

Disestablishment as Legal *Paideia*: Assessing Michael McConnell's Educational and Religious Pluralism

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The legal doctrine of “disestablishment” plays a central role in U.S. law and culture as a touchstone for thinking about religion and public life. As such it serves as a sort of legal *paideia*, shaping the character of both citizens and law. But can the concept of disestablishment extend to other areas of public life beyond religion? Jurist and scholar Michael McConnell has argued that the U.S. educational system ought to be “disestablished” in a fashion analogous to religious disestablishment of the early national period. This would entail universal school vouchers, funded by the public but redeemable at any school that meets minimal criteria (curricular, civic, health, and safety), including religious schools; it would also mean abandoning the sort of democratic control of education proposed by Amy Gutmann and others.¹ McConnell suggests all this in service of creating a “pluralist” educational system that truly respects religious freedom by giving parents real choices about their children’s education. His argument is compelling and clever, but as I shall argue, it is also deeply flawed and at times misguided.

This essay assesses McConnell’s concept of “education disestablishment” and considers its potential impact as a form of legal *paideia*. In the first section I argue that religious disestablishment is indeed a form of legal *paideia*, in the second section I explain McConnell’s attempt to extend the concept of disestablishment to education, and in the third section I evaluate McConnell’s argument with an eye toward the impact education disestablishment would have as an alternate model of legal *paideia*.

PAIDEIA AND RELIGIOUS DISESTABLISHMENT

Paideia is a difficult term to define in part because, like other abstract concepts in foreign languages, its cultural specificity precludes direct translation into English. It was originally used to describe the program of moral and civic education intended to shape republican citizens of the Greek city-states. “True Greek *paideia*,” wrote classicist Werner Jaeger, “meant the process of educating man into his true form, the real and genuine human nature.”² *Paideia* was distinguished from what the Greeks called mechanical (*banauos*) or vocational training, which was thought to be beneath the aristocratic citizens, and as a result *paideia* has historically been associated with liberal arts education. Outside the discipline of the philosophy of education, the word *paideia* is probably best known as part of the word encyclopedia (*enkyklos-paideia*), coined in the sixteenth century to mean a comprehensive compendium of knowledge. In 1982 Mortimer Adler brought the term renewed attention when he published an education manifesto titled *The Paideia Proposal*, which called for a democratic version of the Greek *paideia* in which all public schoolchildren received a rich liberal arts education as a form of civic education.

I use the term *paideia* here in a general sense to mean the process by which a society intentionally forms its members and institutions around a certain idea. The ideas that a particular kind of *paideia* seeks to inculcate form a cultural touchstone, a reference point for refocusing values when they seem to drift from the core. Thus “legal *paideia*” signifies a process by which a legal ideal shapes or forms the people and institutions of society.

In this sense religious disestablishment is clearly a form of legal *paideia* in the United States. Religious disestablishment can (following McConnell) be broadly defined as the “principle under which the government will not officially adopt or espouse any religious doctrine or worldview in preference to other religious or nonreligious doctrines or worldviews” (*ED*, 88).³ This principle is manifested in the First Amendment to the U.S. Constitution and ensconced in the various constitutions of all fifty states. It is also notable that the United States was (arguably⁴) the first nation to eschew a state religion, and it remains among the few nations in the world to do so. Furthermore, the concept of separation of church and state with which it is associated remains a core principle and defining feature of political life. It is clear that disestablishment — including the legal instruments that enforce it and the ideas that sustain it — has dramatically shaped U.S. law and culture, and individual beliefs as well, by emphasizing the individual’s freedom of conscience. Religious disestablishment and the privatization of religion have gone hand-in-hand in this country; as we shall see, education disestablishment promises a similar privatization.⁵

