

April 2000

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Recommended Citation

Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 Chi.-Kent L. Rev. 417 (2000).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol75/iss2/6>

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CONSTITUTING CIVIL SOCIETY: SCHOOL VOUCHERS, RELIGIOUS NONPROFIT ORGANIZATIONS, AND LIBERAL PUBLIC VALUES

STEPHEN MACEDO*

LIBERALISM AND CIVIL SOCIETY REVIVALISM

The current revival of interest in civil society institutions raises important questions about our constitutional project. Has the extension of liberal constitutionalist principles of freedom and equality for all—a movement that came to a head in the “rights revolution” of the 1960s—been lethal to the seedbeds of virtue, as Linda C. McClain and James E. Fleming have asked?¹ Must the reinvigoration of particular moral and religious communities come at the expense of the overarching ideals of our liberal democratic constitutional order? Perhaps most comprehensively: what is the proper relationship between the many differing moral and religious communities and traditions in our society, and the overarching values of the liberal democratic constitutional order as a whole?

I agree with McClain and Fleming that there is good reason to worry that today’s emphasis on character formation and moral education in civil society could come at the expense of efforts to more fully realize liberal ideals. Many of the themes of civil society revivalists were anticipated in the 1980s by communitarians and civic republicans who argued that the liberal preoccupation with individual rights leads to the neglect of communal ties and civic virtue.² In

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1. See generally Linda C. McClain & James E. Fleming, *Some Questions for Civil Society Revivalists*, 75 CHI.-KENT L. REV. 301 (2000). For a thorough discussion of the civic malaise in our society, see generally COUNCIL ON CIVIL SOC’Y, *A CALL TO CIVIL SOCIETY: WHY DEMOCRACY NEEDS MORAL TRUTHS* (1998); NATIONAL COMM’N ON CIVIC RENEWAL, *A NATION OF SPECTATORS: HOW CIVIC DISENGAGEMENT WEAKENS AMERICA AND WHAT WE CAN DO ABOUT IT* (1998).

2. See generally ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1984); ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988); MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY*

addition, cultural conservatism and opposition to an expansive national government lead many on the political right to seek to transfer authority and resources to local governments and private institutions in civil society in order to move away from national ideals of individual freedom and equality for all.³ There is good reason to worry that the revival of interest in local and particular communities could come at the expense of the constitutional ideals of liberal justice that should unite us all.

In this essay, I will address anxieties about the civil society revival by arguing that there is quite a lot that public policy and institutional design can and should do to help insure that liberal democratic ideals are promoted within the sphere of civil society. I will focus on two issues: (1) educational voucher programs that include religious schools and (2) the flow of public funds to religiously affiliated nonprofit institutions that provide social services. However, I will argue that the flow of public monies to religious schools and nonprofit institutions should come with “strings attached” designed to insure that public purposes are served. The predictable result will be that some religious institutions and communities will have to compromise their spiritual mission in order to enjoy access to public funds. Indeed, the flow of public funds to civil society institutions will likely create pressures on many communities and groups to conform to public values, including religious freedom and even nondiscrimination.

Even a liberal democratic constitutional order—in which freedom of association is a great value—counts on an adequate level of support from the norm-generating and character-educating institutions, groups, and associations of civil society. There may be good public reasons to rely on civil society institutions to a greater extent than we have in the past—whether for education or the delivery of social services—but we have no reason to increase our dependence on the vagaries of civil society. We should do what we reasonably can to insure that publicly subsidized civil society institutions serve liberal democratic values.

(1996); CHARLES TAYLOR, *Atomism*, in *PHILOSOPHY AND THE HUMAN SCIENCES* 187, 187-210 (1985).

3. See William A. Schambra, *Local Groups Are the Key to America's Civic Renewal*, *BROOKINGS REV.*, Fall 1997, at 20, 20-22.

LIBERALISM'S CIVIL SOCIETY CRISIS?

Are "civil society" institutions in decline, and if so, how great a problem is this for liberal democratic societies? These are among the most hotly debated issues in political science today. "Civil society" designates those associations, groups, and communities intermediate between the family and the state. Many, though by no means all, social and political scientists argue that social disconnection is increasing, and that this has unfortunate consequences for political life and general well-being.

Robert D. Putnam argues that Americans socialize less, fewer know their neighbors, they go to meetings less frequently and belong to fewer clubs and associations.⁴ Eric Uslaner argues that social disconnection leads to a generalized social distrust and a declining sense of optimism, and people who are generally distrustful of others are less likely to engage in political or civic activities.⁵

I am not going to belabor the problem. These worries may be exaggerated, maybe not. It is striking that many different philosophers and social scientists have converged on a similar set of worries at approximately the same time, both in America and abroad. Moreover, no one is arguing that Americans or other citizens of advanced democracies participate too much, are too community-oriented, or are neglectful of their narrow private interests. Even those who defend the predominant role of private freedom and self-interest in modern commercial republics have long argued that it is worth doing what we can to elevate and broaden self-interest by promoting participation in groups and associations.⁶

There are different ways of looking at the role of civil society in a

4. Compare Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65 (1995), and Robert D. Putnam, *Tuning in, Tuning Out: The Strange Disappearance of Social Capital in America*, 28 POL. SCI. & POL. 664 (1995), with Everett C. Ladd, *The Data Just Don't Show Erosion of America's "Social Capital,"* PUB. PERSP., June-July 1996, at 1. For alternative views regarding the role of civil associations in society, see generally E. J. Dionne, Jr., *Why Civil Society? Why Now?*, BROOKINGS REV., Fall 1997, at 4; William A. Galston & Peter Levine, *America's Civic Condition*, BROOKINGS REV., Fall 1997, at 23; Theda Skocpol, *Building Community: Top-Down or Bottom-Up?*, BROOKINGS REV., Fall 1997, at 16.

5. See generally Eric Uslaner, *Faith, Hope, and Charity: Social Capital, Trust, and Collective Action* (Nov. 1995) (unpublished manuscript, on file with the author); see also Robert Lane, *The Joyless Polity: Contributions of Democratic Process to Ill-Being*, in CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS (Stephen L. Elkin & Karol Edward Soltan eds., 1999).

6. See generally BENJAMIN CONSTANT, *The Liberty of the Ancients Compared with That of the Moderns*, in POLITICAL WRITINGS 308 (Biancamaria Fontana ed. & trans., 1988); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J.P. Mayer ed. & George Lawrence trans., 1969).

liberal democracy. One way is to view the sphere of free association as a sphere of social differentiation and diversity: a place where particular groups of like-minded people come together to pursue their own idiosyncratic aims and interests, to oppose or support the powers that be, to intervene in or withdraw from the larger society, to contest dominant values and norms, and to satisfy their own peculiar psychological needs. This is a principal thrust of Nancy L. Rosenblum's important book *Membership and Morals*, which proposes that the moral valence of associational life is indeterminate. Even groups widely regarded as both unattractive and incongruent with the basic values of liberal democracy—from religious sects to militia groups to privatistic homeowners associations—can provide important psychological benefits for members, and they can help contain what society regards as vices. “There is no systematic answer,” says Rosenblum, “to whether we can depend on the associations of civil society to cultivate the moral dispositions liberal democracy requires, or whether to use public incentives and the force of law to create and enhance liberalizing, democratizing groups.”⁷

I do not want to dispute or deny the value of freedom in free association. Nor would I deny that the moral consequences of associational life are often idiosyncratic and dependent on the psychological needs of particular individuals. Nothing I say in what follows should be taken to deny the importance of leaving space in the associational landscape for many forms of diversity, and for distinctive enclaves marked by idiosyncrasy, contrariness, and even hostility to our most cherished ideals. I do not want to ignore Rosenblum's important cautionary tale. Our political ideals should be subject to criticism, and the diversity of civil society is therefore a crucial public resource. But there is another part of the picture, which Rosenblum tends to discount. Even a free, individualistic society is—to a greater degree than is often allowed—a particular type of society as a whole, having its own distinctive patterns and overarching values. We are free individuals first and foremost but we are also citizens, and the freedom of everyone depends upon a common willingness to support democratic institutions and to respect the rights of other citizens in spite of differences of race, religion, ethnicity, religion, gender, sexual orientation, and other arbitrary factors. There are, indeed, positive liberal democratic ideals that go

7. NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* 15 (1998).

beyond the mere survival of our political institutions: we want citizens to be able to deliberate together about shared concerns and to cooperate in formal institutions and less formal social settings in order to solve their common problems. We need to think about the ways in which our institutions either support, or do not support, the habits, attitudes, and character traits needed by freely self-governing citizens.

