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THE NEW ESTABLISHMENTARIANISM

MICHAEL W. MCCONNELL*

I. LIBERALISM AND ESTABLISHMENTARIANISM

The idea that political communities should share common values has enduring attraction. Plato treated it as virtually axiomatic that the nature of the regime must be reflected in the characteristic virtues of the citizens—citizens of a monarchical regime should have souls appropriate to a monarchical regime, citizens of an aristocratic regime should have souls appropriate to an aristocratic regime, and so forth. Rousseau argued that true freedom could exist only in a society where the hearts and minds of the citizens were in perfect accord with the general will. This sense of common feeling—of fraternity—in Rousseau is so profound that subordinate associations that create divided loyalties must be suppressed. Others, while stopping short of espousing that thick of a conception of fraternity, worry that “balkanization” and excessive attachment to subordinate associations threaten the unity and harmony of the society. Historian Arthur Schlesinger, for example, has warned that in America, the land of “*e pluribus unum*,” we have lost the balance between *unum* and *pluribus*.¹

The idea that a nation should be animated by a set of common values and beliefs, backed by governmental authority, may be called establishmentarianism. Ordinarily, establishmentarianism is associated with an expressly *religious* orthodoxy, but that is not essential. Orthodoxies come in secular as well as religious varieties. Establishmentarianism is also commonly associated with persecution, but that too is a misconception; establishments can range from highly coercive (compelling affirmation of belief and persecuting dissenters) to tolerant. In a tolerant establishment, dissenters are not compelled to espouse the orthodoxy and are not punished for their dissent, but the financial, cultural, and symbolic resources of the nation are

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1. See ARTHUR M SCHLESINGER, JR., *THE DISUNITING OF AMERICA* 141 (W. W. Norton & Co. rev. ed. 1998) (1991).

deployed in support of collective beliefs about the good. Tolerant or coercive, establishments must determine what beliefs to favor, and use governmental authority of some sort to foster those beliefs.

Liberalism² seems to be a break from establishmentarianism. In the liberal tradition, it is thought that citizens of a political community need not share common values regarding the nature of the good life. It is possible, liberals have taught, for people of widely divergent values and commitments to live together in harmony, so long as they mutually forswear the use of public power or private violence to induce their fellow citizens to conform. All must agree to live and let live. We need not agree on much more than that. A liberal society is not a polis.

Liberalism presupposes that there are many reasonable, but mutually inconsistent, worldviews that are compatible with good citizenship,³ and it is neither necessary nor desirable to attempt to forge agreement.⁴ Some citizens take their cues from tradition and normative authorities such as sacred texts and churches; some entertain a vision of the transformation of society into something new and better; some believe that science and reason can (in principle) supply answers to questions of public concern; some, like the Amish, withdraw from society and seek to live their own lives in peace. People also disagree in the conclusions they reach. Some people are libertarians and some are communitarians; some are religious and some are secular; some are feminists, some are environmentalists, some are capitalists, some are hedonists, and some are apolitical. They may be fierce adversaries in the political struggle, but the liberal premise is that there is no need for them all to agree. All can be good

2. Liberalism is

a . . . doctrine of private individual and institutional rights, a judiciary dedicated to the enforcement of those rights, a system of representation designed to mute the excesses of popular passions, a constitutional framework that impedes the hasty translation of public impulses into sweeping changes of fundamental law, and, above all, a private sphere diverse and capacious enough to mount a stern defense against public encroachment.

WILLIAM A. GALSTON, *LIBERAL PURPOSES* 53 (1991).

3. It is sometimes asserted that liberalism must be neutral among *all* conceptions of the good, but this is implausible. Some worldviews (for example, advocacy of slavery or torture) are inconsistent with good citizenship, and can be discouraged (even if not persecuted) by a liberal state. But liberalism is a question of degree, and a regime is liberal to the extent that it has a broad understanding of the worldviews that are welcomed as equal participants in civic life.

4. John Rawls explains: "Political liberalism assumes that, for political purposes, a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime." JOHN RAWLS, *POLITICAL LIBERALISM* at xviii (1996).

Some may be closer to the mainstream, and thus have greater influence on the laws, but none has an official status that makes it constitutionally superior to the others. The dominant values of the society are constantly open to debate and reconsideration (except for the constitutional fundamentals, which are confined to political and institutional questions). To the extent that there are "common" values in the society, these values emerge as a result of what John Rawls calls an "overlapping consensus."⁶ They are not derived or imposed collectively.

There are at least three major arguments for the superiority of liberalism over establishmentarianism. First is the noninstrumental value: it allows free men and women to live their lives in accordance with their own conscience and convictions. This is traditionally the most important argument for liberalism. Second, liberalism enables people of divergent beliefs on fundamental questions to live together in relative harmony. When the state can create an official orthodoxy, people who care about the issues will find it necessary to fight over which creeds and virtues will be established, and dissenters become second-class citizens, if not outright rebels. Establishments politicize moral, cultural, and religious differences, generate discord, and create feelings of exclusion and alienation among the losers. Third, liberalism preserves the social preconditions of pluralistic democracy, which requires a certain degree of heterogeneity and dissent as a protection against complacency and error. A marketplace of ideas is useless if there are no differences among the ideas competing for attention. As Madison argued in *Federalist No. 10*, a multiplicity of sects and factions is a structural protection against majority oppression.

The great weakness of a liberal state is that it is dependent on cultural and demographic preconditions over which it has no direct control. A multiplicity of sects and factions is essential to liberal government, but liberal government cannot bring sects and factions into being. Liberal government can only provide guarantees of freedom of association to protect those that exist. Moreover, a

6. According to Rawls, political liberalism represents a consensus regarding political essentials among adherents of different and conflicting comprehensive worldviews. There is no need for citizens to agree on the reasons that support these political arrangements. Indeed, in a pluralistic society no one "comprehensive doctrine" can "secure the basis of social unity, nor can it provide the content of public reason on fundamental political questions." Rather, each of the various worldviews will endorse these political arrangements "from its own point of view." RAWLS, *supra* note 4, at 134; *see also id.* at 147.

citizens in their own way.

