

Uncivic Diversity

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As the courts implement this ideal [of religious diversity] under the aegis of the religion clauses, they must referee a robust, incessant competition for public allegiance between civic and religious values. In this competition, I maintain, judges' regulatory lodestars must be two kinds of neutrality—among religions, and between the religious values of a pious people and the secular values of a liberal civic culture.¹

There is much that I agree with in Peter Schuck's important *Diversity in America*. The book is a model of empirical scholarship and it makes challenging arguments about an incredibly wide range of policy issues. I want, however, to dissent from some of Schuck's basic principled claims, and in particular the second dimension of neutrality that he announces at the end of the quotation above. That judges and other public officials should not take sides (and remain neutral) in religious controversies (as such) is surely correct. That judges and other public officials should not take sides (and remain neutral) when basic public values come into conflict with non-public values—religious or otherwise—seems to me incorrect.

The call for public neutrality among religious and other non-public sectarian claims I'll call "religious neutrality." The call for public officials to be neutral among religious (and other non-public) claims and our civic or public values I'll call "civic neutrality." Merely to state "civic neutrality" is to suggest its problematic nature. What sort of principle is it? Is it meant to help us to understand and adjudicate fairly among conflicting (sectarian) views? That's what it sounds like, but that is precisely what basic civic or public values are supposed to do. Neutrality itself, if it is going to be a useful and attractive principle in constitutional law (and it often is not) must be specified and understood as part of an array of public principles that help us understand and justify the basic terms of our relations with our fellow citizens. How could it be a public value to be neutral among public values and various competing religious and other non-public values?²

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1. PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 263 (2003).

2. A nonreligious but sectarian value system would be secular humanism, and there are many

Or is civic neutrality not itself a public value, but a claim about the proper relationship between public values—the basic constitutional framework itself—and the religious and other non-public values that compete with them? I'm not sure what it would mean to have a supra-constitutional norm of this sort, or why we would want such a norm. We count on basic public principles to help constitute a common framework that allows us to analyze and adjudicate conflicting claims of all sorts. It makes no sense to set that framework on all fours with the conflicts we are trying fairly to adjudicate. It is not clear what it would mean for us to be neutral between basic public principles (if that's what Schuck means by the "secular values of a liberal civic culture") and competing religious and other sectarian values.

Of course, if Schuck wants to criticize and revise the basic constitutional framework of values, that's fine. There are different interpretations of the values that should inform the basic framework: different ways of understanding fairness and equal liberty, for example. Schuck is right to try to describe and defend an account of the best understanding of these and other values. In addition, the most basic public values are always criticizeable and revisable in the course of public argument, including public arguments over how to adjudicate conflicting religious claims. The principles that constitute the basic public framework are not pre-established in a way that makes them immune to criticism and revision within constitutional politics and adjudication: They are up for grabs, in the sense that they need constantly to be re-interpreted and revised. But to say that our basic public values are criticizeable and even falsifiable is not to say that we intend to be neutral between them and competing non-public values.

It makes no sense to assert in advance the principle that we must be neutral among whatever public values we provisionally think should be authoritative (fairness, toleration, equal liberty for all, etc.) and the great variety of religious and non-religious values that compete in society. That just does not seem coherent.

I should hasten to add that most of what Professor Schuck has to say about particular cases is reasonable. In discussing religious diversity, where we have some differences, he rightly observes that those who seem deeply opposed at the level of abstract principle often find considerable common ground when it comes to dealing with hard cases. Competing principles may frame constitutional and political disputes in starkly divergent terms, but such differences are often tempered when we turn to grapple with complex fact situations and conflicting values that make hard cases hard. General principles do, however, set the contours of our thinking and we want to try and be as clear as possible about them.

Having laid out in very abstract terms my partial dissent from Schuck's discussion, let me explain it a bit more fully.

