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CIVIL SOCIETY AND MULTIPLE REPOSITORIES OF POWER

ABNER S. GREENE*

INTRODUCTION

The primary goal of civil society revivalists is not the revival of civil society. It is the empowerment of otherwise alienated citizens. Reviving civil society is seen as the principal means to that end, but it is not the only means. To be sure, the revivalists focus their attention on participation in nongovernmental associations. But the ways of overcoming alienation are plural, and they include participation in government, participation in nongovernmental associations, and assertions of individual rights against various forms of collective will.

In this brief essay, I first explain why only a pluralist understanding of human flourishing fits with our constitutional structure. I challenge Mark Tushnet’s assertion that a paradox underlies the calls for revival of civil society. Next, I contend that the classic public/private line serves important pluralist ends, helping to ensure a variety of forms of collective action. Third, I take up the claim raised by Linda McClain and Jim Fleming that civil society is valuable only (or primarily) insofar as it fosters civic virtue. At least for adults, this is wrong. Ensuring pluralism for children, however, raises a particularly difficult problem, and in the last section I respond to a challenge raised elsewhere by Steve Gilles, who argues for a strong version of parental liberty to educate children as they see fit. Although Gilles’ framework makes sense in thinking about the liberty of adults, it fails properly to account for the overarching principle of multiple repositories of power when dealing with the education of children.

I. EMBEDDED LIVES: PLURAL WAYS OF FLOURISHING

Think about your everyday life. You pay taxes, cannot park in what looks like an empty space because it is too close to the fire hydrant, and get delayed on the subway for unknown reasons. You

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also get teased by friends for your mood at the local bar, play in your weekly softball game even when you are tired, and get up earlier than you would like in order to get your kids to school. Or consider the flip-side: You are happy that your best way to work is on a newly paved road, crime has gone down in your neighborhood, and your son’s new public school first-grade teacher has him excited about learning. In addition, your private sector job is rewarding, you enjoy your weekly “date” with your spouse to your favorite local bistro, and your new house in the country is coming along fine. Your life—its downs and its ups—is lived in a seamless web of public and private, and you do not spend much time distinguishing public from private pressures or public from private joys. They are all just there, intertwined.

Our lives—our real lives, not the lives of the citizens or persons we often read about in the legal literature—are embedded in a thick public/private mix of influence. Calls for revival of civil society must, therefore, be understood (if not to be turned into straw arguments) as made with the appreciation that we do not one morning just wake up and divorce ourselves from public institutions while running to a peaceful nonalienated land of private associations. Nor should we understand the revivalists to be making the claim that civil society institutions “allow us to generate and maintain values independent of the state’s influence.” Mark Tushnet says revivalists are making just such a claim. He says that “the paradox . . . is obvious: How can civil society’s institutions constrain and be a source of appropriate influence on the very government that defines the boundaries within which they may operate, and that assists them with institutional guarantees?”

But to argue for the exogeneity of civil society—for its existence separate and apart from the state—would be to make an error of description. Civil society institutions may be “private” but they of course are shaped in part by law. Public institutions, in turn, are shaped in part by private mores. The argument for the checking function of civil society institutions—that they can provide a source of power to challenge and offset government—need not depend on the strict independence of those institutions. They can serve as one among many avenues for human flourishing. Even if they are

2. Id. at 6.
endogenous to a broad public-private framework.

The best argument for the revivalists, thus, is not that civil society institutions check the public sector in a way unconstrained by that public sector. Rather, the revivalists should be understood as arguing for a plural form of human flourishing that encompasses participation in civil society institutions, as well as action through governmental or individual forms. This pluralism exists even if we understand these forms of flourishing to be interdependent. And it is linked to the central defining norm of American constitutionalism: multiple repositories of power. Our constitutional culture is built on a shifting foundation, and multiple repositories of power are at the base.3

The refusal to privilege any locus of power, public or private, may be seen in many ways. First, there are the standard divisions of public power: the commitment to dividing power vertically, between nation and states; the parallel commitment to horizontal division of power, among the legislature, executive, and courts; and the role of courts in checking the two political branches. Next, there is the textual locus of many of those checks, the Bill of Rights, many of which help assure the ability of citizens to challenge governing norms. Finally, there is the clearest public/private line: the Constitution’s facial application to government institutions, and its failure to touch private ones.