Since liberalism does not take sides in the conflicts among these many different, but reasonable, understandings, it is unable to engage in effective inculcation of public virtue. Any attempt to inculcate virtue must necessarily offer reasons, and draw upon cultural resources such as stories, songs and ceremonies. But both the reasons and the cultural resources at hand will necessarily resemble those of one moral tradition or community, and thus appear to be parochial or sectarian from other points of view. Even multiculturalism represents a particular tradition and way of life. Were it not so, multiculturalism would not be so controversial. Accordingly, it is difficult or impossible for a liberal state to engage in the direct inculcation of public virtue without compromising its liberal commitment to neutrality among the different and competing reasonable worldviews of the society. When it tries to square this circle, the result is a thin, least-common-denominator version of public virtue too pale to compete effectively with the forces of pop culture and materialism that are all around us.

The principal role for the development and inculcation of ideas of the good life in a liberal society therefore devolves upon private associations.⁵ Unlike the liberal state, with its commitment to universalism and neutrality, these normative subcommunities, collectively called “civil society,” are free to ground their teachings in deep and coherent—albeit particularistic or sectarian—comprehensive worldviews, and to reinforce those teachings by means of evocative and resonant—albeit nonuniversalistic—traditions and cultural resources. Not surprisingly, such groups are frequently able to engage the loyalties of their adherents more intensely than the wider society can do. And necessarily, since these groups will differ with one another in the content both of their moral teaching and of the cultural resources they bring to bear, they will tend to create divisions in society. Many of the papers in this symposium pose the question whether these divisions are desirable, and if not, what to do about them.

According to traditional liberal theory, the network of private associations that make up civil society contributes to the public good by inculcating ideas of public and private virtue, but no group’s beliefs can be “established” as the official orthodoxy of the society.

5. The essential characteristic of a private association is that it lacks coercive power and thus has no power to prevent exit. The state has a monopoly on the legitimate use of force.

certain degree of public virtue is essential to republican government,⁷ but a liberal regime is essentially dependent on civil society to produce a virtuous citizenry.

Most alarmingly, the liberal society risks being undermined by groups that do not support liberal institutions. Not all private associations will inculcate public virtue (from a liberal perspective). In addition to worthy civic associations, like bowling leagues and the PTA, there will be Communist cells, Ku Klux Klans, militias, gangsta rappers, and ecoterrorists. But liberals conclude that the risk entailed by these groups is less serious than the risks of even well-intentioned establishmentarianism. There are certain built-in structural tendencies that incline civil society toward the inculcation of public virtue rather than public vice. The mere fact that these associations are *groups* tends to make them antidotes to selfishness and isolation, which are two ever-present moral risks of liberal capitalism. More significantly, pluralism tends to induce groups to tolerate and cooperate with others, out of self-interest and in order to gain influence in the society. If a group wants to flourish, it needs to appeal to a broad audience, which discourages narrow sectarianism; and if a group needs to find allies, it must engage in compromise and cooperation with others. The social structure in which various groups operate thus creates incentives for social harmony, without any need for direct intervention in their belief systems.

By contrast, direct attempts to tame or silence those we think are injurious to public virtue tend to backfire and to turn in illiberal directions. When, for example, we try to silence unpatriotic voices by banning flag desecration or intolerant voices by enacting hate speech codes, it tends to exacerbate the dissenters' feelings of alienation and to radicalize their opposition to liberal institutions. On the whole, even if some subgroups are not liberal, a pluralistic society seems more likely to live harmoniously if it extends freedom of speech, association, and religion to seemingly illiberal subgroups than if it attempts to weed out dangerous voices. But that means that a liberal society is always at risk. One can hope that the free institutions of civil society will produce virtuous citizens, each in its own way, and believe that the structure of liberal pluralism will tend in that direction. But there is no guarantee. Liberalism is vulnerable at its

7. See THE FEDERALIST NO. 55, at 346 (Madison) (Clinton Rossiter ed., 1961) ("Republican government presupposes the existence of [virtue] in a higher degree than any other form.").

foundations.

In light of this vulnerability, it is not surprising that establishmentarianism also has its advocates. It is tempting to say that the government should take a more direct role in the inculcation of public virtue. Such an important matter should not be left to chance, or to the market, or to the private sphere. Establishmentarian measures are usually urged not on the perfectionist ground that they would improve the souls of the citizens, but on the political ground that certain common values are necessary to the unity and republican character of the state. Benjamin Rush, for example, argued: "I consider it as possible to convert men into republican machines. This must be done if we expect them to perform their parts properly in the machine of the government of the state."⁸ He thus advocated creation of "one general and uniform system of education" which will "render the mass of the people more homogeneous and thereby fit them more easily for uniform and peaceable government."⁹ Similarly, Horace Mann, the father of public education, urged the state to "secure[] to all its children, that basis of knowledge and morality, which is indispensable to *its own security*."¹⁰ The difficulty with this position is that any teaching about public virtue robust and specific enough to be useful will necessarily conflict with other reasonable and legitimate ways of understanding public virtue. When a liberal society decides to play a direct role in the inculcation of public virtue, it thus faces a dilemma. Either it must take sides in favor of one particular reasonable worldview or it must seek a "least common denominator" among the various reasonable worldviews. The former course will necessarily be divisive and illiberal. The search for a least common denominator, however, if pursued honestly, will produce little more than a thin, watered-down, platitudinous understanding of public virtue. (This is on the empirical assumption that pluralism in modern liberal societies is serious and deep; if moral differences are trivial, the least common denominator may be thick enough to be useful.) Moreover, in all likelihood, politics being what it is, the search for common values will prove in

8. Benjamin Rush, *A Plan for the Establishment of Public Schools and the Diffusion of Knowledge in Pennsylvania*, in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC* 17 (Frederick Rudolph ed., 1965), quoted in CHARLES LESLIE GLENN, JR., *THE MYTH OF THE COMMON SCHOOL* 90 (1988).

