

BOISI CENTER INTERVIEWS



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MARTHA MINOW is the Jeremiah Smith, Jr. Professor of Law at Harvard University, and writes about human rights and advocacy for members of racial and religious minorities and for women, children, and persons with disabilities. She spoke with Boisi Center associate director **Erik Owens** before her presentation on creating a just education system at the Boisi Center.

OWENS: Now let's begin by asking you about the title of your talk, "Just Schools." What is justice in education, and what are you striving for in your own work in that regard?

MINOW: The phrase "Just Schools" has quite deliberately two, dual meanings. It refers to justice in schools and it also refers to "if they're just schools, they can't accomplish all of these social purposes." So that's the reason for the title.

And at the same time, justice itself has at least these two meanings that I explored here today: it focuses first on the liberal commitments to equality and liberty and how much should justice in schools be preoccupied with individual success in conventional terms, and second, it asks instead how much should society protect the ability of individuals in groups to express their own identities and traditions and to pass them on to their children. The tension between those two ideas frames the debate over the meaning of justice in schools.

OWENS: So you feel like equality is the meaning of "just" – within that half of your nomenclature you feel equality is what Americans see as justice, as opposed to difference.

MINOW: I think that simply as a descriptive matter, equality is the touchstone that comes from *Brown vs. Board of Edu-*

cation. It has multiple possible meanings that include individual success, fairness —fair treatment—as one version of equal treatment, but equally also points to recognition and remedy, redistribution of resources. So for shorthand I've been



contrasting the politics of recognition with the politics of redistribution. Yet, still sticking with equality as the focus of justice, I think what gets lost is the politics of integration, which I think was as much a focus of *Brown*.

OWENS: You spoke a bit in your talk about the *Zelman* case from 2002, and I'm curious, not really whether you

believe that was well-decided from a constitutional standpoint, but whether it was a good decision for America and for American schools. Following up in particular on the tension from the *Smith* case in 1990, how do you see the minority protections, or lack thereof, folding into the education issue through *Zelman*?

MINOW: Right, so I have two hats to wear here. One is of a constitutional scholar, another as someone who cares a lot about schools. I predicted that *Zelman* would come out the way that it did; given the prior precedents, it was the next logical step within the craft reasoning from precedents. I do think it's not by accident that it was a voucher program with a lot of conditions on it that received Court approval. One of the reasons, but not the only reason, that few communities have taken up the invitation to enact voucher programs reaching private religious schools is that it's not clear that all those conditions would be attractive to a lot of religious school communities.

So the actual impact of *Zelman* is nearly non-existent in the delivery of schooling, though its impact on the Establishment Clause jurisprudence and government aid to religious social services is larger. I think in general, with the conditions involved in the *Zelman* case—like ensuring nondiscrimination in admissions and compliance with the publicly-man-

dated curriculum—the pluralist move in schooling is a good thing if only to promote more opportunities for good education. A lot of urban schools and some rural schools are failing, and that means a lot of kids don't have good chances for succeeding economically or for pursuing their own talents. As a country, we should not be closing the door to options that have some hope of offering better schooling options for the kids who don't have them. So I'm open to the experiment of vouchers. I'm also open to the experiment of charter schools and prefer them because they are more explicitly public schools. I think openness to such experiments is the only responsible way to deal with what is a crisis for many kids in this country.

OWENS: How does the question of equal treatment of religion and what is often called non-religion—how does that fit in with your axis of forms of justice here, in particular in the ways that it's manifested in public schools itself?

MINOW: It may seem surprising that along with gender, language, and disability status, religion is a member of the set influenced by *Brown vs. Board of Education's* notion of equality. Treating religion equality is not an idea that governs the eligibility of private religious schools, for example, if there is a government program funding school books or computers. Equality also extends to the treatment of religion inside public schools to the extent that they open up their spaces to non-religious organizations—for meetings, for clubs, for afterschool programs—they must do the same for religious organizations.

I am thinking about this idea one step further: should a charter school movement within the public system, or of magnet schools or pilot schools, now have to be open to the same extent to groups of people who assemble themselves for religious motives, to the same extent that it would be for non-religious groups? All of them must subscribe

to the same non-sectarian admissions principles and curricular standards. In the meantime, equality has become to a surprising degree the replacement of “non-establishment” in characterizing the treatment of religion as well as the treatment of gender and disability, race.

OWENS: Do you see charter schools as being threatening to the values of equality that you're espousing, or somehow being the place where they can be best manifested? Or neither?

“It's not by accident that Americans have such hopes for schooling because it is the one institution that's publicly funded and universally available.”

MINOW: I think charter schools hold the possibility of promise and peril for equality in schooling. They may enable wonderful innovative, entrepreneurial school programs. I'm intrigued by many that offer longer school days, many that actually offer more resources for kids with special needs. But they could produce new forms of skimming motivated and excellent students and their families; they could produce new forms of segregation. That's especially a concern I have about these identity-based charter schools, based on Arabic language, or a focus on Africa.