While there is much to be learned from Rosenblum's impressive study, I believe she goes too far when she insists that "the heart of liberalism has been to guard against the tutelary or manipulative intent of authorities, particularly political authorities, who want to mold minds, call up moral sentiments, or exact displays of virtue and enthusiasm."⁸ The problem here is with the word "exact," and Rosenblum's insistence that "in the hands of officials, these are familiar excuses for tyranny."⁹ What of all that might be done short of "exaction" and "tyranny" to promote forms of character appropriate to the free and reasonable citizens of an extended republic? Indeed, was not the choice of an extended republic by those who ratified the Constitution a choice to favor certain types of interests and to discourage others? Among the "latent causes of faction" whose effects Madison argued would be more easily controlled in a large republic, is a "zeal for different opinions concerning religion, concerning government, and many other points."¹⁰ In a large and diverse republic, the zealous partisans of narrow orthodoxies would be put at a disadvantage in the competition for political power, as compared with those prepared to enter into political combinations requiring compromise and cooperation with diverse coalitions of citizens. Indeed, Madison argues that an extended republic would give the advantage to those prepared to justify their political aims openly or publicly, and that, in itself, would tend to favor those parties of justice and the common good.¹¹ Fairly large electoral districts would likewise favor those prepared to engage in broad forms of political cooperation, and to build coalitions across a diverse array of interests: the individuals chosen in such settings (it was hoped) would tend to be the "impartial

8. *Id.* at 14.

9. *Id.*

10. THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961). For a useful discussion on the subject, see generally Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347 (1995).

11. See THE FEDERALIST NO. 10, at 83.

arbiter” prepared to promote “the general interests of the society.”¹² The success of the Constitution would depend upon the people’s willingness to transcend local differences and particularisms—the relative homogeneity found within the states—in favor of the overarching substantive values of an extended commercial republic. In an important sense, the Constitution was indeed an attempt to mold minds, call up moral sentiments, and to promote forms of social life and citizen character appropriate to a large commercial republic. The framers of the Constitution did not refrain from “soulcraft,” or the defense of institutions designed to “manipulate” (in some respects) people’s deepest commitments. What saves this “manipulation” from the charge of tyranny is that it is gentle, openly justified, consistent with respect for basic freedoms, and subject to democratic ratification and ongoing deliberation.¹³

While the framers of the Constitution designed a scheme of government that depended on a measure of civic virtue, they did not provide anything like a complete account of the sources of political education. The Constitution itself does not explicitly provide for the educational institutions on which it depends, and that could be accounted as a weakness. Many in the founding generation argued that a national republic needed a national educational program, but this task fell largely to state and local governments.¹⁴ Nevertheless, while education has long been primarily a local responsibility in America, those who designed the system of common schooling in this country in the late 1830s and 1840s did so with an eye to the needs of an increasingly diverse national republic. Publicly supported common schools were seen as the best way of promoting popular enlightenment and ties of mutual understanding and cooperation across the bounds of class, ethnicity, and religion. What was increasingly wanted was a system of schooling that would meet public needs: schools that were, as Selwyn K. Troen has put it, “agents of the

12. *Id.* NO. 35, at 216 (Alexander Hamilton).

13. For the charge that the founders of the republic did not attend adequately to “soulcraft” and the promotion of citizen virtue, see GEORGE F. WILL, *STATECRAFT AS SOULCRAFT* (1983). I certainly would not argue that the Constitution provides an adequate or complete educational scheme.

14. See Robert Coram, *Political Inquiries: To Which Is Added, a Plan for the General Establishment of Schools Throughout the United States*, in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC* (Frederick Rudolph ed., 1965) (1791); Benjamin Rush, *Plan for the Establishment of Public Schools and the Diffusion of Knowledge in Pennsylvania*, in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC* (Frederick Rudolph ed., 1965) (1786); Noah Webster, *On the Education of Youth*, in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC* (Frederick Rudolph ed., 1965) (1790).

community and . . . dedicated to its service.”¹⁵ Educational variety would thwart attempts to bring all children together under the auspices of a common republican culture.

Parochial schools addressed themselves to other ends: they served the interests of particular religious and ethnic communities. Arguing against his own fellow Congregationalists, the Reverend W.S. Dutton insisted, in the pages of Horace Mann’s *Common School Journal*, that

the children of this country, of whatever parentage, should, not wholly, but to a certain extent, be *educated together*,—be educated, not as Baptists, or Methodists, or Episcopalians, or Presbyterians; not as Roman Catholics or Protestants, still less as foreigners in language or spirit, but as Americans, as made of one blood and citizens of the same free country,—educated to be one harmonious people. This, the common school system, if wisely and liberally conducted, is well fitted, in part at least, to accomplish.¹⁶

A miscellaneous mix of educational institutions serving particular needs would not reliably forge a common moral and political culture in an increasingly diverse population. The educational model that spread from New England across the country over the course of the nineteenth century was a locally controlled but common school system with a monopoly on tax support, an institution that would by its nature be public in orientation.¹⁷ As I argue at length elsewhere, the reasons for favoring this institution were not only prejudice against Catholics, xenophobia, and racism—though these abhorrent features of nineteenth century American life must not be denied—but also, and I believe crucially, a desire to overcome divisions among citizens (including divisions of class, ethnicity, and religion) in order to foster friendship, cooperation, and reasonableness among all the citizens of the political community.¹⁸ The public school system embodies America’s determination to forge a shared civic culture even in the face of the challenge of deep normative diversity, and this vital project should be kept in mind as we contemplate both educational reform and policies that effect the structure of relations in civil society.

15. SELWYN K. TROEN, *THE PUBLIC AND THE SCHOOLS* 52 (1975); see also DIANE RAVITCH, *THE GREAT SCHOOL WARS* 17-24 (1974).

16. CHARLES LESLIE GLENN, *THE MYTH OF COMMON SCHOOLING* 223-24 (1988).

17. See DAVID B. TYACK & ELIZABETH HANSOT, *MANAGERS OF VIRTUE* 19-31 (1982).

18. See generally STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* 51-130 (2000).

CIVIL SOCIETY AND THE CHALLENGE OF DIVERSITY

It may well be that in the future we will come to rely more than we have on the educative and character-shaping resources of civil society institutions. This will furnish greater reason to be concerned from a civic standpoint about the consequences of membership in civil society. To notice and take account of the politically educative dimensions of civil society is not, I should emphasize, to provide a justification for coercive intervention or for limiting freedom of association, but the instruments of public policy are often subtle. Public policy and institutional design influence the ways that people use their freedom. At the heart of liberalism is an insistence on the protection of a broad array of individual and group freedoms, but liberalism does not require that public policy must have neutral consequences for the way that people use their freedom, nor does it reject the noncoercive promotion of civic virtue.

There are, of course, critics of liberalism—including the communitarians and civic republicans alluded to earlier—who argue that the “liberal vision of freedom lacks the civic resources to sustain self-government.”¹⁹ The core commitment of liberalism, according to Michael Sandel, is the “resolve that government be neutral on moral and religious questions, that fundamental questions of public policy be debated and decided without reference to any particular conception of the good.”²⁰ Sandel offers a thin caricature of a liberalism whose central feature is an unsustainable commitment to moral neutrality.²¹ Oddly, there are those who want to celebrate this caricature of liberalism, not to disparage it (as Sandel wishes to do) but to deploy it against more robust liberal civic ideals.

Intellectual spokesmen for Evangelical Christianity have discovered the advantages of the language of multiculturalism and epistemological pluralism. Science and public reason are merely powerful belief structures that have no real claim to political authority. Religious fundamentalists have their own worldview, their own hermeneutic, and their own way of life, and so, the argument goes, they qualify for multicultural concern and should be exempted

19. SANDEL, *supra* note 2, at 6.

20. Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765, 1793 (1994) (reviewing JOHN RAWLS, *POLITICAL LIBERALISM* (1993)).

21. See STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* 260-63 (1990); SANDEL, *supra* note 2, at 6; Sandel, *supra* note 20, at 1793.

from public school programs at odds with their worldview.²² Michael McConnell argues that a system of education vouchers would be truer to American liberal principles than is the system of publicly controlled schooling: "The education best suited to the American republic, like the religion best suited to the American republic, is based on the principle of diversity and choice."²³ McConnell is prepared to press his multicultural convictions further than most: "The Religion Clauses of the First Amendment meant that we would *not* have a common civic culture at the most fundamental level."²⁴ The founders, on his interpretation, knew that such a course was politically dangerous, "yet they took the risk."²⁵

McConnell celebrates Sandel's homeopathic version of liberalism, proceduralist, neutralist, and morally thin, in order to preclude attempts to marry liberalism to positive ideals of civic life. McConnell argues, in effect, that it would be improper for the government to foster a shared civic culture if doing so would lead to the transformation of religious beliefs and practices. Governments are, on his view, obliged to design policies that are neutral in their effects on religion. More specifically, the "baseline" of judgments regarding the legitimacy of a law or governmental practice "is the hypothetical world in which individuals make decisions about religion on the basis of their own religious conscience, without the influence of government."²⁶ "The underlying principle is that governmental action should have the minimum possible effect on religion, consistent with achievement of the government's legitimate purposes."²⁷ Government actions amount to improper establishments of religion, according to McConnell, when their "purpose or probable effect [is] to increase religious uniformity, either by inhibiting religious practice (a Free Exercise Clause violation) or by forcing or

22. See STEPHEN BATES, *BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS* 314 (1993); Nomi Maya Stolzenberg, *He Drew a Circle That Shut Me Out: Assimilation, Indoctrination, and the Paradox of Liberal Education*, 106 HARV. L. REV. 581, 582-83 (1993).

