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Recommended Citation

William A. Galston, *The Legal and Political Implications of Moral Pluralism*, 57 Md. L. Rev. 236 (1998)

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Essay

THE LEGAL AND POLITICAL IMPLICATIONS OF MORAL PLURALISM

WILLIAM A. GALSTON*

I. INTRODUCTION

It is an honor to be asked to deliver the Simon E. Sobeloff lecture. Indeed, the more I learn about Judge Sobeloff's life, the more honored I feel. It is hard to decide which of his many accomplishments was the most impressive: delivering his first political speech at the age of twelve; entering the University of Maryland Law School at seventeen; sacrificing his Supreme Court hopes over a matter of principle; or being praised for his writing style by H.L. Mencken!¹ I hope that this Essay will in some small way reflect Judge Sobeloff's lifelong commitment to liberty and justice under the rule of law.

II. MORAL PLURALISM AND CONSTITUTIONAL LAW

While my analysis will move for the most part between philosophical theory and practical politics, I wish to begin with some remarks on constitutional law. There is a line of cases that underscores the claims of pluralism within a liberal constitutional order.

Consider, first, *Meyer v. Nebraska*,² decided in 1923. Reflecting the nativist passions stirred by World War One, the State of Nebraska had passed a law forbidding instruction in any modern language other than English, in any school, prior to the ninth grade.³ A teacher in a Lutheran parochial school was convicted under this statute for the crime of teaching a Bible class in German.⁴ The Supreme Court struck down the law as a violation of the liberty guarantee of the Four-

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1. See MICHAEL S. MAYER, SIMON E. SOBELOFF 1-2, 8-9, 17 (1980).

2. 262 U.S. 390 (1923).

3. *Id.* at 397.

4. *Id.* at 396.

teenth Amendment.⁵ Writing for the Court, Justice McReynolds stated:

That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. . . .

. . . .

The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. . . . But the means adopted, we think, exceed the limitations upon the power of the State and conflict with rights assured to plaintiff in error.⁶

The majority opinion identified the underlying theory of the Nebraska law with the plenipotentary state of Sparta and with Plato's *Republic*, which it quoted at length and sharply distinguished from the underlying theory of liberal constitutionalism.⁷

Consider, second, the case of *Pierce v. Society of Sisters*,⁸ decided in 1925. The people of Oregon had adopted, as a ballot initiative, a law requiring parents and legal guardians to send all students between the ages of eight and sixteen to public schools.⁹ The Society of Sisters, an Oregon corporation that among other activities maintained a system of Catholic schools, sued to overturn this law as inconsistent with the Fourteenth Amendment.¹⁰ The Court emphatically agreed:

The 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. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.¹¹

Consider, finally, the case of *Wisconsin v. Yoder*,¹² decided by the Supreme Court a quarter century ago. This case presented a clash

5. *Id.* at 399, 403.

6. *Id.* at 401-02.

7. *Id.* Justice Holmes, revered in some quarters as a civil libertarian, dissented; he was, he said "unable to say that the Constitution of the United States prevents the experiment being tried." *Id.* at 412 (Holmes, J., dissenting).

8. 268 U.S. 510 (1925).

9. *Id.* at 530.

10. *Id.* at 531-32.

11. *Id.* at 535.

12. 406 U.S. 205 (1972).

between a Wisconsin law, which required school attendance until age sixteen, and the Old Order Amish, who claimed that high-school attendance would undermine their faith-based community life.¹³ A majority of the Court agreed with the Amish and denied that the State of Wisconsin had made a compelling case for intervening against their practices:

[H]owever strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.

. . . .

. . . [T]his case involves the fundamental [T] interest of parents, as contrasted with that of the State, to guide the religious future and education of their children.¹⁴

The Court's decision in *Yoder* has been contested on many fronts. Citing Hobbes and Locke, the conservative theorist Walter Berns has attacked it as an intolerable infringement of state authority—indeed, as a tacit endorsement of anarchy.¹⁵ Following Justice Douglas's dissent,¹⁶ Ian Shapiro and Richard Arneson have argued that the decision is inconsistent with the autonomy interests of the Amish children.¹⁷ And theorists concerned above all with encouraging democratic deliberation have charged that under *Yoder*, these children will acquire neither the information nor the motivation to participate effectively in public life.¹⁸

By contrast, I want to argue that *Meyer*, *Pierce*, and *Yoder* were correctly decided, not only from a constitutional standpoint, but also in accordance with the soundest understanding of citizenship and state power in a liberal democracy. A free society will defend the liberty of individuals to lead many different ways of life. It will also protect a zone within which individuals will freely associate to pursue shared

13. *Id.* at 209.

