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Institutional Autonomy in Public, Private, and Church-Related Schools

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INSTITUTIONAL AUTONOMY IN PUBLIC, PRIVATE, AND CHURCH-RELATED SCHOOLS

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INTRODUCTION

I applaud the interest of the Thomas J. White Center on Law and Government in the contemporary problems that arise under the heading, "Schools and Society." I consider the use of the word "schools" to be an important choice, asking for a more precise focus than the word "education" would suggest. As Eva Brann has said, "A *school* is not the world. And yet it is *a* world, a small republic of the intellect within the political community."[1] This thought reminds us that public and private schools at all levels in our multi-tiered system of American education are institutional entities in their own right. Each school has its own history and tradition, its own distinctive educational mission, its own system of governance, and its own legal identity and institutional integrity.

The maintenance of strong forms of institutional identity and autonomy can be crucial in fulfilling in the lives of individual students the educational objectives for which the schools were established. However, we now live in a day when institutional authority of all kinds has become increasingly suspect. As part of this large scale trend — as well as for reasons peculiar to the unique environment of education — the autonomy of the schools, whether public or private, has eroded substantially in recent years. As a result, our schools are in the midst of an identity crisis that I believe adversely affects their capacity to educate their students. At the same time, some recent Supreme Court decisions appear to hint toward a restoration of institutional strength, thus calling attention to a potential counter-trend that should be both noted and encouraged.

After reviewing some background thoughts on the institutional heritage of schools, I will note two concepts that have tended to undermine their institutional influence: the

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1. E. BRANN, PARADOXES OF EDUCATION IN A REPUBLIC 146 (1979) (emphasis added).

tendency to view first amendment rights in individual rather than institutional terms, and the tendency to use federal regulatory power to control educational policy decisions — especially in the private sector. In dealing with the first of these influences I will summarize some recent cases that could help to slow these trends.

I. The School as a Mediating Institution

In order to place the institutional position of schools into a proper conceptual context, I wish first to discuss the concept of *mediating institutions*.[2] These are the intermediate organizations and associations that stand between the individual and the state. They are typically small, private entities such as the family, neighborhoods, churches, and other voluntary associations that contribute toward the realization of "meaning, fulfillment, and personal identity" for the individual.[3] The public sphere, by contrast, is dominated by the "megastructures" of our mass national markets and by large governmental bureaucracies. The megastructures have enormous social and economic influence, but they do not typically seek to tell us the meaning of our individual lives.

Indeed, democratic theory discourages the governmental megastructures from imposing monolithic orders of meaning on individual citizens. Such overpowering intrusions into personal self-determination are more typical of totalitarian states. As noted by Robert Nisbet, this characteristic of totalitarianism makes it the "ultimate invasion of human privacy." Significantly, this invasion by which totalitarian regimes establish a comprehensive sense of personal meaning for individuals is not possible until "the social contexts of privacy — family, church, association — have been atomized. The political *enslavement* of man requires the *emancipation* of man from all the [intermediate] authorities and memberships . . . that serve . . . to insulate the individual from external political power."[4]

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2. For some development of this theme, see Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 Ohio St. L.J. 663 (1987). The family as a mediating institution is discussed in Hafen, *Law, Custom, and Mediating Structures: The Family as a Community of Memory*, The Rockford Institute Center on Religion & Society (publication forthcoming).

3. *See* P. Berger & R. Neuhaus, To Empower People: The Role of Mediating Structures in Public Policy 2 (1977).

4. R. Nisbet, The Quest for Community 202 (1953).

I note in passing that the pressure seen in our own country in recent years to emancipate individuals from the influence of mediating institutions has often been motivated by a commitment to personal autonomy — which appears on its face to be the opposite of a commitment to increases in state power. For instance, Laurence Tribe contends in the name of individual autonomy that future legal developments will lead to a liberation by the state of "the child — and the adult — from the shackles of such intermediate groups as [the] family."[5] Whatever the ostensible motivation for attacks upon the institutional authority of intermediate groups, however, Robert Nisbet argues persuasively that reduced authority among mediating structures creates precisely the kind of "spiritual and cultural vacuum" that "the totalitarian must have for the realization of his design."[6] This is because "[t]he shrewd totalitarian mentality knows well the powers of intimate kinship and religious devotion for keeping alive in a population values and incentives which might well, in the future, serve as the basis of resistance" against the totalitarian state.[7]