So can the concept of disestablishment extend to other areas of public life beyond religion? McConnell would have us think so. Writing in 2002, just before the U.S. Supreme Court cleared constitutional hurdles to school voucher programs with its decision in *Zelman v. Simmons-Harris*, McConnell published his provocative article (*ED*) in support of school vouchers, arguing that democratic values are ill served by democratic control of schooling, and thus the need for disestablishment. Not only do vouchers not violate the principle of religious disestablishment, he argued, they actually embody it. That is, by fostering a pluralistic educational realm beyond the direct control of the state, universal voucher programs embody the same principles of liberal pluralism that keep religious organizations outside the direct control of the state. Building on an analogy between state schools and state churches, he wrote,

the argument for democratic, collective control of educational choices [meaning: the status quo of public school governance] is similar to the classic argument for an established church, and the reasons that defeated official religious establishment in this country should also be persuasive in defeating official educational establishments. (*ED*, 89)

McConnell’s argument for education disestablishment and the universal school vouchers it entails is subtle, clever, and persuasive enough that it seems almost obvious by the time he finishes laying it out. It is also, however, deeply flawed.

In the next section I take a close look at McConnell’s argument for education disestablishment, highlighting its deft historical analysis and persuasive rhetorical methods before offering a critique of both. In so doing I will linger upon the

problematic conceit at the center of his argument, which I suggest is, on closer inspection, unsuitable in this context.

McCONNELL'S ARGUMENT FOR EDUCATION DISESTABLISHMENT

Liberals and progressives in the United States usually argue for a system of democratically controlled education, McConnell notes at the outset. They want public schools funded by general taxation and controlled by publicly elected school boards, and that teach a curriculum designed to inculcate values necessary for the perpetuation of democratic institutions. The problem is that this position is actually inconsistent with liberal principles (*ED*, 87). "Rather than organizing education along democratic lines," he writes,

a liberal pluralistic society committed to nonestablishment of religion should organize education along pluralistic lines. The precise details of the educational choice plan may vary, but the core idea is that families would be permitted to choose among a range of educational options, including but not limited to government schools. (*ED*, 87)

Unlike Milton Friedman's 1955 proposal for a voucher program with no government role save for financing, McConnell envisions a significant ongoing role for the government in this pluralistic educational environment. The government would not merely provide funding but also set accreditation standards, including those for inculcating "minimal civic responsibility," and "probably even continue to operate its own set of schools." The important difference is that these public schools would no longer enjoy what he calls "monopoly privileges over their competitors" (*ED*, 87-8).

It is worth noting here that McConnell explicitly makes his argument from a civic rather than an individual or family perspective. Since pluralistic education is "obviously" preferable from the perspective of parents' rights, it needs little argument. It is less clear whether pluralistic education can help to maintain "a free and liberal society in the face of cultural, ideological and religious differences" (*ED*, 88). McConnell sets out to prove just that, and he tips his hand at the outset: "It is time to discard the notion that democratic control over education is in principle the form best suited to a liberal, pluralistic society. It is the public school establishment — not educational choice — that is inconsistent with disestablishmentarian liberal values" (*ED*, 89).

McConnell believes that the reasons that originally defeated religious establishment should also defeat governmental educational establishments (*ED*, 89). What are these reasons? In short, established religion failed in America because it "foundered on the *fact* of irreducible pluralism, the *principle* of liberalism, and the *ineffectiveness* of religious monopolies" (*ED*, 92). Let us look at these one at a time.

First is the "fact of irreconcilable pluralism," which doomed early American religious establishments by ensuring that public expenditures on religion were hotly contested by minority groups. The pragmatic difficulty in establishing a single religion in a diverse society cannot be underestimated as a source of inspiration for principles of religious disestablishment. Selecting one or another religious group (or a collection of some but not others) for government support created controversy and stifled religious expression in the eighteenth century. The same holds true in the

current educational context, where the sheer fact of pluralism makes it impossible to create a coherent educational curriculum that instills democratic values while garnering universal approval. Different subject matters and civic values are emphasized in, say, San Francisco than in Nashville, or New York City or St. Paul. In some cities, students from dozens of different ethnic, religious, and racial groups share classrooms without sharing beliefs or traditions that give meaning to their lives. How can these diverse groups come to agreement on a curriculum for public schools? McConnell says educators can choose one of two things: they can present a single coherent curriculum that promotes certain civic virtues, then force dissenters either to leave the public schools or mute their criticisms; or they can water down the curriculum until it avoids discussing anything remotely controversial (and thus important). Neither option does justice to the democratic values schools should inculcate, but the latter is much more common in our public schools today (*ED*, 91–2 and 97–9).