14. *Id.* at 215, 232 (citations omitted).

15. See WALTER BERNs, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 37-44 (1985).

16. *Yoder*, 406 U.S. at 241-49 (Douglas, J., dissenting).

17. See Richard Arneson & Ian Shapiro, *Democratic Autonomy and Religious Freedom: A Critique of Wisconsin v. Yoder*, in IAN SHAPIRO, *DEMOCRACY'S PLACE* 137, 153-55 (1996).

18. See, e.g., Amy Gutmann, *Civic Education and Social Diversity*, 105 *ETHICS* 557, 567 (1995) ("Any defensible standard of civic education must be committed to prepare children for the rights and responsibilities of citizenship even over the opposition of their parents."); Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?*, 105 *ETHICS* 468, 486 (1995) ("[S]ome level of awareness of alternative ways of life is a prerequisite not only of citizenship but of being able to make the most basic life choices.").

purposes and express distinctive identities, creating a dense network of human connections called civil society.

But the boundaries of this protected zone are contested. The laws and regulations of the political community can conflict with the practices of voluntary associations. This conflict has escalated during the twentieth century, as the extension of state power has multiplied the public principles held to be binding on civil associations. Many of these principles are designed to ensure that these associations do not arbitrarily exclude, or abuse, specific individuals; the principles promote public purposes widely accepted as morally compelling.

We are familiar with the moral advantages of central state power; we must also attend to its moral costs. There is what might be called a paradox of diversity: if we insist that each civil association mirror the principles of the overarching political community, then meaningful differences among associations all but disappear; constitutional uniformity crushes social pluralism. If, as I shall argue, our moral world contains plural and conflicting values, then the overzealous enforcement of general public principles runs the risk of interfering with morally legitimate individual and associational practices.

The issue before contemporary constitutional law and liberal democratic theory is not just (as some seem to believe)¹⁹ the *nature* of the procedures by which binding collective decisions should be made, but also the legitimate *scope* of such decisions. My argument constitutes a challenge both to the classical Greek conception of the political order as the all-encompassing association²⁰ and to the Hobbesian conception of plenipotentiary sovereign power.²¹ A liberal polity guided (as I believe it should be) by a commitment to value pluralism will be parsimonious in specifying binding public principles and cautious about employing such principles to intervene in the internal affairs of civil associations. It will rather pursue a policy of *maximum feasible accommodation*, limited only by the minimum requirements of individual security and civic unity.

That there are moral costs to such a policy cannot reasonably be denied. It will permit internal associational practices (for example, patriarchal gender relations) of which many strongly disapprove, and it will allow many associations to define their membership in ways that may be seen as restraints on individual liberty. But as Laurence Tribe

19. See, e.g., ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989) (presenting a theory of democratic process).

20. See especially ARISTOTLE, *POLITICS* bk. 1, ch. 2 (Trevor J. Saunders trans., Clarendon Press 1995).

21. See THOMAS HOBBS, *LEVIATHAN* pt. 2, ch. 18 (Dent 1987) (1651).

has pointed out, this difficulty inheres in the very idea of freedom of association: "rights to associate with X are necessarily rights to dissociate from Y. . . . [T]he right of one person or group to exclude others is *inevitably* a limitation upon the freedom—including the associational freedom—of those others."²² Unless the very idea of freedom of association is to be narrowed dramatically, this moral cost must be accepted.