9. Rush, *supra* note 8, at 22, quoted in GLENN, *supra* note 8, at 89.

10. HORACE MANN, *FIRST ANNUAL REPORT* (Feb. 1838), reprinted in 2 *THE LIFE AND WORKS OF HORACE MANN* 418 (Boston, Walker, Fuller 1867), quoted in GLENN, *supra* note 8, at 220 (emphasis added).

practice to be little more than an excuse for imposition of majoritarian norms.

Through most of the nineteenth century and well into the twentieth century, for example, public educators were less squeamish about the inculcation of common values than they are in this age of self-conscious pluralism and diversity. Public schools explicitly supported the common values of civil religion (originally Protestantism and later some kind of "Judeo-Christianity"), capitalism and its attendant virtues of self-reliance and personal responsibility, and patriotism, against the perceived threats to these values from immigrant groups, Catholics and Jews (and later atheists and "secular humanists"), and political radicals and subversives. Today it is common to deride these hegemonic ideologies. But it is important to recognize that the establishmentarians of this earlier era were not merely narrow-minded bigots. They had genuine reasons for fearing that the moral and cultural underpinnings of Americanism were endangered by the influx of strangers to these shores. Catholics, for example, were suspected of lacking the essential republican virtues of thinking for oneself and valuing individual conscience.¹¹ Indeed, Protestant activists could point to papal encyclicals denouncing liberalism and Americanism, which confirmed their darkest fears.¹² Capitalism and the traditional family could be seen as the very foundation of the American way of life. Socialists and other malcontents seemed disloyal to fundamental American democratic principles.

Thus, nativists, anti-Catholics, and common school reformers joined in creating public institutions to inculcate Protestant, capitalist, and patriotic virtue in the children of newly arrived immigrants. They also created obstacles to the formation of alternative systems of private education that might pass on foreign beliefs and anti-American ideas to coming generations.¹³ Common school advocates

11. See John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960*, J. AM. HIST., June 1997, at 97, 97-98.

12. See RAY ALLEN BILLINGTON, *THE PROTESTANT CRUSADE, 1800-1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM* (1938); GLENN, *supra* note 8, at 219-35. For examples of nineteenth century anti-Catholic argumentation, see LYMAN BEECHER, *A PLEA FOR THE WEST* (1835); R. W. THOMPSON, *THE PAPACY AND THE CIVIL POWER* (1876). These arguments continued well into the modern era, and were often endorsed by elite intellectual figures. See PAUL BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* (1949); McGreevy, *supra* note 11.

13. See LLOYD P. JORGENSON, *THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925* (1987); GLENN, *supra* note 8, at 219-35; WARD M. MCAFEE, *RELIGION, RACE, AND RECONSTRUCTION: THE PUBLIC SCHOOL IN THE POLITICS OF THE 1870S*, at 27-78, 175-202

were particularly incensed at the thought that public funds might be used to subsidize education in "sectarian" schools. According to prominent Connecticut clergyman and educational reformer Horace Bushnell, if funds were provided to Catholic schools, their children

will be shut up in schools that do not teach them what, as Americans, they most of all need to know, the political geography and political history of the world, the rights of humanity, the struggles by which those rights are vindicated, and the glorious rewards of liberty and social advancement that follow. They will be instructed mainly into the foreign prejudices and superstitions of their fathers, and the state, which proposes to be clear of all sectarian affinities in religion, will pay the bills!¹⁴

Indeed, the very existence of ethnic and religious pluralism was often perceived as a threat to American unity. Rousseau's insistence on fraternity found an echo in the argument made by an opponent of parochial schools in testimony to Congress in 1889: the "task of absorbing and Americanizing these foreign masses can only be successfully overcome by a uniform system of American schools, teaching the same political creed."¹⁵ This, he said, would "continue us" as "a united, homogeneous people."¹⁶ The theme of unity and "Americanization" was dominant in discussions of education, immigration, religion, and related issues well into this century.

The argument for common schools found its logical extension in an Oregon law requiring all children to attend public schools. The attorney defending this law in the Supreme Court argued:

Under all governments, even those which are the most free and democratic in their character, the citizen must always owe duties to the State; and it necessarily follows that the State has an interest in making it certain (which can only be done by appropriate legislation) that the citizen is fitted, both in mind and body, to perform these duties. The discretionary powers of a State are broad enough to permit it to decide that compulsory attendance at public schools is a proper "precautionary measure against the moral pestilence of paupers, vagabonds, and possibly convicts."

The voters of Oregon who adopted this law had the right to act on the belief that the fact that the great increase in juvenile crime in the United States followed so closely after the great increase in the number of children in the United States who were not attending public schools, was more than a coincidence. The voters in Oregon might also have based their action in adopting this law upon the

(1998).

14. *Quoted in* GLENN, *supra* note 8, at 229.

15. *Id.* at 252.

16. *Id.*

alarm which they felt at the rising tide of religious suspicions in this country, and upon their belief that the basic cause of such religious feelings was the separation of children along religious lines during the most susceptible years of their lives, with the inevitable awakening of a consciousness of separation, and a distrust and suspicion of those from whom they were so carefully guarded. The voters of Oregon might have felt that the mingling together, during a portion of their education, of the children of all races and sects, might be the best safeguard against future internal dissensions and consequent weakening of the community against foreign dangers.¹⁷

No one can dismiss the force of this argument. Surely, the State does have “an interest in making it certain that the citizen is fitted, both in mind and body,” to perform the duties of citizenship. Perhaps it is true that a “basic cause” of the “rising tide of religious suspicions in this country” is “the separation of children along religious lines during the most susceptible years of their lives.”¹⁸ Maybe the State of Oregon was correct that “the mingling together, during a portion of their education, of the children of all races and sects, might be the best safeguard against future internal dissensions and consequent weakening of the community.”¹⁹

Who would guess that this argument was made on behalf of a hateful law passed at the urging of the Ku Klux Klan for the purpose of closing Catholic schools?²⁰ The irony of using social integration as a means for destroying social pluralism was not lost on the Supreme Court. The Court voted unanimously to strike down the law, saying that “[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.”²¹

II. ENFORCING CONFORMITY IN THE NAME OF PLURALISM

The modern emphasis on pluralism and diversity has rendered the old “Americanization” project decidedly unattractive. But establishmentarianism has had a rebirth—ironically, in the very name of pluralism, diversity, and tolerance. Once again, powerful voices argue that we need to inculcate public virtue. To be sure, the favored

17. *Pierce v. Society of Sisters*, 268 U.S. 510, 524-25 (1925) (argument for the Governor of Oregon).