The result of this careful fracturing of authority is profound. We have no king, no ministry of culture dictating proper English, no prime minister acting in Parliament, no centrally organized church, no power in the courts to block the publication of scandalous newspapers. We have, instead, an irreducible Constitution, one that animates a constant struggle for authority, power, and privilege. Each of the following three sections—on the public/private line, on

the acceptance of significant freedom for adults to create their own normative communities, and on the need to ensure a public sector role in the education of children—is a way of fleshing out our deep commitment to fractured power.

II. DEFENDING THE PUBLIC/PRIVATE LINE

My central claim in this section is that three common distinctions—law versus other constraints, constitutional law versus other law, public law versus private law—serve functions that track our Constitution's core commitment to multiple repositories of power. This requires that both power and its challengers be fractured and relegated to differential modes of collective action. I will offer three arguments. First, all three lines serve a division of labor function; they allow specialization and the development of a certain type of comparative advantage. Second, and more importantly, all three lines promote multiple types of collective action to challenge governing norms. We challenge law through various vehicles, including constitutional amendments, judicial interpretation (controversially), statutory enactments, amendment and repeal, and common law gradualism. We challenge nonlegal norms, such as those of morality and etiquette, through quite different methods. In parallel fashion, the line between what is and is not governed by the Constitution instantiates differential modes of collective action: amendments (and perhaps judicial ruling) for constitutional change and lobbying to gain statutory and regulatory change. Likewise, convincing a legislature or agency to add, amend, or repeal a statute or regulation requires a different type of collective effort than convincing a common law judge to develop principles of common law. Third, all three lines acknowledge our doubts about the legitimation of authority. In establishing different methods for challenging authority, these lines recognize different theories of legitimacy.

When the critical theorist suggests that any of these three lines are fragile, she is certainly correct but, in my view, she is missing the point. I agree that we must study nonlegal norms, seek to apply constitution-like rules to private actors, and persuade common law judges to be less reactionary. The question is not whether collective

4. For example, my defense of the public/private distinction is not meant to secure a private realm of family life toward which the state has no appropriate regulatory role. My concern is to always keep front and center the varieties of methods of achieving social change—to avoid privileging the centralizing mode over less-centralizing contenders.
action is important on both sides of these lines, but rather whether the same type of action should promote change on both sides. There are substantial reasons embedded in our constitutional structure to avoid reducing all sources of constraint to a ground norm, challengeable through a common method. Both negative and positive arguments exist for this conclusion. We should doubt whether any particular method of collective action is best; each method has distinct virtues.  

A. Division of Labor

First, and most obviously, our core commitment to multiple repositories of power both relies on and instantiates a healthy division of labor. Rather than expecting a legislator to be an executive, a constitutional norm-maker to be a private lawmaker or a social anthropologist to be a lawyer, the fracturing of authority allows various shops to be set up. Comparative advantages can be developed. Specifically, expertise can be developed efficiently, without the need to become a master of social change in all of its guises.

B. The Diversity of Modes of Collective Action

The critical push toward collapsing the public/private distinction threatens the diversity of modes of collective action. Assume the schools in my neighborhood are awful, underfunded, crime-ridden and delivering poor education. How should I and my neighbors seek to change this utilizing the three instances of the public/private distinction? To begin with, we can use nongovernmental, private community methods of action (as opposed to invoking rules of positive law). We can seek legislation (as opposed to invoking constitutional norms). We can seek to persuade a state judge to construe our state’s common law as mandating an equal education for all (as opposed to invoking constitutional norms or seeking legislation). I am not now concerned with which of these methods

5. My argument has great affinity to Mike Seidman’s argument in Louis Michael Seidman, Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law, 96 YALE L.J. 1006 (1987). Where Seidman focuses on the need to have robust public and private realms in which different values can be advanced, I focus on the need to maintain diverse modes of collective action to advance such values. We share a sense of the importance of keeping the boundary between the public and the private fluid, subject to creation and recreation in the cauldron of politics. See Greene, Irreducible Constitution, supra note 3, at 299, 301.
will be most productive or which should be available. The example is meant to illustrate the various modes of collective action that are ordinarily available (although not always, in the end, applicable).