III. THE MASTER-IDEAS OF LIBERAL THOUGHT

The current debate over the relation between value pluralism and political liberalism began when the British philosopher John Gray—an ardent foe of the "new liberalism" represented by John Rawls and company—extended his critique to a paradigmatic liberal, Isaiah Berlin.²³ Berlin is famous for two master-ideas. First, he depicts a moral universe in which important values are plural, conflicting, incommensurable in theory, and uncombinable in practice—a world in which there is no single, univocal *summum bonum* that can be defined philosophically, let alone imposed politically.²⁴ And second, he defends negative liberty, understood as the capacity to choose among competing conceptions of good or valuable lives, as the core value of liberal political thought.²⁵

Gray's basic point is that these two master-ideas do not fit together entirely comfortably.²⁶ The more seriously we take value pluralism, the less inclined we will be to give pride of place to freedom or autonomy ("negative liberty") as a good that trumps all others.²⁷ We will recognize that lives defined by habit, tradition, or the acceptance of authority can be valid forms of human flourishing.²⁸ We will therefore conclude that liberalism—understood as the philosophy of societies in which liberty or autonomy takes pride of place—enjoys only local authority.²⁹ If value pluralism is correct, liberalism cannot sustain its universalist claims and emerges at best as one valid form of political association among many others.³⁰

My argument is that the fit between value pluralism and political liberalism is tighter than Gray supposes, but that, nonetheless, his ob-

22. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-17, at 1401 (2d ed. 1988).

23. See JOHN GRAY, *ISAAH BERLIN* (1996).

24. *Id.* at 25.

25. *Id.* at 26.

26. *Id.* at ch. 2.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

jection has important implications for our understanding of the role of deep pluralism within liberal societies. To show this, I will first attempt to clarify the philosophical claims of value pluralism, and then draw out its political consequences.

IV. DEFINING VALUE PLURALISM

Value pluralism is not an argument for radical skepticism, or for relativism. The moral philosophy of pluralism stands between relativism and absolutism. This can be demonstrated fairly quickly:

It is not relativist. From a value-pluralist perspective, some things (the great evils of human existence) are objectively bad, to be avoided in both our individual and collective lives.³¹ Conversely, some things are objectively good (recall Stuart Hampshire on the "minimum common basis for a tolerable human life"³² or H.L.A. Hart on the "minimum content of natural law"³³).

*Nor is value pluralism absolutist.*³⁴ There are multiple goods that cannot be reduced to a common measure, cannot be ranked in a clear order of priority, and do not form a harmonious whole.³⁵ There is no single conception of the good valid for all individuals: what's good for *A* may not be equally good for *B*. Nor is there one preferred structure for weighing goods. In our moral as well as material lives, there are more desirable goods than any one individual or group can possibly encompass; to give one kind of good pride of place is necessarily to subordinate, or exclude, others. Some individuals and groups may be morally broader than others, but none is morally universal.

V. AUTONOMY AND DIVERSITY

What is the relation between value pluralism, thus understood, and the political philosophy of liberalism? One answer—that there exists between them a correspondence of fundamental attitude—is offered by Michael Walzer, who observes:

I don't know anyone who believes in value pluralism who isn't a liberal, in sensibility as well as conviction.

. . . You have to look at the world in a receptive and generous way to see a pluralism of Berlin's sort And you also have to look at the world in a skeptical way, since the

31. See STUART HAMPSHIRE, *MORALITY AND CONFLICT* 154-55 (1983).

32. STUART HAMPSHIRE, *INNOCENCE AND EXPERIENCE* 33 (1989).

33. H.L.A. HART, *THE CONCEPT OF LAW* 189-95 (1961).

34. See BRIAN BARRY, *POLITICAL ARGUMENT* xxxix-xliv, 3-8 (reissue with new introduction 1990) (1965).

35. See *id.* at 3-8.

adherents of each of the different values are likely to rank them very high on a scale designed for just that purpose. And receptivity, generosity, and skepticism are, if not liberal values, then qualities of mind that make it possible to accept liberal values (or, better, that make it likely that liberal values will be accepted).³⁶

This is surely a plausible conjecture. But I would also argue for a more formal logical relation: If the moral philosophy of pluralism is roughly correct, then there is a range of indeterminacy within which various choices are rationally defensible. Pluralism is one premise in an argument for a protected zone of moral liberty. The argument runs as follows. Because there is no one uniquely rational ordering or combination of incommensurable values, no one could ever provide a generally valid reason, binding on all individuals, for a particular ranking or combination. And, under what might be called *the principle of rational authority*, a generally valid reason of this sort, while not a sufficient condition for restricting the liberty of individuals to lead a range of diverse lives, is certainly a necessary condition.

