between women and men as the basis for the family, arguing instead for focusing on the “Mother/Child dyad”; on her model, the state should subsidize the latter nurturing units.¹⁴⁷

Can the family be transformed along feminist lines to make it a more equal institution, one that honors women’s status as free and equal citizens and facilitates their full participation in political and civic life? To update a question from the *Ladies Home Journal*: “Can marriage be saved?” Or should it be saved? Civil society-revivalists condemn divorce (which women initiate more frequently than men) and nonmarital family forms as indicia of civic and moral decline, and argue for governmental measures to discourage both.¹⁴⁸ They might view increases in divorce and decisions to opt out of marriage as evidence of an ascendance of adults selfishly putting their happiness above the well-being of children.¹⁴⁹ But there are important issues of sex equality, including sex role expectations and unequal distribution of power and responsibilities within marriage, that may offer

146. See Blankenhorn, *supra* note 44, at 275-76; see also BLANKENHORN, *supra* note 127. Indeed, *A Call to Civil Society* mentions, as a “public example” of “behavior that violates the norm of personal responsibility,” “[a] pop star announces that she wants a baby but not a husband.” *A CALL TO CIVIL SOCIETY*, *supra* note 11, at 5.

147. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 226-36 (1995); Martha Albertson Fineman, *The Family in Civil Society*, 75 *CHI.-KENT L. REV.* 531 (2000). We do not understand why Professor Elshtain attributes these ideas to us or why she charges us with “a willingness to entertain . . . the possibility that men can just take a hike.” See Elshtain, *supra* note 11, at 591. Our own approach, as we hope we make clear in this section of the article, is to argue for the reconstruction of marriage along more inclusive, egalitarian lines and for the instantiation of care as a public value. Moreover, Fineman uses the gendered term “Mother/Child dyad” as a metaphor for the social practice of caretaking that addresses inevitable dependency (rather than as a literal and exclusive biological category), but she believes that “men can and should be Mothers” that is, engage in caretaking. See FINEMAN, *supra* at 234-35. Elsewhere, one of us has favorably discussed Fineman’s call for public support for caregiving. See Linda C. McClain, *Toward a Formative Project to Secure Freedom and Equality*, 85 *CORNELL L. REV.* (forthcoming 2000).

148. See *A CALL TO CIVIL SOCIETY*, *supra* note 11, at 19-20; *A NATION OF SPECTATORS*, *supra* note 10, at 13.

149. See *A NATION OF SPECTATORS*, *supra* note 10, at 7.

persuasive explanations for many women's resistance to marrying, or their willingness to exit marriage and to pursue motherhood apart from marriage—even as some of these women continue to affirm belief in marriage as an institution.¹⁵⁰ Marriage is an institution in the midst of transformation, just as traditional gender roles within marriage and the larger society are the subject of contestation and reconstruction. Revivalists neglect a promising approach that would focus on some of the sources of discontent within marriage (such as women's double burden) and on institutional reconstruction of marriage (such as the ideal of "peer marriage," i.e., an egalitarian conception of rights, responsibilities, and the exercise of power within marriage), which might address that discontent as well as the problem of women's double burden within marriage.¹⁵¹ Moreover, some feminist proponents of same-sex marriage argue for the critical transformative potential of same-sex marriage to put in question inequality and hierarchy based on gender roles within heterosexual marriage.¹⁵²

Focusing upon the family as an important site of social reproduction and caregiving could afford an important opportunity to argue that supporting the work of social reproduction is a public responsibility, and to attempt to instantiate care as a public value. (Indeed, this could be a common goal shared by civil society-revivalists and many feminists and liberals.)¹⁵³ This would provide a

150. See Kathryn Edin, *Few Good Men*, AM. PROSPECT, Jan. 3, 2000, at 26 (reporting results of study of low-income single mothers' attitudes about marriage and what factors prevent them from marrying; also noting the role of low-income women's distrust of men and their requirement that potential husband be economically stable). For a provocative argument that low marriage rates among African-Americans are due in significant part to the gender attitudes of African-American men, see ORLANDO PATTERSON, *RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES* 161-65 (1998).

151. See PEPPER SCHWARTZ, *PEER MARRIAGE: HOW LOVE BETWEEN EQUALS REALLY WORKS* (1994); Pepper Schwartz, *Peer Marriage*, RESPONSIVE COMMUNITY, Summer 1998, at 48; see also McClain, *supra* note 144, at 506-10. Interestingly, Amitai Etzioni advocates peer marriage as part of a communitarian reconstruction of the family. ETZIONI, *supra* note 50, at 179-80.

152. See, e.g., Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 L. & SEXUALITY 9, 16-19 (1991); Robin West, *Integrity and Universality: A Comment on Ronald Dworkin's Freedom's Law*, 65 FORDHAM L. REV. 1313, 1329-34 (1997). For a cautionary view about the regulatory effect of marriage upon its participants, see Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251 (1999).

153. For examples of liberal and feminist calls for a national conversation about America's "care crisis" and the need to instantiate care as a public value, see MONA HARRINGTON, *CARE AND EQUALITY* (1999) (arguing for a reform of liberal politics); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self*, 8 AM. U. J. GENDER SOC. POL'Y & L. (forthcoming 2000) (arguing for recognition of the "subsidy" provided by the society-preserving work done by families); see also Linda C. McClain, *Care as a Public Value*:

foundation for thinking creatively about institutional reform that would support care, understood as “essential to human health” and “balanced development,” including “developing human moral potential.”¹⁵⁴ Human development literature looking at the issue of care in a more global perspective finds that “the role of care in the formation of human capabilities and in human development is fundamental” not only for children, but also for adults, and that “the expansion of markets tends to penalize altruism and care.”¹⁵⁵ It also finds that “both individuals and institutions have been free-riding on the caring labour that mainly women provide.”¹⁵⁶

A more explicit focus on care also might lead civil society-revivalists to focus on the problems raised by women’s disproportionate responsibility for care in an “invisible human ecology of care” involving women both as unpaid and paid caregivers.¹⁵⁷ It also could build on the revivalists’ recognition that market forces are not necessarily compatible with civic health¹⁵⁸ by offering a powerful vantage point from which to critique the ways in which current economic arrangements impinge upon families and devalue care, as well as the human costs of policies championed as furthering “efficiency” and productivity.¹⁵⁹ Moral revivalists advance the goal that parents should spend more time with their children, and lament a state of affairs in which “for most Americans in recent

Foundations for Public Responsibility (unpublished manuscript, presented at the Feminist Legal Theory Workshop, Children: Public Good or Individual Responsibility?, Cornell Law School, Nov. 19-20, 1999) (examining liberal, feminist, and civic republican sources for instantiating care as a public value).

154. HARRINGTON, *supra* note 153, at 48-49. Harrington argues that “to assure good care to all members of the society should become a primary principle of our common life, along with the assurance of liberty, equality, and justice.” *Id.* at 48.

155. *The Invisible Heart—Care and the Global Economy*, in HUMAN DEVELOPMENT REPORT 1999, at 77, 79 (United Nations Development Programme, 1999) [hereinafter *The Invisible Heart*].