Looking first at the public/private distinction as seen through the governmental/nongovernmental line. Assume there is a private association that discriminates against racial minorities. How might this be stopped? We might try to act without the aid of government. Various forms of private pressure might be brought to bear, including picketing, meetings with association leaders, boycotts of association members’ businesses, and meetings among those challenging the association. These forms of collective action are nongovernmental, but they are the essence of politics. They help to bring together previously disparate folk; the common enemy, the association, helps to create a community-in-opposition that it wishes would just go away.6

What would happen if the disaffected abjured these methods of action, and instead went directly to court, for a constitutional or common law ruling, or to the legislature, for statutory action? Many of the virtues of the private forms of collective action would disappear. I am talking now not only about the possibly greater effectiveness of private action, but also of what one might call the ancillary effects of such action. Namely, the bonding among the challengers and the increased confidence in their ability to affect the conditions of their lives.

Next consider the public/private distinction at the governmental level, where constitutional norms are set against statutory ones. Why should we refuse to apply constitutional anti-discrimination norms directly to private exclusionary associations? I do not doubt for a minute that many such associations affect the lives of the excluded in substantial ways. My local public school might refuse to admit black children; my local little league might do the same. Both will have

6. There is, of course, great instability in the definitional distinction between public and private here. Both governmental and nongovernmental power sources use sanctions and forms of coercion. Perhaps initial consent in joining can identify the nongovernmental associational realm, but that condition also seems inexact, given both the possibility of exit from a governmental jurisdiction and the lack of truly volitional consent in joining many nongovernmental groups. On involuntary membership as the touchstone of “government” versus “nongovernment,” see Robert C. Ellickson, Cities and Homeowners Associations, 130 U. Pa. L. Rev. 1519, 1523 (1982). Additionally, I do not suggest that life apart from government is somehow natural or prepolitical. See Karl E. Klare, The Public/Private Distinction in Labor Law, 130 U. Pa. L. Rev. 1358, 1417 (1982). Even given an unstable borderline between the public and the private, and even given the infusion of politics in both forms, my concern is to recognize the value of the various methods of politics, of collective action.
disastrous results for the black kids, not to mention the white ones. If we aggregate private opportunities for discrimination, it becomes clear that private power centers can be every bit as dangerous as public ones. So why not apply constitutional norms to the private centers? Underlying the textual answer (the Constitution in most places constrains governmental actors only) is an answer sounding in multiple repositories of power. Just as government itself must be fractured at its core, so must the ways to challenge power, public and private, be divided rather than united.

By refusing to apply the Equal Protection Clause to the racially discriminatory private association, and by refusing to apply the Free Speech Clause to the corporation that forces its employees to toe the company line, we accomplish two important goals. First, we allow ourselves to remain unsure of the correctness of any particular form of collective action. I will say more about this in the next section; the main point is that a certain agnosticism about virtue is not only healthy, but also fitting with the broad anti-foundationalism of our constitutional culture.

Second, and the focus of this section, we encourage a diversity of modes of collective action. You cannot just walk into a federal court and get an injunction against the private discriminator or speech-suppressor. You must proceed in other ways. The discussion of the first instantiation of the public/private distinction just above—the governmental/nongovernmental line—suggests that you can gather up like-minded dissenters and find various ways of applying pressure. This is a kind of grass-roots political empowering that does not exist with lawsuits. The next instantiation, constitutional/nonconstitutional, suggests the use of legislative modes of change. Just as private pressure can lead both to more finely reticulated responses from the oppressors and more genuine bonding among the oppressed, so can legislative lobbying produce results different from those engendered by constitutional agitation.

