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# Civil Society, Metaphysics, and Tolerance

DAVID C. WILLIAMS\*

Professor Becker's paper powerfully documents the dependence of civil society on particular social conditions. Civil society is not a cure-all for all times and all places; it cannot survive unless the context is right. As a historian, Professor Becker devotes most of his attention to a close description of the writings of early proponents of civil society, like Burke and Hume and Smith; he explains to us what they thought it took to make civil society work. He also offers, however, one predictive/normative claim of his own: for civil society to work, citizens must make political claims based on interest, rather than metaphysics.<sup>1</sup> Because they are totalizing, Professor Becker argues, metaphysical claims tend to destroy the respect for private association necessary for civil society.<sup>2</sup> In keeping with the disciplinary norms of my own field, I intend to focus on the soundness of this claim under modern conditions. I will argue that civil society does not depend on a politics of interest but on a culture of tolerance. A politics of interest can sometimes help advance a culture of tolerance but can sometimes frustrate it; a metaphysical politics can sometimes frustrate a culture of tolerance but can sometimes help it.

A consideration of the American experience suggests the importance of cultural tolerance to civil society because the American experience defies the predictions of those who believed that civil society depends on factors other than tolerance. To many eighteenth-century writers, civil society was so dependent on those other social factors that it must have seemed a veritable hothouse flower. Some writers believed that civil society depended on social hierarchy,<sup>3</sup> and in Professor Becker's view, civil society indeed emerged from and was secured by a culture of deference.<sup>4</sup> Civil society, under this view, might be threatened by the egalitarianism of the market itself, which was also paradoxically one of the constituent elements of civil society.<sup>5</sup> Some writers believed that civil society might be threatened by democracy. In this view, democracies can be turbulent and unruly; the mobilized people might seek through democratic reform to invade the market and private sphere so central to civil society.<sup>6</sup> For related reasons, some writers feared that civil society could not survive revolution; civil society

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1. See Marvin Becker, *An Essay on the Vicissitudes of Civil Society with Special Reference to Scotland in the Eighteenth Century*, 72 IND. L.J. 463, 465-67 (1997).

2. Relatedly, according to Professor Becker, the state must take care to ensure that the minimal material interests of its citizens are met, lest it invite revolution. Professor Becker therefore warns that the elimination of welfare in this country might lead to a breakdown in the general economic satisfaction necessary to allow civil society to flourish. See *id.* at 464-65, 471-72.

3. See *id.* at 472-73.

4. See *id.* at 468, 471-72.

5. See *id.* at 473.

6. See *id.* at 463, 470-71.

depends on incremental, practical reform, not a totalizing attempt to remake human nature on behalf of the volk.<sup>7</sup>

For some early proponents, then, civil society existed in some tension with equality, democracy, and revolution. Professor Becker hints that, if reconceptualized, some broader notion of civil society could and did survive all of these threats,<sup>8</sup> but he predicts that it might not survive a further change, from a politics of interest to a politics of metaphysics. In this prediction, he again echoes a worry common in the eighteenth century, that civil society depended on a politics of interest, in which all are willing to bargain and compromise their claims. By contrast, in this view, a metaphysical politics always threatens to become totalizing in the same way that a democratic or revolutionary politics does.<sup>9</sup>

According to Professor Becker, this distinction is not a historical relic but a live concern, as Americans increasingly argue about metaphysical concerns in the public square with little resolution and much anger, even hatred. He writes:

[C]ivil society cannot deal with the proposition that racism must be eradicated, but it can work to prevent illegal discrimination. It cannot end rape or “take back the night,” but it can ensure that legal procedures will be more fair to women. It cannot end homophobia, but it can punish employers for job discrimination. In other words, it cannot satisfy grand and overarching claims for fundamental changes in culture or social psychology. Moreover, the public space or political sphere characterizing civil society is inadequate to deal with ideological differences such as the opposition between “pro-life” and “pro-choice.” As eighteenth century exponents of civil society clearly perceived, such ideological differences were not amenable to rational disposition or empirical proof.<sup>10</sup>

The experience of America, however, belies these worries. To European observers, before and after Tocqueville, America seemed the very exemplar of civil society.<sup>11</sup> It was full to overflowing with private associations,<sup>12</sup> and it cherished the free market and limited government.<sup>13</sup> Yet America was also revolutionary, democratic, and egalitarian. To be sure, it would not do to overstate any of these qualities. Recent historical writing reminds us that America was never as democratic or egalitarian as we might retrospectively like to believe,<sup>14</sup> and we were revolutionary only sporadically—in 1776<sup>15</sup> and around

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7. *See id.* at 464, 468-71.