The second reason McConnell gives for the demise of establishmentarianism in both religion and education relates to the principle of liberalism itself. Whatever else it is, liberalism is a philosophy built upon respect for free conscience, and thus it has an inherent aversion to government-sanctioned orthodoxy of any sort. No matter how tolerant religious establishments might have been to dissenters, writes McConnell, they

required the political community to make a collective democratic judgment regarding controversial questions of the good life, supported those judgments with the financial and symbolic weight of official approval, required dissenters to support those judgments through taxation, and denied dissenters an equal share in public benefits. (*ED*, 104)

Democratic control of education creates much the same problem, with the additional rub that public education is sometimes claimed to be ideologically neutral because it takes no position on religious questions. Despite being a “foundational myth of our system of public education,” this claim of neutrality has no merit, for “any school — at least any school that aspires to prepare children for responsible adulthood — necessarily will have and impart a viewpoint (even if that viewpoint is moral relativism)” (*ED*, 105–6).

The third reason McConnell gives for the triumph of disestablishmentarianism was the practical ineffectiveness of religious monopolies. It was James Madison who fretted that established religion led to “indolence in the clergy and servility in the laity,” but he shared with many of his founding peers a belief that religious vitality depends upon religious freedom (*ED*, 92). McConnell argues that the same holds true for education, which would flourish under pluralist governance, opening up new avenues for the inculcation of morally coherent worldviews that can sustain democratic values for generations to come. Public schools today, he argues, are unable to present a “deep or coherent comprehensive worldview” to their students, a weakness that has allowed students to slide into a culture of “crass consumerism, materialism, premature sexualization, rebellion, and nihilism” (*ED*, 133). Only educational disestablishment that leads to pluralist governance of the schools can save us from ourselves, it seems.

Or does it? In the next section I take on McConnell's argument with a critical eye.

ASSESSING MCCONNELL'S ARGUMENT

My brief summary of McConnell's fifty-page essay cannot do justice to its elegant yet methodical style or the subtlety with which it gathers disparate facts into tight arguments. I cannot properly recount, for example, his deft analysis of disestablishmentarianism's early history, which he skillfully weaves into his later arguments for educational disestablishment. It is in many ways a brilliant example of persuasive writing, not least by virtue of its central conceit: McConnell's argument for what is essentially a universal school voucher program is persuasive because it couches its call for radical reform in the sweet melodies of religious liberty. Most Americans are deeply committed to the idea, however imprecisely they formulate it, that church and state are properly separate institutions, and that this separation somehow protects religious freedom. McConnell skillfully redirects this disestablishmentarian impulse toward one of our most cherished (though troubled) institutions: the public school system.

McConnell also successfully reclaims words like "pluralist" that have been affiliated with progressive agendas for a long time, and puts them in the service of a major conservative political cause. This is not an easy task, although conservatives are doing so with increasing frequency while liberals and progressives stick to their defense of public schools as the appropriately "common" or shared site for civic formation. Of course, co-opting an opponent's language and key ideas is a time-honored rhetorical strategy, and conservatives have opened a variety of such fronts in challenging the schools. Consider Gerald Graff's concept of "teaching the controversies" which was designed as a multiculturalist reminder that "knowledge is often established in the crucible of controversy" and as such is neither permanently fixed nor forever relative. Today, "teach the controversy" is being used — sometimes disingenuously — as a sort of motto by those who argue that high school students need to know about intelligent design or creation science simply because they are controversial ideas.⁶

