

# Liberal Government, Civil Society, and the Rule of Law

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Peter Schuck's *Diversity in America* makes the most important contribution in recent years to the clarification of a mostly muddled topic. Whether you agree or disagree with his conclusions (I do some of both), it is impossible to come away without a more sophisticated intellectual framework and a far richer understanding of the stakes.

The book's subtitle, *Keeping Government at a Safe Distance*, points to one of Schuck's central themes: Even when we believe that more diversity would be a good thing, public instrumentalities are often ill-suited to promote it. "Although law has many strengths," Schuck declares, "the ability to create the values and experiences we associate with genuine diversity is not one of them."<sup>1</sup> Indeed, he continues, "government and law are natural enemies of diversity, especially when they are most eager to create it."<sup>2</sup> The reason, he argues, has nothing to do with the motives of lawmakers and everything to do with the nature of law, which acts through categories that inevitably oversimplify reality. When law tries to acknowledge the true contours of diversity by establishing ever more nuanced categories or by making broad grants of discretionary authority, it increases the burdens of enforcement and creates loci of arbitrary power. Genuine diversity, in Schuck's view, is a product of "civil society" and "culture," not law, and no amount of legal engineering, however thoughtful, can obviate this fact.<sup>3</sup>

This does not mean that law has no legitimate and beneficial relation to diversity. Schuck distinguishes between "protecting" and "promoting" diversity through public policy.<sup>4</sup> The latter, he argues, is usually a practical mistake and often a moral mistake as well. The former, on the other hand, is essential: While law can be used to repress and homogenize difference, human history shows that public institutions are needed to safeguard the social diversity that individuals and groups create for themselves. Consequently, Schuck supports

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1. PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 322 (2003).

2. *Id.* at 323.

3. *Id.* at 323-24.

4. *Id.* at 27-28.

robust First Amendment protections as well as the antidiscrimination thrust of 1960s-era civil rights laws,<sup>5</sup> even as he criticizes several efforts (most notably in Yonkers, New York) to mandate housing integration.<sup>6</sup> Protecting excluded minorities' right to live where they choose and giving them the resources they need to do so is one thing; a "take-it-or-leave-it, top-down, court-designed, court-managed" remedy is something else entirely.<sup>7</sup>

To assess these claims, we should begin where Schuck does, with a taxonomy of diversity. As a freestanding, unqualified term, "diversity" is virtually (but as we shall see, not entirely) without meaning. The initial questions are, or ought to be: Diversity of what? Diverse in which respects? Schuck defines diversity as "those differences in values, attributes, or activities among individuals or groups that a particular society deems salient to the social status or behavior of those individuals or groups."<sup>8</sup> This definition has the merit of emphasizing the relativity of diversity—that is, its rootedness in particular times, places, and conceptual schemes. For Greek thinkers, differences of birth, occupation, economic status, and conceptions of justice were fundamental.<sup>9</sup> In *Federalist 10*, James Madison stresses differences of interests, talents, and opinions.<sup>10</sup> Orthodox Marxists focused on differences of class to the near-exclusion of all else,<sup>11</sup> which led to the fateful misjudgment in 1914 that international working-class solidarity would trump nationalist passions. In the contemporary United States, the class differences that configured the politics of the New Deal era have largely given way to differences in race, ethnicity, gender, and religion.

It is fair to say, I think, that the long struggle with the legacy of slavery and discrimination against African Americans is at the heart of the dominant understanding of diversity in America today, so much so that many other aggrieved groups have modeled their struggles for inclusion and equal treatment on the civil rights movement of the 1950s and 1960s. However, this template for diversity—the assertion (or assumption) that the situation of other groups is comparable to that of African Americans—has generated some difficulties. For example, advocates for gay marriage often offer an analogy between their situation and that of African Americans when interracial

5. *Id.* at 27.

6. *Id.* at 257-60.

7. *Id.* at 259.

8. *Id.* at 7.