23. Michael W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U. CHI. LEGAL F. 123, 123.

24. *Id.* at 133.

25. *Id.*

26. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 169 (1992).

27. *Id.*; see also Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 37 (1989). But see Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, in 1997: SUPREME COURT REVIEW 79-139 (Dennis J. Hutchinson et al. eds., 1998).

inducing a contrary religious practice (an Establishment Clause violation), without sufficient justification."²⁸

The principle that government actions should have neutral effects on the religious beliefs that compete in society has been soundly rejected by most liberals, and for good reason. For one thing, everything that government does will have nonneutral effects. It is also impossible to imagine how one would go about determining the ways in which government action has influenced the religious beliefs of citizens. Moreover, should the inquiry extend to statutes and policies only, or should constitutional provisions be scrutinized as well? The problem is that the Constitution itself runs afoul of McConnell's principle of neutrality of effects. Specifically, the Constitution was designed to undermine the political influence of narrow and insular forms of zealotry. The effect of this design would be to favor tolerant sects prepared to engage in trustful cooperation with citizens of many faiths. The Constitution's own nonneutrality suggests that McConnell's principle is dubious.

Adopting the principle of neutral effects would also be extremely divisive. It would encourage citizens to be constantly regarding laws and government actions from the point of view of their differing sectarian standpoints, striving to discover whether every religious group is burdened equally. The very complexity and uncertainty of this project and the inevitability that perceptions of benefits and burdens will be significantly colored by partiality to one's own sect would sow mistrust and conflict among religious groups.

McConnell seems to believe that public authority to promote a common civic culture runs out once peace and mere toleration have been established among competing religious factions. However, the Constitution itself points in the direction of deliberative politics and a society in which cooperation is fostered across the bounds of particular and local allegiances. Quite apart from what the Constitution envisages, it is hard to see how the Constitution *prohibits* popularly elected governments from adopting policies in the realms of education and social life to encourage popular enlightenment, the capacity for reflective and self-critical deliberation, and broad forms of social cooperation. Of course, all such policies will have nonneutral impacts on differing religious traditions.

Not surprisingly, sensible liberals reject the requirement that

28. McConnell, *supra* note 26, at 169.

government actions should have neutral effects on religious beliefs. As John Rawls put it:

it is surely impossible for the basic structure of a just constitutional regime not to have important effects and influences as to which comprehensive doctrines [including religious doctrines] endure and gain adherents over time; and it is futile to try to counteract these effects and influences, or even to ascertain for political purposes how deep and pervasive they are. We must accept the facts of common sense sociology. . . . Neutrality of effect or influence political liberalism abandons as impracticable.²⁹

It is important to stress, as Kathleen M. Sullivan has noted, that our overarching civic framework is not to be regarded as one competing sectarian view among others.³⁰ The point of view of *public* reflection about justice is the common authoritative standpoint from which we construct and justify the principles that define basic freedoms and that allocate authority among private persons, groups, and public agencies. The shared constitutional framework provides institutions within which constitutional principles and public policies are openly debated, enacted, criticized, contested, and revised. The defense of this shared order does not rest on a single account of religious truth, or one particular view of man's place in the cosmos. Instead, the justification for our shared civic project invokes urgent political imperatives and principles of political morality that are accessible to reasonable people of many faiths.³¹ There is never any guarantee that the public morality or democratically chosen policies will be neutral in their effects on the various ways of life of citizens. Indeed, it would seem to be the most natural thing in the world that membership in religious and cultural communities ebbs and flows in response to all sorts of changing cultural, economic, and political factors. It would seem not only natural but appropriate for communities and traditions to change as the ideas and principles associated with liberal justice settle into a society. Not only is there no reason to try and correct for these nonneutral effects on religious and cultural communities, we count on the communities changing in ways that are supportive of liberal democracy.³²

29. JOHN RAWLS, *POLITICAL LIBERALISM* 193 (1993).

30. See Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 199-201 (1992).

31. See generally MACEDO, *supra* note 18; RAWLS, *supra* note 29.

32. For a longer discussion on this issue, see generally MACEDO, *supra* note 18; see also Stephen Macedo, *Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism*, 26 POL. THEORY 56, 56-89 (1998).

LIBERAL CIVIL SOCIETY: PLURALISM AND INCLUSION

Many who express doubts about civil society revivalism are skeptical because they see “neo-Tocquevillians” as advancing the simple claim that groups and associations are good for democracy. But groups and associations are not necessarily seedbeds of good citizenship. For a society to be “rich in civil associations” could mean that it is plagued by anti-democratic underground groups on the far right or the far left—groups at odds with basic principles of liberty and equality for all. We need to make sure that the ideal of civil society that we promote is indeed one that we have reason to believe will tend to support our largest and most inclusive civic ideals.

It is not sufficiently emphasized in the literature on civil society that our aim should be to promote a certain structure of groups and associations. The appropriate structure is captured in labor economist Mark Granovetter’s phrase, “the strength of weak ties,” as well as in the older and very basic emphasis in political science on the importance of “cross-cutting cleavages.” Liberal democratic virtues are most reliably fostered when citizens have multiple and cross-cutting memberships: a variety of memberships and only partially overlapping affiliations that do not reinforce a consistent set of social cleavages. The crucial thing is to foster memberships that are not tribalistic but pluralistic.

A pluralistic, cross-cutting pattern of groups and associations is important both for the freedom of individuals, and for civic virtue. For individuals, a variety of memberships that do not consistently reinforce each other help individuals maintain a critical stance on their memberships. That is, no one affiliation or set of affiliations provides an unproblematic or simple answer to the question “who am I?” While downplaying the idea that there is a general story to be told about the relationship between associations and liberal democracy, Nancy Rosenblum does not hesitate to affirm the importance of pluralism to freedom:

[I]t does not suffice for moral development that the social stock of values and practices carried by associations is abundant if the lives of men and women are terminally fixed and situated, if they are unable to exploit the freedom of association. The possibility of shifting involvements among associations—the *experience* of pluralism by men and women personally and individually—is what counts.³³

33. ROSENBLUM, *supra* note 7, at 17.

Pluralism is indeed vital to individual freedom and the civic health of liberal democracies, and we should not downplay its distinctiveness. This pluralism is implicit in Madison's account of the advantages of an extended republic.

For liberal democratic societies as a whole, cross-cutting patterns of membership help insure that social divisions do not run too deep. Group allegiances nurture the personal interaction and individualized monitoring needed to enforce group norms, assay the reliability of our peers, reward cooperators, punish defectors, and thereby promote cooperation. Intensely inward-looking and insular group allegiances, however, deter wider forms of cooperation: tribalism is at odds with the openness of liberal citizenship at its best, which is characterized by patterns of reciprocity and trust that transcend the bounds of ethnicity, race, class and region. We foster a pluralistic liberal pattern of associations because our civic aim is to promote cooperation and reciprocity not only within particular groups but also across groups. The importance of a pluralistic structure of group life is reaffirmed by Durkheim, Kornhauser, and Putnam, as well as Gabriel A. Almond and Sidney Verba, who argue that "pluralism, even if not explicitly political pluralism, may indeed be one of the most important foundations of political democracy."³⁴

Leaders of extremist groups resist the pull of fragmented loyalties and moderated commitments. Consider Raphael S. Ezekial's portrait of the typical American neo-Nazi or Klan leader:

The white supremacist leader has proven successfully to himself that he *doesn't* have to make it in the ordinary world. . . . He has tried out his style on a small world he creates, and on the sector of the mainstream world with which he interacts. He avoids distracting entanglements; he builds a small world, mostly of followers, that confirms him; he avoids entanglements that would cause doubt.³⁵

Social orders that promote both individual freedom and broad forms of social cooperation are, therefore, pluralistic: societies in which groups compete with each other and with the state for the allegiances of individuals, and in which individuals' loyalties are

34. GABRIEL A. ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS* 322 (1963). See generally EMILE DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* (Cornelia Brookfield trans., 1957); WILLIAM KORNHAUSER, *THE POLITICS OF MASS SOCIETY* (1959); ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993).

35. RAPHAEL S. EZEKIAL, *THE RACIST MIND: PORTRAITS OF AMERICAN NEO-NAZIS AND KLANSMEN* 146 (1995).

divided among a variety of “cross-cutting” (or only partially overlapping) memberships and affiliations.