156. *Id.*

157. Arlie Russell Hochschild, *The Nanny Chain*, AM. PROSPECT, Jan. 3, 2000, at 32 (describing the human costs of “global care chain,” or “invisible human ecology of care,” linking rich and poor countries, when first world mothers depend on nannies emigrated from Third World countries, who in turn depend on other caregivers to care for the children left behind; and arguing for raising the value of caring work and for getting fathers to contribute more child care). For example, the use of the gender-neutral term “parent” in *A Call to Civil Society* tends to mask this unequal burden. A CALL TO CIVIL SOCIETY, *supra* note 11, at 19.

158. See A CALL TO CIVIL SOCIETY, *supra* note 11, at 10-11; A NATION OF SPECTATORS, *supra* note 10, at 40.

159. See Martha McCluskey, *Subsidized Lives and the Ideology of Efficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. (forthcoming 2000) (concluding that “the double standard which holds that public support for capital, not care taking, will promote the overall public good rests on ideological faith—and political power—more than economic evidence”).

decades, our roles as workers and consumers have gotten thicker and more dominant, while our roles as family members and neighbors have grown thinner and weaker.”¹⁶⁰ Nonetheless, they evidently hold back from pursuing any ambitious program to instantiate care as a core public value (and care for children as a crucial component of that value) and from undertaking institutional reform necessary to achieve that end. Instead, they turn to exhortation of individual employers to take comparatively modest steps toward more flexible working arrangements “wherever possible.”¹⁶¹ The challenge in thinking about care is to find ways to nurture human capabilities that avoid the gendered division of labor and that aim at a fairer distribution of labor between men and women and among government, family, community, and employer.¹⁶²

Finally, to the extent that civil society-revivalists’ prescriptions for the family implicate the “war over the family,” or at least family forms, we disagree with their apparent assumption that civic virtue requires one family form, that of a heterosexual, two-parent, married family.¹⁶³ We share Rawls’ view that while government has a legitimate concern with the functions that families perform, “no particular form of the family . . . is required by a political conception of justice so long as the family is arranged to fulfill these tasks [of social reproduction] effectively and doesn’t run afoul of other political values.”¹⁶⁴ A functional approach to family policy would be

160. A CALL TO CIVIL SOCIETY, *supra* note 11, at 13, 15, 24. For a liberal argument for such a public value, and specific proposals for reform, see HARRINGTON, *supra* note 153.

161. A CALL TO CIVIL SOCIETY, *supra* note 11, at 24. As Martha Fineman observes, in this symposium, civil society-revivalists’ reliance on exhortation or cajoling business, labor, and economic institutions to perform their civic responsibilities contrasts with their calls to reform marriage and divorce laws. Fineman, *supra* note 147, at 538.

162. As one recent study concludes:

The nurturing of human capabilities has always been difficult and expensive. In the past it was assured by a gender division of labour based on the subordination of women. Today, however, the cost of providing caring labour should be confronted explicitly and distributed fairly—between men and women, and among the state, the family, or community and the employer.

The Invisible Heart, *supra* note 155, at 83.

163. Both reports appear to make this assumption in the sense that their discussions of “the family” and of its importance for moral and civic renewal clearly presuppose the heterosexual, two-parent, married family. See, e.g., A CALL TO CIVIL SOCIETY, *supra* note 11, at 7, 18; A NATION OF SPECTATORS, *supra* note 10, at 13. Both reports are silent on the issue of same-sex marriage.

164. Rawls, *supra* note 89, at 788 n.60. This view is supported by a commitment to a principle of toleration for diverse comprehensive moral views concerning intimate association, by a concomitant commitment to refraining from imposing a particular orthodoxy about how best to order one’s family life, and by concerns for sex equality and antidiscrimination principles. Professor Elstain correctly states that we, drawing upon this passage from Rawls, “embrace a ‘functional approach to family policy,’” but goes on to state that “there are serious

more inclusive, and would reach same-sex parents (nowhere mentioned in either *A Call to Civil Society* or *A Nation of Spectators*) who, social science evidence suggests, can be competent, loving parents who can adequately perform the responsibilities of social reproduction.¹⁶⁵ A more constructive, and less divisive, approach to family policy would be to address such matters as the moral and political importance of families, how best to reconstruct the family and other institutions of civil society to meet the needs of children and to redistribute responsibility, and—to the extent that the erosion of civil society reflects decreases in women’s voluntary activities and childcare in light of changed patterns of family life and workforce participation—what alternative sources of social capital exist or might be fortified.¹⁶⁶

problems with the functionalist approach to family life,” and even goes so far as to attribute Talcott Parsons’ functionalist theory of “systems maintenance” to us and to Rawls! See Elshstain, *supra* note 11, at 591. With all due respect, embracing a “functional approach” in a generic sense is not the same thing as taking “the functionalist approach,” much less a “functionalist” approach in Parsons’ specific sense. Neither we nor Rawls embrace a “functionalist” approach to family policy that is unconcerned with the well-being of children—and certainly not a functionalist approach inspired by Parsons—and there is no basis in our writing for saying that we do. Furthermore, Elshstain’s statement that Rawls “gives no account of moral development, but he does privilege, like Parsons, the ‘needs’ of the ‘macro-order,’” *id.* at 592, is groundless. Indeed, on Rawls’ view, families are to perform the function of “ensuring [children’s] moral development.” See *supra* text accompanying note 131. We do not understand how anyone who has read Rawls could propound this interpretation or make this charge. See JOHN RAWLS, *A THEORY OF JUSTICE* 453-504 (1971) (discussing the acquisition of a sense of justice and the stages of moral development); see also OKIN, *supra* note 134, at 97-100 (offering a sympathetic critique of Rawls’ “much-neglected” account of childhood moral development).

165. See *Baehr v. Miike*, No. CIV. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) (finding that expert testimony supported that gay and lesbian parents can be “as fit and loving parents, as non-gay men and women and different-sex couples” and that, because the state failed to demonstrate that its compelling interest in the optimal development of children required that families consist of married, biological (or at least heterosexual) parents, excluding gay men and lesbians from marriage was an unconstitutional denial of equal protection of the laws); see also *Baker v. Vermont*, No. 98-032, 1999 WL 1211709, at *35 (Vt. Dec. 20, 1999) (“The laudable governmental goal of promoting a commitment between married couples to promote the security of their children and the community as a whole provides no reasonable basis for denying the legal benefits and protections of marriage to same-sex couples, who are no differently situated with respect to this goal than their opposite-sex counterparts.”). For conflicting assessments of the social science evidence, compare Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 (contending that social science literature suggests that children in same-sex families are harmed by the intimate relationships of their parents and arguing for a rebuttable presumption of harm in the law), with Carlos A. Ball & Janice Fareell Pea, *Warring With Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253 (rebutting Wardle’s assessment of the social science literature and arguing that gay and lesbian parents should be evaluated individually on basis of their ability to be good parents instead of on assumptions based on sexual orientation).

166. Of course, civil society-revivalists might respond that, even accepting a functional approach to family, social science evidence supports the premise that two-parent families are better for children and that children in single-parent families fare worse. This social science debate is ongoing, and here we do not seek to assess, or to add to, the underlying empirical literature. Undisputably, poverty is harmful for children, and single-parent families generally

D. Have Gains in Equality and Liberty Caused the Decline of Civil Society?

In some of the calls for reviving civil society, there is a troubling moral accounting that seems to juxtapose, on the one hand, gains in equal citizenship and the extension of civil rights and liberties to minorities and women against, on the other hand, losses in civic virtue, the erosion of civil society, and the emergence of serious moral, civic, or social problems. In such an accounting, the trade-off for the benefits of the civil rights movements in extending full citizenship to African-Americans, women, and other groups previously denied such citizenship has been the breakdown of civil society. We will mention the work of two serious and thoughtful scholars, William A. Galston and James Q. Wilson.