Note that this case for a zone of liberty is a claim about limits on coercive interference in individual or group ways of life. It is not an argument that each way of life must itself embody a preference for liberty. This distinction—liberty within ways of life versus liberty between ways of life—is part of a broader contrast.

There are two quite different standpoints for understanding modern life, with different historical roots. The first of these, which gives pride of place to *autonomy*, is linked to what may be called the Enlightenment project—the experience of liberation, through reason, from externally imposed authority.³⁷ Within this project, the examined life is understood as superior to reliance on tradition or faith, and preference is given to self-direction over any external determination of the will.

The alternative standpoint, which gives pride of place to *diversity*, finds its roots in what I shall call the Reformation project—that is, the effort to deal with the political consequences of religious differences emerging within Christendom. In this project, the central task is that

36. Michael Walzer, *Are There Limits to Liberalism?*, N.Y. REV. BOOKS, Oct. 19, 1995, at 28, 31.

37. The "Enlightenment project" is my term. For related discussions, see JOHN RAWLS, *POLITICAL LIBERALISM* xvi-xxviii (1993) and Charles Larmore, *Political Liberalism*, 18 POL. THEORY 339, 342-46 (1990).

of accepting and managing diversity through mutual toleration within a framework of civic unity.³⁸

In my judgment, social theorists—especially liberals³⁹—go astray when they give pride of place to an ideal of personal autonomy, understood as the capacity for critical reflection and for choice guided by such reflection. The inevitable consequence is that the state takes sides in the ongoing tension between reason and faith, reflection and tradition, needlessly marginalizing and antagonizing groups that cannot conscientiously embrace the Enlightenment project.

Rightly understood, liberalism is about the protection of diversity, not the promotion of autonomy. In practice, liberal societies are unusually hospitable to critical reflection of all kinds.⁴⁰ But that doesn't mean that the cultivation of critical reflection is a higher-order political goal: liberal societies can and must make room for individuals and groups whose lives are guided by tradition, authority, and faith.

It may be suggested that while autonomy poses clear challenges to faith, the moral philosophy of value pluralism is not straightforwardly hospitable to faith either. This is true. Some faiths purport to establish clear hierarchies of values, with universally binding higher-order purposes.⁴¹ Some faiths argue for sociopolitical domination, against the idea of a free civil space.⁴² Clearly value pluralism cuts against these claims.

Still, there are zones of overlap between value pluralism and religious belief. In practice, even well-articulated faiths are characterized by internal value pluralism. And once the multiplicity of faiths is an irreversible fact, other considerations—many themselves faith-based—come into play to restrict state coercion on behalf of any single faith. This is a kind of restraint on certain religious practices, and it may well stack the deck in favor of faiths that emphasize inward conscience rather than external observance. Nonetheless, value pluralism establishes a meaningful social space for religious belief and practice.

38. The "Reformation project" is also my term. For discussion, see *supra* note 37 and sources cited therein.

39. See WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 329 n.12 (1991) (criticizing Gutmann's, *supra* note 18, and Macedo's, *supra* note 18, emphasis on autonomous choice as "a drive toward a kind of uniformity, disguised in the language of liberal diversity").

40. The standard examples of this include a rigorous free press, public competition among political doctrines and parties, wide scope for scientific inquiry, universities not under state control, and religious diversity.

41. See, e.g., 1 *Corinthians* 13:13 ("So faith, hope, love abide, these three; but the greatest of these is love.").

42. An example is Shi'ite Islam as interpreted and enforced by the *mullahs* of contemporary Islam.

VI. POLITICAL CHOICES

As this discussion suggests, there is a distinction between pluralism at the level of individual lives and at the level of political institutions. Two differences are key.