18. *Id.* at 525.

19. *Id.*

20. See David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 *AMER. HIST. REV.* 74 (1968).

21. *Pierce*, 268 U.S. at 535.

conception of the good life has changed. No longer do we emphasize the Protestant, capitalist, and patriotic virtues of yesteryear. The new ideology is based on the eradication of racism, sexism, heterosexism, and related reactionary beliefs. The new virtue *par excellence* is the virtue of toleration. Not only must we forswear the use of public power or private violence to force our fellow citizens to conform to our notions of the good life—we must affirm and respect their choices. We must not be judgmental. We must be sensitive to their feelings. We must be inclusive. The irony is that this new establishmentarianism is just as hostile to pluralism, diversity, and dissent as was the old. Let us consider several examples of the new establishmentarianism.

Douglas Rader was a student at the University of Nebraska at Kearney.²² He is a member of a religious minority. He believes that the Bible is the Word of God, that he must live in a way that glorifies God, and that there is no area of his life that is outside the influence of his faith. He abstains from smoking, premarital sex, alcohol and drugs, and profanity. On admission to the University, he asked to be allowed to live in a supervised housing facility called the Christian Student Fellowship. There he would be able to participate in regular Bible study and fellowship and live in an environment supportive of his chosen beliefs. The University, however, insisted that he live in a freshman dormitory. According to the court, student life in the dormitory was characterized by heavy drinking and drug use, casual sexuality, and profanity. Rader testified that he had “heard from many of my classmates and friends of the wild lifestyles allowed in the dormitories at UNK . . . The obnoxious alcohol parties in the dormitories, the immoral atmosphere, and the intolerance towards those who profess to be Christians” and stated that being required to live in the dorm would “severely hinder” his free exercise of religion and “be a definite hardship” for him.²³

The University exempted some 900 out of 2500 freshmen from

22. All of the following is taken from *Rader v. Johnston*, 924 F. Supp. 1540, 1543-49 (D. Neb. 1996). There was a similar controversy at Yale University, involving Orthodox Jewish students who objected to living in the loose moral environment of the dormitories. See *Hack v. President & Fellows of Yale College*, 16 F. Supp. 2d 183 (D. Conn. 1998) (appeal pending); John Garvey, *The Yale Five*, COMMONWEAL, July 17, 1998, at 7. I focus on the *Rader* case because it involved a public university. As a private university, Yale has every right to be illiberal, and its only real offense was its hypocrisy in claiming to encourage pluralism and diversity while refusing to accommodate the needs of members of an obvious moral-religious minority.

23. See *Rader*, 924 F. Supp. at 1544-45. This may be compared to the idea of a “hostile environment” under modern sexual harassment law.

the dormitory requirement for various reasons, but refused to exempt students who wished to live at the Christian Student Fellowship. There was reason to believe this was because University officials viewed Rader's conservative moral and religious beliefs as narrow-minded. Referring to Rader and his family and friends, a University official testified: "I would differ with those in the room. Diversity of thought is positive."²⁴ The University defended its requirement, as applied to Rader, on the ground that living in a dormitory would "foster diversity and promote tolerance among UNK students."²⁵ That apparently meant that Rader was insufficiently tolerant and open to diversity, since University officials seemed unmoved by Rader's complaint that life in the dorms was intolerant toward his way of life and overwhelmingly nondiverse from his point of view. In support of its policy, the University introduced a statistical study entitled *How College Affects Students*, which reported that on-campus residency is "positively, if modestly linked to . . . a liberalizing of social, political, and religious values and attitudes," and makes it more likely that the resident "will exhibit no religious preference by the time he or she is a senior in college."²⁶ Apparently, the University viewed abandonment of moral and religious upbringing as a liberating and enlightening development in the lives of students.

The irony here was essentially the same as in *Pierce*. It should be obvious that Rader, with his old-fashioned morality, was the *dissenter* in this environment. The residence requirement was a means by which to pressure him, and students like him, to conform to the dominant moral-political orthodoxy—just as the requirement of attendance at Protestant-dominated public schools in *Pierce* was a means by which to convert members of the Catholic minority to majoritarian conceptions of "Americanism." Rader made moral judgments that ran contrary to the University's idea of "diversity," which means boundless tolerance for everything—except for dissent from the dogma of toleration. To require members of a minority to avoid "exclusive" subgroups (such as the Christian Student Fellowship in *Rader*) is to favor majoritarianism. Unless minority groups can form separate communities, they will be swamped.

The University's policy in the *Rader* case is an illustration of the confusion of genuine liberalism, which is political, with a particular

24. *Id.* at 1554 n.26.

25. *Id.* at 1543.

26. *Id.* at 1549 n.17.

understanding of virtue. Rawls has explained that a “political” conception of justice is one that applies only to “the framework of basic institutions,” whereas a “comprehensive” doctrine is one that addresses nonpolitical life as well, including “conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct.”²⁷ Political liberalism insists that the state must be tolerant—better yet, neutral—among reasonable conceptions of the good. That does not mean that *individuals* must be neutral among conceptions of the good. Indeed, to insist that individuals be neutral is illiberal, because it favors one controversial understanding of the good life over others. Douglas Rader is a citizen, too, and his understanding of the good life deserves respect no less than that of his more latitudinarian peers. To insist that citizens of a liberal regime display the moral qualities that a liberal *state* must display is Platonic and establishmentarian, not liberal.