8. *See id.* at 463, 473-76.

9. *See id.* at 465-66.

10. *See id.* at 469.

11. *See* ADAM B. SELIGMAN, *THE IDEA OF CIVIL SOCIETY* 12, 61-62 (1992).

12. *See* ROBERT H. WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* 15, 72-75 (1995).

13. *See id.* at 23-26, 43-44.

14. *See id.* at 7, 16, 86-111.

15. *See* GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992).

the Civil War,<sup>16</sup> and perhaps in 1787,<sup>17</sup> during the New Deal and the 1960s.<sup>18</sup> Yet even with these qualifications, America was clearly more democratic<sup>19</sup> and egalitarian<sup>20</sup> than Europe, and our revolutions did not kill civil society in this country—if anything, they created space for it.<sup>21</sup>

Indeed, not only was there no tension between American civil society and revolution, democracy, and egalitarianism, many Americans believed that these qualities positively helped to promote civil society. Revolution cleared the decks of the old British imperial power<sup>22</sup> and, later, via the Civil War, abolished the southern slavocracy<sup>23</sup> that sought to control the world of work and association. Democracy encouraged the growth of a self-assertive, liberty-loving, and self-directed citizenry, and it blocked the creation of an overly-intrusive state.<sup>24</sup> Finally, egalitarianism purportedly inhibited the growth of a neo-feudal regime that would have restricted the economic and associative freedoms of its peons.<sup>25</sup>

Much the same could be said about the relation of civil society to a politics of metaphysics. America has managed to retain a vibrant civil society despite being more pervasively and utopianly religious than Europe for quite some time.<sup>26</sup> Such religious convictions have entered into American politics from the beginning. They account for many of the most inspiring and liberating politicolegal movements in American history: the abolitionists,<sup>27</sup> the early women's rights movement,<sup>28</sup> the religious wing of the civil rights movement,<sup>29</sup> all sought to remake American culture in light of divine commands. Those metaphysical convictions even account, in a general sense, for Americans' tendency to see their country as a light to the world, a nation charged with the special mission of

16. See JAMES M. MCPHERSON, *ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION* 3-42 (1991).

17. The extent to which the Constitution was revolutionary has become a subject of considerable scholarly contention of late. See, e.g., Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475 (1995); Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994); Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13 (1995).

18. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 103-13 (1991).

19. See WIEBE, *supra* note 12, at 15, 42, 83.

20. See *id.* at 17-18, 42, 44-47.

21. See *infra* text accompanying notes 22-23 (discussing British imperial power and slavocracy).

22. See WIEBE, *supra* note 12, at 18; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969).

23. See MCPHERSON, *supra* note 16, at 1-22; WIEBE, *supra* note 12, at 96-100.

24. See WIEBE, *supra* note 12, at 27-30, 61, 65-70.

25. See *id.* at 23-27, 30-31, 44-46.

26. See BARRY A. KOSMIN & SEYMOUR P. LACHMAN, *ONE NATION UNDER GOD: RELIGION IN CONTEMPORARY AMERICAN SOCIETY* 8-9 (1993); WIEBE, *supra* note 12, at 90-91.

27. See RONALD G. WALTERS, *THE ANTISLAVERY APPEAL: AMERICAN ABOLITIONISM AFTER 1830*, at 37-53 (1976).

28. See WIEBE, *supra* note 12, at 107-08.

29. See SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 1072-78 (1972).

spreading democracy and liberty around the globe.<sup>30</sup> And many Americans believe that its metaphysical bedrock has helped civil society, rather than injured it, for at least two reasons. First, the robust proliferation of religious groups and metaphysical ideas has meant that no one group can seize political power to oppress others.<sup>31</sup> Second, much of American metaphysics has centered precisely on the importance of civil society to a fully-realized human life and a redeemed America.<sup>32</sup>

How do we account for this strange consistency of civil society with many qualities that Europeans found so threatening? I submit that revolution, democracy, egalitarianism, and even metaphysics are in the abstract neutral with regard to civil society; they are all forms by which citizens can promote or suppress civil society, depending on their underlying cultural values. And one chief cultural value supporting civil society in a diverse republic is tolerance.<sup>33</sup> If our culture is tolerant, then we are likely to have tolerant revolutions, tolerant democracies, and tolerant metaphysics. If it is not, then we will not. By the same token, a politics of interest can destroy civil society when those in charge become intolerant of the interests of others. Indeed, despite their rhetoric, most totalitarian states rest on a politics of interest: one group seizes the state machinery for its own ends and uses it to suppress rival systems, such as civil society.<sup>34</sup> Moreover, a politics of interest contains its own incentives to intolerance and the destruction of civil society: if politics is nothing more than the pursuit of interest, then it may seem perfectly natural to take advantage of a position of power to oppress others. Indeed, perhaps the surest way to guarantee oppression is to teach citizens that civil society is nothing more than a slightly domesticated war of all against all, that tolerance is a hopeless illusion.<sup>35</sup>

30. See SACVAN BERCOVITCH, *THE AMERICAN JEREMIAH* 176-210 (1978); SACVAN BERCOVITCH, *THE PURITAN ORIGINS OF THE AMERICAN SELF* 136-86 (1975).