A nettlesome set of problems confronts those who would seek ways to fairly adjudicate the many conflicts among diverse religious communities and public agencies seeking to pursue general public purposes. It is generally agreed that laws may not directly advance or inhibit religious aims without running afoul of the Constitution. But suppose a general law in pursuit of some legitimate public purpose imposes burdens on particular religious beliefs and practices? This has long been a vexed area of constitutional law. "Accommodationists" argue for a presumption in favor of special exemptions for religious minorities when their beliefs or practices are burdened by some general rule or policy. They insist, as Schuck puts it, "that religion can only retain its meaning-creating, value-conferring force and integrity if it enjoys considerable breathing space in which to pursue distinctive beliefs and practices"; the law should create a "strong presumption" favoring even those practices that seem illiberal or in some cases are illegal.³ "Separationists," on the other hand, resist any strong general presumption in favor of accommodations or exceptions when religious beliefs are incidentally burdened by general laws and policies that advance legitimate public purposes (Schuck generously treats some of my work as representing the separationist position). Schuck sympathizes with the accommodationist view, which he sees as necessary to the diversity and vitality of religion in America. He tends to ascribe to separationists the belief that the state needs to be protected from religion because public values are fragile and "religion is a potentially divisive force when brought into public life," as he says.⁴ Accommodationists are most concerned to protect religion from the state, Schuck argues, whereas separationists focus on protecting the state from religion.

Schuck's own position is that judges should go considerably further than most now do in the direction of accommodationism or exception-making, in order to protect religious beliefs and practices that run afoul of or exist in tension with public purposes and public programs of one sort or another. Consistent with this, Schuck defines the neutrality that underlies the religion clauses "to mean a requirement that the law accommodate any religious practice or claim that does not threaten compelling governmental interests."⁵ As students of constitutional law know, "compelling interests" are only those of the highest order. He would interpret the Constitution to require judges to make exceptions to the drug laws for the sacramental use of peyote in Native

3. SCHUCK, *supra* note 1, at 276.

4. *Id.*

5. *Id.* at 263.

American religious ceremonies. And he would have required local school districts to accommodate the fundamentalist parents in the *Mozert*⁶ case. Those parents objected to texts used in public school classes on the grounds that the texts were hostile to their religious beliefs because the books treated religious diversity in an evenhanded and nonjudgmental way, whereas the parents believed that the whole truth can be found in the Bible literally interpreted. Schuck argues that, “[i]n a vast, diverse society like ours, the nonendangering practices and claims of (usually small) religious groups seldom threaten overriding secular values”;⁷ as a result, judges should look favorably on all claims for religiously-based exceptions or accommodations with respect to general public requirements and programs.

There is one obvious problem with Professor Schuck’s position as I have described it so far, and that problem is fairness or equality. We all bear burdens in the name of supporting political society. It seems unfair to require the state to carve out exceptions or accommodations whenever the state burdens *religious* beliefs and practices, but not other deeply held beliefs and practices that play an equally deeply constitutive role in the lives of persons and communities. Schuck deals with this problem by broadening neutrality to mean that government must not “favor religion over nonreligion or the reverse,” and so he broadens the accommodationist principle to include “deeply held but deviant worldviews—including secular ones as well as, say, the Old Order Amish.”⁸ By broadening his civic neutrality principle to include both religious and non-religious worldviews that compete with civic values, Schuck addresses the potential arbitrariness, favoritism, and inequality of providing accommodations only to religious groups, beliefs, and practices.

Schuck’s general principle is still problematic, as I will argue shortly, but as stated it bears some similarity to claims advanced by John Tomasi and William A. Galston. Galston, for example, has argued for a new understanding of liberalism founded on “public principles, institutions, and practices that afford maximum feasible space for the enactment of individual and group differences, constrained only by the ineliminable requirements of liberal social unity.”⁹

It is worth noting that Schuck does not go as far as some others, or as far as the Religious Freedom Restoration Act would have taken us: Schuck says laws and policies should accommodate religious and ethical dissenters unless there is a compelling state interest, but he does not insist that the law must also be narrowly tailored so that it is the least burdensome means of achieving the

6. *Mozert v. Hawkins County Pub. Sch.*, 827 F.2d 1058 (6th Cir. 1987).

7. SCHUCK, *supra* note 1, at 308.

8. *Id.* at 283.

9. WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 23 (2002); *see also* JOHN TOMASI, LIBERALISM BEYOND JUSTICE: CITIZENS, SOCIETY, AND THE BOUNDARIES OF POLITICAL THEORY (2001).

compelling state interest.

In any event, Schuck (like Tomasi and Galston) avoids the charge of arbitrary preference for religious persons, communities, and interests, by broadening the relevant protections to include non-religious persons and groups. This may lead to other practical problems, including discerning when conscientious grounds really exist.

