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SYMPOSIUM ON LEGAL AND CONSTITUTIONAL IMPLICATIONS OF THE CALLS TO REVIVE CIVIL SOCIETY

SYMPOSIUM EDITORS

LINDA C. McCLAIN AND JAMES E. FLEMING

I. INTRODUCTION

FOREWORD: LEGAL AND CONSTITUTIONAL
IMPLICATIONS OF THE CALLS TO REVIVE
CIVIL SOCIETY

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and James E. Fleming

SOME QUESTIONS FOR
CIVIL SOCIETY-REVIVALISTS

Linda C. McClain 301
and James E. Fleming

This Article raises some questions for proponents of reviving civil society as a cure for many of our nation's political, civic, and moral ills (whom McClain and Fleming designate as "civil society-revivalists"). How does civil society serve as "seedbeds of virtue" and foster self-government? Have liberal conceptions of the person corroded civil society and undermined self-government? Does the revivalists' focus on the family focus on the right problems? Have gains in equality and liberty caused the decline of civil society? Should we revive civil society or "a *civil* society?" Would a revitalized civil society support democratic self-government or supplant it? McClain and Fleming largely agree with the revivalists that it would be a good thing to revive civil society, but they raise doubts about whether its revival can reasonably be expected to accomplish what its proponents hope for it, e.g., moral renewal, civic renewal, and strengthening the bonds of citizenship. They suggest that civil society is at least as important for securing what we call "deliberative autonomy"—enabling people to decide how to live their own lives—as for promoting "deliberative democracy"—preparing them for participation in democratic life. Working within the tradition of political liberalism, and guided by key feminist and civic republican commitments, McClain and Fleming also sketch their own views concerning the proper roles and regulation of civil society in our morally pluralistic constitutional democracy.

II. THE CONSTITUTION OF CIVIL SOCIETY

A. GENERAL

LAW IN CIVIL SOCIETY, GOOD SOCIETY, AND THE PRESCRIPTIVE STATE

Amitai Etzioni 355

A distinction must be made between the civil and good society. The social philosophies, laws, and social formations applying to both differ, although the two terms have been increasingly collapsed into that of the "civil society." However, such a synthesis precludes sound analysis of both concepts.

THE CONSTITUTION OF CIVIL SOCIETY

Mark Tushnet 379

This Article explores the relationship between the institutions of civil society and our government. Although it is said that the institutions of civil society can act as a check on government power, this Article explores the paradox implicit in that notion: the boundaries of these institutions *are defined by the government* directly or indirectly. After analyzing the question "How can civil society's institutions be an appropriate check on government when the government itself exercises significant influence on these institutions?" Tushnet illustrates how free expression, freedom of religion and substantive due process have been interpreted with respect to the institutions of civil society. In doing so, the Article examines the ways in which constitutional law defines and regulates civil society, as well as the restrictions on the government's constitutional powers to do so. Ironically, Tushnet concludes that the government's constitutional power with regard to civil society's institutions is limited by civil society itself.

B. RELIGION AND CIVIC EDUCATION

CONSTITUTING CIVIL SOCIETY: SCHOOL VOUCHERS, RELIGIOUS NONPROFIT ORGANIZATIONS, AND LIBERAL PUBLIC VALUES

Stephen Macedo 417

The renewed interest in civil society has given rise to a number of constitutional, political, and moral concerns. Critics of "civil society revivalism" worry that relying on local communities and institutions could come at the expense of overarching constitutional ideals of liberal justice. While some argue, for example, that channeling public monies to religious and other private schools would help invigorate the educational influence of families, churches and other communities in civil society, others argue that the flow of public funds to sectarian schools will undermine the public institutions that support citizenship and children's freedom. While acknowledging that there are reasonable concerns associated with school vouchers, this Article argues that there is much that public policy and institutional design can and should do to insure that liberal democratic values are promoted within the sphere of civil society. The polity should take full advantage of the educative and character-forming resources furnished by civil society institutions. However, the flow of tax dollars to private institutions should be accompanied by conditions and restrictions that help insure that public values are being served. Indeed, some constitutional concerns about vouchers are eased when the programs are designed so that schools cannot exclude children with vouchers on religious grounds. One predictable result will be that some religious institutions will have to compromise their spiritual mission in order to enjoy access to public funds, but that is often appropriate and acceptable. The Article also argues against the principle that public policies must be designed to have neutral impacts on religious communities.

This Article responds to the notion that government should identify and enforce a set of common beliefs and values, which McConnell calls "establishmentarianism." McConnell argues that establishmentarianism is inferior to the view that the values of society must emerge from the free institutions of civil society (liberalism). In doing so, McConnell explores the irony that modern insistence on diversity can go beyond mere tolerance of dissenting viewpoints and undermine the diversity and pluralism of society as a whole. Pluralism consists of a variety of different groups; an insistence on pluralism within groups has a homogenizing effect. Specifically, the Article addresses this notion in the context of religious schools where McConnell responds directly to those who wish to use noncoercive forms of state power to secularize these schools and make them resemble common schools. In sum, McConnell concludes that government must promote public virtue indirectly by protecting private associations that develop and transmit divergent world views, and that establishing a public orthodoxy through government power cannot succeed.