A. *The Political Weighing of Competing Values*

Even if there are no binding rational principles guiding individuals' weighing of competing goods, the same need not be the case for political choices. For example, suppose you take as a basic principle of political morality that each person or group is to be treated in accordance with the strength of its valid claims. In the context of value pluralism, this warrants a strategy of compromise and balance to accommodate multiple valid claims. So understood, the politics of compromise is not an unprincipled, split-the-difference tactical pragmatism; nor is it the pursuit of conflict reduction for its own sake, a bare *modus vivendi*. Rather, it is the right thing to do in circumstances of value pluralism. (This is also an argument in favor of the messiness of politics and against a pernicious legalism that absolutizes competing claims and creates winner-take-all outcomes.)

My experience dealing with policy disputes while in government reinforces my confidence in this assertion. In case after case, I encountered many conflicting arguments, each of which seemed reasonable up to a point. Each appealed to an important aspect of our individual or collective good, or to deep-seated moral beliefs. Typically, there was no way of reducing these heterogeneous values to a single common measure. Nor was there an obvious way of giving one aspect of our moral experience absolute priority over others. The most difficult choices in politics, I came to believe, are not between good and evil but between good and good.

It is true that value pluralism does not always yield a tranquil or straightforward decisionmaking process. As Philip Tetlock has argued, conflicts among valued goods generate acute discomfort and typically lead to modes of evasion—particularly when some or all of the values are (in Durkheim's sense) sacred rather than secular, or when decisionmakers are enmeshed in processes of accountability that make it costly to acknowledge that trade-offs must be made.⁴³

Still, even if we cannot reduce qualitatively different claims to a common measure, there may be ways of deliberating about trade-offs

43. Philip Tetlock et al., *Revising the Value Pluralism Model: Incorporating Social Content and Context Postulates*, paper presented at the Eighth Ontario Symposium on Personality and Social Psychology: Values, London, Ontario (Aug. 17-18, 1993).

among them that allow us to distinguish between more and less reasonable outcomes. For example, the claim that one good should enjoy an absolute or lexical priority over others is typically hard to sustain in a deliberative political context. In situations in which an increment of one good can be obtained only at the cost of rapidly increasing losses of other goods, most people will agree that at some point enough is enough. They also realize that circumstances alter cases. Gray sometimes uses existentialist language to characterize the politics of value pluralism.⁴⁴ But his focus on radical choice, unguided by reason, seems empirically dubious. There are considerations short of mathematical or logical rigor that nonetheless incline people to agree on a decision.

B. *Narrowness and Capaciousness*

We can draw a second distinction between individual and social pluralism. While any particular life necessarily represents a narrowing of value—one among many possible rankings and combinations of values and goods—the same is not the case (at least not in the same way and to the same extent) for societies. Some societies may embody a collective narrowing—an individual choice writ large. Others may represent capaciousness—that is, they may encompass a range of ways of life that can neither be commensurated nor combined at the level of individuals.⁴⁵

Does value pluralism entail a preference for social capaciousness over social narrowing? Gray's position is that the preference for capaciousness is a matter of history rather than logical entailment; it reflects the central role of autonomy in our culture, and the fact of (increasing) interpenetration of cultures, which in many circumstances can be halted and reversed only through tactics ranging from the coercive to the barbaric.⁴⁶ But capaciousness, Gray argues, is not required in circumstances in which homogeneity may be preserved (through tradition, precedent, or authority) unless deliberately perturbed by outside influences.⁴⁷

My view of the relation between value pluralism and social capaciousness is quite different. It rests on a modest proposition concerning what might be called philosophical anthropology. While it is true,

44. See GRAY, *supra* note 23, at 8-9.

45. An example of collective narrowing would be ancient Sparta, where family life, education, and public resources were all directed toward the cultivation of military virtues. The contemporary United States is an example of what I am calling "capaciousness."

46. JOHN GRAY, *LIBERALISMS: ESSAYS IN POLITICAL PHILOSOPHY* 241-42 (1989).

47. *Id.* at 213-15.

as Gray suggests, that we are beings whose good is given only in part by our (generic)⁴⁸ nature, it is also the case that the diversity of human types is part of what is given. A narrow society is one in which only a small fraction of inhabitants can live their lives in a manner consistent with their flourishing and satisfaction. The rest will be pinched and stunted to some considerable degree. All else being equal, this is an undesirable situation, and one that is best avoided. To the maximum extent possible in human affairs, liberal societies do avoid this kind of pinching. This is an important element of their vindication as a superior mode of political organization.