The danger in the new emphasis on civil society is that it could serve as an excuse for the abandonment of our largest and most inclusive civic ideals. We should reappraise the virtues of small communities, not as a way of turning our backs on the individual freedoms and equality made possible by national institutions, but to better realize the complex values that compose a liberal democratic civic life properly understood. It is not the lack of entanglements but the variety of cross-cutting associative ties that helps ward off oppression and tyranny, whether from the centralized state or from groups themselves.³⁶ Groups are, therefore, crucial to the project of moral education and citizen formation in a modern mass society, but if civil society is to foster freedom and wide forms of reciprocity and reasonableness, we should favor an overall structure of group life that is pluralistic.

SCHOOL REFORM AND CIVIL SOCIETY

Today’s debates over school reform present the possibility of a momentous shift in American public policy, a shift that seems already underway. In place of the unified systems designed to educate all the children of the community in a public institution, today’s reform proposals often aim to promote educational variety, parental choice, competition among schools, and even privatization. Public schools are often (and often justly) portrayed as bureaucratic, remote, and impersonal institutions that fail to gain the support of families and communities outside the school, and that fail to create nurturing communities within the school. The Council on Civil Society therefore calls for the creation of more charter schools. Charter schools are often formed within existing public school buildings and they depend on their ability to attract students who wish to attend. They can often hire and fire their own teachers, and they can flexibly define their own distinctive mission. Because charter schools are smaller than other public schools, and because families choose the school and its mission, charter schools may be better able than other public schools to promote a shared ethos and sense of community among teachers and students within the school. Charter schools also permit energetic educators to create a variety of more focused

36. See generally SIDNEY VERBA ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* (1995).

educational experiments within the public system.³⁷

The Council on Civil Society is also sympathetic to voucher proposals: "To enhance parental authority in the upbringing of their children, and to improve education by enhancing accountability, we urge government at all levels to expand the ability of parents to choose the schools their children attend."³⁸ Vouchers are extremely controversial when they allow parents to choose religious schools. There is plausible (though disputed) evidence that current voucher experiments are yielding educational benefits. Insofar as vouchers are targeted at poorer children or the worst performing schools—as in the programs designed in Milwaukee, Cleveland, and Florida—they may help promote more equal educational attainment. In addition, Milwaukee Mayor John Norquist plausibly argues that providing choice within a troubled urban setting may be an effective way of keeping some middle class families from moving to the suburbs.³⁹

Vouchers are often defended not simply as a way of increasing competition among schools, but also as a way of invigorating the educational influence of churches, families, and other communities in civil society. Voucher opponents have many concerns, including the fear that funding sectarian schools will contribute to social "Balkanization" and undermine children's freedom. If public education funds flow to schools representing particular religious communities (the vast majority of nonpublic schools in America are religious schools), then the structure of American education policy will no longer tilt to the same degree in favor of efforts to build civic bonds across religious divisions.

Let us accept this thumbnail sketch of the moral hopes of reform advocates, and the anxieties of reform opponents. With the arrival of vouchers and an educational system that places much more emphasis

37. For a discussion of charter schools, see generally MACEDO, *supra* note 18.

38. COUNCIL ON CIVIL SOC'Y, *supra* note 1, at 23.

39. See JOHN O. NORQUIST, *THE WEALTH OF CITIES: REVITALIZING THE CENTERS OF AMERICAN LIFE* 83-98 (1998). For judicious surveys on the effectiveness of school choice, see generally Karl L. Alexander & Aaron M. Pallas, *School Sector and Cognitive Performance: When Is a Little a Little?*, 58 SOC. EDUC. 115, 115-28 (1985); Christopher Jencks, *How Much Do High School Students Learn?*, 58 SOC. EDUC. 128, 128-35 (1985); John F. Witte, *Public Subsidies for Private Schools: What We Know and How to Proceed*, 5 EDUC. POL. 206, 206-27 (1992) (arguing that there is reasonably strong evidence that students learn slightly more in Catholic high schools, and that there is suggestive evidence that the effect is greatest for students from disadvantaged backgrounds). For recent arguments regarding the advantages of school choice programs and vouchers, see Jay P. Greene et al., *Effectiveness of School Choice: The Milwaukee Experiment*, 31 EDUC. & URBAN SOC'Y 190, 190-213 (1999); Jay P. Greene et al., *Lessons from the Cleveland Scholarship Program* (visited Jan. 19, 2000) <<http://data.fas.harvard.edu/pepg/lessons-928.htm>>.

on choice and diversity, it becomes an altogether legitimate question to ask what are the prospects that private educational institutions receiving public dollars, including religious institutions, will promote public purposes? Although there is nothing we can do to altogether allay concerns about a voucher system that includes religious schools, there are things that we can do to help insure that voucher recipients tend to conform with public purposes. I want to defend the strings that will come attached to vouchers, and argue for their significance. Transferring public funds to private schools increases the public's stake in private schools, and the fact is that it will also enlarge the public's influence over private educational institutions.

SCHOOL VOUCHERS IN CLEVELAND

Should voucher experiments that include religious schools be foreclosed on federal constitutional grounds? I do not believe so, but we should make sure that voucher programs are designed to address legitimate concerns. It would, of course, be crucial that vouchers would be given to parents and that the money could be spent on a wide variety of schools, public as well as private, secular as well as religious. The Supreme Court has already accepted the notion that state income tax deductions for educational expenses incurred at religious schools are permissible so long as those deductions include expenses incurred by parents with children in secular and religious schools and at public as well as private schools.⁴⁰ Vouchers go a step beyond tax exemptions, however, and provide parents with a portion of public monies. Admittedly, if we accept vouchers as a legitimate policy choice, constitutional law leaves behind the old principle that public aid may flow only to those aspects of schooling that are of public importance and that are "indisputably marked off from the religious function"⁴¹ (an example would be a state subsidy for bus transportation to parochial schools). Constitutional law is moving away from this principle in any case. Moreover, it is not clear that vouchers should raise any decisive problems so long as parents are free to choose among a wide variety of types of schools, and there is good reason to believe that the assistance promotes important public purposes.

40. See generally *Mueller v. Allen*, 463 U.S. 388 (1983) (holding that a state statute that allowed taxpayers to deduct educational expenses incurred for children did not violate the Establishment Clause because the benefit to parochial schools resulted from the independent decisions of parents).

41. *Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

It seems clear that voucher programs aim to serve the legitimate secular purpose of providing an improved education to children of poorer families and to children in public schools that perform poorly. It also appears likely that voucher programs can be administered in such a way as will not excessively entangle the government in religious affairs. The crucial remaining question under the Supreme Court's famed "Lemon Test" is whether a voucher plan has the "primary effect" of aiding religion.⁴² The details of voucher programs can help us determine whether public purposes predominate.

In the mid-1990s, the City of Cleveland School District faced an educational and fiscal crisis so severe that the U.S. District Court for the Northern District of Ohio ordered the State to take over the administration of the district. The Ohio Legislature responded by creating a Scholarship and Tutorial Program.⁴³ The Act created a tutorial program for children attending Cleveland public schools,⁴⁴ and provided for a limited number of scholarships (or vouchers) to enable students from Cleveland to attend "alternative schools" that registered for the program.⁴⁵ These alternative schools could be private schools in Cleveland, or public schools adjacent to the City of Cleveland School District.⁴⁶ Students whose family income was not more than 200% of the federal poverty level received ninety percent of their school tuition.⁴⁷ All other students with higher family incomes could receive up to seventy-five percent of their tuition, but there was a fixed ceiling for each student of \$2500.⁴⁸ The State placed no restrictions on how the schools may use the money.⁴⁹

In the original School Voucher Program Plan, enacted by the Ohio Legislature in 1995, private schools were allowed to admit students according to the following priorities:

- (1) [S]tudents enrolled in the previous year, (2) siblings of students enrolled in the previous year, (3) students residing within the school district in which the private school is located by lot, (4) students whose parents are affiliated with any organization that

42. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (reasoning that the Establishment Clause requires (1) that the statute must have a secular legislative purpose; (2) that the statute's principal or primary effect must be one that neither advances nor inhibits religion; and (3) that the statute must not foster an excessive government entanglement with religion).