There is nevertheless a deeper problem still. Schuck characterizes the debate between accommodationists (his side) and separationists (my side, very roughly speaking) as a debate about whether one is more worried about the state threatening religion or religion threatening the state. This is way too simple. What is at stake in establishing a strong presumption in favor of accommodations and exceptions is not “the state” but democratic self-governance. Claims for exceptions and exemptions could be advanced against collective purposes of all sorts, from health care to schooling. Admittedly, Schuck allows that collective purposes will win out if public officials can show that exceptions would threaten a “compelling state interest,” but this is generally understood to be the most demanding constitutional test, encompassing government interests of the highest magnitude only. Schuck may have some more modest and reasonable balancing test in mind, but it is not especially clear what that is.

With respect to education, for example, Schuck would have judges require public school officials to accommodate parents such as those in the *Mozert* case who dissent from reasonable measures to teach core civic values such as tolerance and knowledge of our nation’s religious diversity. And what would it mean to show, on the other side, that the state has a “compelling interest” in disallowing parents’ desire to have their children exempted from parts of the public school curriculum? An imminent breakdown of civil order? A serious upsurge of severe intolerance that could be addressed in no other way? I really wonder whether the “compelling state interest” test is the right standard to bring to bear on all the vast variety of complaints that religious and ethically-motivated adults have about public education policy, health and welfare policy, etc.

Some of what Schuck says makes me nervous. Schuck states, for example: In the real world, we must choose among competing versions of the truth, and neither flat-earthism nor cannibalism (to pick extreme examples) should be taught in a public school—at least until the state gives parents who favor those subjects a genuine choice, through tax dollars, to send their children elsewhere. The state can and should provide this choice, as I maintain later in this chapter. But until it does, the public schools have a special obligation to accommodate parents in cases like *Mozert*.¹⁰

This is not the most pellucid passage in Schuck’s book (does he mean

10. Schuck, *supra* note 1, at 282.

“disfavor” in his italicized passage?). In any event, the quotation seems to suggest that parents who want their children educated in flat-earthism and cannibalism might deserve public subsidies to help support the choice. The passage even suggests that public schools might teach these subjects so long as parents who disagree have the publicly funded choice to go elsewhere. I may be misreading what Schuck intends to say, but my interpretation squares with the broad claim that we should be neutral among public educational values and competing particular non-public values. But this is surely “neutrality” run amuck. It is reasonable to resist the notion that the state should certify a view of the whole truth of human existence. But it is quite a different matter to disallow democratic communities from certifying bodies of knowledge that have passed reasonable public tests, that hold up under scrutiny, and that we are committed to scrutinizing further. Simply because some people would prefer another form of education for their children is not a sufficient reason to publicly fund those choices, especially when we have ample grounds for rejecting as silly or appalling (as in Schuck’s examples in the quotation above) the things that particular parents want to teach.

One thing which Schuck does not emphasize sufficiently is that schooling and education policy do not fall neatly within the sphere of private liberty. Of course, we do accord parents a great deal of authority and power over their children’s upbringing. Not only in the home, but through their participation in religious communities and in many other settings, parents have enormous influence over what their children learn and think. Public education policy and public requirements concerning formal schooling express, however, our profound public interest in the education of children as equal persons and as future citizens. We insist, via public educational policy, that children are not simply creatures of their parents, but are also future citizens and independent persons with their own lives to lead and their own interests. The public school system is subject to many criticisms, and it is in practice flawed in a variety of ways (as indeed are other public and private institutions), but the basic rationale for the institution of public schooling is legitimate and reasonable.¹¹ Indeed, public schools and educational policy more broadly are perhaps the most important site where public officials (including professional educators), citizens, parents, and other private groups come together to establish reasonable ways of insuring that children are prepared for lives of equal freedom and responsible citizenship. There will be many difficult conflicts to be worked out in this vitally important area of public life, but Schuck’s position gives too little scope for the exercise of reasonable forms of collective political judgment and democratic public policy.

11. I have argued for this at length elsewhere and will not repeat those arguments here. See STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* (2000).

There is a danger of placing too much weight on general pronouncements, as I have said, but general pronouncements do help mark off easy cases and direct our attention to what are claimed to be hard cases. The *Mozert* case, where fundamentalist parents didn't want their children to be exposed to public school books that seemed to teach valuable civic lessons like tolerance and knowledge of the religious diversity of our nation, seems to Schuck an easy case. But he rightly notes that religious practices might "threaten the lives and well-being of small children."¹² Where are the hard cases? Schuck explains: "Much harder are those involving parental choices that arguably threaten a child's life or safety."¹³ Of course, it depends on the degree of the risk, but I would tend to think that Schuck is drawing the line too much on the side of parental autonomy. I would have thought that parenting practices that constitute serious threats to children's lives and safety would be easy cases for public intervention.