The American system of public education was originally established as an extension of the private, mediating sphere.[8] Such concepts as local control, funding by local taxation, and *in loco parentis* correctly identified the important delegation of parental power that was inherent in the process of education in neighborhood public schools. Responding to this delegation, the schools have long been committed, along with their commitment to traditional academic subjects, to the teaching of such fundamental civic and moral skills as self-discipline, honesty, cooperation, self-reliance, and responsibility. Such instruction has involved public schools in the core mediating role of value transmission, although not to the same complete extent as has been typical of private schools.

In more recent years, however, the place of the public school in our political and social structure has become less clear. Especially since the school desegregation movement, schools have been increasingly cast in the role of state agents, which has moved them away from a mediating role and toward the state megastructure.[9] From the perspective of law

5. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 988 (1978).
6. Nisbet, *supra* note 4 at 203.
7. *Id.*
8. *See* Hafen, *supra* note 2, 48 OHIO ST. L.J. at 699.
9. For a summary of such historical trends, see Hafen, *supra* note 2 at 670-95.

and federal policy, the schools are now indeed part of the governmentally-sponsored megastructure. Yet many parents and others still assume the schools should play a value transmission role more typical of a mediating institution. The reality is that public schools are now cast in both roles, with some segments of the public expecting them to be value neutral while other segments expect them to take strong value-oriented positions. This structural ambiguity has become a source of tension and ambivalence in the minds of teachers and administrators as well as in the public's perception.

This uncertainty about the place of public schools in our political structures has created confusion about the nature, role, and authority of the schools. In addition, the institutional authority of the schools has been diminished by a variety of historical influences that accelerated during the revolutionary era of the 1960s. As documented by educational historian Diane Ravitch, the student revolts on college campuses blended with a variety of anti-authoritarian protest movements that had the cumulative effect of altering the hierarchical patterns of organization and instruction in public schools as well as in higher education.[10] The empirical studies of Gerald Grant and David Riesman also found that the most widespread and significant impact of this period of educational upheaval was expanded student autonomy, which led to broad reductions in traditional academic and behavioral expectations on college campuses as well as in public schools.[11] James Coleman and his colleagues corroborated these findings with their studies comparing private and public high schools, which documented — among other factors — the connections between reduced authority in the public schools and reduced levels of academic performance by public school students on standardized tests.[12]

The Coleman studies also demonstrated that private

10. *See generally* D. RAVITCH, THE TROUBLED CRUSADE: AMERICAN EDUCATION 1945-80 (1983).

11. G. GRANT AND D. RIESMAN, THE PERPETUAL DREAM: REFORM AND EXPERIMENT IN THE AMERICAN COLLEGE 188-89 (1978).

12. J. COLEMAN, T. HOFFER, & S. KILGORE, HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED (1982). See also the brief summary of this research in Coleman, *Private Schools, Public Schools, and the Public Interest*, THE PUBLIC INTEREST (Summer, 1981), at 19, which addresses the linkage between public school students' academic performance and public school policies relating to homework, attendance, and discipline.

schools generally had higher expectations of their students in such areas as the academic content of the curriculum, howework assignments, attendance requirements, and disciplinary patterns. Coleman found that these relatively demanding educational policies in private schools were directly correlated with higher student scores on national achievement tests, even though the family background characteristics of students in private schools also influenced the higher test scores. This evidence suggests that the institutional authority of private schools was less damaged by the revolutionary stirrings of the past generation.

At the same time, however, the institutional energy and influence of private education at all levels have suffered from immense financial pressure. Tuitions can only rise so high, and then they are out of reach for those who desire a private education. Generally restrictive (even if frequently inconsistent) interpretations of the establishment clause have also complicated the ability of church-related schools to obtain state or federal financial assistance.[18] Student financial aid programs have alleviated some of this pressure, especially among church-related colleges and universities. Yet, as I will discuss shortly, student aid is available only when accompanied by enforced conformity to federal policies that can threaten the unique educational mission of a private school. Because private schools play a more complete and active mediating role with their students than do public schools, the pressure to conform to federal standards constitutes a particularly potent threat to the very reasons a private school may exist.