A second recent episode involves the exclusion of the Christian Legal Society from the services of the placement office at two prominent law schools (Yale and Chicago). These schools prohibit the use of placement services by employers that discriminate on a number of grounds, including religion. Because Christian Legal Society does not hire staff members or student interns who do not share the organization’s religious beliefs, it has been banned from recruiting on the campus of these schools, along with racists and other discriminators.

But it is not right to apply a religious nondiscrimination requirement to a religious organization, any more than it would be appropriate to forbid other ideologically based organizations to hire on the basis of adherence to their ideology. It would be silly (or worse) to forbid synagogues from “discriminating” in favor of Jews when they hire rabbis, or to prevent Catholic archdioceses from hiring only Catholic canon lawyers. The same is true of Christian Legal Society staffers. The responsibilities of staff lawyers include leadership of Bible studies and worship activities for student and lawyer groups, providing guidance for lawyers about their ethical responsibilities as Christian lawyers, and helping to develop policies and positions on matters of concern to the Christian legal community. These are legitimate—indeed praiseworthy—activities, and they

27. RAWLS, *supra* note 4, at 11-13.

cannot be conducted by a person outside the faith. The religious employment criterion does not discriminate “against” non-Christians; religion is a *bona fide* occupational qualification for these positions.

For precisely this reason, federal civil rights laws exempt religious organizations from the religious antidiscrimination laws. This exemption was unanimously upheld by the United States Supreme Court in *Corporation of Presiding Bishop v. Amos*.²⁸ In his concurring opinion, Justice William J. Brennan explained that “religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: ‘select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.’”²⁹ Brennan continued: “we deem it vital that, if certain activities constitute part of a religious community’s practice, then a religious organization should be able to require that only members of its community perform those activities.”³⁰ To be sure, as private institutions, Yale and Chicago have the *right* to adopt policies that differ from federal antidiscrimination law, and are under no obligation to act in conformity to the First Amendment, but I cannot fathom why they should choose to do so.

This is an example of intolerance masquerading as nondiscrimination. No other ideologically oriented organization is required to hire people who do not share the organization’s philosophy. The Sierra Club is free to hire environmentalists and to reject applicants who think pollution is a good thing. Lambda Legal Defense Fund is free to hire believers in gay rights and to reject those they consider homophobes. Only religious organizations are denied the freedom to exclude those who do not share their beliefs. The effect is not to expand opportunities or combat prejudice, but simply to reduce the diversity of job opportunities that law students will learn about from the placement center, and to stigmatize legitimate groups as unworthy “discriminators.”

A third example involves the Boy Scouts. In a recent decision,³¹ the New Jersey Supreme Court held that Boy Scout troops, though a private expressive organization, may not discriminate on the basis of

28. 483 U.S. 327, 328 (1987).

29. *Id.* at 341 (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981)).

30. *Id.* at 342-43.

31. All of the following is taken from *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1229-30 (1999), *cert. granted*, no. 99-699. The author of this essay is assisting the Boy Scouts in this case in the United States Supreme Court.

(among other characteristics) religion, sex, or sexual orientation in their selection of members or leaders. The court held that it must allow James Dale, an avowed homosexual and gay rights activist, to serve as assistant scoutmaster, despite the Boy Scouts' view that homosexual conduct violates the Scout Oath and Law. The logic of the decision suggests that Boy Scout troops could similarly be required to appoint atheists as scoutmasters, notwithstanding the requirement of reverence toward God. The court stated—implausibly—that this would not affect the Boy Scouts' ability to communicate their moral views. The court disregarded the fact that the scoutmaster, as leader, is responsible for communicating the organization's message to the members. No expressive association can survive if the government can insist that it appoint leaders whose words and conduct are contrary to the group's moral or philosophical position.

Some have greeted this decision as a victory for the civil rights of homosexuals. But it is not that. No person has a civil right to join or lead an organization when they do not share its beliefs. No matter how strongly the legislature of New Jersey may feel about the morality of homosexual conduct, it should not be able to impose those opinions on private organizations with a contrary view.

As these examples illustrate, the modern insistence on "diversity" can collide with freedom of association, and threaten to undermine the diversity and pluralism of the society as a whole. If every group is internally diverse and pluralistic, reflecting the population as a whole, every group will be the same. If groups are required to accept members and appoint leaders who do not share their distinctive beliefs, their distinctive voice will be silenced. If individuals with disfavored beliefs can be forced to participate in institutions designed to mold them in accordance with the dictates of political correctness, the tapestry of pluralism will be seriously impaired. Genuine pluralism requires group difference, and maintenance of group difference requires that groups have the freedom to exclude, as well as the freedom to dissent. Freedom of association is an essential structural principle in a liberal society.

III. STEPHEN MACEDO'S SUBTLER, GENTLER ESTABLISHMENTARIANISM

In his contribution to this symposium, to which I have been asked to respond, Stephen Macedo provides a surprisingly frank

defense of the new establishmentarianism. In marked contrast to those who see deep diversity and pluralism as characteristic of modern liberal society, Macedo is confident that “[t]his society stands for certain common values.”³² In his essay, Macedo is a bit vague about the content of these values; they apparently center on inclusiveness and cooperation.³³ More significantly, these values, while “common,” are also disputed and endangered. (One guesses that if he were more specific about the content of these values, they would be even more disputed and controversial than he lets on.)³⁴ In order to protect these “common”—but disputed and endangered—values, 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.”³⁵ We need to realize that the existence and autonomy of private associations is problematic: to the extent that private associations are consistent with a “strategy for pursuing public purposes more effectively,”³⁶ they should be encouraged; but to the extent they dissent from “our largest and most inclusive civic ideals,”³⁷ they should be discouraged.