Galston argues that it is a debatable question “whether the cultural revolution of the past generation has left the United States better or worse off,” for “[a]lthough the civil rights movement is widely acknowledged to have righted ancient wrongs, epidemics of crime, drugs, and teenage pregnancy have exacted a fearful toll.”¹⁶⁷ We certainly concede that the latter are serious problems. But what

are poorer than two-parent families. But a functional approach should also be attentive to broader questions of social justice (e.g., whether the current distribution of resources be used as the baseline from which to measure one’s moral entitlement to have children), and to issues of sex and race equality. The proposition that persons should not become parents until they are ready to accept the concomitant responsibilities seems inarguable. However, the common statement that only people who can afford to have children should do so tends to slight such questions and issues, as well as to ignore the extent to which the government does subsidize families (e.g., without the Earned Income Tax Credit, many working poor families could not “afford” to have children). One dilemma that single-parent families bring to the fore is that of attempting to combine market labor with caregiving labor and the invisibility, in the traditional breadwinner/caregiver two-parent family, of the vital work of nurture and social reproduction that is usually performed by mothers and other women.

Rather than adopting public policies that give preferences for various governmental benefits to two-parent marital families, as moral revivalists advocate, it might be a more productive avenue of public policy to find ways to support such families without undermining or stigmatizing single-parent families. For example, it seems unfair, if not perverse, to adopt welfare reform based on the premise that “personal responsibility” requires that mothers receiving welfare must work (to support their children), and then to adopt preferential policies that undercut those mothers’ ability to work out of a fear that, if mothers are *too* successful in moving from welfare to work, this may have the effect of deterring other women from entering marriage. See David T. Ellwood, *Anti-Poverty Policy for Families in the Next Century: From Welfare to Work—and Worries* (unpublished paper, presented at the John F. Kennedy School of Government, Harvard University, Nov. 17, 1999) (noting that “the real conundrum in this domain is that although there is little evidence that social policy had a major influence on family formation, some policymakers fear that increasing the capacity of single parents to provide for their families might increase the formation of such homes”).

167. GALSTON, *supra* note 26, at 273; see also Galston, *supra* note 10, at 608-11; Galston, *supra* note 141, at 11-14.

do the gains have to do with the losses, that is, what does the civil rights movement have to do with such problems? Galston claims that society used to have more civic virtue and a “dominant and effective” cultural consensus (namely, one that gave WASP men a dominant position in society), while acknowledging that there were some unjust aspects, such as racial inequality and segregation, gender inequality within the household and workplace, and the marginal status of certain ethnic and religious groups. Thus, he grants that the civil rights movements of the 1950s and 1960s properly attacked undeniable injustice toward and exclusion of groups like African-Americans from full membership in society. For Galston, however, the civil rights movements in effect opened a Pandora’s Box that let loose an indiscriminate attack, in the name of equality and liberty, on all hierarchies and authority that formed part of traditional morality and cultural consensus, and that unleashed a demand for the legitimation of difference, in whatever form, with dire consequences for civil society and the polity.¹⁶⁸

Similarly, in *Seedbeds of Virtue*, Wilson comments on the difficulty of reckoning up “the balance sheet of [the] sea change in the culture of liberalism.”¹⁶⁹ He bemoans a movement away from the traditional morality that “ordinary men and women” lived under for centuries—which included “a firm attachment to the fundamental virtues of daily life, a desire for liberty tempered by moderation, [and] a willingness to judge other people on the basis of standards they thought were universal”—toward modernism and postmodernism—which includes “extreme understandings of liberty and equality” and “relativistic views of human nature.”¹⁷⁰ He writes:

I began by recalling the familiar facts of crime, drug abuse, divorce, and illegitimacy, but it is time to recall as well what else has changed. Slavery has been abolished and segregation rolled back; mass higher education has produced a vastly more sophisticated and talented population; and women are less often the victims of a sexual double standard. Against those gains we must measure the increased tolerance of drug experimentation, the social marginalization of religious believers, the heightened skepticism about institutional authority, and a certain confusion over sexual

168. GALSTON, *supra* note 26, at 268-70. Some prominent civil society-revivalists claim that, although contemporary Americans long for community, they resist the authority necessary to maintain it. See EBERLY, *supra* note 25, at 8-12.

169. James Q. Wilson, *Liberalism, Modernism, and the Good Life*, in *SEEDBEDS OF VIRTUE*, *supra* note 8, at 17, 29.

170. *Id.* at 20, 25, 26.

roles.¹⁷¹

Wilson's balance sheet appears either to represent a rather mixed assortment of factors or to reflect a highly questionable etiology of decline. Again, what do the gains have to do with the supposed losses?¹⁷² And how have gains in racial and gender equality caused such supposed problems and indeed the decline of civil society?

In any event, Wilson's moral accounting, like Galston's, seems to make the disturbing assumption that more equality and liberty leads to less virtue, and that the trade-off for a more just and inclusive society is a regrettable sacrifice of traditional morality and cultural consensus. These troubling juxtapositions and accountings appear to manifest ambivalence about pluralism and the value of individual autonomy, or personal self-government,¹⁷³ as well as anxiety about the possibility of finding a basis for social solidarity and trust without moral consensus and, in fact, moral truths. Indeed, it is well to recall that the subtitle of *A Call to Civil Society*—of which both Wilson and Galston are signatories—is “*Why Democracy Needs Moral Truths*.”¹⁷⁴

Have these changes brought about a decline in civic virtue and an erosion of civil society? It is problematic to look backwards for a time when virtue was more abundant, for the history of America includes shameful exclusion of categories of persons from citizenship and full membership in society. To be sure, many civil society-revivalists recognize the importance of avoiding the “nostalgia trap.”¹⁷⁵ For example, *A Call to Civil Society* reports that among its signatories “there is little desire to ‘go back’ to some earlier era,”¹⁷⁶ and *A Nation of Spectators* reports that “[i]n recent decades, important social movements have helped protect individual rights and have brought long-suppressed voices into our public dialogue.”¹⁷⁷ Nonetheless, some revivalists seem to engage in selective retrieval,

171. *Id.* at 29.

172. With all due respect to Professor Wilson, we are dubious about some of these supposed losses, e.g., “the social marginalization of religious believers,” the reports of which we believe have been greatly exaggerated, and “a certain confusion over sexual roles,” if by this he means to refer to liberals and feminists challenging traditional assumptions about sexual roles and to gay men and lesbians coming out of the closet to challenge such assumptions.

173. Galston's work generally does not manifest such ambivalence about pluralism. In his book *Liberal Purposes*, whose subtitle is *Goods, Virtues, and Diversity in the Liberal State*, he has provided a rich substantive account of liberal democratic virtues that are appropriate for a culturally and morally diverse society. GALSTON, *supra* note 26.

174. *A CALL TO CIVIL SOCIETY*, *supra* note 11.

175. See generally *COMMUNITY WORKS*, *supra* note 2.

176. *A CALL TO CIVIL SOCIETY*, *supra* note 11, at 5.