43. See OHIO REV. CODE ANN. § 3313.974—.979 (West 1995).

44. See *id.* § 3313.975(A).

45. See *id.*

46. See *id.* § 3313.974(G).

47. See *id.* § 3313.978(A), (C)(1).

48. See *id.*

49. See *id.*

provides financial support to the school, and (5) all other applicants by lot.⁵⁰

As of the beginning of the 1999-2000 academic year, 3801 students were enrolled in the program.⁵¹ Sixty percent of those students were from families at or below the poverty level.⁵² While public schools in districts adjacent to the City of Cleveland could register to receive voucher program students, none of these public schools bordering on the City of Cleveland agreed to participate.⁵³ Fifty-six private schools registered to participate in the program, and court records as of 1995 indicate that eighty percent of participating schools, enrolling eighty-five percent of the Program students, were sectarian.⁵⁴ Some of these schools appeared to have had a pervasively sectarian character.⁵⁵ For example, one school's informational material states that "total religious instruction is the major focus of the educational program. . . . Lessons learned in formal religious classes are purposefully carried over into all subject areas."⁵⁶

An Ohio State Court of Appeals struck down the Cleveland voucher experiment on the ground that the Pilot Program, while neutral on its face, was "skewed toward religion."⁵⁷ The appeals court insisted that the aid program gave parents only the formal freedom to choose among sectarian-nonsectarian, or public-nonpublic schools because of "the lack of public school participation in the scholarship program."⁵⁸ The lack of participation was especially troubling to the appeals court because it was within the state's power to design a program without the bias toward religious schools "by compelling public school participation in the program."⁵⁹ As the program stood, the Court concluded that

[t]he only real choice available to most parents is between sending their child to a sectarian school and having their child remain in the troubled Cleveland City School District. Such a choice can hardly be characterized as "genuine and independent." Rather, such a choice steers aid to sectarian schools, resulting in what amounts to a

50. *Id.* § 3313.997(A).

51. *See Simmons-Harris v. Zelman*, 54 F. Supp. 2d 725, 728-29 (N.D. Ohio 1999).

52. *See id.*

53. *See id.* at 728.

54. *See id.* at 729.

55. *See id.*

56. *Id.*

57. *Simmons-Harris v. Goff*, No. 96. APE 09-982, 1997 Ohio App. LEXIS 1766, at *22 (Ohio Ct. App. May 1, 1997), *rev'd*, 711 N.E.2d 203 (Ohio 1999).

58. *Simmons-Harris*, 1997 Ohio App. LEXIS 1766, at *19.

59. *Id.* at *20-21.

direct government subsidy.⁶⁰

The Ohio Supreme Court reversed the decision just described, reasoning that the appeals court gave too much weight to the fact that the vast majority of parents participating in the voucher program chose sectarian schools.⁶¹ The Ohio Supreme Court noted that the crucial inquiry was whether “the scholarships are allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion.”⁶²

The Ohio Supreme Court found only one constitutional flaw in the voucher program’s design, and this occurred in the fourth of the selection priorities that the private schools were allowed to employ in accepting students.⁶³ That provision allowed sectarian schools to give priority to “students whose parents are affiliated with any organization that provides financial support to the school.”⁶⁴ The Ohio Supreme Court found that this provision “favor[ed] religion” and was unconstitutional because it gave parents an incentive to modify their religious beliefs or practices in order to enhance their opportunity to receive a scholarship at a particular sectarian school.⁶⁵ As a result, the *Simmons-Harris* court removed the above provision and found that the voucher program was otherwise good law.⁶⁶

The Ohio Legislature quickly re-passed the School Voucher legislation in response to the Ohio Supreme Court’s decision, omitting the offending “selection priority” provision.⁶⁷ However, on August 24, 1999, days before the beginning of the 1999-2000 school year, a federal district court judge filed an injunction putting a stop to the program on grounds that it was an unconstitutional establishment of religion.⁶⁸ The federal district court returned to the state appeals court ruling, and concluded that parents and children in Cleveland have no “significant choice between parochial and nonparochial schools” on account of the nonparticipation of public schools adjacent to Cleveland.⁶⁹ A few days later, after parents and children who were

60. *Id.* at *26.

61. *See Simmons-Harris*, 711 N.E.2d at 210.

62. *Id.* (quoting *Agostini v. Felton*, 521 U.S. 203, 231 (1997)).

63. *See id.*

64. OHIO REV. CODE ANN. § 3313.977(A) (West 1995).

65. *Simmons-Harris*, 711 N.E.2d at 210-11.

66. *Id.* at 211.

67. *See* OHIO REV. CODE ANN. § 3313.974—.979 (West 1999).

68. *See Simmons-Harris v. Zelman*, 54 F. Supp. 2d 725, 741 (N.D. Ohio 1999).

69. *Id.* at 737. The district court also stated: “In this case . . . monies would go directly to support the regular educational program of a religious institution including, in some cases, religious instruction.” *Id.* at 741.

planning to attend schools under the scholarship program had been thrown into an uproar, the Court issued a stay of the order, but only for the fall semester.⁷⁰

The upshot of this drama is that the Ohio Legislature, the courts, and the suburban school districts have put many Cleveland parents and children eager to take advantage of school choice in a cruel situation. The real problem with the Scholarship Program, as noted by the federal court and Ohio Appellate Court, is that Ohio has failed to require suburban public schools to participate in the program and give parents a real choice among schools. One hopes that Ohio will respond by expanding choice, rather than deciding that choice is not worth the political cost of allowing poor inner-city children access to the educational advantages of public schools outside of Cleveland.

The courts improved the voucher program (as I argue below) and have given the Legislature an opportunity to improve the voucher program. If the Legislature is serious about improving the quality of educational opportunities available to the children of Cleveland, it should mandate that suburban school districts with available spaces must accept Cleveland voucher students. That would give scholarship recipients a genuine choice among public and private, secular and sectarian schooling. In addition, it would allow the Ohio Legislature to make a more powerful case that school choice is not designed to favor religious schools, but is being used to advance a variety of public purposes including promoting competition among schools and integrating students of varying racial and economic classes. The State of Ohio now has an opportunity to deliver a better choice program that is also more defensible in constitutional terms.

It is worth highlighting certain features of the revised legislation. To receive vouchers, some schools—including sectarian schools—will have to redefine themselves as institutions and communities more attuned to public values.⁷¹ Specifically, the Ohio Legislature conditioned participation in the Scholarship Program on the requirement that registered private schools do not discriminate on the basis of religion or teach hatred on the basis of religion.⁷² Thus, all schools will have to adopt the value of religious nondiscrimination when it comes to the admission of voucher students. One suspects

70. On November 5, 1999, a sharply divided U.S. Supreme Court issued an order permitting Cleveland to operate the voucher program, pending the federal court's ruling on the program's constitutionality. See *Zelman v. Simmons-Harris*, 120 S. Ct. 443, 443 (1999).

71. See OHIO REV. CODE ANN. § 3313.976(A)(4), (A)(6).

72. See *id.*

that this accommodation of religious schools to public norms could alter the nature of religious schools as communities. Participating religious schools must treat children of diverse faiths (with vouchers) equally in admissions. Educationally attractive sectarian institutions will tend to become places in which children of all faiths (with vouchers) have a right to be selected and, therefore, become members of the school community regardless of whether they share the religious beliefs of the schools. It seems very likely that these legally “entitled” students will bring with them additional public pressures to create a welcoming and nondiscriminatory atmosphere for children of all faiths or no faith at all. One can easily foresee problems for the religious schools if enrolled voucher children felt that that they were being pressured to either conform with religious beliefs and practices or leave the school. The school’s affiliation with the particular sponsoring religious community may be somewhat muted, even attenuated, or at least revised as a consequence: religious references in the curriculum may become more ecumenical, or else perhaps robust expressions of sectarianism will tend to be confined to certain voluntary aspects of the curriculum. As a result, it can be expected that these legitimate public conditions on the schools that receive vouchers will likely exert pressures that will substantially alter the nature of some schools.

It is also significant that the Ohio Supreme Court raised no difficulties with the third selection criterion, which allows alternative schools to favor children residing within the school district in which the private school is located. According to that provision, sectarian schools receiving vouchers may favor children from within a geographical community but not a religious community. Interestingly, this is exactly what traditional public schools do: they are common educational institutions for all of the children living within a geographical area, irrespective of differences of religion, race, or class.

The voucher law that temporarily succeeded in passing constitutional muster had, therefore, a variety of interesting and highly nonneutral features. Religious schools that utilize “sectarian” principles in admissions decisions must remake themselves as a condition of receiving public monies. Moreover, they must remake themselves not simply in superficial ways but in ways that seem likely to alter the nature of these schools as moral communities. These religious schools must become a bit more like public—or, as they were once called, “common”—schools: educating all the children of a

geographical community irrespective of sectarian beliefs. It is hardly surprising, nor does it seem in principle wrong, that religious schools receiving public monies are required to become a bit more like public educational institutions appropriate to a pluralistic extended republic. No doubt the schools receiving public funds are likely to face additional informal pressures from voucher students, their parents, and the larger political community.

Important battles of the future will concern the conditions that state legislatures should or are allowed to impose upon religious schools and other institutions that accept public monies. Many religious school advocates worry that public vouchers will be accompanied by public regulations (such as those described in the previous section) amounting to a "poison pill" undermining the robustness and distinctiveness of the religious elements in parochial schooling.