To return to McConnell's argument, I suggest that whatever similarities exist between public schools and established churches, two key aspects of his argument undercut the analogy he works so hard to sustain. First, in allowing for a significant ongoing role for the government in pluralist education — including the continued operation of government schools and the accreditation of all schools — McConnell essentially creates a regime of educational toleration rather than disestablishment, even if the government schools no longer enjoy "monopoly privileges." "It may well be desirable to have a public/private mix in primary and secondary education," he writes, and "it seems probable that in many parts of the country, the majority of families will choose to use government schools, to the extent that those schools are responsive and effective." In addition, government schools might be needed "as a backstop to the private system, if the private system fails to provide schools that certain children can conscientiously attend" (*ED*, 88 and 135, n. 3). This is a very

different situation than religious establishment, where the government is absolutely prohibited from, say, opening a small church to serve as a “backstop” for a group of Lutherans who have no local church because they live in a predominantly Jewish neighborhood.

Second, the way in which government is strictly prohibited (in the First Amendment) from being in the church business is quite unlike the expectation that it will always be in the business of educating future citizens. McConnell rightly acknowledges the latter fact (as I just illustrated), but apparently fails to see how it undercuts his analogy between religion and education. If government-enforced orthodoxy is illiberal in religion and education alike, he should want the government entirely out of the business of setting curricular standards and running the schools, if not the business of funding them, too.

A number of other problems with McConnell’s argument come to the surface under close inspection. For example, while he rightly highlights the impossibility of settling on a single curriculum that will be responsive to all citizens (*ED*, 97), he greatly underplays the significance of democratic localism, the decentralized school management that currently allows individual schools to adjust their curricula to meet community needs.⁷ McConnell is also right to deplore the lowest-common-denominator style of moral and civic education presently employed in public schools (*ED*, 98), but his solution — send everyone who wants moral coherence to private schools — is too extreme. The better answer is to expand the range of classroom discussion to include the topics that matter most to students and teachers, and to model the kind of civil discourse students will have to employ when they leave the school grounds. Some such proposals tread more closely to constitutional boundaries than others. Emile Lester, for example, has argued that public schools ought to “encourage students to use religion in politics consistent with the principles of good faith, and to have the public school curriculum model these virtues.”⁸ Robert Kunzman argues for a thicker (and yet more constitutionally sound, in my view) kind of classroom discussion about deep-seated ethical norms. His model of “ethical dialogue” is premised on the notion that genuine respect for persons requires exploration of and engagement with competing moral visions.⁹ These and other attempts to bring more discussion of religion and ethics into the public school classroom will not, and should not, make such schools “morally coherent” in the sense of promoting a comprehensive doctrine or worldview, but they could go a long way toward making schools spaces for meaningful discussion about the sorts of questions students will face as adult citizens.

Elsewhere McConnell argues that a diverse society needs diverse educational alternatives if it wants to reproduce that diversity over generations (*ED*, 101). While his point is well taken, he seems to forget that common schools are designed to provide centripetal force to a society pulled apart by entropy, not merely to reproduce existing differences and inequalities.

McConnell also overreaches in his discussion of the 1925 Supreme Court case that established the right of parents to remove their children from public schools and

send them to private schools.¹⁰ He calls this the “exit right” and argues that it is “the only constitutional right students or their families have against unwelcome nonreligious indoctrination in the public schools” (*ED*, 120, n. 100). “As a practical matter,” he continues,

[this] exit right can be exercised only by families with the wherewithal to obtain private education or the capacity to engage in home-schooling. One can argue that a democratic society has the right to compel all citizens to be educated according to a common curriculum, and one can argue that a liberal society must allow families to control the upbringing of their children. But who would argue that the right of exit from the common schools should be confined to those who can afford it? There may be no constitutional right to funding for educational alternatives, but it would seem consistent with liberal principle to provide it. (*ED*, 120)