177. *A NATION OF SPECTATORS*, *supra* note 10, at 5.

evidently assuming that this history of exclusion was an unfortunate element of history that can be easily removed (like a weed among the seedbeds), and they fail to consider whether such a history seriously undermines the very notion of a more virtuous past.¹⁷⁸ Rogers Smith's powerful book, *Civic Ideals*, seriously questions the argument or assumption that racism, sexism, and nativism were simply marginal, unfortunate aspects of that past. Smith advances the thesis, borne out by extensive historical evidence, that the history of United States citizenship laws is one "shot through with forms of second-class citizenship, denying personal liberties and opportunities for political participation to most of the adult population on the basis of race, ethnicity, gender, and even religion,"¹⁷⁹ reflecting the view of American civic identity that "true Americans were native-born men with Anglo-Saxon ancestors."¹⁸⁰

Beyond this notion of a moral accounting, there is also the idea that rights and responsibilities are out of balance with one another. Civil society-revivalists carry forward certain themes sounded nearly a decade ago in prominent critiques of rights and "rights talk," in particular, that there is an imbalance between rights and responsibilities, and that the responsible exercise of rights that makes "ordered liberty" possible requires that persons possess certain virtues and traits of character.¹⁸¹ The argument seems to be that America's "absolutist" rights rhetoric, tempered neither by notions of responsibility and obligation nor by the mores of a healthy civil society, leads to an imbalance between rights and responsibilities, to the impoverishment of political discourse, and ultimately to the incapacity for self-government.¹⁸² Self-government, on such an

178. We do not mean to suggest that Galston makes such an assumption regarding this history of exclusion. In this symposium, Dorothy Roberts argues that civil society-revivalists seem forgetful of the pervasive, systemic racism in the history of the United States and that their program for attacking "moral decline" fails to give a central place to social justice and to rectifying the contemporary effects of such an immoral history. Dorothy E. Roberts, *The Moral Exclusivity of the New Civil Society*, 75 CHL.-KENT L. REV. 555 (2000). Battles in recent years over public monuments illustrate the problems raised in the text. See SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES (1998).

179. ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 2 (1997).

180. *Id.* at 3.

181. See *supra* note 26 and accompanying text (citing many of the leading sources and noting that some of the earlier critics of rights talk are prominent voices in the calls to revive civil society). A striking formulation is Senator Orrin Hatch's invocation of Tocqueville: "Thus, while the law allows the American people to do everything, there are things which religion prevents them from imagining and forbids them to dare." Orrin G. Hatch, *A Dependence on the People*, 77 CORNELL L. REV. 959, 961 (1992) (citing TOCQUEVILLE, *supra* note 34, at 269).

182. See GLENDON, *supra* note 26.

account, requires "government of the self" and the virtue of self-restraint.¹⁸³ *A Nation of Spectators* asks: "Can we relentlessly pursue individual choice at the expense of mutual obligation without corroding vital social bonds? Will we remain secure in the enjoyment of our individual rights if we fail to accept and discharge our responsibilities?"¹⁸⁴ Furthermore, it contends that "Americans today place less value on what we owe others as a matter of moral obligation and common citizenship; less value on personal sacrifice as a moral good; less value on the social importance of respectability and observing the rules; less value on restraint in matters of pleasure and sexuality; and correspondingly greater value on self-expression, self-realization, and personal choice."¹⁸⁵ Therefore, the noble idea of "ordered liberty" has degenerated into the idea of "liberty as license": Expansive understandings of individual rights to liberty, autonomy, or personal choice, spawned by liberalism's culture of "expressive individualism," have corroded the virtues necessary for democracy.¹⁸⁶ Elsewhere, one of us has thoroughly criticized such critiques of rights and "rights talk,"¹⁸⁷ and we will not repeat those criticisms here.

To be sure, *A Nation of Spectators* is not altogether hostile to rights and "rights talk," for it affirms that "all human beings possess fundamental rights" (such as "freedom of religion, of speech, of the press, and of assembly") and posits that "government's essential purpose is to protect those rights."¹⁸⁸ (*A Call to Civil Society* is not as forthright about rights.) Still, perhaps because revivalists seek to correct a perceived imbalance between rights and responsibilities, the reports contain very little "rights talk" and much more talk of fortifying a sense of personal responsibility and mutual obligation. There is a striking absence in the reports of appeals to rights, or to any national governmental initiatives that implicate rights, as ways of advancing the goals of civic and moral renewal.¹⁸⁹ But it is important

183. A NATION OF SPECTATORS, *supra* note 10, at 8; see also A CALL TO CIVIL SOCIETY, *supra* note 11, at 7.

184. A NATION OF SPECTATORS, *supra* note 10, at 7.

185. *Id.*

186. See *id.* at 6-8; see also A CALL TO CIVIL SOCIETY, *supra* note 11, at 16.

187. See McClain, *supra* note 26.

188. A NATION OF SPECTATORS, *supra* note 10, at 7.

189. For example, the reports seem to contemplate that citizens may have obligations to persons who are economically disadvantaged, but there is no suggestion that the latter have any reciprocal right entailed by the former's obligation. Indeed, Galston contends that the "right to welfare" is a "bogus right." Galston, *supra* note 10, at 605.

to remember that national initiatives to secure rights have been central, if not indispensable, to pursuing equal citizenship for racial and ethnic minorities and for women.¹⁹⁰

There is another type of moral accounting in the discourse about civil society that is less problematic than those of Galston and Wilson. On this sort of account, the trade-off for a more inclusive definition of citizenship is a decline in social solidarity and trust and the loss of civil society, understood as the classical idea of face-to-face interactions in a small republic with a homogeneous people. In *The Idea of Civil Society*, Adam Seligman argues that the basis for membership in society has changed from belonging to various associations and particular groups to inclusion in the more universal category of the autonomous, rights-bearing citizen. He argues that America has served throughout the world as the “paradigm” of a “truly ‘civil society’” precisely because of its idea of moral personhood as the basis for political community and its history of the gradual realization of the category of universal citizenship.¹⁹¹ (Of course, this view should be read against Smith’s less benign view of this supposed unfolding dynamic.) And yet, the “paradox of modern society” is that “the very universalization of trust in citizenship . . . undermines the concrete mutuality and shared components of the moral community upon which trust is based. Hence the call for a return to civil society.”¹⁹² The problem, Seligman contends, is that universal citizenship affords an inadequate foundation for social solidarity and trust because it is so abstract and empty of the face-to-face interactions of the classical idea of civil society. Moreover, although liberal and progressive nationalists attempt to find a model of American citizenship that is both strong and inclusive, some scholars contend that such inclusive citizenship is an inevitably weak bond because it competes with other stronger membership bonds.¹⁹³

This type of moral accounting usefully identifies the problems of

190. Galston writes that “[t]he civil rights movement a generation ago triggered an outpouring of pent-up demands throughout our society for the recognition of long-denied rights.” William A. Galston, *Political Economy and the Politics of Virtue: U.S. Public Philosophy at Century’s End*, GOOD SOC’Y, Winter 1998, at 1, 10. He continues: “While few question the appropriateness of this recognition, some public intellectuals are now expressing doubts about the general ‘culture of rights’ to which it has given rise.” *Id.*; see also ELSHTAIN, *supra* note 2; Elshtain, *supra* note 11.