SCHOOL VOUCHERS IN MILWAUKEE

School voucher legislation in Milwaukee has not been subject to as elaborate an array of judicial hurdles as in Cleveland, and yet the program has evolved significantly in response to constitutional and political concerns. Up to fifteen percent of the children in the Milwaukee public school system are allowed to participate,⁷³ and they can attend both sectarian and nonsectarian private schools at state expense.⁷⁴ Participating schools receive the per-pupil share of state aid to the city's public schools, which amounted to \$4400 for the 1996-1997 school year.⁷⁵ Of the 122 private schools in Milwaukee, thirty-three are nonsectarian and approximately eighty-nine are sectarian.⁷⁶ Sectarian schools enroll about eighty-four percent of the city's students attending private schools.⁷⁷ Some of these sectarian schools are pervasively religious, and their informational materials claim that teachers have been trained to "integrate God's Word across the curriculum."⁷⁸

73. See WIS. STAT. ANN. § 4003 (West 1995).

74. See *id.* § 4002.

75. See *Jackson v. Benson*, 570 N.W.2d 407, 413 (Wis. Ct. App. 1997). However, the law also stipulates that the payments to private schools cannot exceed the "operating and debt service costs per-pupil that is related to educational programming" as determined by the State. WIS. STAT. ANN. § 4006(M).

76. See *Jackson*, 570 N.W.2d at 413.

77. See *id.*

78. *Id.*

Two features of the Milwaukee voucher program are worth highlighting. The Milwaukee voucher plan contains provisions, similar to those in the Cleveland plan, regarding selecting students. The provisions are only used in situations when more children with vouchers apply to a particular school than the school can accommodate. In such a situation, children are accepted on the basis of a lottery system, but preferences can be given to children already enrolled and their siblings. Schools can still work to insure that parents and children understand the distinctive mission and nature of their schools before they apply or accept the offer of admission. In addition, and importantly, the Milwaukee Legislature added a provision that requires that children with vouchers should be able to “opt-out” of any religious activity that they or their parents find objectionable.⁷⁹ This rule goes a step beyond Cleveland’s program in helping to insure that religious exercises are voluntary in schools receiving vouchers. An initial survey suggests that none of the 6300 children enrolled in the voucher program, most of whom are in Catholic, Protestant, or Islamic schools, are opting out of mandatory religious exercises.⁸⁰

Nevertheless, Joe Laconte, writing in the conservative Heritage Foundation’s *Policy Review*, worries that the opt-out requirement and the admission policy could discourage some religious schools from participating in the program.⁸¹ Some religiously affiliated schools “tend to oppose the opt-out clause on principle or won’t risk its impact on the classroom.”⁸² The provision is most objectionable to conservative Protestant schools for whom “the fingerprints of faith are nearly everywhere,” schools “that connect academic subjects to biblical themes, from science classes that probe the origins of life, to history lessons that emphasize the religious faith of the America’s founders.”⁸³

Some religious schools also oppose any effort to distinguish academic or disciplinary requirements from their religious mission.⁸⁴ As Joseph McTighe of the Council of American Private Education puts it, “[t]hese schools don’t want to compromise the purpose for

79. See WIS. STAT. ANN. § 4008(E).

80. See Joe Laconte, *Paying the Piper: Will Vouchers Undermine the Mission of Religious Schools?*, POL’Y REV., Jan.-Feb. 1999, at 30, 34.

81. *Id.*

82. *Id.*

83. *Id.*

84. See *id.*

which they exist.”⁸⁵ For such schools, there will be some uncertainty about exactly what constitutes a “religious exercise” from which children have a right to be excused, and this uncertainty also bothers those who run these schools. The American Civil Liberties Union or other groups who object to public funding of religious programs that seem to verge on indoctrination might file lawsuits. This possibility might lead schools that are accepting vouchers to place more emphasis on secular subjects and to make religious exercises a discrete part of the curriculum. Pressures to do such things can be seen as public influences at odds with the autonomy and integrity of some religious institutions, especially pervasively religious institutions. Catholic and many other church-affiliated schools have accepted the conditions. However, the most conservative Protestant schools—those in which “[e]verything is taught with regard to God’s word and how it applies in our lives”—have refused to accept voucher students.⁸⁶ They worry that the restrictions will undermine their ability to preserve the sort of religious atmosphere they want.

How should we feel about the existence of such pressures? Should we regard the policies that generate them as examples of impermissible government nonneutrality toward religion: a deviation from McConnell’s ideal world in which governments must strive to avoid influencing people’s religious beliefs and practices, even when that influence amounts to the promotion of a shared civic framework? Should the likelihood of such pressures make us feel better or worse about voucher programs that include religious schools? Do such regulations amount to unacceptable means of pressuring conservative religious communities to tone down and moderate their religious strictures? Will public monies have the effect of requiring religious schools to treat religious exercises as options that are not essential to the core curriculum, like extra-curricular activities?

The details of voucher programs matter. The design of admissions procedures and opt-out provisions can help insure that schools receiving public monies are relatively open to all the children in the polity on a nondiscriminatory basis. Of course, these provisions are not simply regulations about administrative details. Rather, they have the effect of reconstituting private institutions in ways that make them more conformable with public values. They seem likely to alter the nature of many religious schools that receive

85. *Id.*

86. *Id.*

vouchers—perhaps dampening some forms of religious diversity. Further, altering the nature of religious schools will likely exert pressure on religious communities more broadly.

Contrary to McConnell's concerns, none of this seems objectionable to me so long as the conditions that attach to vouchers have legitimate public justifications. It is inevitable and appropriate that the receipt of vouchers by a private school gives the public a greater stake in the way the school conducts its business. The justification for vouchers is (or should be) that they allow us to pursue public purposes more effectively. That being said, imposing public conditions and public expectations on the conduct of schools that receive vouchers is altogether appropriate. The opt-out provisions help insure that children will not have religious exercises imposed upon them—though there would still be worries about peer pressures to conform. The array of public conditions considered here—opt-out provisions and bans on religious preferences in admissions—help make the schools participating in voucher programs more open and inclusive environments that welcome all of the city's children and not simply co-religionists.

The public educational purposes that have influenced the design and growth of public schooling for 150 years will not and should not be put aside just because new instruments of public policy are being utilized. Voucher programs should be designed in such a way as to advance our full range of public purposes. More specifically, the programs should not simply strive for "academic achievement" (though that is quite important), but also strive for equal educational opportunity, and the pursuit of inclusion and mixing across boundaries of religion, race, class, and other important divisions. Constitutional concerns about allowing public monies to flow to religious schools should be assuaged by public regulations that help insure that schools receiving public monies are conforming with the public values of a diverse republic. The inevitable concomitant, of course, is that the flow of public monies acts as a vehicle by which public values further "colonize" the private realm, including the religious realm. I see no way around that fact, nor do I see why it must be regarded as objectionable. The recourse for religious and other private institutions that wish to resist public values is to not become conduits for public monies dedicated to public purposes.

Schools receiving students with voucher dollars will have to accept the fact that they are liable to feel the pressure not only from explicit public requirements, but also from a variety of more informal

public norms. In fact, the pressures and worries beginning to be experienced by religious schools receiving vouchers are not new. Similar sorts of pressures have long been felt by religiously affiliated organizations receiving public funds for the delivery of social services. Religious nonprofits have long received substantial public funding and the "charitable choice" provision of the 1996 Federal Welfare Reform Act encourages government to channel more social services funding to religious groups. The Council on Civil Society endorses this development and urges the President and Congress to "strengthen and expand" it so that faith-based organizations can "compete on equal terms with other private groups for government contracts," *without* "denying or relinquishing their religious charter."⁸⁷ But how should we feel about what seems inevitable: that as a consequence of receiving public funds some faith-based organizations will experience pressures to alter the way they express their religious convictions?

MIXING SACRED AND SECULAR IN THE NONPROFIT SECTOR

Let us now consider an interesting account of the experiences of the religious nonprofit organization, an account that seems to me instructive in light of the above concerns. The lessons from these organizations suggest that public regulations help infuse religious institutions with a broader array of public norms and expectations, and, as a result, civic purposes will tend to be served even though it may be difficult (and self-defeating) to actively police the inner workings of civil society institutions.

