Religious Organizations, Charitable Choice, and the Limits of Freedom of Conscience

Emily R. Gill

In this article, I consider the claims made by those who advocate greater inclusion of religiously based organizations in the public realm. I examine two ostensibly "religion-blind" models—pluralist-accommodationist and noncognizant—used to justify inclusion, along with current jurisprudence, in the context of President Bush's faith-based initiative. I contend that corporate freedom of conscience in its state-sponsored applications often unfairly affects those who do not subscribe to the beliefs of religious organizations. I thus reject public funding of religiously based organizations, or those in which religious faith is a central organizing element, unless the recipients are required to adhere to the rules that govern secularly based organizations.

With an increase in religious pluralism in the United States over the past half century, the meanings of freedom of conscience and the free exercise of religion have become the focus of increasing controversy. As Nancy Rosenblum observes, "[T]he proliferation of faiths . . . increases the number and kind of government actions that can be said to impose a burden on religion." Whereas claims on religious exemptions from general laws were formerly made typically by marginalized groups, such as the Old Order Amish or Orthodox Jews, now all groups make these claims. "Religious associations want not only exemption from certain obligations but also a share of public benefits, and courts and legislatures are forced to articulate the grounds on which they extend or deny public funding for the activities of religious groups in specific areas." Finally, advocates of public support for religion suggest that government may be obliged to ensure "the conditions of religious flourishing," or, at the very least, "refrain from policies that have the effect of weakening religion and threatening the viability of faith-based groups."[1] However, although the emphasis on religious pluralism augments the freedom of religious organizations, it does so only at the price of diminishing the freedom of conscience both of some members and of those outside these organizations.

In language that provided the basis for what became the First Amendment, James Madison stipulated in 1789 that "The civil rights of none shall be abridged on account of religious belief or worship; nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[2] Today the phrase "full and equal rights" is more and more often interpreted to mean not simply the individual free exercise of religious beliefs, but also the unfettered right of religiously based corporate bodies to engage in religious practices—sometimes with government assistance—that may adversely affect others. Religious organizations and their advocates contend that because individual conscience is molded and expressed in communities and associations, freedom of conscience also dictates freedom for religious organizations to engage other groups in the public square if First Amendment guarantees are to be fully realized. According to Steven Monsma, "Individual religious conscience makes little sense outside the context of the religious group. It is within that context that individuals' religious consciences are shaped, affirmed, and expressed."[3] Protection of corporate political advocacy is thus characterized as leveling the playing field, as removing obstacles to the full participation of religious citizens and their organizations in the shaping of our common life.

This broader interpretation of the full and equal rights of conscience, however, conflates two distinct stances. First, the government may protect the individual's right to believe and to worship as conscience dictates, as well as to engage

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in practices flowing from these beliefs that do not adversely impact the rights of others. Second, the government may permit the individual *and her faith community,* perhaps even as a matter of public policy, to engage in and promote policies that in essence penalize others who do *not* share that community's beliefs. Groups are central to this second contingency, as they can persuade government more effectively than can individuals. I may, for example, believe that God has called me to ensure that adherents of other beliefs and practices are marginalized—even when their thoughts and actions affect none but themselves. More importantly, I and my coreligionists may enlist the government's aid, refuting critics by suggesting that they wish to deny my full and equal right of conscience.

The circumstances that led to *Romer v. Evans* (1996) provide an extreme example of this latter position. In this case, the Supreme Court struck down a Colorado constitutional amendment, passed by referendum, that repealed ordinances adopted by three political subdivisions to prevent discrimination based on sexual orientation and that further barred any state entity from enacting similar protections. In his majority opinion, Justice Anthony Kennedy wrote that the rights withheld under the amendment "are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." The amendment imposed a broad disability on one particular group without any rational relationship to legitimate state interests, and "A State cannot so deem a class of persons a stranger to its laws."[4]

In the view of David A. J. Richards, such legislation embodies "political homophobia" and is "a constitutionally illegitimate expression of religious intolerance." Selective enforcement of traditional moral values against particular groups' claims to equal protection under the law suggests an equation of their identity with individuals of traditionally despised religions, implying that adherents should either convert or remain silent.[5] *Romer* is an extreme example because the Colorado amendment represented the cooptation of the machinery of government by supporters of traditional values, many animated by religious commitments. But even in cases where religiously based organizations merely influence political bodies to prevent passage of antidiscrimination legislation, they may claim the moral high ground because, after all, their free exercise of religion and the status of their conscientious beliefs are at stake.