191. SELIGMAN, *supra* note 121, at 186.

192. *Id.* at 187.

193. See Peter J. Spiro, *The Citizenship Dilemma*, 51 STAN. L. REV. 597 (1999) (reviewing SMITH, *supra* note 179); see also *infra* text accompanying notes 230-31.

trust and social solidarity amidst difference as fundamental. What is the glue that holds society together and that motivates persons to cooperate? Can there be social solidarity or even social cooperation in a heterogeneous, diverse society? Civic revivalists offer one promising path in questing for a “constitutional faith.” Tellingly, as Galston suggests in recent work questing for a basis for political unity in the face of the demise of the “informal cultural establishment of the beliefs and mores of white Anglo-Saxon Protestants” and the rise in identity politics, “it is clear that no such establishment can or should serve as the basis of national unity.”¹⁹⁴ Rather, “the alternative to a common culture would seem to be a revitalized understanding of political unity,” that is, a “constitutional faith.”¹⁹⁵

We also believe that the conception of civil society that we endorse, which allows for a multiplicity of sites in which public deliberation, contestation, and argument can take place, is helpful. In addition, we believe that feminist and liberal works offer helpful building blocks for a model of civil society that contemplates social cooperation and trust among different, but free and equal, citizens. We will mention two examples here. First, feminist critiques of communitarian invocations of community suggest that we cannot and should not go home again to those homogeneous and exclusionary communities of the past—“communities of place”—which devalued difference and included elements of subordination. Instead, we should develop models of community that recognize and appreciate difference. Marilyn Friedman suggests that “unchosen communities are sometimes communities we can and should leave” in favor of “communities of choice,” or voluntary communities. She observes: “Perhaps it is more illuminating to say that communities of choice foster not so much the constitution of subjects as their reconstitution.”¹⁹⁶ A helpful feminist inquiry might be to “identify the sorts of communities that provide nonoppressive and enriched lives for women.”¹⁹⁷

Second, Rawls’ political liberalism posits that reasonable

194. Galston, *supra* note 190, at 9.

195. *Id.* (mentioning SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988)).

196. Marilyn Friedman, *Feminism and Modern Friendship: Dislocating the Community*, in *FEMINISM AND COMMUNITY*, *supra* note 140, at 187, 202-03.

197. *Id.* at 199; see Susan H. Williams, *A Feminist Reassessment of Civil Society*, 72 *IND. L.J.* 417, 440-46 (1997). Friedman and Iris Marion Young both point to the ideal of the nonoppressive modern city as a model of solidarity without domination in circumstances of difference. See Friedman, *supra* note 196; Iris Marion Young, *The Ideal of Community and the Politics of Difference*, in *FEMINISM AND COMMUNITY*, *supra* note 140, at 233.

pluralism is a permanent feature of a constitutional democracy such as our own, and that achieving uniformity concerning a conception of the good as the basis of social and political unity is not possible without the use of intolerably oppressive state power.¹⁹⁸ In the face of the “fact of reasonable pluralism” and the related “fact of oppression,” political liberalism seeks to establish the preconditions for social cooperation among free and equal citizens on the basis of mutual respect and trust,¹⁹⁹ and even what Rawls calls civic friendship.²⁰⁰ It does so through securing basic liberties and the preconditions for the exercise of persons’ moral powers—which correspond to what we have called deliberative democracy and deliberative autonomy—and through requiring reciprocity and honoring the moral duty of civility (including the constraints of public reason) in deliberating about the common good. Excluding persons from such basic terms of citizenship is, on this account, inherently suspect. Political liberalism assumes the formative role of the institutions of civil society in shaping persons to engage in social cooperation (subject to the principles of justice).

E. Should We Revive Civil Society or “A Civil Society?”

Some civil society-revivalists, especially moral revivalists, exploit an ambiguity between the idea of “civil society” and that of “a civil society.” The ambiguity is this: “Civil society” is a realm between the individual and the state, or besides the market and the state, encompassing an array of associations such as family, religious organizations, and other voluntary associations, whereas “a civil society” is a society in which good manners flourish and certain standards of civilized conduct are obeyed.²⁰¹ Thus, the lamentations

198. RAWLS, *supra* note 51, at 37, 144.

199. *Id.*

200. Rawls, *supra* note 89, at 771.

201. Both reports express concern about the rise of incivility. *A Call to Civil Society* offers the following definition and examples of uncivil behavior:

[T]he public understands weakening morality as behavior that is increasingly uncivil—that is, behavior that reflects a rejection of legitimate authority and a lack of respect for others. Neighbors not being neighborly. Children disrespecting adults. Declining loyalty between employers and employees. The absence of common courtesy, such as indifference from retail clerks, or being treated like a number by impersonal bureaucracies. Drivers who menace and gesture at other drivers. In general, people who tend to push others aside, looking out only for themselves. Nearly 90 percent of the public believes that this type of incivility is a serious national problem. About 80 percent believe that the problem has gotten worse in the past ten years.

A CALL TO CIVIL SOCIETY, *supra* note 11, at 5. *A Nation of Spectators* deploys a more political notion of civility:

over the decline of civil society are often accompanied by cries about the rise of incivility.²⁰² Indeed, *Seedbeds of Virtue* contains articles by moral revivalists like Glendon side by side with an essay by Judith Martin, a/k/a Miss Manners. Miss Manners suggests that “[o]beisance to etiquette” is “the oldest social virtue and an indispensable partner of morality”²⁰³—since it “has been used to establish the principles of social virtue as well as the rules, symbols, and rituals of civilized life.”²⁰⁴ She poses the question: “[W]hat if the decline of etiquette is one of the most serious social problems, from which other serious social problems devolve merely as epiphenomena?”²⁰⁵ Thus, civic virtue becomes civility in the sense of good manners and etiquette. More recently, Stephen Carter describes the current level of incivility in America as “intolerable” and calls for an “etiquette of democracy,” arguing that a “revival of civility . . . will require a revival of all that is best in religion as a force in our public life.”²⁰⁶

To this ambiguity we sketch three responses. First, even if both the decline of civil society and the decline of civility are regrettable, and both signal political or moral crises, they are not the same thing. Civil society might break down despite excruciatingly correct and civilized conduct; and civil society might thrive despite bad manners. In fact, a vital civil society might lead to the debunking of the manners and civility of the “elders and betters” in the polity. Some lamentations over the decline in civility may be, in part, a cloak for conservative, communitarian defenses of the status quo. Criticisms of the status quo, however apt and compelling from the standpoint of normative political theory and the Constitution’s commitments to liberty, equality, and justice, will usually seem uncivilized and intemperate to defenders of the status quo—especially when those criticisms come from or are made on behalf of persons or groups historically excluded from full participation in the benefits of the

Civility does not mean eliminating passion and conflict from public discourse. Nor does it mean agreement for agreement’s sake. Civility means disagreeing with others without demonizing them. It means respecting them as sincere patriots and as partners in a shared quest for civic answers that are both practically effective and morally compelling.

A NATION OF SPECTATORS, *supra* note 10, at 4.

202. See Benjamin DeMott, *Seduced by Civility: Political Manners and the Crisis of Democratic Values*, NATION, Dec. 9, 1996, at 11.

203. Judith Martin, *The Oldest Virtue*, in SEEDBEDS OF VIRTUE, *supra* note 8, at 61, 61.

204. *Id.* at 63.