The private nonprofit sector is enormous and crucial to the delivery of social services in America. Consider first of all that there are 1.4 million nonprofit associations in the United States with a total income estimated at nearly \$320 billion.⁸⁸ Eleven percent of the American workforce or sixteen million persons work in this sector, which includes a majority of American hospitals, a substantial portion of our nursing homes and educational institutions, and the bulk of social service delivery.⁸⁹ Nonprofit organizations are deeply dependent on government funding: nonprofits as a whole receive

87. COUNCIL ON CIVIL SOC'Y, *supra* note 1, at 21.

88. See STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY 3 (1996).

89. See *id.*

thirty-one percent of their income from government sources.⁹⁰

Religiously-based organizations make up a substantial portion of the nonprofit sector. Moreover, religiously based hospitals, nursing homes, schools, and social service programs are vital social service providers in the United States, and they are, like other nonprofits, heavily dependent on public monies. Consider the striking fact that seventy-five percent of the annual budget of the Roman Catholic Archdiocese of New York—\$1.75 billion—comes from government sources.⁹¹ Nearly \$200 million a year goes to Catholic Relief Services from various government contracts and grants.⁹² Prominent Catholic, Jewish, and Protestant groups receive large portions of their revenues from government sources: 65% for Catholic charities, 75% for the Jewish Board of Family and Children's Services, and 95% for the Lutheran Social Ministries.⁹³

What is the consequence of this dependence for the religious missions of nonprofits? Are public monies subsidizing religious activities? Are religious values being transformed in ways that represent an infringement on the autonomy of religious communities? Some recent evidence provides support for the view that public influences on religious organizations may be substantial and salutary from a civic standpoint.

Stephen V. Monsma is among those who argue that we should try to correct the nonneutral effects of the religious reliance on public monies because these effects compromise the autonomy and integrity of religious communities.⁹⁴ Religious persons, according to Monsma, must be free to follow the dictates of their conscience "without penalty or hindrance."⁹⁵ Religious groups must be free to define their own identity: "fundamental to a religious group's autonomy is its right to define for itself its doctrines, practices, purposes, and goals. . . . It is a serious violation of a religious group's autonomy for outside groups or the government to dictate belief and practice."⁹⁶ From this, Monsma contends that insofar as government dictates

90. *See id.* at 4.

91. *See id.* at 10.

92. *See id.*

93. *See id.* at 1; *see also* STEPHEN BATES, NATIONAL SERVICE: GETTING THINGS DONE? 45 (1996) (reporting similar figures for nonsectarian charities: 60% of the revenues for Save the Children are government provided, 78% for CARE, and 80% for the United Cerebral Palsy Association).

94. *See* MONSMA, *supra* note 88, at 1.

95. *Id.* at 19.

96. *Id.* at 20.

religious “doctrines, practices, purposes, and goals,” it obviously runs beyond its proper sphere and should be curbed.⁹⁷ The more difficult question is when, if ever, in pursuing *legitimate* public purposes such as those we have discussed in the case of education, can government exert illegitimate influences over religious communities—influences that violate their religious “autonomy” and integrity.

Monsma’s study of these questions is fascinating. He conducted a survey of 760 nonprofit organizations from the educational and social service fields. A large number of these nonprofits were religiously based, and Monsma’s purpose was to see what effect the flow of public monies is having on faith-based nonprofits. In spite of his concern that public pressures are eroding religious autonomy, Monsma reports that the vast majority of religious nonprofits reported feeling no pressures from government officials to curtail or eliminate religious practices. This was even true of those organizations ranking highest on a “Religious Practices Scale” measuring the thoroughness of an organization’s religious orientation.⁹⁸ In Monsma’s survey, seventy-eight percent of the heads of those religious colleges and universities ranked in the most thoroughly religious category “failed to report even one instance of pressures or problems over their religious practices from government.”⁹⁹ The findings were similar for child service agencies.¹⁰⁰

Religiously-based nonprofit organizations are full and active participants in publicly subsidized social service activities. Equally striking, public officials impose far less direct pressure on religiously based nonprofits than one might have expected.¹⁰¹ Even those nonprofits that rank at the high end of the “religious practice” scale—those who select employees based on agreement with the organization’s religious beliefs, who favor students or clients in agreement with the religious doctrines, child service agencies that say prayers at meals, etc.—encounter surprisingly little direct and overt pressure from the government to curtail these activities.¹⁰² Indeed, among child service and international relief organizations, religiously-based agencies report fewer problems of government interference

97. *Id.* at 20-21.

98. *See id.* at 82.

99. *Id.* at 84.

100. *See id.* at 93-94.

101. *See id.*

102. *See id.*

than do purely secular organizations.¹⁰³ The flow of public monies to the nonprofit sector has been eased by the fact that constitutional principles that might raise warning flags—constitutional norms to the effect that when public monies flow to religious institutions they are to be used for public purposes only—have not been strictly enforced in this area of public policy.¹⁰⁴ This means, of course, that public funds are being used to subsidize the religious activities of religious organizations. Many religiously-based, child-service agencies that receive public funds have spoken prayers at meals, require other religious activities, hire only staff who agree with the organization's religious orientation, and have a paid chaplain on the staff.¹⁰⁵ The same sorts of practices are bound to go on in religious schools receiving vouchers. In the social service sector, these practices sometimes become points of contention with public officials but not as frequently as one might have expected. The picture that emerges from Monsma's study is that religious primary and secondary educational institutions may be unique in the degree to which strict separationist mandates have been vigorously enforced.¹⁰⁶

Part of the reason for the under-enforcement of separationist constitutional norms is, no doubt, because of the sense that religiously-based social service institutions are providing vital public benefits and often doing so more effectively than public bureaucracies. In addition, once government monies are flowing to care-giving agencies with broad supervisory responsibilities, enforcing public rules against religious activities would be difficult and disruptive. Moreover, a thorough enforcement of constitutional norms would raise precisely the sorts of "entanglement" worries that the Supreme Court has said can be enough to trigger a constitutional prohibition on government aid in the first instance.

103. *See id.*

104. *See* *Everson v. Board of Education*, 330 U.S. 1, 15 (1947) (allowing states to reimburse parents of children in religious schools for public transportation costs because transportation was clearly separable from the religious mission of religious schools).

105. In the past, the Court has been most suspicious when public funds flow to institutions with a pervasively sectarian atmosphere. Supreme Court decisions made it clear that statutes which distribute public monies to religious schools cannot have the primary effect of advancing or inhibiting religion and cannot foster excessive entanglement with religion. *See generally* *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (holding that program which allowed public school teacher to visit religious schools to teach classes had the primary or principal effect of advancing religion and violated the Establishment Clause of the First Amendment). *But see* *Agostini v. Felton*, 521 U.S. 203 (1997) (departing from the rule established in *School District of Grand Rapids* and allowing public schoolteachers to provide remedial education to low-income, special needs children in religious schools).

106. *See* MONSMA, *supra* note 88, at 75, 89-99.

Public policy displays a decided flexibility in this area. A working accommodation balances constitutional concerns that government should not promote or subsidize religion against the competing conviction that religious agencies are crucial to the delivery of important social services. Nevertheless, as noted above, Monsma worries about the extent to which the current system compromises religious autonomy. He may be right in thinking that some adjustment in the terms of these bargains would be useful, but we need to be careful not to adopt an unwarranted demand that government must abstain from exerting any nonneutral effects on religious communities.

Monsma argues for principles of “equal treatment” and “positive neutrality” according to which government should be neutral “toward persons of all faiths and those of none. This means government should neither advantage nor disadvantage any particular religion, nor should its actions either advantage or disadvantage religion in general or secularism in general.”¹⁰⁷ Public money should be allowed to fund “the programs and activities of religiously based nonprofits that are of a temporal, this-world benefit to society, as long as public funds are supporting similar or parallel programs of all religious traditions without favoritism and of similar or parallel programs of a secular nature, whether sponsored by secularly based nonprofits or government itself.”¹⁰⁸ Government should take positive steps to insure that “[p]rograms of certain religious traditions would not be favored over any others.”¹⁰⁹

I agree with Monsma that, under some conditions, it should be acceptable for public monies to flow to faith-based agencies and programs that have religious elements woven into them. For this funding to be acceptable, it would have to be available to a wide variety of religious and secular agencies and programs, and recipients would need to have a *real choice* of programs so that they are not pressured into submitting to religious impositions as a consequence of their need for publicly supported assistance. Monsma accepts these strictures.

Nevertheless, we need to be careful not to embrace false expectations about the “neutrality” of public policies. There is no principled imperative that government actions must be maximally

107. *Id.* at 178.

108. *Id.*

109. *Id.*

neutral in their effects on religious communities and believers. It might be that we have good public reasons for subsidizing some faith-based schools and other social welfare agencies, but that does not mean that we must avoid exerting pressures on those private institutions that receive public funds to open their doors to all beneficiaries regardless of faith.

Part of the reason is that it will likely be impossible to insure that all recipients of social services (including school children) will have anything like the same freedom to choose among good schools or service providers. Wealthier, more popular, and longer established religious communities will often have greater resources and superior institutions. Many children or other recipients of social services may want to take advantage of the agency (or school) that is nearest to home or perceived to be "best" in some important respect. These considerations argue for encouraging or requiring publicly funded service providers to create an atmosphere which is open to all and in which students or clients are not pressured to conform to religious strictures as a price of receiving aid. Of course, Catholic schools, Catholic Charities, and many other religiously-based educational and social service providers already operate this way.