9. ARISTOTLE, POLITICS 89-105 (Peter L. Phillips Simpson trans., Univ. of N.C. Press 1997) (bk. 3, chs. 7-13).

10. THE FEDERALIST NO. 10, at 40, 41 (James Madison) (Terence Ball ed., 2003) ("As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. . . . The diversity in the faculties of men from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests.")

11. For the locus classicus of this view, see KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO (1848).

marriage was prohibited almost everywhere<sup>12</sup>—a comparison that many African-American leaders reject.<sup>13</sup> Be that as it may, we would not be discussing diversity in the terms we use today (and Schuck probably would not have written his book) had it not been for the conflicts over race that have transformed our society and reconfigured our politics over the past half-century.

In addition to “diversity of what?” we must ask, “diversity *where?*,” and “at what level of social organization?” It is possible for a political community’s population to be heterogeneous, considered in the aggregate, while being divided into geographical areas, each of which is ethnically homogeneous. Or consider education: Increasing diversity *within* schools can often be achieved only by reducing diversity *among* schools. For example, if a government requires boys and girls to be educated together, every school is diverse with respect to gender, but all schools are the same with respect to the gender distribution of their student bodies.

Here, as elsewhere, social understandings prove decisive. From the bare facts in the education example, it is impossible to conclude that one state of affairs is more diverse, taken as a whole, than the other. Each community must decide for itself which unit of analysis is most important—a judgment that is sure to reflect its understanding of desirable public means as well as some specification of collective purposes.

This brings us to a third set of defining questions: Diversity *for what?* Guided by what principles? A society’s sense of its most important problems will shape the answers. Perhaps some Americans see diversity as what Schuck calls an “independent social value,”<sup>14</sup> that is, as a good in itself. For most Americans, however, the principal value of diversity is as a means for rectifying wrongs. If certain groups have been excluded from key institutions and sectors of society, and if society comes to believe that this exclusion is wrongful, then the principle of diversity can be used to promote inclusion. If the exclusion of some groups from institutions, such as police departments and retail sales, impedes the functioning of those institutions, then fostering diversity enhances their effectiveness. If some groups are held in lower esteem than others, then diversity functions as an anti-hierarchical principle: Regardless of religious, racial, and ethnic divisions (to name only a few social fault-lines), all groups should enjoy equal public standing and regard. John Stuart Mill favored diversity in part because he believed that exposure to a wide range of opinions and ways of life would foster greater awareness of

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12. Peggy Pascoe, *Why the Ugly Rhetoric Against Gay Marriage Is Familiar to This Historian of Miscegenation*, HIST. NEWS NETWORK, at <http://hnn.us/articles/4708.html> (Apr. 19, 2004).

13. Kimberley A.C. Wilson, *Some See Parallels in Gay Marriage Debate: Interracial, Same-Sex Union Bans’ Similarity Disputed as Md. Bills Come to Fore*, BALT. SUN, Feb. 25, 2004, at 5B.

14. SCHUCK, *supra* note 1, at 310.

oneself and others and facilitate social learning.<sup>15</sup> One may also favor diversity of opinions and ways of life on the grounds that such diversity both expresses and serves liberty or even because of the stimulation and joy to be found in the experience of variety.

What is the antonym of diversity? Schuck's answer is homogeneity, which he regards as problematic if it is a product of coercion.<sup>16</sup> But there is another, more traditional answer, namely, unity, understood as an agreement on core principles accompanied by some degree of sympathetic fellow-feeling among citizens. Since antiquity, theorists and statesmen have argued that no stable or decent society can be sustained without civic unity; absent unity, the only possibilities are anarchy, tyranny, or civil war.<sup>17</sup> But opinions have changed concerning the kinds and degrees of unity that social order requires. For example, it was long thought that civic unity rested on religious homogeneity. It took an intellectual revolution in the seventeenth century to propose, and then test, the proposition that civic tranquility and unity can be secured in circumstances of religious diversity. It took another intellectual revolution in the eighteenth century to suggest that multiple diversities—of interests and secular opinions as well as religious faith—can support (and perhaps even be a necessary condition for) stable constitutional self-government.