Against this background sketch of some influences that have undermined the institutional autonomy of both public and private schools, I wish to focus on two particular legal concepts that have contributed to declining authority patterns. Both of these concepts interact with the other large scale forces I have mentioned, making it difficult to identify cause and effect relationships. If the constitutional status of institutional autonomy could be clarified with respect to concepts such as these, however, the ability of schools to resist other sources of erosion would be strengthened.

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13. *E.g.*, Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 473 U.S. 402 (1985); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971).

II. Institutional Autonomy and the First Amendment

The first constitutional problem, which has an impact on both public and private schools, is that the first amendment has often been thought to protect individual rights more than it protects institutional rights, in both free expression and religion cases. Schools are part of a special cluster of entities whose institutional interests should be protected by the principles of the first amendment. These institutions include newspapers, schools, universities, churches, and other associations concerned with the development of intellectual and spiritual concerns. For many purposes, the family could be included within this group. These are the carriers of meaning, the institutions Alexis de Tocqueville called "the intellectual and moral associations of America," which he distinguished from the "political and industrial associations."[14] They are devoted to such meaning-related values — both for individuals and the society — as free inquiry, public dialogue, artistic expression, intellectual discourse, personal religious discovery, and the building of associations that foster personal development as well as mediation between the individual and the megastructures.

These values have long enjoyed unusually protected status within the protections of the first amendment, but the nature of the protection varies in important ways when it is applied to individual but not to institutional interests. Consider an illustrative anecdote related to freedom of the press. I spoke recently with a friend who publishes a daily regional newspaper. He said the newspaper business is not as satisfying as it once was for him, in part because of the constant difficulty he experiences with young journalists who are deeply committed to what he called "advocacy journalism." This attitude represents a commitment not only to investigative reporting, but to the idea that news reporting should promote causes the reporter believes in. My publisher friend said his cub reporters view the first amendment as a personal protection, not only against governmental censorship, but against the contrary judgments of their publisher. He considers their views to be in error, because he pays the bills and is held responsible for the content of the paper. Yet I think the reporters' attitudes typically reflect contemporary assumptions.

Administrators and journalism faculty in the schools and

14. 2 de Tocqueville, DEMOCRACY IN AMERICA 114 (Bradley ed. 1945).

colleges that finance campus newspapers have probably had feelings similar to those of this publisher when they have been required by some courts to print stories prepared by student writers and editors with whose judgments they disagree. In *Kuhlmeier v. Hazelwood School District*,[15] for example, the Eighth Circuit recently held that the first amendment rights of students were violated when a school administrator refused to publish sensitive stories written by students for an official high school paper. The Supreme Court has just reversed this case, which suggests that when public school students are concerned, the students' most fundamental first amendment interests just might be advanced by reinforcing a school's institutional ability to exercise education judgments in such extra-curricular activities as student newspapers.[16] The Court had already determined in 1986 that the institutional role of a high school justifies the regulation of a vulgar speech in a student body election assembly.[17]

Some defenders of free expression concepts assume that schools should not supervise student expression, because academic freedom, like freedom of speech, is an individual, not an institutional, right. This assumption is probably influenced by the historical development of academic freedom as a source of protection for individual faculty expression in American universities. The older heritage of the concept of academic freedom, however, can be traced to the nineteenth century German universities, where the faculty's teaching freedom was strongly linked with the university's institutional right to manage its own academic affairs. This pattern was clearly influenced by the tradition that the faculty elected its own academic officers, but institutional autonomy from state interference was still the result.[18]

The U.S. Supreme Court has in a few recent cases introduced the idea of *institutional academic freedom* for American schools. One of the earliest descriptions of the concept of academic freedom as a first amendment interest was contained in Justice Frankfurter's concurring opinion in *Sweezy v. New Hampshire*.[19] The case involved an individual faculty member, as did virtually all of the early academic freedom cases; how-

15. 795 F.2d 1368 (8th Cir. 1986), *rev'd* 108 S.Ct. 562 (1988).

16. This argument is developed in Hafen, *supra* note 2, 48 Ohio St. L.J. 663 (1987).

17. Bethel School District No. 403 v. Fraser, 106 S.Ct. 3159 (1986).

18. *See* Finkin, *On "Institutional" Academic Freedom*, 61 TEXAS L. REV. 817, 822-23 (1983).