The third instantiation of the public private line is the so-called public law/private law distinction. Here, I will focus on the institutional issue: the common law as made by judges versus statutory/regulatory law made elsewhere.7 Remember that the pressure toward collapsing the public/private distinction comes from

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7. In source of law terms, law is “private” if made by nongovernmental actors and merely enforced by the courts. The common law has been (in its less ambitious guise) the method for private law to manifest itself in a governmental pronouncement.
the public side, wanting to diminish the private. So, one might argue that advances in, say tort law, should be made legislatively rather than judicially. The legislature is more accountable than the judiciary. The legislature has fact-finding capabilities the judiciary lacks. Legislation applies prospectively, which has its own virtues. So why allow tort law to be made by judges?

There are two answers, depending on one's view of the common law. If we want the common law to be the "common" law, moving incrementally and capturing common understandings through the law, then the virtue of so-called private law is its mirroring of nongovernmental modes, yet capturing them in a governmental form, thereby allowing governmental sanctions. If we want the common law to be something grander (think of California's development of product liability), then the virtue of so-called private law is in its elegant (mischievous?) combination of policymaking without accountability. A republican form of government may be bequeathed to us in Article IV, Section 4, but nonrepublican forms of action can be salutary, ushering in important legal/social change that otherwise would not occur; either because of too-high collective action costs in the purely private realm (too hard to fight Coca-Cola's exploding bottles through citizen boycotts) or too-high lobbying blockades in the legislative realm.

The criticism of the three instantiations of the public/private line decries the smallness of the private and champions the tremendous ability of the public to get things done; to sweep away power centers that have privileged the haves and stomped on the have-nots. My main point in this section has been to defend a diversity of forms of collective action, which I believe the public/private line results from and helps to foster.

C. Uncertainty and Legitimacy: A Different Type of Diversity

In the previous section, I said that maintaining the public/private distinction in each of its instantiations allows us to remain unsure of the correctness of any particular form of collective action, and that a certain agnosticism about virtue is not only healthy, but also fitting

8. There is, of course, enormous pressure to collapse the public into the private, as well. But libertarian critiques of government, although sharing a desire to dissolve the public/private line, raise a host of different problems. I won't deal with them here.

9. Clearly more so than an unelected judiciary; probably more so than an elected judiciary, too, because each legislator will represent fewer people than a judge and will hold herself out as a constituent server.
with the broad anti-foundationalism of our constitutional culture. This section is a point about both uncertainty and legitimacy.

With respect to uncertainty, there are times when we are convinced that law is needed over extralegal norms, or constitutional law over other law, or public law over private. At many other times we may be only marginally persuaded of the need for one form of collective action over another. In constitutional law there are famous (and unending) debates about whether a constitutional versus statutory mode is the best way to go in certain instances (e.g., the criticism of *Roe v. Wade* on the ground that state statutory action was solving the problem and leading to greater political empowerment). Relishing the diversity of modes of collective action helps guard against the hubris of certainty, thus acknowledging and bringing to light a deeper uncertainty of the chosen means of achieving social change. That uncertainty leads to a greater willingness to consider other options for change, to question one’s chosen method.

In regards to legitimacy, classic doubts about the legitimacy of governmental action persist on both the left and the right. The right tends to argue along lines of non-consent—both systemically and issue by issue, government acts on all with the actual consent of only some. More generally, the challenge from the right seeks to limit government on the ground that even if a more systemic notion of consent is available, because such a notion will necessarily depend on certain fictions, the resulting governmental power should be made small. The left has a different concern. The concern here is about the cooptation of government by sources of concentrated power, and the deliberate and indifferent ignoring of the needs of those that are worse off.

Both right and left are expressing concerns about governmental legitimacy. Maintaining a robust public/private line can help assuage such concerns by leaving in place various methods of challenging power. Each method may have its own legitimacy problems, to be sure, but because no method gains monopoly status, the legitimacy problems are traded off against each other and thereby minimized. In the first instantiation of the public/private distinction, we can engage in extralegal forms of collective action not just because of their

empowering virtues, but also because of their more direct claim to legitimacy. The banding together of like-minded people to force change from a local institution of power skirts the legitimacy problem of getting the government to force such change. When the local power institution yields to the community demands, we can see this as analogous to private contracting, to “true” consent by both sides. Such consent is absent if the city council pushes similar change through legislation. Extralegal forms of collective action have their own legitimacy problems, though. Heavy forms of coercion from parochial interests may force decisions in the interest of the few rather than the many, whereas governmental action would filter the parochial interests, leading to legislation (or other forms of governmental action) more truly representative of the population.