This argument against unfunded moral mandates tugs at the heartstrings but fails to persuade. In fact we have no problem as a society granting a right that requires private funds to exercise. The right to bear arms immediately comes to mind, since we do not provide weapons to all who wish to exercise this right; but others, such as a right to petition or the right of religious free exercise (to stick with the First Amendment), similarly fail to arrive with travel funds to join a faraway protest or building funds to construct a temple in one’s backyard. More controversially, the U.S. Constitution is presently understood to guarantee the right to an abortion under certain circumstances, but the Supreme Court has not required that the state provide funds for women to attain one (though some do).

Even so-called exit rights are provided in other areas of society without recourse for those who cannot afford alternatives. To take one prominent example, Massachusetts now requires all its residents to have health insurance and offers some insurance plans on a sliding scale to accommodate its poorest citizens, yet if one objects on religious grounds to the plan’s coverage for gay couples or its funding for abortions, the only alternative is higher-cost private insurance that meets one’s desires for a particular form of morally coherent healthcare.

Near the end of his essay, McConnell becomes increasingly exercised when discussing the inculcation of democratic values by private schools. Whereas he had stated previously that government schools would continue to serve a salutary function under pluralist governance, here he pillories them for being unable to convey the coherent moral structure needed to transmit democratic values. “There is every reason to expect that democratic values will be more reliably and effectively conveyed by schools that reflect particular moral and religious worldviews than by schools run by the government,” he writes (*ED*, 125). McConnell draws upon some solid evidence that urban Catholic schools provide precisely this sort of civic education, but it is far from clear whether other religious schools do so as well.¹¹ Furthermore, I wonder whether the structure of pluralist school governance won’t teach students more of the same lessons: that choice is the paramount virtue, and that schools are but one more venue for the exercise of that choice. Here is another unwelcome consequence of the *paideia* of education disestablishment.

For his part, McConnell has no doubt that private education is the only way forward:

Citizens concerned about democratic values should strive to strengthen those institutions that unite parents and children, that provide a coherent moral vision, that combat the materialistic hedonism of our age. In this social context, home schools and religious schools (and other schools provided by morally coherent subcommunities) may be the best democratic schools we have. (*ED*, 133)

If McConnell is right about this, government schools have no place in his pluralistic educational environment, for as merely depraved sites of incoherent moral ramblings, they would serve no positive democratic ends. True, they would provide a home for those who seek moral incoherence, but a secular private school could apparently do this much more efficiently. Even if public schools are useful as a backstop for those with no other acceptable options, it is a mystery why McConnell would encourage their ongoing existence when government-enforced orthodoxy of any sort is so illiberal.

In any event, I am disinclined to agree with McConnell's claim that public schools necessarily inculcate morally incoherent value systems — incomplete, perhaps, but not incoherent — or even that moral coherence is a requirement of liberal civic education. For McConnell to suggest that home schools, simply by virtue of their moral coherence, “may be the most democratic schools we have,” demonstrates how misguided his perspective on civic education can become when extended to its logical conclusion. Home schools, not public schools, are the ultimate backstop for parents who cannot find another option in the vast U.S. educational system; they should be regulated closely and tolerated in spite of their moral coherence (which can produce an exceptionally illiberal education), not celebrated because of it.¹²

CONCLUSION

McConnell's call for education disestablishment is, essentially, a call for education privatization. Despite his claim that universal school vouchers would create better (more tolerant, more engaged) citizens than the present system dominated by public schools, the core of his argument is about protecting individual conscience, not promoting the common good. In this sense McConnell sees education as primarily a private good (with some public benefits), properly keyed to individual interests and preferences that can only be met through separate schooling. Common schooling, like the concept of a common good, is anathema to McConnell's focus on the multiple and perhaps irreconcilable goods of a diverse society. A more robust and lengthy response to this position would entail a challenge to liberal pluralism itself as the most appropriate public philosophy for our day. In the meantime, however, by providing a spirited point-by-point rejoinder to McConnell's proposal, I hope to have at least raised a few warning flags about his central analogy between religious and educational disestablishment.