31. The classic exposition of this idea is Madison's *Federalist* No. 10:

A zeal for different opinions concerning religion . . . have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. . . . Extend the sphere [of a republic] and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.

THE FEDERALIST No. 10, at 124, 127 (James Madison) (Isaac Kramnick ed., 1987).

32. See BERCOVITCH, *THE AMERICAN JEREMIAH*, *supra* note 30, at 181-90; SELIGMAN, *supra* note 11, at 71-91 (detailing the metaphysical roots of American civil society).

33. I do not, of course, mean to suggest that tolerance is the only important value, nor do I mean to suggest that tolerance alone will protect civil society. I do, however, mean to argue that cultural values like tolerance are more significant to the preservation of civil society than maintaining a politics of interest instead of a politics based on metaphysical claims.

34. See ABBOTT GLEASON, *TOTALITARIANISM: THE INNER HISTORY OF THE COLD WAR* 18, 107, 132, 172, 189, 285-86 n.92 (1995).

35. At the risk of belaboring the obvious, let me reiterate that I am not arguing that revolution or metaphysics or even democracy or egalitarianism are necessarily good things. Nor am I even arguing that they always support civil society. Rather, I am arguing that they sometimes support civil society and sometimes destroy it. To argue, as Professor Becker does,

Like Professor Becker, many liberal theorists have recommended a politics of interest rather than metaphysics. I suspect, however, that when theorists make this recommendation, they have particular sorts of metaphysics and interests in mind. They assume that metaphysics will be intolerant, totalizing, and dictatorial—and some metaphysics fit that description. They also assume that citizens will view their own interests as partial, malleable, and hence compromisable—and sometimes they do. But sometimes citizens pursue their own interests in intolerant and totalizing ways, and some metaphysics are gentle, tolerant, and ecumenical. In short, I believe that in recommending a politics of interest, most theorists are really concerned about something else, and that is civic humility leading to cultural tolerance. But if that is what we really want, then that is what we should espouse.

Let me offer two examples to illustrate this claim that civil society does not depend on a politics of interest and can tolerate a politics of metaphysics. After the Civil War, the radical republicans that formulated the Thirteenth, Fourteenth, and Fifteenth Amendments offered a metaphysical explanation for their work: they were promulgating the rights that natural law gave to every citizen of every free republic. They sought to overhaul American culture, especially Southern culture, to free it from the past. And they thought that they were speaking and writing for the ages, to wreak a permanent change in American history. Yet the goal of this very metaphysical crusade was precisely the advancement of civil society—in the republicans' famous slogan: free soil, free labor, free men. They sought to strike the shackles of slavery from the South and substitute a free market system, and they sought to perpetuate, guarantee, and extend that system in the North.<sup>36</sup> Contra Professor Becker's thesis, then, metaphysical politics does not necessarily destroy civil society.

Nor does a politics of interest guarantee civil society. For example, the antilabor movement of the early twentieth century sought to extinguish civil society among workers. Through antistrike injunctions, tortious interference suits, yellow dog contracts, brutal use of private police, and the national guard and other mechanisms, employers sought to ensure that employees could not organize to press for economic demands. In many places, this campaign resulted in a virtual state of legal peonage for workers, forced to work and to work in the same job regardless of their wishes. Yet this movement was based not on any metaphysical wish to overhaul American society, but rather on simple interest: employers sought to retain the economic power that they then enjoyed, even if it meant destroying civil society for many Americans.<sup>37</sup>

My claim—that civil society depends on a culture of tolerance rather than a politics of interest—is in some ways hopeful. As Professor Becker argues, American politics now contains many metaphysical elements and is perhaps

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that there is an inherent tension between metaphysics or revolution on the one hand and civil society on the other is thus to oversimplify a complicated relationship.

36. See ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1970); MCPHERSON, *supra* note 16, at 3-10; WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 44-47, 60-90 (1988).