Monsma is concerned, however, about the autonomy of religious communities and the integrity of religious beliefs. Citing the important work of sociologists Paul DiMaggio and Walter Powell,¹¹⁰ Monsma worries that

[c]ultural expectations may have a coercive effect, rising standards of professionalization may lead to subtle pressures, and—most important—the uncertain environment created by uncertain legal standards may lead religiously based nonprofits to model themselves after already existing organizations that are less religious and whose receipt of public funds is more clearly legitimate. The tendency may be for religiously based nonprofits receiving public money to drop or tone down their distinctive religious characteristics, thereby making themselves more like their secular or nominally religious counterparts who are successfully receiving public funds.¹¹¹

Moreover, Monsma echoes some of Stephen Carter's complaints, pointing out that religious leaders and organizations are really only welcomed into the public sphere when they are willing to stress

110. See generally Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147 (1983).

111. MONSMA, *supra* note 88, at 163.

“broad, consensual themes of good citizenship, respect for others, and acts of charity.”¹¹² “Thus,” Monsma continues, “the head of a religiously based social welfare agency is welcomed into community groups and is respected by local news media as long as she does not critique the moral-religious views of others or appeal to church authority or biblical standards to support a controversial position.”¹¹³ If, on the other hand, she breaks the rules of acceptable public discourse, “there is an embarrassed silence and countless clues will inform her she has transgressed certain unwritten rules of the game. . . . The subtle pressures are there.”¹¹⁴

We also need to keep in mind, however, that not all “cultural expectations” are “coercive,” and not all of the “subtle pressures” that public policy exerts with respect to religious belief are to be regretted or apologized for. That religious communities receiving public monies feel pressured to conform to some public expectations is perfectly natural and even salutary from a public standpoint. Insofar as the public chooses to rely on private associations to promote the public’s interest in moral and civic education, and insofar as those private agencies voluntarily accept a share of public monies, we should hope that public policy tilts in favor of such public values as fairness among all citizens, equal access, and openness to outsiders.

We can certainly join Monsma in recognizing and applauding the contribution that religiously-based nonprofits make to the public good, and I do not want to suggest that all is necessarily well in this sphere. I agree that we should drop the old principle that public funds may only assist faith-based institutions when those funds support secular functions that can be strictly separated from the religious mission. However, we should not aim to immunize faith-based institutions receiving public funds from all pressures toward openness and inclusion. If religious believers sometimes feel they are being asked to “tone down” their religiosity, that will often be the price of agreeing to serve as a provider of public services.

To his credit, Monsma sees both sides of the issue and advocates protection of a core set of public values. He insists that public funds should be denied to programs and activities that are primarily other-worldly in nature: “Such activities as worship services, the construction of chapels, or classes in religious doctrine could not be

112. *Id.* at 163-64.

113. *Id.* at 164.

114. *Id.*

funded under positive neutrality.”¹¹⁵ He also insists that all nonprofit organizations receiving public monies have “an obligation to be supportive of the basic norms and rules of the game that unite the American people,” including “the worth and dignity of all persons . . . the rule of law, the right to privacy, and freedom of expression . . . [and] a sense of civility and tolerance.”¹¹⁶ He would deny public funds to groups that teach “hatred and intolerance or in other ways work to destroy the social fabric fundamental to civil society.”¹¹⁷ He would allow religious organizations receiving funds to favor persons of their own religious traditions in their hiring practices, but they should not be allowed to engage in racial or ethnic discrimination.¹¹⁸ The upshot is that Monsma wants to do a bit more to insure that religious organizations do not need to denature themselves when providing publicly subsidized services, so long as those religious organizations are not deeply at odds with basic public principles. I am arguing that the array of public purposes is richer than Monsma recognizes.

We should, as a constitutional matter, allow experimentation to take place at the intersection of church and state when it comes to education and the provision of social welfare services. The polity benefits enormously from the moral energies of religious communities when it comes to education and care for the aged, the sick, drug users, orphans, etc. Nevertheless, we should also try to insure that public policies are attentive to the full range of public values. If religious agencies are being deterred from entering the social service delivery field on account of restrictions on their ability to remain faithful to their religious missions, and there are extensive unmet needs among the sick and elderly and others in need of care, then perhaps constitutional rules should be eased somewhat more than I suggest. But if most religious schools are willing to accept the

115. *Id.* at 180. Monsma continues, “if the overall mission or program of the religious nonprofit has this-world benefits to society and if its programs and activities are not dominated by and built around required religious exercises or efforts at proselytizing, their existence does not pose a problem.” *Id.* at 186. He also says that all groups receiving public funds would have to submit to “minimal, nonintrusive accountability standards” to insure that they are actually delivering on the civic programs and purposes that justify public support. *Id.* at 180.

116. *Id.* at 181.

117. *Id.* Private organizations should follow the old Christian adage of “[h]ate the sin but love the sinner.” *Id.*

118. *See id.* at 188-89. Monsma also argues that “[s]ome gender discrimination should be allowed in the case of nonprofits from religious traditions with long-standing and sincerely held beliefs that make gender-based role distinctions.” *Id.* at 189. Moreover, religious organizations should not be required to accept and condone homosexual behavior. *See id.* at 188.

conditions contained in the Milwaukee and Cleveland voucher programs, and the vast majority of faith-based non profits are reasonably content with the current rules governing funding—as by Monsma’s own account they seem to be—then attaching strings to public funds for the sake of fostering openness and inclusion in civil society appears to be well worth the price.

CONCLUSION: THE NECESSITY OF PROMOTING LIBERAL VALUES IN ALL SPHERES OF LIFE

It seems to me that we have every reason to think more about the contributions that civil society institutions can make to the moral infrastructure of modern liberal democracies. It is very important, however, that we not mistake the grounds for placing greater weight on civil society. It would be wrong to proceed based on the mistaken assumption that the sphere of liberal democratic civil society is a sphere of radical diversity and idiosyncrasy. It would be equally wrong to suppose that “freedom of association” requires freedom from influence, freedom from differential incentives, or the right to live in a world where public policy strives to avoid influencing the way that people use their freedom.

Oddly, proponents of placing greater reliance on civil society institutions sometimes make diametrically opposed arguments about why we should do so. In a recent paper arguing for school choice, for example, Michael McConnell insists that parental choice and educational diversity are justified because America has always been characterized by too much pluralism, too much religious and cultural diversity, for a system of common schooling to be possible.¹¹⁹ To be truly common, the substantive curriculum of the common schools would have to be extremely thin. Any education with real moral substance, on the other hand, is too controversial and sectarian to justify promoting through public policy. So, McConnell argues, the deep pluralism of America—symbolized by its religious diversity—argues for parental choice and educational diversity.

On the other hand, and in the same paper, McConnell makes an altogether different and far more powerful argument in favor of school choice, an argument advanced by recent proponents of Catholic schooling: namely, that school choice that includes religious

119. See generally MICHAEL W. MCCONNELL, *Education Disestablishment: Why Democratic Values Are Ill-Served by Democratic Control of Schooling*, in NOMOS XLIII: MORAL AND POLITICAL EDUCATION (Stephen Macedo & Yael Tamir eds., forthcoming 2000).

schooling would serve public values more effectively than today's public schools. It is not only that religious schools would increase test scores and lower dropout rates, but that they would also help counteract some of the unfortunate cultural tendencies which are reflected in today's public schools: the rampant materialism, the loss of discipline, the hedonism and acceptance of premature sexuality, the absence of authoritative guidance, and the surrender to youth culture.

Which is it? Should we adopt a policy of educational choice because we have no common values, no civic ideals? Or because a greater degree of choice would better serve public values properly understood? I contend that the latter approach is the correct way of thinking about how public policy should orient itself with respect to questions of educational reform and civil society generally. The case for including religious schools—which are mainly Catholic schools—in voucher programs is greatly strengthened by the fact that Catholicism has finally accepted basic liberal principles of equal freedom for citizens of diverse faiths. When Antony Bryk and his colleagues make the case that Catholic schooling serves the “common good,” they rightly begin with an account of Vatican II, and emphasize the importance of this revolutionary change in the doctrines of the Church.¹²⁰ Now that these changes are in place, it is much easier to appreciate the many good qualities of Catholic education.

We should take fuller advantage of all the educative and character forming resources at our disposal. Part of what might happen as a consequence of school reform, and the great revival of interest in civil society institutions—part of what should happen in any case—is that we will think about the means of civic education more broadly than we have in the past. This means that we will increasingly face the difficult task of negotiating conflicts and tensions among basic public values and some of the most powerful and deeply held nonpublic values. Liberals will have to face up to the fact that the success of our constitutional experiment depends upon our ability to constitute not only political institutions but also civil society institutions and patterns of social life which inevitably do much of the work of moral and political education in a free society.

120. See generally ANTHONY S. BRYK ET AL., *CATHOLIC SCHOOLING AND THE COMMON GOOD* (1993).