The underlying issue is the extent to which the state (the largest unit of political authority) should use its coercive power to create homogeneity throughout the society it governs. One part of the answer is empirical: the extent to which the state's capacity to carry out its core functions depends on a higher degree of uniformity than the uncoordinated decisions of individuals, groups, and political subunits within society would produce. The experience of modernity demonstrates that governments can accept more social diversity without loss of political capacity than pre-modern theorists and statesmen believed possible. Nevertheless, as Schuck rightly observes, there are limits. Because political communities are held together by bonds of mutual regard and trust, a diversity that is "too widespread, too divisive, too inward-looking, and runs too deeply can narrow or dissolve these bonds—or even prevent them from forming in the first place."<sup>18</sup>

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15. Peter Berkowitz, *Mill: Liberty, Virtue, and the Discipline of Individuality*, in *MILL AND THE MORAL CHARACTER OF LIBERALISM* 32 (Eldon J. Eisenach ed., 1998).

16. SCHUCK, *supra* note 1, at 320-24. Schuck views homogeneity as the product of legal and regulatory categories imposed on social reality. *Id.* at 311.

17. Aristotle, for example, defines agreement on what is just and unjust as the core of political community, ARISTOTLE, *supra* note 9, at 9-12 (bk. 1, ch. 2), and he views disagreements about justice, especially those based on class divisions, as threatening the destruction of communities, *id.* at 94-95 (bk. 3, ch. 10). In an effort to avoid civil dissension and war, Hobbes went to far as to make the sovereign the sole judge of what could be taught, in both secular and religious matters. See THOMAS HOBBS, *LEVIATHAN* 121-29 (Richard Tuck ed., Cambridge Univ. Press rev. student ed. 1996) (1668) (pt. 2, ch.18).

18. SCHUCK, *supra* note 1, at 60.

Many current debates between “civic liberals” and “diversity liberals” rest on contestable empirical judgments concerning the threat to civic unity posed by specific kinds of diversity. Scholars such as James Davison Hunter argue that contemporary differences of cultural outlook go so deep as to amount to a culture war that threatens national unity.<sup>19</sup> Others such as Alan Wolfe reply that a surprisingly wide range of cultural consensus exists among the general public, although it is often obscured by contestation among mobilized elites.<sup>20</sup> For the most part, Schuck presents himself as a defender of diversity, which makes his contention that “the challenges to national unity are probably greater than at any time since the Civil War”<sup>21</sup> all the more surprising. In any event, I do not believe a fair reading of the evidence sustains his uncharacteristically alarmist view.

I have focused on ways in which empirical features of social life can shape judgments about the range of permissible diversity. Another part of the answer is normative: the respects in which the decisions of individuals, groups, and political subunits produce outcomes inconsistent with core principles that the state has decided it must enforce uniformly throughout the territory it governs. Until the momentous decisions the United States began to make fifty years ago, claims based on “states’ rights” were used successfully not only to defend the legal separation of the races, but also to deny central attributes of citizenship, such as the right to vote.

Today, the debate over the right of the national government to enforce uniformity of citizenship rights throughout subordinate political units is mostly over. While the states continue to regulate the time, place, and manner of voting, for example, they can no longer deny or dilute the votes of discrete minorities within their jurisdictions.<sup>22</sup> Some residual disputes remain, of course. While the laws of marriage and divorce have long been a state rather than a federal matter, yielding a considerable diversity of eligibility requirements, the Supreme Court has decided that the underlying right to marry has constitutional roots and that certain regulations (such as the prohibition on interracial marriages) violate core constitutional principles.<sup>23</sup> It remains to be seen whether the evolving constitutional jurisprudence will ultimately strike down prohibitions on same-sex marriage. The push for a federal constitutional amendment defining marriage as the union of one man and one woman reflects social conservatives’ fears about just such an outcome. By contrast, many advocates of gay marriage would be satisfied with a state-by-state approach, which would inevitably yield long-term differences among the states on this

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19. JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

20. ALAN WOLFE, *ONE NATION, AFTER ALL* (1998).

21. SCHUCK, *supra* note 1, at 99.

22. *See Voting Rights Act*, 42 U.S.C. § 1973(c) (2000).

23. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967).

matter.

The debate over the right of public authorities to enforce uniformity on the institutions of civil society is far less settled. I agree with Schuck when he insists that “the distinction between public and private morality, between the values laws should mandate and those it should leave to the disparate choices of a diverse civil society, lies at the core of a liberal society,”<sup>24</sup> and that “the diversity that flows from the[] exercise of individual freedom is presumptively valid.”<sup>25</sup> I also agree with Schuck’s application of this principle to the freedom of association: “[I]f valuing diversity in a liberal society means anything, it means assuring people’s freedom to form exclusive groups that embrace unpopular beliefs in ways permitted by the Constitution and without undue interference by the law.”<sup>26</sup> Consistent with this approach, Schuck endorses the conclusion the Supreme Court reached in *Boy Scouts of America v. Dale*,<sup>27</sup> which upheld the right of the Scouts to exclude gays from its leadership positions.<sup>28</sup>

Schuck devotes an impressive chapter to relations between government and religious associations. His general thesis is that government regulation should be guided by two principles of neutrality: “among religions, and between the religious values of a pious people and the secular values of a liberal civic culture.”<sup>29</sup> He acknowledges, however, that there is no non-neutral way of moving from the abstract concept of neutrality to a specific conception, the content and application of which are bound to be “highly contestable.”<sup>30</sup> After all, Justice Scalia defended his notorious decision in *Employment Division, Department of Human Resources of Oregon v. Smith*,<sup>31</sup> which delivered a body blow to strategies of religious accommodation, as an appropriately neutral response to demands for free exercise exemptions from generally valid state laws.

For this reason, among others, the lines between public and private morality and between appropriate and inappropriate government intervention in faith-based institutions, are often difficult to draw. For example, the Internal Revenue Code offers an exemption from federal income taxes to organizations performing “charitable” activities.<sup>32</sup> Bob Jones University, an educational institution with a fundamentalist Christian orientation, banned interracial dating on the grounds that the Bible prohibits mixing of the races. When the grant of a

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24. SCHUCK, *supra* note 1, at 195.

25. *Id.* at 57.

26. *Id.* at 326.

27. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

28. *Id.* at 38.

29. *Id.* at 263.

30. *Id.*

31. 494 U.S. 872 (1990).

32. I.R.C. § 501(c)(3) (2000).

tax exemption to the University was challenged, the Supreme Court ultimately ruled that it should be withdrawn because the practices of the university were “contrary to public policy.”<sup>33</sup> The Court seemed to have in mind public values of a high order, those that are basic to our constitutional structure and traditions. The *Bob Jones* case stands for the proposition that while the government must be neutral among religions, and between faith-based and secular institutions, in granting tax exemptions, it may nonetheless use non-neutral criteria to screen out some otherwise eligible applicants. Schuck never discusses this case, and it is not clear whether he regards it as consistent with his neutrality-based approach.

There is a deeper reason why the line between permissible and impermissible public action is often difficult to draw. Schuck distinguishes four different stances government may adopt toward diversity—“protecting, promoting, exploiting, and empowering.”<sup>34</sup> I will not tarry on the latter two. Suffice it to say that empowering diversity involves providing the resources and other conditions needed for individuals to choose freely (school vouchers, for example), while exploiting diversity means using various kinds of civil associations in pursuit of public purposes (President Bush’s faith-based initiative for the delivery of social services is an example). Within broad limits, Schuck supports both of these strategies.