CIVIL SOCIETY AND MULTIPLE
REPOSITORIES OF POWER

Abner S. Greene 477

Securing plural mechanisms for human flourishing is at the core of the civil society project. Greene advances this claim first by arguing that it is impossible to disentangle the public from the private in our everyday lives, and thus it is no slight on the civil society project that private, civil society institutions are not exogenous from the public institutions with which they interact. Second, Greene defends the traditional public/private line at least insofar as it reflects plural modes of achieving legal and social change. Third, the Article buttresses the case for civil society even if such institutions foster non-democratic, anti-assimilationist norms. Finally, the Article contends that educating children raises a different and complex set of issues, best resolved by ensuring that no person or persons have monopoly power over such education.

C. POLITICAL PARTIES

*PRIMUS INTER PARES: POLITICAL
PARTIES AND CIVIL SOCIETY*

Nancy L. Rosenblum 493

Primus Inter Pares observes that civil society theorists have left political parties out of their accounts of intermediate associations, and explores the reasons for this omission. Rosenblum argues that the distinctive characteristics of American political parties as membership groups and the internal nomos of parties are keys to their capacity to cultivate the dispositions and practices required by representative democracy.

D. THE FAMILY: GENDER, RACE, AND INEQUALITY

THE FAMILY IN CIVIL SOCIETY *Martha Albertson Fineman* 531

Civic societarians view deviance from the traditional two-parent family as the root of all social problems in the United States. Growing income inequality is central to understanding social decline as many families with young children are struggling financially to provide for their families. The real problem, then, is not with family form, but with the lack of support for dependency relationships.

THE MORAL EXCLUSIVITY OF THE
NEW CIVIL SOCIETY

Dorothy E. Roberts 555

While commending civil society revivalists' commitment to freedom and equality, this Article argues that the revivalists' moral vision is marred by exclusivity. Roberts locates this moral exclusivity in a flawed account of the relationship between social inequality and moral decline. By discounting the importance of social justice for creating civic faith, involvement, and solidarity, the revivalists' proposals tend to benefit society's most privileged families.

III. RESPONSES

WILL THE REAL CIVIL SOCIETY
ADVOCATES PLEASE STAND UP?

Jean Bethke Elshstain 583

Some critics have charged the Council on Civil Society with longing for a society that excludes entire categories of persons from membership, with being blind to "abuse and violence" within marriage, and being blasé about growing social and economic inequalities. This Article responds to these and other critiques from McClain and Fleming, Fineman, and Roberts by arguing that *A Call to Civil Society* clearly demonstrates not only a commitment to the morality and dignity of all human persons, but also a prohibition against any institution that promotes "invidious distinctions between men and women." The remainder of this Article argues that critics of *A Call to Civil Society* in this issue ironically espouse positions that further erode the democratic ideal of social pluralism and bear little relationship to the actual conditions contributing to the weakening of civil society in America.

CIVIL SOCIETY, CIVIC VIRTUE, AND
LIBERAL DEMOCRACY

William A. Galston 603

While the contemporary "civil society revival" is not without flaw, many of the criticisms leveled against it are exaggerated and rest on misunderstandings of the claims being advanced. Contrary to critics' charges, a renewed focus on civil society is compatible with appropriate attention to the significance of economic trends and the public sector. In turn, however, we cannot fully understand the changes in the economy and the public sector without considering the independent causal role of trends in the family, culture, and public opinion. In assessing these trends, qualitative historical-cultural analysis is not enough; quantitative social science data play an essential role.

STUDENT COMMENT

NO TIME IS THE RIGHT TIME: THE SUPREME
COURT'S USE OF RIPENESS TO BLOCK
JUDICIAL REVIEW OF FOREST PLANS FOR
ENVIRONMENTAL PLAINTIFFS IN OHIO

FORESTRY ASS'N V. SIERRA CLUB Eacata Desirée Gregory 613

This Comment examines the Supreme Court decision that resolved the split in the circuits over the justiciability of Land and Resource Management Plans, or Forest Plans, which the Forest Service prepares. In *Ohio Forestry Ass'n v. Sierra Club*, the Court denied the Sierra Club's challenge to the Forest Plan for Wayne National Forest, holding that the issues were not ripe for review absent site-specific, on-the-ground activities. Gregory argues that the Court's decision reflects the continuing use of justiciability doctrines, such as ripeness, to restrict environmental plaintiffs' access to the courts. She maintains that Forest Plans are final agency actions that are binding and cause identifiable injury, thus making them ripe for review. This Comment concludes that insulating Forest Plans from judicial review could eliminate effective and efficient scrutiny of Forest Service actions, contrary to congressional and statutory intent.