205. *Id.*

206. STEPHEN L. CARTER, CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY 11, 18 (1998).

status quo,²⁰⁷ persons or groups who often view their own protests as reflecting their civic virtue.²⁰⁸

Second, some moral revivalists who confound “civil society” with “a civil society” evidently do not understand, as Stephen Holmes has put it, that “civil society” to some extent is “society ‘civilized’ by state action.”²⁰⁹ They appear to yearn for a pre-political or politics-free realm of civil society. They seem to want civil society to be civilized without the state, perhaps to be civilized by good manners. But citizens within civil society need to be civilized by the state in two important respects: first, in the sense of honoring the moral duty of civility and the constraints of public reason, to be explained below; and second, in the sense of inculcating civic virtue, including the disposition to care about, and the capacity to deliberate about, the common good of the polity, not just about the good of their associations within civil society.

Finally, and most importantly, many civil society-revivalists, especially those who believe that liberal interpretations of the Constitution as erecting a wall of separation between church and state have contributed to the erosion of both civil society and civility, fail to see that they are preaching incivility in the first sense just mentioned: They advocate flouting what Rawls has called the moral duty of civility by ignoring or rejecting the constraints of public reason.²¹⁰ These constraints seek to assure, at least where fundamental political questions (in particular, constitutional essentials and matters of basic justice) are at stake, that political decisions will be justifiable on the basis of public reason (or common ground): that is, on grounds that citizens generally can reasonably be expected to endorse, whatever

207. See JOHN STUART MILL, *ON LIBERTY* 51 (David Spitz ed., Norton 1975) (1859) (“[F]or if the test be offence to those whose opinions are attacked, I think experience testifies that this offence is given whenever the attack is telling and powerful, and that every opponent who pushes them hard, and whom they find it difficult to answer, appears to them, if he shows any strong feeling on the subject, an intemperate opponent.”); DeMott, *supra* note 202, at 11 (discussing remarks by Randall Kennedy observing that nineteenth-century civility promoters had charged abolitionists with incivility and stating that “if you’re in an argument with a thug, there are things much more important than civility”); see also Randall Kennedy, *The Case Against “Civility,”* AM. PROSPECT, Nov.-Dec. 1998, at 84.

208. See Harris, *supra* note 85, at 322 (describing a protester’s sense of civic duty as a motive for activism, and citing a finding by SIDNEY VERBA ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* (1996)).

209. STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 262 (1995).

210. See RAWLS, *supra* note 51, at 217, 212-54; Rawls, *supra* note 89. Rawls speaks of the idea of public reason as imposing “a moral, not a legal, duty—the duty of civility.” RAWLS, *supra* note 51, at 217; see Rawls, *supra* note 89, at 769.

their particular conceptions of the good, because they come within an overlapping consensus concerning a political conception of justice, rather than solely on the basis of particular comprehensive religious, moral, or philosophical conceptions of the good. Rawls conceives the idea of public reason as entailed by the moral duty of civility among free and equal citizens who hold divergent religious, moral, or philosophical conceptions of the good. These constraints and this duty must be honored if free and equal citizens are to engage in social cooperation on the basis of mutual respect and trust in a constitutional democracy such as our own, which is characterized by the fact of reasonable pluralism and which recognizes the related fact of oppression. Thus, some civil society-revivalists, despite their cries about the decline of civility in the sense of good manners, may be fomenting incivility in this more serious, significant sense.

Civil society-revivalists might charge that the constraints of public reason unduly hinder citizens' pursuit of a formative project of politics, inculcation of civic virtue through politics and civil society, and deliberation through democratic procedures. But these constraints do not preclude a proper formative project of politics, prevent inculcation of civic virtue, or unduly hinder deliberation.²¹¹ The disposition to honor the moral duty of civility, including the constraints of public reason, is a crucial component of civic virtue properly conceived (as including concern for pursuing the common good and the capacity to deliberate about it as well as concern for finding common ground for political decisions). Citizens who reject this duty of civility are thus lacking in civic virtue and are uncivilized in both senses mentioned above. For they put their zealous quest for the good as they see it above pursuing the common good and common ground for decisions in a polity characterized by a diversity of reasonable religious, moral, and philosophical views.

The question of the injustice of the family, and the problem of the incivility of certain persons and associations who zealously seek to impose their comprehensive conceptions of the good upon the diverse polity, are aspects of a larger question: What if the supposed seedbeds of virtue spawn "bad seeds" such as bad citizens and associations?²¹²

211. See MACEDO, *supra* note 58 (developing a civic liberalism that would inculcate liberal virtues and honor the constraints of public reason); Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417 (2000) (same).

212. As noted above, both reports acknowledge this possibility. See *supra* text accompanying notes 52-61.

What about persons, associations, and communities that reject civic virtues such as concern for pursuing the common good and for honoring the constraints of public reason, to say nothing of liberal virtues such as toleration of diversity and respect for the liberty and equality of all citizens? To qualify as a seedbed of virtue, must an institution inculcate virtues that are significant preconditions for democratic self-government? What if an institution inculcates views, values, or attitudes that are inimical to democratic self-government, e.g., racism, sexism, homophobia, and theocratic beliefs?

To some extent, the state (and the Constitution) may seek to civilize such associations and to moderate such attitudes. But some of the conduct and attitudes that are “bad seeds” and the fruit thereof may be constitutionally protected. The revivalists do not seem to have reckoned with the irony that “allowing [an] undemocratic enclave group the power to govern themselves might further democracy by reinforcing the Constitution’s commitment to the value of self-sovereignty.”²¹³ Our aim here is not to resolve these questions. Instead, we simply wish to note that the “bad seeds” might include not just hate groups and groups who do not contribute to and indeed undermine democratic self-government, but also groups who, however law-abiding and God-fearing, maintain attitudes that are corrosive of civic virtue, understood as including concern for the common good and for common ground.

Tamir persuasively argues that the state should not insist upon congruence between civil society and liberal democratic virtues, but should protect freedom of association within civil society. She observes, however, that “a constitutional shelter that protects freedom of association and associational relationships from unwarranted state intervention might not be enough.”²¹⁴ She argues that government should address, through education and financial support, obstacles to enjoying the benefits of such protection; given the differential resources of oppressed or disadvantaged groups in society, government should also establish mechanisms to allocate resources to such groups so that they can deliver the goods of association to their members.²¹⁵ Furthermore, she contends that the

213. Judith Lynn Failer, *The Draw and Drawbacks of Religious Enclaves in a Constitutional Democracy: Hasidic Public Schools in Kiryas Joel*, 72 IND. L.J. 383, 396 (1997). For a response, see Sanford Levinson, *On Political Boundary Lines, Multiculturalism, and the Liberal State*, 72 IND. L.J. 403 (1997).