19. 354 U.S. 234, 263 (1957).

ever, Justice Frankfurter also described academic freedom in institutional terms as the four essential freedoms of a university: who may teach, what may be taught, how it shall be taught, and who may be admitted to study. The Supreme Court relied on this language in the more recent *Bakke* case, which upheld a limited first amendment right for a university to establish admissions preferences for minority students, despite a contrary equal protection claim by a white student who was excluded by the university's admissions policy.[20] And in a unanimous 1985 opinion authored by Justice Stevens, the Court upheld a university's dismissal of a student for academic reasons, with the Court relying explicitly on the first amendment "academic freedom" of "state and local educational institutions" as a premise for its reasoning.[21] Justice Stevens stated that "academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students. . . . but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself."[22]

The facts of this most recent case may limit institutional academic freedom to decisions involving subjective academic judgments; however, Justice Stevens has elsewhere endorsed the institutional freedom of schools and colleges to control the use of school facilities and extracurricular programming decisions.[23] In addition, the concept of institutional academic freedom does contribute toward the ultimate purposes of the first amendment by strengthening a school's ability to teach its students. Freedom of expression has two meanings: freedom *from* restraints and freedom *for* expression — developing the capacity for self-expression. A major purpose of education is the development of expressive powers in the second sense, an educational process that requires more than the mere removal of restraints. As schools exercise judgments about educational policy, for individual students or for an entire curriculum, they affirmatively nurture first amendment values.

The institutional autonomy of church-related schools and colleges is also influenced by prevailing interpretations of

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20. Regents of the University of California v. Bakke, 438 U.S. 265, 312 (1978).

21. Regents of University of Michigan v. Ewing, 106 S. Ct. 507, 514 (1985).

22. *Id.* at 514 n.12.

23. *See* Widmar v. Vincent, 454 U.S. 263, 278 (1981) (Stevens, J., concurring).

the first amendment's religion clauses. In the religion context, as in the free expression context, it has been common to emphasize individual rather than institutional interests. In part this attitude is the result of historical developments. Robert Nisbet has noted, for example, that the ascendance of Protestant thought in the development of Western civilization shifted the focus in religion from the visible to the invisible Church: "[T]he individual man of faith replaced the corporate Church as the repository of divine guidance."[24] Yet, wrote Nisbet, the communitarian and institutional sources of religion are crucial, because experience shows that unsupported individual faith dissolves under the acids of materialism and political power.

Mark Tushnet has similarly observed that the dominant influence of Protestantism in American history gives an individualistic flavor to assumptions about the meaning of "religion" in the religion clauses. Protestant theology emphasizes the individual's relationship with God, while in the Catholic, Mormon, and Jewish traditions, for example, the institutional church or communal forces play a larger role. Tushnet believes this anti-institutional tendency is reinforced by the assumption of the Western liberal tradition that the free market economy is most likely to flourish when personal economic decisions are made according to self-interest and without interference from such intermediate institutions as churches. In contrast to the liberal tradition, the republican tradition's reliance on representative mechanisms would have allowed more shaping of individual lives by larger orders and would implicitly be more likely to understand the legitimacy of institutional religion.[25]

Also in this area, however, the Supreme Court has recently emphasized the institutional dimension of religious liberty. Just last term the Court unanimously upheld against an establishment clause challenge the constitutionality of a federal statute that permits religious organizations to discriminate on the basis of religion in favor of their own members in good standing when making employment decisions in nonprofit activities.[26] The Court recognized that only religious activities should be entitled to an exemption from certain

24. Nisbet, *supra* note 4, at 243.

25. Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 729-738 (1986).

26. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 107 S. Ct. 2862 (1987).

anti-discrimination laws, but overturned the lower court's attempt to construct a test that would allow judges to decide which activities are religious. The Court preferred to base the justification for an exemption on the objective question of whether the organization's activity is non-profit rather than profit. Recognizing the need to limit governmental interference with "the ability of religious organizations to define and carry out their religious missions," the Court was concerned about the chilling effect of requiring a religious organization "on pain of substantial liability, to predict which of its activities a secular court will consider religious."[27]

In his concurring opinion, Justice Brennan recognized that "religious organizations have an interest in autonomy in ordering their internal affairs," in part because a religious community is "an organic entity not reducible to a mere aggregation of individuals." Thus, determining the nature and leadership of its own activities is "a means by which a religious community defines itself." Then Justice Brennan added this significant insight about the relationship between institutional and individual first amendment freedoms: "Solicitude for a church's ability to [engage in its own self-definition] reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well."[28]

These emerging doctrines of institutional academic and religious freedom may help clarify the role of both public and private schools in determining the nature and content of their educational missions when challenged by claims of individual constitutional rights. Lest this point mistakenly be viewed as unsympathetic to individual liberties, I stress, building on Justice Brennan's observation, that the institutional strength of educational and religious institutions is a crucial source for nurturing affirmatively in *individual* lives the values that underlie the first amendment. Most churches, many private schools, and to an important extent even the public schools exist as mediating institutions among whose primary purposes is to encourage over the long term individual growth, development, and expression.[29] If, by contrast, we see schools through anti-institutional lenses as arms of the censoring governmental megastructure, presumed to be the enemy of open expression, we cast doubt on the core teach-

27. *Id.* at 2868.
28. *Id.* at 2871-72 (Brennan, J., concurring) (footnote omitted).
29. *See* Hafen, *supra* note 2, 48 OHIO ST. L.J. at 695-712.

ing role of the schools and undermine the fundamental first amendment right of students to receive an education.

III. Institutional Autonomy and Government Regulation

A second threat to the institutional autonomy of schools is the indiscriminate and excessive government regulation of educational policy. A complete treatment of this topic is beyond the scope of this essay,[30] but recent legislation offers an example of such excessive regulation which deserves our attention — in part because of its novel applications to private, church-related colleges, and in part because the legislation has received relatively little opposition.

Title IX of the Education Amendments of 1972 prohibits sex discrimination in any educational "program or activity receiving Federal financial assistance."[31] Other statutes similarly forbid discrimination on the basis of race, handicap, and age in programs or activities that receive federal aid. In 1984, the Supreme Court interpreted Title IX as it applied to private, church-related Grove City College in Pennsylvania.[32] This college had never received federal financial assistance, but some of its students had personally received federal educational grants. The school did not discriminate on the basis of race, sex, or other impermissible criteria in any of its programs, but its administration refused to sign a technical statement of compliance on the grounds that doing so relinquished its institutional autonomy.

The Court construed Title IX to mean that student aid may be regarded as aid to the institution for the purpose of establishing federal jurisdiction under the constitutional spending power. The Court held that such jurisdiction was limited, however, to the specific educational program or activity that actually received federal funds. In the case of Grove City College, this meant that only the student financial aid office was subject to Title IX.

Shortly after this decision was announced, a new "Grove City" civil rights bill was introduced in Congress for the pur-

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30. For some references, *see generally*, Bok, *The Federal Government and the University*, 58 Pub. Interest 80 (1980); Oaks, *A Private University Looks at Government Regulation*, 4 J.C. & U.L. 1 (1976); O'Neil, *God and Government at Yale: The Limits of Federal Regulation of Higher Education*, 44 U. Cin. L. Rev. 525 (1975).

31. 20 U.S.C. § 1681 (1982).

32. Grove City College v. Bell, 465 U.S. 555 (1984).

pose of broadening the language of Title IX and similar statutes so that any indirect federal aid would trigger jurisdiction across the complete campus of a school (or, for that matter, any other public or private entity) receiving federal funds.[33] The language of that proposal has since been slightly modified in the form of the Civil Rights Restoration Act of 1987.[34] The effect of this legislation is particularly discouraging to the private colleges and universities that — often at great sacrifice, compared to their sister institutions — have refused direct federal assistance for many years in order to ensure their right of institutional autonomy enough to define their distinctive educational missions. Under the new legislation, a private college with one student enrolled who is on the GI Bill or receiving a Pell grant will be subject to campus-wide federal jurisdiction on the same terms and to the same extent as schools whose buildings and programs have received major federal subsidies for many years.

One other feature of the new act deserves mention because it relates directly to our earlier discussion about institutional autonomy on religious as well as educational grounds. Title IX, as originally enacted, exempts from its operative definitions schools that are "controlled" by a religious organization when the application of Title IX would conflict with the religious tenets of such organizations.[35] Schools, however, that have a religious mission but are not *controlled* by churches are not exempt.