In the second instantiation of the public/private line, the legitimacy problems of constitutional change are widely understood. To the extent that constitutional change takes place through judicial decision (I bracket whether such is the case), much has been written about the legitimacy problems regarding the power of nine unelected judges. Statutory, regulatory, and common law change are all trumpeted as more legitimate.

Constitutional amendment is also thought, by some, to have greater legitimacy than judicial “interpretation.” But constitutional amendment carries its own legitimacy problems. The difficulty of the amendment process is based on what many deem fundamental illegitimacy in the document—equal representation in the Senate plus a supermajority requirement. The Senate problem is thought to violate a cardinal principle of equality. The supermajority requirement (although lauded by many) is problematic both on its own (denying the voice of the majority in some instances) and when combined with the Senate problem (allowing a few underpopulated states to have a vastly disproportionate impact on amending). But just when it seems that nonconstitutional methods of governmental change are superior, good arguments come along for the greater legitimacy of higher lawmaking of constitutional change in whatever guise (amendment, judicial interpretation, or constructive amendment by the people). Lower lawmaking, the quotidian stuff of politics, carries its own brand of illegitimacy, including capture by powerful private groups.

Such concerns with constitutional and statutory change arise in the third instantiation of the public/private line. Public law is either too unaccountable (in its constitutional forms) or too accountable (in
its lower track forms). Private law, some argue, is more truly representative and efficient than public law. Thus, it is more legitimate. It is a close cousin of extralegal forms of collective action, in some cases simply opening the courts to enforcement of such private deals. But private law is not free from legitimacy problems, which include some of the problems of extralegal action and some of statutory action—a certain parochialism, denial of the common good, and shift of power from one monopoly source to another.

Forcing social change will always raise legitimacy questions. Maintaining a diversity of modes of collective action helps to minimize the challenge from any given front and, in a way, aids in legitimating the entire package of collective action on all fronts combined.

III. IS CIVIL SOCIETY DEFENSIBLE ONLY IF IT FOSTERS CIVIC VIRTUE?

My principal difference with the paper offered by this symposium's co-organizers, Linda McClain and Jim Fleming,12 is that it continually critiques civil society institutions for not carefully enough inculcating democratic virtues, virtues of citizenship. This critique is misplaced, for one of the hallmarks of civil society institutions is their centrifugal rather than centripetal force. That is, many nongovernmental associations offer values that are more separatist and insular than they are inclusive and heteronomous. That our constitutional order both permits government to foster the collective through government speech rather than coercion, while simultaneously allowing private, nomic communities to develop quite different modes of living, is a strength rather than a weakness. It is wrong to chastise civil society institutions for not being enough like public institutions.

McClain and Fleming sound the call throughout their paper for civil society that mirrors or buttresses public citizenship. They do this first by characterizing the revivalists as calling for civil society to "prepare[ing] children to be good citizens" and for the family to be the first and most important school for citizenship.13 Having set up the revivalists this way, they then ask, "how does 'table talk'... shape

13. Id. at 310.
family members for democratic self-government?" They add, "there is nothing about families and their moral discourse that insures that they will be seedbeds of virtue rather than seedbeds of vices such as parochialism, prejudice, and intolerance." The revivalists also, according to McClain and Fleming, "claim that participation in voluntary associations within civil society fosters the arts and habits of self-government." But how do these institutions "develop a commitment to shared values?" They do acknowledge that civil society "is at least as important for securing deliberative autonomy—enabling people to decide how to live their own lives—as for promoting deliberative democracy—preparing them for participation in political life." But this concession does not lead McClain and Fleming to analyzing the virtues of a private associational realm that offers, perhaps, homogeneity rather than heteronomy. Instead, they suggest two ways in which civil society and democratic self-government may be linked. First, civil society associations may serve as "counterpublics" to the state. But McClain and Fleming's description of these counterpublics suggests virtue only insofar as they mimic democratic values. Second, civil society associations may serve as locations for democratic deliberation. Again, the virtues of civil society are seen through the prism of civic virtue only.