214. Tamir, *supra* note 48, at 233.

215. See *id.* Tamir endorses Young’s recommendation of creating “compensatory political forms to ensure that such groups have an equal voice in agenda setting and policy formation.”

state should be “committed to balancing the harmful effects of associational activities.”²¹⁶ And it should “play an important role in fostering liberal democratic virtues,” for example, “in encouraging political participation, public debate, and social cohesion.”²¹⁷

Thus, civil society in some respects should be “civilized” by the state through inculcation of such principles as freedom, equality, and toleration.²¹⁸ This approach entails both that government should engage in a limited formative project of instilling civic virtue and promoting public values, and that citizens should adhere to a duty of civility. Elsewhere, one of us has argued for governmental responsibility to undertake a formative project aimed at cultivating the capacities for democratic and personal self-government.²¹⁹ This project is compatible with key civic republican, feminist, and liberal principles about the preconditions for good lives and a vital polity. Such a formative project would aim at fostering moral capacities necessary for self-government that would allow diverse citizens to pursue their conceptions of justice and of the good, individually and in association with others, within a constitutional framework that protects basic rights and liberties. Thus, we emphatically reject the charge that liberalism is “lethal,” or that liberalism forbids any sort of formative project that would cultivate civic virtues and moral capacities.²²⁰

F. Would a Revitalized Civil Society Support Democratic Self-Government or Supplant It?

Is a vital civil society a precondition for vigorous democratic self-government or an alternative to it? Remarkably, many civil society-revivalists, notwithstanding their worries about the decline of virtue and the erosion of trust in our basic political institutions, are

Id.

216. *Id.* at 216.

217. *Id.* at 232.

218. See Hefner, *supra* note 74. For example, in this symposium, Stephen Macedo advocates structuring educational voucher programs “with strings attached” so that such vouchers will allow the more effective pursuit of public purposes (e.g., being more open and inclusive). Macedo, *supra* note 211, at 418. For an argument that this attempts to inculcate civic virtue by imposing or establishing a public orthodoxy, see Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453 (2000).

219. See McClain, *supra* note 110.

220. In this view, we largely agree with Stephen Macedo and, to a lesser extent, William Galston. See GALSTON, *supra* note 26; MACEDO, *supra* note 58; STEPHEN MACEDO, *LIBERAL VIRTUES* (1990). One of us, however, has criticized certain aspects of Galston’s work elsewhere. See McClain, *supra* note 26.

ambivalent about the value of government. For all their rhetoric about civil society preparing people for citizenship and democratic self-government, it is clear that many civil society-revivalists hope that a revived civil society would supplant government (especially the national government) to the extent that the institutions of civil society would reclaim certain functions now performed, if at all, by government.²²¹ The reinvigoration of civil society thus would entail the withering away of the state or in any event the shrinking of the national government.²²²

Needless to say, civil society-revivalists do not reject out of hand the need for government. And it is important to acknowledge distinctions here between civic and moral revivalists. For example, *A Nation of Spectators* rejects the debate between “proponents of activist government” and “partisans of civil society” as “unproductive,” and suggests that “[t]here is no reason to believe that

221. See, e.g., Adam Meyerson, *How Congress Can Champion Civic Renewal*, POL’Y REV., Mar.-Apr. 1998, at 6 (describing a model of “citizen legislators” in Congress who actively encourage and help “private citizens and local governments to solve community problems without federal interference”); see also GLENDON, *supra* note 26, at 141 (criticizing interpretations of separation of church and state that would limit the ability of religious organizations to play a role in meeting various social needs and praising *Bowen v. Kendrick*, 487 U.S. 589 (1988), for allowing the involvement of religious organizations in addressing the problem of teen pregnancy as an “encouraging indicator of the Court’s receptiveness to Congressional efforts to transcend the state-market framework” and as sending a signal to the elected branches that “more creative uses of the structures of civil society may now be permissible in the American welfare state”); Hatch, *supra* note 181, at 962 (stating that “individuals who are unable to govern themselves need a great deal of government”). Several revivalists (e.g., Glendon, Galston, Blankenhorn, and Elshstain) are also affiliated with the Responsive Communitarian movement, whose platform urges that government “should step in only to the extent that other social subsystems fail” and states: “A good citizen is involved in a community or communities, but not necessarily active in the polity.” *The Responsive Communitarian Platform: Rights and Responsibilities*, *supra* note 26, at 4, 11, 12.

222. We should acknowledge that some revivalists who advocate the crucial role of civil society in addressing certain social problems nonetheless caution against the inference that civil society can do so without substantial governmental help. See John J. DiIulio, Jr., *The Lord’s Work: The Church and Civil Society*, in COMMUNITY WORKS, *supra* note 2, at 50-58 (describing efforts of African-American inner-city ministers to prevent juvenile violence in Boston). But this type of public-private partnership, particularly when it involves religious institutions, may raise some significant constitutional as well as practical concerns. For example, the so-called “Charitable Choice” provision of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 encourages religious groups to expand their involvement in providing services to welfare recipients by allowing them to accept governmental funds while permitting them to retain their “religious integrity” (by, for example, preserving a religious atmosphere in their facilities and discriminating on the basis of religion in their hiring practices). See Amy Sherman, *Implementing “Charitable Choice”: Transcending the Separation Between Church and State*, PHILANTHROPY, Jan.-Feb. 1999, at 14, 15 (quoting Sen. John Ashcroft, sponsor of the provision). Both moral and civic revivalists recommend that the President and Congress “strengthen and expand” the 1996 “charitable choice” legislation “to all federal laws [that] authorize government . . . to contract with non-governmental organizations to provide services.” A CALL TO CIVIL SOCIETY, *supra* note 11, at 21; see also A NATION OF SPECTATORS, *supra* note 10, at 17.

reducing the size of government would automatically increase the scope of voluntary activities."²²³ The report affirms the crucial role of local institutions, yet maintains that "reinvigorated localities cannot substitute for effective national institutions," and identifies restoring trust in our national government as a central task of civic renewal.²²⁴

By contrast, it seems fair to say that many moral revivalists champion local government over national government and espouse a modest role at best for national government. *A Call to Civil Society* explicitly posits that "the core challenge facing our nation today is not primarily governmental or economic."²²⁵ At the same time, it includes local government among the seedbeds of virtue and treats it as a "partial exception to the thesis that our basic challenge is not governmental."²²⁶ The report praises the structures of participatory local government, which allow face-to-face civic engagement, as "primary incubators of civic competence" and as transmitters of the "particular skills of citizenship: deliberation, compromise, consensus building, and reason giving."²²⁷ Yet it does not explain why we could not look to state and national governments as affording an opportunity for fostering such competence and deliberation. Furthermore, although revivalists claim not to repudiate the gains made by the women's movement or the civil rights movement, the devaluation of national government or (for that matter, national initiatives appealing to rights or to social justice) is troubling for what it may portend about the role of rights in "democratic civil society."²²⁸ Remarkably, it appears that the report's only prescriptions involving the national government involve federal tax incentives to strengthen two-parent, married families and religious institutions and to return responsibilities from the national government to local government and to the institutions of civil society (such as charitable organizations).²²⁹ What is more, *A Call to Civil Society* refers repeatedly to the idea of the common good, but it does so only in connection with the institutions of civil society, and it seems never to refer explicitly to the idea of the common good of the national polity.

223. A NATION OF SPECTATORS, *supra* note 10, at 10.

224. *Id.* at 11.

225. A CALL TO CIVIL SOCIETY, *supra* note 11, at 4.

226. *Id.* at 10.

227. *Id.*

228. For the idea of "democratic civil society," see generally A CALL TO CIVIL SOCIETY, *supra* note 11; ELSHTAIN, *supra* note 2, at 5.