Thus, because Grove City College is not actually controlled by a Church, despite its strong Christian affiliation and educational mission, its religious interests must be subordinated to the commands of Title IX regulations when the two are in conflict. (This assumes, of course, that at least one student is receiving a federal grant, thereby creating federal jurisdiction under Title IX.) For example, the school could not exclude students involved in extramarital sex,[36] nor could it freely pursue other personal value preferences based on a religiously-grounded view of traditional family life, such as counseling students about conflicts between marriage and ca-

33. *See The Civil Rights Act of 1984: Hearing on S. 2568 Before the Senate Comm. on Labor and Human Resources*, 98th Cong., 2d Sess. 52-110 (1984) (statement of Bruce Hafen, President, American Association of Presidents of Independent Colleges and Universities).

34. Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988). The Act was passed to reverse the *Grove City* decision.

35. *See* 34 C.F.R. § 106.12(b) (1987).

36. *Id.* at §§ 106.21(c), 106.40 and 106.57 (1987).

reer choices in ways that affirm role distinctions in family life based on gender.[37] The college's right not to encourage abortion, such as by not including abortions within its student health insurance, has been preserved by an abortion provision in the 1988 act.[38]

These amendments to Title IX are designed to reach as far as possible in eradicating sex discrimination. I can understand this objective, because I have seen the harmful effects in education and elsewhere of gender-based policies and stereotypes. For that reason, my concerns about the amendments relate not to their particular objectives in cases where harmful discrimination actually exists, but to the way it illustrates a contemporary tendency to discount competing constitutional values in seeking a solution to complicated social problems. Just as an emphasis on individual rights in constitutional theory can obscure the significant contributions to individual liberty made by relatively autonomous intermediate institutions, so too an exclusive and single-minded emphasis on one area of social policy as it applies to educational environments can discount competing educational policies that are important to maintaining diversity, student choice, and other first amendment values in our total educational system. I will illustrate by identifying two concerns that draw on the foregoing background regarding the Grove City legislation.

First, the legislation extends federal authority from institutions or activities that are *directly* benefited by government funding to those that are *indirectly* benefited. This occurs by expanding from *program-specific* coverage of the type the Supreme Court recognized in its 1984 case to *campus-wide* coverage, regardless of the purpose, amount, or organizational location of the funds. Thus, if the chemistry department receives a federal research grant, the school's bookstore and athletic department are also covered by Title IX. This indirect benefit theory was also the basis for the refusal by the bill's proponents to include an amendment that would have

37. *Id.* at § 106.36(b) (1987).

38. The abortion provision in the Act declares:

NEUTRALITY WITH RESPECT TO ABORTION

Nothing in this title shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service including the use of facilities, related to an abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.

excluded certain forms of student aid from the definition of institutional assistance.

Legislative and judicial policymaking has traditionally been sensitive to the need for maintaining some theory of limits on the reach of federal regulatory power, especially where institutions involved in the protection of first amendment values are involved.[39] For example, "indirect" educational assistance in the form of benefits to students or their families has long been distinguished from "direct" payments or benefits to schools in the context of Supreme Court cases dealing with aid to parochial schools. The distinction has often been a crucial one: only indirect benefits can now withstand establishment clause challenges.[40]

Federal Pell Grants to college students illustrate the conceptual difficulty of regulations based on indirect aid. Many student-oriented funding programs are administered through campus-based programs that involve financial management and discretionary judgments by college officials. However, college officials have no discretion with respect to the management or use of Pell Grant funds. A college may administratively assist its students in applying for the grants and may be a conduit for ensuring that student checks reach the appropriate student recipients; but students apply for and receive such grants upon satisfaction of personal criteria established and controlled by the Department of Education. The student is, after all, the intended primary beneficiary of the grant program. Because Pell Grant funds are designed to enable a student to attend college, the student may use the funds to pay for a variety of educational-related expenses, from food and lodging to tuition. Costs other than tuition are often high enough in relation to grant amounts to consume all of a student's federal funds. When a grant-receiving student pays her tuition, she may thus be using her own or other non-federal funds. The college she attends obviously benefits from her attendance, of course, but this indirect benefit is no different from the benefit received by other private businesses in her college town. Indeed, if she pays her rent or auto repair bill — but not her tuition — with her Pell Grant,

39. Most attempts to authorize federal aid to education during the twenty years after 1945 were unsuccessful because of widespread fears in Congress and elsewhere that, among other risks, federal assistance would lead to federal controls that would undermine local authority over education. *See* D. RAVITCH, THE TROUBLED CRUSADE: AMERICAN EDUCATION, 1945-1980 (1983).