The real action lies elsewhere, in the distinction between protecting diversity, which Schuck strongly supports, and promoting it, which he generally opposes. In protecting minorities against discrimination, he declares that the liberal State “need not, indeed *should not*, advance any particular conception of how much and what kinds of diversity are socially optimal.”<sup>35</sup> In practice, of course, the line between protection and promotion is not so bright, and Schuck knows this. For example, he notes that the Bill of Rights “*promotes* diversity by *protecting* freedom of religion, thought, speech, privacy, and many other conditions that nourish a diversity of beliefs, ideas, associations, and practices.”<sup>36</sup> In fact, James Madison explicitly promoted diversity. Not only did he argue, on theoretical grounds, that increased diversity was the inevitable consequence of increased liberty;<sup>37</sup> he favored more diversity in the belief that it would help ward off the popular tyranny into which (in his view) the democratic majorities of Greek antiquity had typically degenerated. His advocacy of the “extended republic” in opposition to those arguing the traditional case for small republics pivoted on the proposition that a larger

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33. *Bob Jones Univ. v. United States*, 461 U.S. 574, 582 (1983).

34. SCHUCK, *supra* note 1, at 27-28.

35. *Id.* at 27.

36. *Id.* at 35 (emphasis added).

37. See THE FEDERALIST NOS. 10, 51 (James Madison).

political community would surely be a more diverse community.<sup>38</sup>

Schuck's aversion to diversity-promoting policies raises crucial questions for the conduct of public education. While he supports, for example, experimentation with same-sex schools, he argues that government's role is "not to promote such schools but only to eliminate discriminatory rules that unfairly inhibit them."<sup>39</sup> This is perplexing on its face: Surely the efforts of local governments, such as the city of Detroit, to foster important educational and safety objectives through same-sex public schools amount to promotion. Does Schuck oppose this?

Or consider the history of American public education in the half century since *Brown v. Board of Education*.<sup>40</sup> Nearly everyone can agree on the necessity of using law to sweep away *de jure* discrimination and segregation. But what about integration, brought about by law rather than the decisions of families? In discussing the efforts of a federal judge to integrate housing in Yonkers, Schuck notes what he regards as a paradoxical relation between diversity and law: "The harder the law tries to create or promote diversity, the more law magnifies and highlights its own weaknesses, and the more law reveals as inauthentic, illegitimate, and disvalued the diversity that it fashions."<sup>41</sup> This general view of law could lead us to conclude that using law to enforce school integration leads at best to outcomes (namely, diverse student bodies) that are inauthentic and illegitimate. Is that Schuck's view? If not, if on his view legally enforced school integration may be acceptable, on what basis can we distinguish between proper and improper uses of law to promote diversity?

The root of the difficulty is this: Schuck's distinction between coercive government and free civil society is too sharp to sustain. As Schuck knows very well, law is more than a neutral framework within which individuals make choices. Citizens express what they value through collective as well as individual decisions. In every society, law promotes an ensemble of preferred public purposes. In so doing, law imparts a characteristic tendency to the civil society it frames. While liberal societies are distinctive in the scope they afford for civil society, their legal systems are no more devoid of purpose than are others. I agree with Schuck that liberal societies ought not regard fostering diversity as an end in itself. However, to the extent that promoting diversity serves as a means for the attainment of legitimate liberal purposes, there is in principle no reason why the law cannot do so. If it is true that integration, not merely non-discrimination, in public education is needed to achieve the promise of equal citizenship and civic unity, then the public effort to create

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38. THE FEDERALIST NO. 51 (James Madison).

39. SCHUCK, *supra* note 1, at 326.

40. 347 U.S. 483 (1954).

41. SCHUCK, *supra* note 1, at 322.



## Rule of Law

schools in which races and ethnic groups learn and play together cannot be dismissed as a misunderstanding of the rule of law.

As a practical matter, the use of law to promote diversity may fail, either because the effort creates too much collateral damage or because popular objections thwart its implementation. Schuck is right to suggest that judges and legislatures have not always weighed these considerations wisely and that the consequences have often been social conflict rather than social progress. But it is important not to turn these prudential difficulties into matters of general principle.