Specifically, we should insist that groups “be arranged in pluralistic patterns,”³⁸ meaning that they foster a mixing of races, sexes, and beliefs; “the crucial thing is to foster memberships that are

32. Stephen Macedo, *Constituting Civil Society: School Voucher, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417 (2000). The Macedo essay was revised after preparation of this response. With Macedo’s permission, I have retained some quotations from the original essay that do not appear in the published version. The revised essay makes more modest claims about the need for public orthodoxy—though his ultimate conclusions remain the same. For example, Macedo has abandoned his claim, quoted in text, that “[t]his society stands for certain common values.” He has substituted the more ambiguous claim that “[e]ven 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.” *Id.* at 420. He goes on to say that citizens of this country have an obligation to “support democratic institutions” and to “respect the rights of other citizens.” *Id.* Nothing in this more modest formulation of his position suggests any reason why liberal citizens should be discouraged from joining together in non-universalistic groups based on common interests and commitments.

33. “Our civic aim is to foster cooperativeness and reciprocity not only within particular groups but across groups.” *Id.* at 429.

34. In another work, Macedo states that his brand of liberalism is “deeply at odds with certain religious faiths (from Augustinian Catholicism to Islamic fundamentalism) and many other ways of life.” STEPHEN MACEDO, *LIBERAL VIRTUES* 74 (1990). Adherents to these “many” ways of life will no doubt find Macedo’s claim to speak for our common values presumptuous, if not frightening.

35. Macedo, *supra* note 32, at 421.

36. This statement quoted in text comes from the original version of Macedo’s essay.

37. Macedo, *supra* note 32, at 428.

38. This statement quoted in text comes from the original version of Macedo’s essay.

not tribalistic but pluralistic.”³⁹ He thinks it is important to weaken people’s ties to specific groups, so that “no one affiliation or set of affiliations” will be seen to provide an “unproblematic” answer to the question “who I am.”⁴⁰ “Intensely inward-looking and insular group allegiances” are “at odds with the openness of liberal citizenship at its best.”⁴¹

To be sure, Macedo recognizes that there is something illiberal in the notion that institutions that dissent from the society’s collective conception of public virtue should be suppressed. He does not mean to “provide a justification for coercive intervention or for limiting freedom of association.”⁴² “All liberals,” he assures us, “will join in opposing the coercive pursuit of a very demanding ideal of good citizenship.”⁴³ But, he reminds us, “the instruments of public policy are often subtle” and it is hard to see why we must abstain from gently promoting patterns of good citizenship.⁴⁴ Liberalism does not “reject the noncoercive promotion of civic virtue.”⁴⁵

Macedo thus proposes what might be called a “subtler, gentler” establishmentarianism. This approach converts liberalism from a position in which freedom of association, with its attendant pluralism and diversity, is seen as *desirable*, to the view that the government’s *means* by which to suppress differences should be restricted. Contrary to what is usually thought, liberal states may espouse an orthodoxy about the good life. So long as they do not engage in outright “coercion,” they may use “subtle” and “gentle” instruments of government power—including taxation and selective funding—to promote their view of patterns of good citizenship.

Any liberal tempted to endorse Macedo’s noncoercive establishmentarianism in anticipation of its effects on distasteful private groups should be warned: there is no guarantee that government will share Macedo’s particular understanding of public virtue. The instruments of government power (however “subtle” and “gentle”) will be wielded as a result of political decisions, for better or worse. Rudolph Giuliani will wield the powers of the public fisc as often as Hillary Clinton. The only guarantee is that majoritarian

39. Macedo, *supra* note 32, at 428.

40. *Id.*

41. *Id.* at 429.

42. *Id.* at 424.

43. This statement quoted in text comes from the original version of Macedo’s essay.

44. Macedo, *supra* note 32, at 424.

45. *Id.*

norms will tend to be favored over minority voices. That is one reason liberals have traditionally resisted this idea.

As a theory of constitutional law, there is something to commend Macedo's view that government may use its control over public resources to encourage some beliefs and discourage others (though it is not ordinarily associated with people who call themselves "liberals"). The government may not punish artists for producing indecent or blasphemous art, but it may deny them subsidies. The government may not force students to participate in the pledge of allegiance, but it is not unconstitutional to lead the class in the pledge. The government may not be able to declare Christianity the national religion, but it can declare Christmas a national holiday. The government may not prevent women from aborting their unborn children, but it doesn't have to pay for abortions, or allow government-funded doctors to counsel or refer for abortions. In legal jargon, this is called the "right-privilege distinction," which is opposed to the doctrine of "unconstitutional conditions." Because the unintended and incidental effects of government programs are so widespread, and inquiries into motive so indeterminate, it is difficult to craft judicially manageable standards in cases not involving either coercion or viewpoint discrimination. (The indeterminacy of the "endorsement" standard for Establishment Clause cases is ample evidence of that.)⁴⁶ But constitutional law should not be confused with liberal political theory. Macedo seems to argue not merely that there is no judicially enforceable prohibition on the use of "subtler, gentler" (i.e., noncoercive) governmental power to favor some understandings of good citizenship over others, but that this is desirable. I consider that highly questionable—at least as a matter of liberal theory.

Even as a matter of constitutional law, the Court has not drawn a clear line between coercion and other uses of governmental power. Indeed, the contours of the unconstitutional conditions doctrine are a notoriously murky and contested area of law.⁴⁷ Much depends on the

46. See Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 267 (1987).

47. See, e.g., Richard Epstein, *The Supreme Court 1987 Term: Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Michael McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1049 (1991); Michael McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 SAN DIEGO L. REV. 255, 257 (1989); Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 990 (1995); Kathleen M. Sullivan,

breadth of the beneficiary class, the objectivity or subjectivity of governmental allocation criteria, and established patterns of governance. Most to the point, it seems relatively clear that governments may not grant or withhold public benefits on the basis of *viewpoint*, and that religion is a viewpoint.⁴⁸ To the extent that Macedo wishes to use the power of selective funding to discriminate against groups that do not share his particular brand of "good citizenship," and especially those that impart a religious ideology, it seems likely that he will run afoul of the First Amendment. Less direct forms of interference with the operations of private groups will raise more difficult legal issues.