Gray has rightly argued that liberal polities are not neutral in their sociological effects; certain forms of life are placed in the defensive, or marginalized.⁴⁹ Still, there is more scope for diversity in liberal societies than anywhere else. And those societies have it in their power to adopt policies that maximize the possibility of legitimate diversity.

VII. LIBERAL POLITICS AND CIVIC DIVERSITY

Within liberal political orders (as in all others), there must be some encompassing political norms. The question is how "thick" the political is to be. The answer will help determine the scope of legitimate state intervention in the lives of individuals, and in the internal processes of organizing that make up civil society.

The constitutional politics of value pluralism will seek to restrict enforceable general norms to the essentials. By this standard, the grounds for national political norms and state intervention include basic order and physical protection; the sorts of goods that Hampshire, Hart, and others have identified as necessary for tolerable individual and collective life;⁵⁰ and the components of shared national citizenship. It is difficult, after all, to see how societies can endure without some measure of order and material decency. And since Aristotle's classic discussion of the matter,⁵¹ it has been evident that political communities are organized around conceptions of citizenship that they are required to defend.

But how much farther should the state go in enforcing specific conceptions of justice, authority, or the good life? What kinds of dif-

48. *Id.* at 257.

49. *Id.* at 260.

50. *See, e.g.*, GALSTON, *supra* note 39, at 178 (tracing the "commitment to life" to "public efforts to protect individuals against violence" to the justification for government intervention in the form of public education campaigns).

51. ARISTOTLE, *supra* note 20.

ferences should the state permit? What kinds of differences may the state encourage or support? This is, of course, a normative issue: What are the principled limits to state power? But it is also an empirical question: Must civil associations mirror the constitutional order if they are to sustain that order?

The political theorist Nancy Rosenblum has answered that question in the negative.⁵² Rosenblum asks us to look at different functions of civil associations.⁵³ They can express liberty as well as personal or social identity, provide arenas for the accommodation of deep differences, temper individual self-interest, help integrate otherwise disconnected individuals into society, nurture trust, serve as seedbeds of citizenship, and resist the totalizing tendencies of both closed communities and state power.⁵⁴

It is not obvious as an empirical matter that civil-society organizations within liberal democracies must be organized along liberal democratic lines in order to perform some or all of these functions. Consider recent findings reported by the political scientists Sidney Verba, Kay Lehman Schlozman, and Henry Brady: religious organizations—including fundamentalist churches—serve as important seedbeds of political skills, particularly for those without large amounts of other politically relevant assets such as education and money.⁵⁵ There is room for deep disagreement about the policies that many religious groups are advocating in the political arena. But there seems little doubt that these groups have fostered political education and engagement to an extent few other kinds of associations can match, at a time when most social forces are pushing toward political and civic disengagement.⁵⁶

As a general matter, then, the liberal democratic polity should not casually interfere with organizations that don't conduct their internal affairs in conformity with broader political norms. At one level, this point is obvious: I take it that we would agree, for example, that antidiscrimination laws should not be invoked to end the Catholic Church's exclusion of women from the priesthood.

But let's move to a less clear-cut example. Consider the issues raised in the case of *Ohio Civil Rights Commission v. Dayton Christian*

52. Nancy L. Rosenblum, *Civil Societies: Liberalism and the Moral Uses of Pluralism*, 61 SOC. RES. 539 (1994).

53. *Id.* at 551-57.

54. *Id.*

55. SIDNEY VERBA ET AL., VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 325-30 (1995).

56. *Id.* at 317-30.