Schuck tends to depict the values on the side of "separationism" in terms that reference the "state." For my part, it is not the "state" that seems to me the crux of the matter, but rather the authority of the democratic political community. It seems to me quite reasonable for us to deliberate publicly about whether we could fulfill our public educational purposes more effectively by giving parents more publicly funded and publicly regulated choice among schools. I tend to agree with Schuck that choice programs targeted at disadvantaged children in poorly performing schools are a good thing on balance, but it seems to me crucial to show that greater choice would help us pursue our public educational aims more effectively: that competition among schools, for example, would improve educational outcomes, especially for the disadvantaged, and indeed that expanded choice might help overcome the inequities between rich and poor communities that are built into the current system of local financing and local pupil assignment. I largely agree, therefore, with Schuck's sympathy for publicly funded voucher programs that "enlarge the sadly-limited options of low-income families, enabling them to seek schooling that may redeem their children's lives,"¹⁴ though my grounds are more public-regarding than Schuck's.

If parental choice in education is to be publicly funded, along with faith-based social service organizations, it is also important that these organizations should be subject to the same reasonable regulations as other service providers that accept public funding. If faith-based organizations are worried that the conditions that come attached to public subsidies will undermine their religious integrity and autonomy, they should forego the opportunity to become tax-

12. SCHUCK, *supra* note 1, at 286.

13. *Id.*

14. *Id.* at 307.

funded subcontractors to public agencies.¹⁵ With respect to public funding of faith-based public services we seem mainly to agree. With respect to schools, our disagreements are significant, though perhaps not radical: I would disallow, though Schuck would allow, religiously based admissions criteria for students with vouchers. I believe that if schools want to accept children with publicly funded vouchers they should not be allowed to pick and choose among these children based on religious criteria. Spaces in schools that are supported with public funds should be open to all the children in the community, not just co-religionists.¹⁶ (More broadly, it seems to me that if publicly funded school choice is to be expanded, it should be for the sake of improving public educational policy rather than as a preference for particular and private over common educational values. There are difficult questions of public policy here that should not be settled by judicial fiat.)

I agree with Schuck that judicial oversight is necessary to ensure that religious interests, especially minority religious interests, are not unfairly discounted. He attributes to me the view that there are only prudential grounds for accommodating dissenting religious minorities, but in fact I agree and have said that there may often be principled grounds.¹⁷ (In fact, I have gone so far as to argue for some sort of flexible intermediate scrutiny standard when assessing the complaints of religious groups, according to which public officials would need to identify an important governmental interest that is being advanced in a reasonable manner.)¹⁸ But there seems to me a wide swathe of reasonable discretion here for democratic deliberation and public policy decision. It does not seem to me that public agencies are required to move toward greater parental choice in education, or greater client choice among social welfare agencies, as a matter of basic constitutional principle.

If some of Peter Schuck's principles worry me, part of his response seems to be that I worry too much. I worry about risks to civic ideals in insufficiently regulated school choice programs; he says my worries are overblown:

The claim that a public school monopoly is necessary to promote these [civic] ideals has no empirical support and is refuted by the experience of other democracies where governments pay private school tuition for large numbers of students—76% in the Netherlands, 58% in Belgium, 30% in the United Kingdom,

15. I have written about the faith-based initiatives at greater length in Stephen Macedo, *The Constitution of Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417 (2000).

16. For the same reason, I would not allow schools to impose mandatory religious exercises on children who attend with vouchers. I have argued this at greater length in MACEDO, *supra* note 11, and Macedo, *supra* note 15. For a reasonable overview of how vouchers might work to serve the public interest, see NAT'L WORKING COMM'N ON CHOICE IN K-12 EDUC., BROOKINGS INST., *SCHOOL CHOICE: DOING IT THE RIGHT WAY MAKES A DIFFERENCE* (2003). I was privileged to be a member of this commission.

17. MACEDO, *supra* note 11, at 211 ("When complaints are advanced by small and politically weak religious groups, moreover, courts can help ensure that their concerns are taken seriously and that they are treated with equal concern and respect.")