Macedo supports his position by analogy to the Founders' preference for an extended Union, which by encompassing many diverse interests and factions would foster deliberation and diminish the risk of factional oppression. With all respect, that is a false analogy. Of course, a liberal society may (and should) structure *governmental* institutions in an inclusive manner. It is an entirely different proposition that liberal society should use its authority to attempt to induce private associations to conform to those same norms.

Macedo's specific example of how his approach would work—educational vouchers that would include religious schools—is illuminating. Vouchers, he argues, could be an effective way to induce private sectarian schools to "become more religiously pluralistic."⁴⁹ He points to features of the voucher plans in Milwaukee and Cleveland that require participating schools to admit voucher students on a random basis and to excuse voucher students from compulsory religious exercises. When schools admit students of different faiths, he points out, this will generate "pressures to create a welcoming and nondiscriminatory atmosphere."⁵⁰ He foresees "problems for the religious schools if enrolled voucher children feel that they are being pressured to either conform with religious beliefs and practices or leave the school."⁵¹ He predicts that, as a result of vouchers, the school's "affiliation with the particular sponsoring

Unconstitutional Conditions, 102 HARV. L. REV. 1413 (1989); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

48. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 820-21 (1995).

49. This statement quoted in text comes from the original version of Macedo's essay.

50. Macedo, *supra* note 32, at 437.

51. *Id.*

religious community” is “very likely to be somewhat muted, even attenuated, or at least revised as a consequence.”⁵² In other words, private religious schools would be forced by the internal pressure of a diverse student body to soften, and perhaps abandon, their religious identity and message. Under vouchers, he says, the schools “must become a bit more like public—or as they were once called ‘common’—schools.”⁵³

But why would it be a good thing to induce religious schools to shed their religiosity? Macedo does not say. Nothing in his essay suggests a conscious anti-religious animus, and his qualified support for educational vouchers is at least superficially pluralistic. But Macedo equates secularization of private schools with their becoming “more attuned to public values.”⁵⁴ This is difficult to understand. So long as schools provide high quality education to low income children, and teach their own brand of democratic patriotism, why are “public values” offended by religious “sectarianism?”⁵⁵ One would expect a religiously neutral government to be neutral—not opposed—to sectarian instruction.

It cannot be thought that eliminating or reducing religious alternatives is an advance for individual freedom. To be sure, some families might like to have the choice to obtain the secular benefits of education at a particular school without being troubled by its religious message. But this would deprive other families of what would seem to be an equally valuable freedom: to choose a school for *both* its secular *and* its religious benefits. It is logically possible to please both types of family by creating a pluralistic system in which some schools are religious and some are not. Each family could exercise choice at the front end, but no one should be given a “heckler’s veto” over the educational philosophy or program at the school they have chosen. Macedo’s plan, which results in “muting, or attenuating, or at least revising” the religious identity of *all* schools (at the price of losing an entitlement to a fair share of public benefits), seems to reduce the level of freedom overall.

Macedo endorses a provision of the Wisconsin voucher legislation that forces participating schools to permit voucher recipients to “opt out of any religious activity that they or their

52. *Id.*

53. *Id.* at 437.

54. *Id.* at 436.

55. *See id.* at 437.

parents find objectionable.”⁵⁶ Interestingly, children attending public schools have no such right to opt out of activities (such as parts of the school program, tendentious and unbalanced textbooks, lewd sex education assemblies or free condom distribution programs) that parents find religiously objectionable.⁵⁷ It is hard to understand why private institutions, chosen by the families, should have a greater obligation to accommodate dissenters than public schools where pupils are assigned by the government. When families choose among educational options, the freedom to “opt out” of unwelcome parts of the educational program can and should be exercised at the beginning, when choosing the school. Nothing in civil libertarian principle supports the proposition that they should be able to force the school, which presumably reflects the preferences of other families, to change its practices.

Nor is it necessary for a private school, even if it receives voucher students, to accept students who do not share its religious commitment. It is not invidiously discriminatory for a private association committed to certain beliefs and values to limit itself to persons who share those beliefs and values. Indeed, this is essential for the broader pluralism of society. Thus, when passing the Civil Rights Act of 1964, when Congress forbade recipients of federal financial assistance to discriminate on the basis of race, it explicitly chose *not* to impose a similar prohibition on discrimination on the basis of religion. Indeed, to impose such a restriction, when secular associations are generally free to “discriminate” on the basis of adherence to their value systems, might well be unconstitutional.

Although Macedo apparently does not take this view, the most logical reason to suppose that a decline in the religiosity of education would be a good thing is that religion—or at least religious difference—is a bad thing. Perhaps religion provides too strong an affiliation. Believers may get the impression that allegiance to the Supreme Being is a superior obligation to the obligations of a citizen. Perhaps religious difference is an obstacle to what Rousseau called “fraternity” and Macedo calls “cooperativeness and reciprocity. . . across groups.”⁵⁸ As the attorney for the State of Oregon argued in *Pierce*, the “rising tide of religious suspicions in this country” may be

56. *Id.* at 439.

57. See *Mozert v. Hawkins County Sch. Bd.*, 827 F.2d 1058, 1060, 1068 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988); *Brown v. Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525, 531-32 (1st Cir. 1995); *Curtis v. School Comm. of Falmouth*, 652 N.E.2d 580, 585 (Mass. 1995).

58. Macedo, *supra* note 32, at 429.

attributable to “the separation of children along religious lines during the most susceptible years of their lives, with the inevitable awakening of a consciousness of separation.”⁵⁹ It is better to mold the youth of America according to “common” ideals and “common values,” which must be secular in nature.