Schools.⁵⁷ A private fundamentalist school decided not to renew the contract of a pregnant married teacher because of its religiously based belief that mothers with young children should not work outside their homes.⁵⁸ After receiving a complaint from the teacher, the Civil Rights Commission investigated, found probable cause to conclude that the school had discriminated against an employee on the basis of her sex, and proposed a consent order including full reinstatement with back pay.⁵⁹ The Dayton Christian Schools sued the Commission, arguing that any investigation or sanctions would violate the Religion Clauses of the First Amendment.⁶⁰

As Frederick Mark Gedicks observes, this case involves a clash between a general public norm (nondiscrimination) and the constitutive beliefs of a civil association.⁶¹ The teacher unquestionably experienced serious injury through loss of employment.⁶² On the other hand, forcing the school to rehire her would clearly impair the ability of the religious community of which it formed a key part to exercise its distinctive religious views—not just to profess them, but also to express them in its practices.⁶³ The imposition of state-endorsed beliefs on that community would threaten core functions of diverse civil associations—the expression of a range of conceptions of the good life and the mitigation of state power.⁶⁴ In this case and others like it, a liberal politics guided by value pluralism would give priority to the claims of civil associations.⁶⁵

Current federal legislation and constitutional doctrine reflect this priority to a considerable degree. Thus, although Title VII of the Civil Rights Act prohibits employment discrimination on the basis of religion,⁶⁶ section 702 of the statute exempts religious organizations.⁶⁷ In the case of *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,⁶⁸ the Supreme Court not only upheld this accommodation in principle but also extended its reach to a wide

57. 477 U.S. 619 (1986).

58. *Id.* at 623.

59. *Id.* at 623-24.

60. *Id.* at 624-25.

61. Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 Wis. L. REV. 99, 101.

62. *Id.* at 102.

63. *Id.*

64. *Id.*

65. *Cf. id.* at 115.

66. 42 U.S.C. § 2000e-2(m) (1994).

67. *Id.* § 2000e-1(a).

68. 483 U.S. 327 (1987).

range of secular activities conducted under the aegis of religious organizations.⁶⁹

This does not mean that all religiously motivated practices are deserving of accommodation. Some clearly aren't. No civil association can be permitted to engage in human sacrifice: there can be no free exercise for Aztecs. Nor can a civil association endanger the basic interests of children by withholding medical treatment in life-threatening situations. But there is a basic distinction between the minimal content of the human good, which the state must defend, and diverse conceptions of flourishing above that baseline, which the state must accommodate to the maximum extent possible. There is room for reasonable disagreement as to where that line should be drawn. But the moral philosophy of pluralism should make us very cautious about expanding the scope of state power in ways that coerce uniformity.

There are two complications for the position I have described. First, the expansion of the modern state means that most civil associations are now entangled with it in one way or another. If participation in public programs means that civil associations must govern their internal affairs by general public principles, then the zone of diversity is dangerously narrowed. There should therefore be some relaxation of the prevailing legal doctrine that the state cannot do indirectly what it is forbidden to do directly.

Second, there is a distinction between permission and encouragement. There is no requirement that the state confer benefits on civil associations that violate important public principles. In my judgment, the *Bob Jones* case was correctly decided.⁷⁰

VIII. A RIGHT OF EXIT

I want to conclude with a brief discussion of the conception of liberty flowing from the pluralist view. Within broad limits, civil associations may order their internal affairs as they see fit. Their norms and decisionmaking structures may significantly abridge individual freedom and autonomy without legitimating external state interference. But these associations may not coerce individuals to remain as members against their will. Thus there is a form of liberty whose promotion is a higher-order political goal: individuals' right of exit from groups and associations that make up civil society. This liberty will

69. *Id.* at 336, 338.

70. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (denying tax-exempt status to a school that did not admit persons who engaged in or advocated interracial dating or marriage).

involve not only insulation from certain kinds of state interference, but also a range of affirmative state protections.

To see why this is so, we need only reflect on the necessary conditions for a meaningful right of exit. These include knowledge conditions, offering chances for awareness of alternatives to the life one is in fact living; psychological conditions, including freedom from the kinds of brainwashing practiced by cults; fitness conditions, or the ability of individuals to participate effectively in some ways of life other than the one they wish to leave; and social diversity, affording an array of meaningful options.

This last points to a background feature of the judgment I expressed regarding the case of *Dayton Christian Schools*—the existence of employment alternatives for the affected teacher. If that religious community had been coextensive with the wider society—if there were no practical exit from its arena of control—my conclusion would have to be significantly revised. The pluralist concept of liberty is not just a philosophical abstraction; it is anchored in a concrete vision of a pluralist society in which the innate human capacity for different modes of individual and group flourishing has to some significant degree been realized.