And yet, an equal recognition of the identity group through ethnic-themed schools may be another form of justice, as we see in the example of the native Hawaiian charter schools. They represent some advance for equality, both recognition of a distinctive culture but also demonstrably preparing the kids so they are doing better on standardized tests. The only dimension along which they don't advance the equality is integration to produce diversity within the same school. That's a concern, but it's not unique to charter schools.

OWENS: Turning a bit back to the other dimension of just schools, you're arguing that schools must be merely schools in some sense. How would it happen that Americans stop placing everything that they want out of their society upon the schools when that seems to be such a prevalent part of American history? Is it something that can be reshaped? How would you address that?

MINOW: Well, I do think it's not by accident that Americans have such hopes for schooling because it is the one institution that's publicly funded and universally available. It's the only entitlement program. It's the only universal program. And maybe, therefore, the way out of the excessive expectations for schooling is to create some other programs that are also universally available to all kids. So what if there was public funding for after-school programs in a serious way? And funding made available to lots of different institutions? In the moment, after school is pieced together through private organizations, and some bits of public money that's always uncertain.

What if everybody understood? You go to your schooling for part of the day and you go to your after-schooling for part of the day. And then community resources—religious, museums, universities—would be mobilized around that. What if there were different understandings of public/private partnerships? That's been a pre-occupation of mine, so that we recognize

that the way the kids spend their time out of school is itself something that the public cares about. So that would be one way to deal with both excessive expectations placed on schools and the need to generate more resources for kids.

The focus should not be solely on academic achievement, and certainly not solely on performance on standardized tests. I think to some extent *No Child Left Behind* has pushed this as the sole measure for schools. *No Child Left Behind* has said look, we want kids to do better on these basic performance indicators so schools have to focus on that. Now what's squeezed out of the school day are arts and sports, and social competence and elements of learning that are as essential as reading and math to success in life as well as in work and citizenship.

OWENS: There's been much gnashing of teeth and ink spilled about the decline of civic engagement in American life—and the golden ages vary according to writer—do you subscribe to a sort of thesis of declining American civic engagement and if so, or regardless, how does that manifest itself? Is it in a sort of general civic spiritedness or is it then about the sort of civic skills and knowledge that we have that we no longer have that we once had before?

MINOW: Well, you know Alan [Wolfe] is one of the world's experts on this subject and I'm friendly with Bob Putnam, so I know enough to know I don't know enough about this subject. What I do know is that we're witnessing an explosion of civic engagement with the current election. That would suggest that whatever long term trends there have been, they are not so deeply etched that they can't be altered by either leadership or national crisis.

Still, I do think that there's a risk of diminution of cross group familiarity. So what Bob Putman calls "bridging social capital" rather than "bonding social capital" – the social capital or networking across different groups – I worry that



our society is producing less of that. That's why I'm worried about the identity based schooling. And yet, at the same time you see trends in the direction of "narrow-casting," balkanization, you can see counter-trends. So I know enough to know I can't generalize about that.

OWENS: My last question is intended to have you consider both constitutional and philosophical issue of what happens when religion is treated like gender and ethnicity? Is there something lost in the process, philosophically speaking, and is there not a danger, constitutionally speaking, when religion is itself singled-out for a certain *je ne sais quoi*, perhaps? What is it that is singled-out, we don't know, but something, clearly in the first amendment. What happens when we treat religion like other forms of difference?

MINOW: Well I think that when the courts try to diminish concerns about public support for religion by flattening religion out, by treating Christmas as simply an occasion for purchasing, there's a danger of an insult to religion itself that isn't even fully appreciated by the courts as they're doing that. And I'm pointing here specifically to crèche cases and the treatment of religious symbols in public life where the trend in the courts is to diminish the religiosity of

the symbols, and I think that that's a bad approach. It's inattentive to religion, and it fails to recognize that the metaphor of a wall between church and state was meant to protect both sides, not just the state from the religion, but the religion from the state.

At the same time, I guess I do think that this is not a danger when the secular institutions recognize religious identity as worthy of the same kind of recognition and equal regard that is accorded to people on the basis of other identity characteristics.

And yet to turn the dial yet another way, I do think that there are interesting arguments by Larry Sager, Chris Eisgruber and others, that this equality of regard approach should not produce special treatment for religion. If there's going to be a combination on a free exercise ground for somebody who wears a beard for religious reasons, then there should be one comparably for someone who wears it for health reasons or aesthetic reasons.

I can see the attraction of that view, but I disagree with that too. And I think that that's failing to recognize what is distinctive about religion both as a textual matter given the first amendment, but also in terms of the depth of the meaning of religion in people's lives. Perhaps even more fundamentally, and more expres-

sive of my own views, religion deserves to be treated differently from other forms of identity and difference because of historical experience with the degree of tension, conflict and violence that has occurred over religious difference.

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