229. See, e.g., A CALL TO CIVIL SOCIETY, *supra* note 11 at 19, 21-23.

At the root of this strong preference for local government appears to be the old, face-to-face model of civic engagement, yet it seems to be at the expense of a conception of national citizenship or, for that matter, national community. Indeed, although *A Call to Civil Society* quests for a shared public moral philosophy, it evidently does not quest for a meaningful conception of national citizenship or national community. Or if it does, it does not say so. And some revivalists contend openly that the idea of "national community" is bankrupt and may be "this century's greatest disappointment."²³⁰ Such views echo other critiques of liberal appeals to national community as failing to inspire citizens' loyalty or to capture their longings for meaningful community.²³¹

The aspiration that civil society supplant government, or that government wither away, belies the civil society-revivalists' claims that civil society is a school for citizenship and democratic self-government. They invoke Tocqueville for such claims. But Tocqueville himself also observed that it was politics that spreads "the general habit and taste for association" and thus that "politics precedes civil society."²³² As suggested above, it is not clear why or how the institutions of civil society could serve as such a school. For example, it is not clear why getting people to be members of groups and associations, and to care about and pursue the good of those groups and associations, would get them to care about and pursue the common good of the polity. Doing so may merely get them to care about and pursue the good of those groups and associations. Worse still, it may simply spawn forms of groupism and localism that are antithetical to the common good of the polity as a whole.

In the concluding remarks of the great work *Politics and Vision*, Sheldon Wolin writes that "it is not the animus against politics and the political that is characteristic of our time . . . but rather the sublimation of the political into forms of association which earlier

230. William A. Schambra, *All Community Is Local: The Key to America's Civic Renewal*, in COMMUNITY WORKS, *supra* note 2, at 44, 46. Schambra was not a signatory to either *A Call to Civil Society* or *A Nation of Spectators*, but he was on an advisory panel for the National Commission on Civic Renewal, see A NATION OF SPECTATORS, *supra* note 10, at 66, and he contributed a paper expressing such views to a book prepared for the Commission. See William A. Schambra, *Is There Civic Life Beyond the Great National Community?*, in CIVIL SOCIETY, DEMOCRACY, AND CIVIC RENEWAL, *supra* note 2, at 89 (contending that the progressive liberal ideal of a national community has failed).

231. See SANDEL, *supra* note 116, at 282-304.

232. Kumar, *supra* note 1, at 391 (paraphrasing Tocqueville); see also Keith E. Whittington, *Revisiting Tocqueville's America: Society, Politics, and Association in the Nineteenth Century*, 42 AM. BEHAV. SCI. 21 (1998).

thought had believed to be non-political.”²³³ He observes that “the vision of political theory has been a disintegrating one, consistently working to destroy the idea that society ought properly to be considered as a whole and that its general life was best expressed through political forms.”²³⁴ Wolin argues, moreover, that “the divorce between what is political and what is general has repeatedly led recent writers into paths of futility . . . [such as “localism” and “groupism”]; the result has been a series of dead ends.”²³⁵ The civil society-revivalists, especially the moral revivalists, should heed this caution: they should avoid such disintegrating visions and dead ends.

Put another way, we should resist taking a “flight from the political,” and the related idea that it is possible to choose civil society alone, and thereby escape from the power and coercion of the state.²³⁶ Instead, as Michael Walzer argues, “the state . . . is unlike all the other associations. It both frames civil society and occupies space within it. It fixes the boundary conditions and the basic rules of all associational activity (including political activity).”²³⁷

Of course, old-fashioned liberal pluralists celebrated private associations of civil society as “buffers” between the individual and the state. Yet their celebration of such associations led to a vision of interest-group pluralism, wherein there was no such thing as the common good above and beyond the outcome of the clash and aggregation of private interests in the political marketplace.²³⁸ Such a theory was corrosive of the idea of civic virtue as an attitude of concern for the common good and a capacity to deliberate about the common good. In response, some liberals called for what we today would call syntheses of liberalism and republicanism.²³⁹ Hence, it is no surprise that many of the serious proponents of liberal-republican theories of deliberative democracy such as Amy Gutmann and Dennis Thompson as well as Cass Sunstein and Frank Michelman, who are deeply critical of interest-group pluralism, are not among the

233. SHELDON S. WOLIN, *POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT* 429 (1960).

234. *Id.* at 430.

235. *Id.* at 432.

236. Hefner, *supra* note 74, at 16; see also Michael Walzer, *The Idea of Civil Society*, *DISSENT*, Spring 1991, at 293, 301.

237. Walzer, *supra* note 236, at 302.

238. See, e.g., ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956); DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS* (1951). But see ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989).

239. See, e.g., THEODORE J. LOWI, *THE END OF LIBERALISM* (2d ed. 1979); RAWLS, *supra* note 164.

enthusiastic civil society-revivalists.²⁴⁰ Indeed, from the standpoint of such theories, there are good reasons to be wary of civil society, e.g., because of its potential for oppression and because it may undermine the quest for civic virtue of national citizens. Sandel makes a nod in the direction of calling for reviving civil society,²⁴¹ but it is conclusory and evocative, and he is generally concerned with differentiating himself, as a civic republican, from communitarians of the sort who yearn to revive civil society.²⁴²

We venture to suggest that one is most likely to see civil society as a school for citizenship against a background assumption that persons otherwise are atomistic individuals, unencumbered selves, or lone rights-bearers. Only thus could the barest indication of connection with others seem to support or even to relate to citizenship. Only thus could involvement in pursuing the good of a group appear to reinforce or be conducive to democratic self-government. As suggested above, getting people connected with others does not necessarily make them good citizens, nor does getting them to think about and pursue the good of groups and associations necessarily translate into thinking about and pursuing the common good of the polity. Thus, revitalizing civil society would not necessarily support or contribute to democratic self-government (again, it might primarily relate to personal self-government and enrich people's personal lives). That is not to say that it would necessarily undermine it. But reviving civil society may do as much to supplant as to support democratic self-government. Indeed, that seems to be what some civil society-revivalists hope it will do.

III. CONCLUSION

In this article, we have raised some questions for proponents of reviving civil society as a cure for many of our nation's political, civic,

240. GUTMANN & THOMPSON, *supra* note 115; CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988). That is not to say that proponents of deliberative democracy do not advocate civic renewal. Gutmann and Thompson, for example, are on the Senior Advisory Council of the National Commission on Civic Renewal. See *A NATION OF SPECTATORS*, *supra* note 10, at 66.

241. SANDEL, *supra* note 116, at 343-49.

242. MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (2d ed. 1998) (introducing the second edition of this book by differentiating himself, as a civic republican, from communitarians). Sandel advocates civic renewal and, like Gutmann and Thompson, see *supra* note 240, is on the Senior Advisory Council of the National Commission on Civic Renewal. See *A NATION OF SPECTATORS*, *supra* note 10, at 66.

and moral ills. We largely agree with the revivalists that it would be a good thing to revive civil society, but we have expressed doubts about whether its revival can reasonably be expected to accomplish what its proponents hope for it, e.g., moral renewal, civic renewal, and strengthening the bonds of citizenship. We have suggested that civil society is at least as important for securing what we call “deliberative autonomy”—enabling people to decide how to live their own lives—as for promoting “deliberative democracy”—preparing them for participation in democratic life. Working within the tradition of political liberalism, and guided by key feminist and civic republican commitments, we also have sketched our own views concerning the proper roles and regulation of civil society in our morally pluralistic constitutional democracy.