40. *See* Mueller v. Allen, 463 U.S. 388 (1983).

those recipients may obtain a more "direct" benefit than her college. Yet the college is regarded as a "recipient" of federal assistance and the landlord or repair shop apparently is not.

My point is not simply the unfairness of regulating some indirect beneficiaries while excluding others; rather, the move from direct to indirect benefits as a source of jurisdiction may upset longstanding theories about the basis for limitations on federal power, introducing a slippery slope that will defy meaningful distinctions. Congress may obviously condition grants of financial assistance on the willingness of a recipient to comply with federal requirements or policies, simply because governmental funds should not be expended in ways that run counter to legitimate government objectives. The Supreme Court has thus interpreted the spending power broadly, so long as the conditions accepted by the recipients are reasonable and unambiguous[41] and "narrowly tailored" to the achievement of the legislative goal.[42] But indirect benefits involve broad tailoring as well as broad ambiguities, in part because all private-sector entities are benefited indirectly by tax exemptions and other elements of federal taxation or expenditure policies. It is difficult to imagine where meaningful lines distinguishing the private sector from the public sector can be drawn amid such breadth and complexity.

Second, the legislation seems insensitive to the potential impact of broad federal sex discrimination policies on religious educational institutions. Some advocates of gender neutrality argue that the elimination of actual sex discrimination is an insufficient goal of federal civil rights policy. Rather, they stress the need to eradicate all social or institutional attitudes in both the public and private sectors that reinforce female-male distinctions of any kind, including attitudes that originate in family life, ethnic groups, religious associations, or social traditions that reinforce any form of sex role assumptions. Churches or church-related colleges that encourage hierarchical and patriarchal traditions would obviously be obstacles in this path. Only by reaching into these private sources of attitude, some believe, will the ultimate sources of discrimination be reached and controlled. I note, parenthetically, that the Equal Rights Amendment would not reach as far as the 1988 civil rights legislation in establishing

41. South Dakota v. Dole, 107 S. Ct. 2793, 2796 (1987); Grove City College v. Bell, 465 U.S. 555, 575 (1984).

42. Fullilove v. Klutznick, 448 U.S. 448, 480 (1980).

gender-neutral values, because the ERA would apply only to state — not private — action.

Given the broad goal of addressing privately developed beliefs, the pervasiveness of federal spending makes the spending power an attractive vehicle to extend federal regulatory authority into the realms where those beliefs may have their roots. By this means, mediating institutions can be subjected to pressures that characterize them as part of the governmental megastructure, thus reducing their capacity to be carriers of meaning in the development of personal value orientation. The idea of transforming private, church-related colleges into a quasi-public institution in this way seems especially ironic, because it tends to impose the tangled contemporary arguments about separating church and state on the campus of a *church-related* college. The very existence of such schools has been historically justified on the grounds that they offered individual students a private, clearly religious alternative to the megastructure.

In another sense, the policy goals of gender neutrality advocates seek to convert the state-controlled and value-neutral megastructure into a vast, value-oriented institution more typical of the private tradition, choosing certain personal values and sources of meaning to the exclusion of others. That exclusion may not be healthy for the development of long range social and legislative policy. Consider, for example, a legitimate value framework that competes with gender neutrality for public support. American society has experienced in recent years a steady erosion of social and legal support for the concept of stable, formal marriage, which has contributed directly and indirectly toward increasingly unstable family structures. The most serious harm caused by this instability is inflicted on children, whose developmental needs for continuity and stability are well documented. A plausible case can be made that a serious public policy reorientation is needed to restore support for stable marriage and kinship patterns in all legal, economic, and social environments. This case could identify instances in which cultural attitudes are subtly changing in both institutional and social contexts, with the effect of undermining attitudes and patterns essential to long term social stability.