18. *Id.* at 201.

25% in Australia, and so on.¹⁹

As it turns out, and as Professor Schuck now knows (because he provided a generous blurb for the back of the book!), the lessons of the non-American experience with school choice is not so clear.

It is true that, as some choice advocates have long claimed, most other advanced democracies have long experience of publicly funding a wide array of schools—public (as we would call them), religious, secular academies, and so on. In the cases Schuck mentions, and in other cases that include Canada and Germany, it is hard to find any dire civic consequences as a result of publicly funded choice among public, private, secular, and religious schools. Intolerance does not seem to be greater in choice systems, and various forms of segregation do not seem to be worse. What Schuck does not mention, and what choice proponents often fail to mention, is that publicly funded school choice abroad is typically contained within regulatory frameworks whose robustness and extent would shock Americans.

Typical regulations and requirements that accompany public funding abroad include mandatory national curriculum and national testing, requirements that schools reflect the local demographic mix, intrusive national inspection regimes, uniform teacher qualifications, and teachers in all sectors that belong to the same unions. Not all of these regulations apply everywhere, but very extensive regulations are the general rule abroad when governments fund non-public schools. Generous funding is accompanied by generous regulation. Indeed, in other countries, the distinction between “public” and “private” schools is not salient: all funded schools are considered part of the public system.²⁰

So, in fact, where publicly funded school choice is extensive, public policy gives great weight to a wide variety of civic values: choice and diversity are not the sorts of “trump cards” that Schuck seems to want them to be. I very much doubt that announcing broad principles that limit the reach of public values is helpful to managing this complex interface.

A final question: Is diversity neutral? Schuck lauds the “religiosity, diversity, and separation” between church and state that distinguish the United States from European countries. He clearly recognizes that religious diversity in America is a distinctive condition, however, which “conditions” the form that religion tends to take here. As he observes: “Even the Jesuits, the most disciplined, hierarchical, and orthodox of Catholic groups, have come under the spell of these fragmenting, individualizing conditions of modern American

19. SCHUCK, *supra* note 1, at 304.

20. I draw here on PATRICK J. WOLF ET AL., *EDUCATING CITIZENS: INTERNATIONAL PERSPECTIVES ON CIVIC VALUES AND SCHOOL CHOICE* (2004), which contains an account of how other countries promote civic values in their regulation of non-government schools.

religious life.”²¹ Insofar as these American religious conditions are distinctive, insofar as they promote fragmentation in place of hierarchy and discipline, they are evidently non-neutral in their effects on the form of religious life—which is to say that “diversity” is not neutral.

Is this a problem for Professor Schuck? Should we correct for this non-neutrality? May “disciplined hierarchical” religious groups, like the Jesuits, rightly complain about the non-neutral social structure to which they are subjected?

Schuck seems to want to say “yes.” He writes:

One might argue that America absorbs all religions by assimilating them to a democratic culture that demands fealty to individualism, formal equality, common morality, and other liberal orthodoxies. Respect for religious diversity, in this view, embraces only practices and beliefs that are broadly consistent with these orthodoxies but does not extend to exotic ones like polygamy, the sacramental use of peyote, and withholding medical care from children. It is in this sense a domesticated, denatured diversity, confined to respect for what does not threaten.²²

That is a terrific statement on behalf of robust, uncivic diversity, or an “undomesticated” pluralism: Diversity is not worth the name unless we accommodate views and practices that “threaten” our own core values, such as individualism (meaning what? individual freedom?), children’s health, etc. Schuck would not take this as far as he might—he would not require public funding of racist schools, he would not require public officials to respect parenting practices that really threaten children’s lives or health. But he sometimes seems to take it pretty far.

It seems to me, nevertheless, that the basic thought here is puzzling. Obviously, we should and do permit a wide scope for freedom, and we tolerate many practices that ought not to be approved of nor publicly funded. I am also sympathetic to the idea that greater choice in schooling or with respect to other forms of public services may increase our capacity to realize our public educational purposes. But I am not convinced, as Peter Schuck seems to be (and he is not alone, as I argued above), that we need a thick new layer of constitutional limitations on democratic public authority. Certainly not in the name of “values” as indeterminate as diversity and neutrality.

21. SCHUCK, *supra* note 1, at 268.

22. *Id.* at 274.