The argument that civil society should be judged by how successfully it replicates the virtues of a democratic public realm is clearest when McClain and Fleming discuss public reason. Public reason requires that fundamental political decisions are made on the basis of a common ground, rather than on a particular comprehensive view of the good. "The disposition to honor the moral duty of civility," argue McClain and Fleming, "including the constraints of public reason, is a crucial component of civic virtue properly conceived. . . . Citizens who reject this duty of civility are thus lacking in civic virtue. . . . For they put their zealous quest for the good as they see it above pursuing the common good and common ground . . . ." And if civil society spawns such "bad seeds," it is appropriate for the state to try to "civilize" them, "through

14. Id. at 311.
15. Id.
16. Id.
17. Id. at 312.
18. Id. at 316.
19. Id. at 318.
20. Id. at 346.
inculcation of such principles as freedom, equality, and toleration."^{21}

If civil society institutions are to be judged by their replication of core commitments of the state, then they will often fail. It is as if Chief Justice Burger's defense of the Amish in Wisconsin v. Yoder^{22} became the template for acceptance of nongovernmental associations. Recall that the Amish parents were arguing for a constitutionally based opt-out from mandatory schooling laws.^{23} Burger's opinion for the Court awarding such an opt-out focused on how the Amish way of life, although insulated, replicated just what any parent would want for their children, and what we would want from our democracy.^{24} Burger's opinion appears to rest the case for an opt-out on the separating group's willingness to mimic in their insulation what we otherwise cherish in our assimilated environment. To recognize a constitutional right of exit only under such terms is not to recognize much. The same could be said of McClain and Fleming's argument in their paper here. The virtues of civil society institutions must be understood apart from how well they replicate our core common public commitments.

Elsewhere I have argued for the virtues of separatist, nomic communities.^{25} It is not just that they offer a place of opposition to the government and that they desire to foster conceptions of the good that differ from those of the public realm. We must also recognize that these nomic communities seek to remain apart from that realm, without even serving as a source of opposition. Some communities want to live by themselves, by their own mores, and simply be left alone. Our constitutional order is capacious enough to permit this. In fact, the multiple repositories of power understanding of our constitutional culture—its anti-foundationalism and its radical recognition of plural locations of power—insists on the virtues, not just the necessary evil, of communities that wish to exit, either in whole or in part.

IV. CHILDREN AND CIVIL SOCIETY

Although adults must be given the freedom to depart from the public, civic order, the same argument cannot apply to adults' choices

21. Id. at 347-48.
23. See id. at 209-12.
24. See id. at 209-12, 240.
25. See generally Greene, Kiryas Joel, supra note 3.
for their children. There are two principal arguments for ceding substantial power to parents to educate their children as they see fit. The first is that part of liberty of adults includes the freedom to choose how to educate their children, even if that involves education in insular, nondiverse ways of thinking. The second is that the best interests of children are served, generally, by granting virtually nonregulable education power to parents. Steve Gilles has written a "parentalist manifesto," which relies on a version of the second argument. Here, I contend that ensuring a robust civil society while simultaneously remaining true to our Constitution's core principle of nonconcentrated power requires rejecting Gilles' position.

Gilles argues that "the deference we extend to parental educational choices should approach (though not necessarily equal) the deference we give to the self-regarding choices of adult individuals." An argument from "parental incentives asserts that the state should defer to parents' educational decisions on the ground that parents are more likely to pursue the child's best interest as they define it than is the state to pursue the child's best interest as the state defines it." Here, Gilles maintains that we "should allocate comprehensive educational authority to whoever is most likely to act in the child's best interest," and that "parents seem naturally inclined to love and care for their children."