It is not difficult to imagine that the goals, and perhaps the means, of such a campaign might conflict with those of the campaign for gender neutrality. Yet society's interest in upholding stable patterns of marriage and kinship is not a trivial concern. Of course serious differences in perception

exist regarding the actual relationship between family stability and sex role differentiation. But the very existence of strong, unresolved differences on matters of such profound social consequence is enough to warrant a cautious approach.

In addition to these implications for social policy, ideas about sex roles and family life are central to the religious beliefs of many people and many private institutions. Many church-related colleges and universities, freely chosen as private institutions by the students who attend them, have traditionally regarded attitudes about marriage, children, family life, and related value questions as central to the concerns of their students. Thus these schools have, as matters of both educational and religious philosophy, significantly augmented their students' own family and religious life in the process of value formation and value transmission.

There are also important differences between sex and race as legal classifications. It is therefore risky uncritically to transfer legal doctrines developed in the context of state action or in the context of racial problems to the context of gender. This is especially the case when religious values are involved, because of the potential impact on matters of personal morality.

For example, the Fair Housing Act, one of the original race discrimination laws, was amended a few years ago by adding "or sex" to the statute. Shortly afterward, a single female was refused rental accommodations in a student apartment building because of a requirement by a church-related university that single students living off campus reside in sex-segregated buildings. After reviewing the woman's complaint, the Justice Department announced its intention to bring suit. However, when the public media realized that such enforcement of federal sex discrimination laws appeared to require single men and women to share apartments and bedrooms, the roof of public outcry fell in on the Justice Department. An agreement was finally reached which allowed sex-segregated housing either on or off campus at educational institutions whose policies are derived from religious or moral principle. As this illustration suggests, widely supported religious and moral values can be undermined by the indiscriminate mixing of race and sex as legal categories.[43]

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43. *See* N.Y. Times, Mar. 5, 1978, § 1 at 33. A N.Y. Times editorial stated, "As for those people who like to be close to members of the opposite sex, their desire is neither novel nor unnatural. We had not realized

These examples suggest that private colleges have larger reasons to pursue autonomy than the desire to cover up some kind of invidious discrimination. Both the history of American education and our theory of democratic pluralism — especially at the level of higher education — reflect the value of a rich variety of educational institutions, many of them reflections of the unique vision of their founders.

Such diversity also reflects the value in a democratic society of allowing individuals to choose among alternative approaches. We have had single-sex colleges, religious colleges, secular colleges, vocational institutes, and pure liberal arts institutions. Which of these approaches is correct? Historically, we have not thought it appropriate for the federal government to answer that question. Like the economic marketplace, the national marketplace of ideas is well-served by divergent approaches and brisk competition. In addition to offering the consumer a wide array of choices, the competitors learn from one another and the entire marketplace is improved. And, reflecting the place of mediating institutions, the variety and institutional integrity of such diverse approaches is at the heart of the first amendment's interest in allowing each man or woman to define the meaning and purpose of his or her own life.

CONCLUSION

Mediating institutions have traditionally stood between individuals and the government megastructure. They have come under attack in recent years from the individual side because of their institutional character at a time when all institutions have seemed suspect. They are also under assault from the megastructure side, partly because of constitutional doctrines that favor individual over institutional values, and partly because financial pressures force their absorption by governmental megastructures. In addition, the megastructure may be too willing to respond to pressure from the advocates who wish to see the megastructure absorb mediating institutions in order to control them.

The argument for broad institutional autonomy may be stronger when applied to private, church-related schools than it is when applied to public schools. But schools of both kinds are entitled to their own forms of first amendment protection. They need increased institutional strength, not only to

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until now that it required the intervention of Washington to be satisfied." N.Y. Times, Mar. 29, 1978, § 1 at 26.

encourage a stronger private educational sector, but to encourage greater educational quality throughout the American system of education. Justice Brennan wrote that the "furtherance of the autonomy of religious organizations often furthers individual religious freedom as well."[44] For the same reason, enhancing the autonomy of educational institutions also enhances the educational opportunities of the students who attend them.

44. Corporation of the Presiding Bishop v. Amos, 107 S.Ct. 2862, 2871-72 (Brennan, J., concurring).