This view of religion, however, is utterly without empirical support. There is not a scrap of evidence that religiosity is correlated with bad citizenship, intolerance, or lack of cooperativeness. Indeed, by most objective measures, religious Americans are more democratically engaged than most of their fellow citizens.⁶⁰ Church attendance has a high correlation to voter turnout—far higher than any other institutional affiliation.⁶¹ Religion also seems to encourage other forms of civic engagement. Students at nonpublic schools are far more likely to engage in community service than students at public schools. Only 9.7% of public school students report work on community service, as compared to 22.3% of students in Catholic schools and 31.2% of students in other private schools.⁶² By far the most common form of voluntary charitable activity in America is under religious auspices.⁶³ Religiosity also tends to correlate with socially responsible behavior, such as lower drug use, crime, cheating, and adolescent sex.⁶⁴

This not particularly surprising. Precisely because they reflect a more homogeneous moral community, religious schools are able to inculcate public virtue more effectively than public schools. Religious schools can teach from a coherent moral framework, and can use the potent cultural resources of the religious tradition. Public schools, by contrast, must be reluctant to offend. The very features Macedo

59. *Pierce v. Society of Sisters*, 268 U.S. 510, 525 (1925).

60. For more detail on this point, see Michael W. McConnell, *Education Disestablishment: Why Democratic Values Are Ill-Served By Democratic Control of Education*, in NOMOS XLIII: MORAL AND POLITICAL EDUCATION (Stephen Macedo & Yael Tamir eds., forthcoming 2000).

61. See SIDNEY VERBA ET AL., VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 359 (1995). In this context, I use the term “church” to denote any religious worship service or religious organization.

62. See U.S. DEP’T OF EDUC., DIGEST OF EDUCATION STATISTICS 1997, at table 146 (1997).

63. See JOHN A. COLEMAN, *Deprivatizing Religion and Revitalizing Citizenship*, in RELIGION AND CONTEMPORARY LIBERALISM 264 (Paul Weithman ed., 1997); VERBA ET AL., *supra* note 61, at 297.

64. See DAVID B. LARSON & SUSAN S. LARSON, THE FORGOTTEN FACTOR IN PHYSICAL AND MENTAL HEALTH: WHAT DOES THE RESEARCH SHOW? 65-78 (1994); J. Gartner et al., *Religious Commitment and Mental Health: A Review of the Empirical Literature*, 19 J. PSYCHOL. & THEOLOGY 6 (1991); Norval D. Glenn & Charles N. Weaver, *A Multivariate, Multisurvey Study of Marital Happiness*, 40 J. MARRIAGE & FAMILY 269, 279 (1978); Barbara R. Lorch & Robert H. Hughes, *Religion and Youth Substance Abuse*, 24 J. RELIG. & HEALTH 197 (1985).

hopes will be destroyed by vouchers are what give private schools their comparative advantage as moral educators. The premise of the argument for vouchers is that they will lead to greater diversity and competition among schools. If the policy has the effect of subjecting all schools—even private schools—to the homogenizing effects of government regulation, and thus to make them more like public schools, the experiment will be self-defeating.

Macedo may have no special animus against religion as such. His concern seems to be that some groups inspire too intense a loyalty. He worries when “one affiliation or set of affiliations provides an unproblematic or simple answer to the question ‘who am I?’”⁶⁵ He prefers “fragmented loyalties” and “moderated commitments.”⁶⁶ He thinks the state should encourage “pluralistic” groups—meaning groups that lack any strong sense of common identity based on nonuniversalistic characteristics—and should discourage “tribalism,” which he does not define.⁶⁷ This, however, seems dubious as a matter of social psychology. Groups do not typically form around universalistic characteristics; what would be the point? Groups are defined by their particular interests, backgrounds, beliefs, and aspirations. The hope is that through these more particularistic associations, individuals become attached to wider circles of community. As Burke famously argued: “To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed toward a love to our country and to mankind.”⁶⁸ To discourage the “little platoons” on the assumption that they are too “tribalistic” is self-defeating. Pluralism is a product not of many pluralistic groups, but of many *different* groups.

Macedo argues that advocates of civil society, such as myself, make inconsistent claims. On the one hand, we contend that “America has always been characterized by too much pluralism, too much religious and cultural diversity, for a system of common

65. Macedo, *supra* note 32, at 428.

66. *Id.* at 429.

67. *Id.* at 428. Even on these criteria, we should not worry too much about religion in the United States today. In a country riven by racial and social divisions, churches often serve as cross-cutting associations. For many people, church is the place they most often cross paths, as equals, with people from other races and walks of life. It takes a strong bond—such as faith in Christ—to break down other barriers.

68. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE, 41 (J. G. A. Pocock ed., Hackett Pub. Co. 1987) (1790).

schooling to be possible.”⁶⁹ On the other hand, we contend that “school choice that includes religious schooling would serve public values more effectively than today’s public schools.”⁷⁰ He sees this as a contradiction: “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?”⁷¹

This is not a contradiction. What Macedo fails to appreciate is that virtue—public or otherwise—cannot be orchestrated by the state. It is the product of voluntary communities, teaching and learning through conviction, not force. The United States of America does have certain common values, but these values are rooted in quite different traditions and systems of beliefs; and are understood in many different ways. To attempt to define those values is a mistake, because any authoritative definition necessarily will be too limited and too parochial. The great promise of civil society is that it provides a means for inculcation of public virtue without direct imposition of a public orthodoxy.

This has been America’s experience with disestablishmentarianism. America’s founders appreciated that republican government would require public virtue, and that public virtue requires the underpinnings of religion and morality. But they also realized that America was too diverse to permit agreement on religious fundamentals and, thus, that an attempt to establish an official church would produce division and discord. The great solution to the republican problem was to promote public virtue *indirectly*, by protecting freedom of speech, association, and religion, and leaving the nation’s communities of belief free to inculcate their ideas of the good life, each in their own way. To attempt to direct and control this process—to establish a new public orthodoxy through the noncoercive powers of government—will not succeed, because it cannot. In a pluralistic society, such as ours, common values are not determined by central authorities, but emerge from the overlapping consensus of free private associations. Establishmentarianism is neither liberal in theory nor successful in practice.

69. Macedo, *supra* note at 32, at 450.

70. *Id.* at 451.

71. *Id.*