37. See WIEBE, *supra* note 12, at 126-27, 130-31.

becoming more metaphysical. In my view, however, if civil society cannot coexist with metaphysical politics, then civil society is in trouble. Many of the best things in life are metaphysical, and it is unlikely that politics could ever successfully bar them at the door for long. Because humans thirst for communal meaning, it seems unlikely that citizens could subsist for long on a pure politics of interest.<sup>38</sup> Happily, as I have argued, civil society can coexist with metaphysical politics, as long as they are tolerant metaphysics.

On the other hand, the dependence of civil society on a culture of tolerance creates its own problems. First, there are analytical difficulties. I have not defined the content of a tolerant culture with any precision, and it may not be possible to offer a rigorous, acontextual definition. No culture can be infinitely tolerant; beyond some point, a tolerant culture cannot tolerate intolerance. We therefore must draw a line between intolerance of intolerance on the one hand and simple intolerance itself on the other. That line can be very difficult to draw, and it is the subject of much liberal theory. Thus, Professor Becker argues that civil society cannot seek to eradicate racism or misogyny or homophobia. By contrast, I would submit that any civil society worth its salt must try to eliminate precisely those intolerant creeds; unless it does so, civil society cannot be a lived reality for minorities or women or gay Americans. Sometimes one must restrict some freedoms—as of the employer to discriminate—in order to secure others—as of the employee to be judged on his or her own merits. But it is often difficult to know how to make such judgments.

Second, there are cultural problems: how do you secure a tolerant culture? I have assumed throughout these remarks that America has a tolerant culture, a culture that explains the efflorescence of civil society here. But America has often been intolerant,<sup>39</sup> and our tolerance has often been grudging, a recognition only that in a diverse society, it may be necessary to live and let live.<sup>40</sup> Those facts do not undercut the claim that American civil society has depended on a tolerant culture—for when we have been intolerant, civil society has been hurt, and when we have been grudgingly tolerant, civil society has still gone on, however haltingly. But those facts do raise concerns about the future of civil society because, like civil society itself, tolerance is a somewhat fragile flower.<sup>41</sup>

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38. See David C. Williams, *Pragmatism and Faith: Selznick's Complex Commonwealth*, 19 *LAW AND SOCIAL INQUIRY* 775, 796-97 (1994).

39. See DAVID H. BENNETT, *THE PARTY OF FEAR: FROM NATIVIST MOVEMENTS TO THE NEW RIGHT IN AMERICAN HISTORY* (1988).

40. See WIEBE, *supra* note 12, at 81-82.

41. Again, I would like to make the precise nature of my argument clear. I am proposing that a culture of tolerance will promote civil society better than will a politics of interest. I am not proposing that a culture of tolerance is ever easy to obtain or preserve. Nor am I suggesting that a culture of tolerance is some kind of freestanding social structure; as I observe in the text, it is heavily dependent on other social factors. But I am suggesting that if, in the end, the culture becomes intolerant, civil society will wither. If we care about civil society, we must therefore take care to promote tolerance as a learned value within the culture. In my view, that claim is intensely realistic because, whether we like it or not, learned cultural values shape our destiny. By contrast, I believe that Professor Becker's faith in a politics of interest is somewhat unrealistic; we have altogether too many examples of such a politics becoming oppressive to civil freedoms.

We know some of the conditions that tend to destroy tolerance: economic downturn, war, inherited ethnic antagonisms, a monolithic majority with small and weak minorities. Presumably the opposite conditions would tend to promote tolerance. I would also suggest, however, that one of the conditions that best promotes tolerance is civil society itself, as in the old Scottish Enlightenment model. Few things help break down intolerance better than exposure, under the right conditions, to other sorts of people with other sorts of views. And that is precisely how the Scots imagined civil society, as the easy public congress of people from all backgrounds and walks of life, so that individuals could somehow gel as a society without the coercive hand of the state.<sup>42</sup> Civil society and tolerance, in other words, tend to grow on each other. Once in place, they have some resilience, but once lost, they are very hard to get back.

As Professor Becker eloquently argues, then, civil society is dependent on the right social conditions. But the important condition, I submit, is not antidemocratic or antirevolutionary or antimetaphysical; rather, it is learned tolerance. Americans have a fairly rich store of that condition, but it is always easy to let it slip away. Indeed, we may always be in the process of feeling it slip away and then clutching it back. We can only hope that we remember to clutch it back before it gets beyond our reach.

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42. See SELIGMAN, *supra* note 11, at 33-35. I mean here to suggest only that the Scots were right that exposure in public can promote tolerance and so civil society. I do not mean to suggest that they were also right that civil society rests on natural moral affections expressed in these public settings. Rather, it seems much more likely to me that tolerance is a learned cultural disposition.