1. Michael McConnell, “Education Disestablishment: Why Democratic Values Are Ill-Served by Democratic Control of Schooling,” in *Moral and Political Education, NOMOS XLIII* (2002), 88. This work will be cited as *ED* in the text for all subsequent references. For contrast, see Amy Gutmann, *Democratic Education* (Princeton, N.J.: Princeton University Press, 1987).

2. Werner Jaeger, *Paideia: The Ideals of Greek Culture*, trans. Gilbert Highet, vol. 1, 2nd ed. (New York: Oxford University Press, 1945), xxiii.

3. It is perhaps noteworthy that McConnell defines disestablishment in terms of the law's posture toward "religious or nonreligious doctrines or worldviews." While this clearly articulates the twentieth and early twenty-first centuries' dominant interpretation, respect for nonreligious doctrines or worldviews was arguably not the intention of the First Amendment's eighteenth-century authors. My thanks to David Skeel for raising this point.

4. Holland briefly disestablished its national church in the early nineteenth century, before Massachusetts became the last U.S. state to do so in 1833. But the U.S. federal disestablishment of religion was unprecedented.

5. I am making an historical claim here, not a normative or causal argument about the relationship between religious privatization and disestablishment. It is true that some, perhaps most, who argue for a more "public" religion — one that properly finds its expression in the public sphere with regard to all matters of social and political questions — are also keen supporters of religious disestablishment (Southern Baptists come to mind in the contemporary context). But the currently regnant understanding of disestablishment as separation of church and state is one that dovetails considerably with the concept of religion as a private spiritual enterprise that ought neither to engage in politics nor be engaged by politics. Indeed the concept of separation of church and state would be unthinkable without some degree of religious privatization. For an extended historical account of U.S. religious and political views about disestablishment, see Philip Hamburger, *Separation of Church and State* (Cambridge, Mass.: Harvard University Press, 2002).

6. Stanley Fish, "Academic Cross-Dressing: How Intelligent Design Gets Its Arguments from the Left," *Harper's*, December 2005, 70–2.

7. Localism is not without its limits, of course; local communities are bound by the same constitutional constraints as are states and the federal government. For more on democratic localism, see David Tyack, *Seeking Common Ground: Public Schools in a Diverse Society* (Cambridge, Mass.: Harvard University Press, 2004), 5.

8. "Good faith requires that when religious believers make a sincere and substantial effort to balance their sectarian claims with secular legal logical and empirical claims, other citizens have an obligation to take these arguments at face value and engage with them." Emile Lester, "Teaching Good Faith: The Role of Public Schools in Promoting Civil Discourse about Religion" (unpublished paper, February 2008), 2 and 32.

9. Robert Kunzman, *Grappling with the Good: Talking About Religion and Morality in Public Schools* (Albany: State University of New York Press, 2006).

10. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

11. McConnell cites Anthony Bryk's classic study (with Peter Holland and Valerie Lee), *Catholic Schools and the Common Good* (Cambridge, Mass.: Harvard University Press, 1993), along with several controversial studies of school voucher programs. For a summary of other studies on parochial schools and civic education (which, on the whole, confirm the enhanced civic engagement of parochial school graduates but do not posit causation with moral coherence), see William Galston, "Political Knowledge, Political Engagement, and Civic Education," *Annual Review of Political Science* 4 (2001), 217–34.

12. For a careful argument defending the existence of home schools in a liberal democracy while insisting that they be carefully regulated in the interest of children's autonomy and civic education, see Rob Reich, "Why Home Schooling Should Be Regulated," in *Home Schooling in Full View: A Reader* (Information Age Publishing, 2005), 109–20.