An argument from "parental ideals rejects the claim that the state has a paramount interest in controlling the education of its future citizens, on the ground that individuals have an even more fundamental interest in nurturing their children and in being nurtured by their parents." Here, Gilles makes the following arguments: "[c]hildren belong to (and with) their parents," "[p]arenting is central to the flourishing of parents and children," "nurturing children is inseparable from shaping their values," "majoritarian control of the child's values is unjust," "[m]ajoritarian interference

27. Id. at 939.
28. Id. at 940.
29. Id. at 952-53.
30. Id. at 953.
31. Id. at 940.
32. Id. at 961.
33. Id. at 962.
34. Id. at 965.
35. Id. at 967.
with parental transmission of values is likewise unjust,"36 and finally "[m]ajoritarian interference with parental education is not in the child's best interest."37 Accordingly, because of both the argument from parental incentives and the argument from parental ideals, the state should displace parental education of children only if the parents "unreasonably deprive children of the essential prerequisites for adult life and liberal citizenship."38

I agree with much of Gilles' argument. Our constitutional culture does not support heavy top-down imposition of child-rearing decisions. The commitment to divided power requires that families exist as separate sources of normative authority. But we can retain strong families and simultaneously ensure that children reap the benefits of multiple repositories of power. The simple way to achieve this is to insist that all children attend public schools.39 This way (which would involve overruling Pierce v. Society of Sisters)40 parents would be able to influence directly an enormous proportion of a child's time (all the time not in school) and teachers and children of various walks of life would be able to influence another, smaller proportion.

An immediate objection to this idea is that the state would become a monopolist of formal education, and that does not seem to gibe with the commitment to divided power. But the enormously difficult problem regarding children's education is that the alternative, allowing parents to control the formal education of their children, risks losing some children to the monopoly of their parents. Parents who would educate them in ways that never give children the opportunity to learn to choose differently. At least in my suggested system parents can still, through their love and nurturance (key factors for Gilles), have heavy influence over how their children develop.

Gilles rejects an argument of this sort. "[T]he state battling with

36. Id. at 968.
37. Id. at 970.
38. Id. at 941.
39. Such a move would also allow us to devote our educational reform efforts at improving public schools, even public school choice, rather than pushing toward the establishment of a multitude of private schools, many of which will be homogenous. I make the argument here for requiring public schooling, but I could make the same point in a somewhat weaker way by allowing private schools with substantial state oversight to ensure that certain values be taught. See AMY GUTMANN, DEMOCRATIC EDUCATION 32-33, 50, 118 (1987). Gilles rejects both models.
40. 268 U.S. 510 (1925); see also Greene, Vouchers, supra note 3, at 406-08.
minority parents to win the child's allegiance is both subversive of parental nurturing and authority, and counter to the widely held and reasonable judgment... that the child needs to receive a coherent education shaped by some controlling conception of the good."41 Gilles adds an argument that since we all want our children's education to follow our notions of the good life, we would agree in principle to a reduced role for the state. But that argument is highly contentious and basically assumes away all of the key disputed matters. It is the first argument that must carry the day here for Gilles: that the "strongest educational influences in the child's life" should not be placed "at cross purposes" and thereby "sow confusion and discord rather than coherence and stability."42 This is a critical juncture of Gilles' paper, because one could agree with virtually everything else he argues about parental authority over children, but depart at this point by insisting on a critical state role to counteract a potential parental monopoly. Gilles' argument that children are somehow damaged by being exposed to a multitude of values, of theories of the good, is completely speculative, and it is anchored in a highly disputed conception of moral learning.

In the next section of the piece Gilles maintains that "most parents agree that children need to be raised in some coherent, comprehensive tradition that will ground their values and beliefs."43 Either this is uncontroversially true (to the extent that it cedes a substantial role to parents in rearing their children) or it speculatively resolves the key question (on whether raising children to believe in certain things is significantly damaged by insisting that children be exposed to other norms as well).

I would suggest, contrary to Gilles, that strong, loving parents can handle the conflicting values their children might pick up in public schools. By showing both through word and deed a better way to be, parents can strengthen those purportedly superior choices through opposition to other modes, rather than simply teaching them in a vacuum.

41. Gilles, supra note 26, at 969.
42. Id.
43. Id. at 970.