In this paper, I outline two models that validate inclusion of religious organizations in the public realm. One is a pluralist-accommodationist model; the other takes no authoritative notice of religion at all in the formation of public policy. Adherents of each model believe theirs accords with the First Amendment. Both, however, would allow public funds to be awarded to religious nonprofit organizations, seemingly without the balancing act so often required under current jurisprudence. I then address President George W. Bush's faith-based initiative, which channels public funds to religiously based organizations under the charitable choice provisions of the 1996 welfare reform law. After considering its strengths and weaknesses, I briefly assess the faith-based initiative from the standpoint of each model. Finally, I consider the desire of faith-based organizations to maintain their religious character in social service programs and to use religious criteria in selecting employees.

Freedom of association with like-minded others to achieve a common purpose is a valuable freedom; however, the exercise of this freedom often adversely affects differently minded others. In my view, corporate freedom of conscience that results in actions injurious to others cannot be justified simply because the actors are associated in a religiously based group. Applying the two models, I conclude that neither permits the sorts of accommodation that religious social service providers desire along with public funds. Religiously based organizations, if supported by public funds, must therefore be willing to sacrifice some freedom of speech for the sake of compliance with public purposes. Overall, funding mechanisms can only operate fairly and effectively if all potential recipients are held to the same standards.

In Pursuit of Free Exercise: Accommodation or Noncognizance?

Every state is based on some set of determinate principles and commitments that reflect a particular ethical stance. Accordingly, every state takes a particular stance toward religious belief. This fact precludes religious neutrality: a state that favors neither one religion alone nor all religions equally favors a secular society, where all religion is privatized, by default. As Eldon Eisenach notes, any "authoritative public discourse that integrates personal, social and political roles also and necessarily ranks and measures ways of life. . . . thereby subordinating some ends and spheres of life to others. All significant acts of democratic political life entail these choices."[6] William Galston concurs: "Properly understood, liberalism is about the protection of legitimate diversity. . . . [Nevertheless,] the liberal state cannot be understood as comprehensively neutral. Rather, it is properly characterized as a community organized in pursuit of a distinct ensemble of public purposes."[7] In other words, despite the liberal state's support for diversity, its espousal of public purposes or core commitments acts to produce one range of preferences rather than others. *Which* purposes and commitments emerge is the stuff of politics.

With respect to protection of the free exercise of religion, the range established by the courts has been broad. At one extreme, the Supreme Court ruled, in *Corporation of the Presiding Bishop v. Amos* (1987), that Mormons running a nonprofit gymnasium facility were legitimately exempt from the nondiscrimination requirements of Title VII of the 1964 Civil Rights Act when they fired a janitor for failing to qualify for the certificate required to attend Mormon temples. Although the district court had concluded that the

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plaintiff's duties had no relation "to any conceivable religious belief or ritual of the Mormon Church or church administration," Justice Byron White argued for the Court that a 1972 amendment to Title VII exempts all activities of religious organizations from hiring restrictions. "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' . . . , it must be fair to say that the *government itself* has advanced religion through its own activities and influence."[8] That is, one way to avoid deciding whether particular practices should be protected is to decide that almost *any* practice should be exempted that religious authorities claim is necessary or central to their faith community.

At the other extreme, the Supreme Court ruled in *Employment Division v. Smith* (1990) that Oregon could deny unemployment benefits to members of the Native American Church for using peyote in religious ceremonies without demonstrating a compelling state interest, as the penalty was only the incidental effect of a neutral and generally applicable law. The majority held in part that consideration of a religious exemption from the effect of such laws "would enmesh judges in an impermissible inquiry into the centrality of particular beliefs or practices to a faith."[9] That is, a second way to avoid deciding whether particular practices should be protected is to decide that, to avoid a possibly arbitrary outcome, almost *no* practices will be protected. *Smith* exemplifies a sharp contrast with *Amos*.

Currently two Supreme Court decisions form the bedrock jurisprudence of church-state separation. In *Everson v. Board of Education* (1947), a 5–4 majority declared that although the establishment clause of the First Amendment prohibits aid to one, some, or even all religions, public money may be used to bus children to parochial schools because, like police and fire protection, transportation does not directly support their religious mission. In *Lemon v. Kurtzman* (1971), a 7–1 majority found that public supplements to teachers' salaries in parochial schools for teaching secular subjects violates the establishment clause. To be permissible, such aid must have a secular purpose, its primary effect must neither advance nor inhibit religion, and the law must not promote an excessive entanglement of government with religion. The force of these decisions is to require a separation of the secular from the sacred aspects of religiously based organizations if public support is to be permissible.

The complexities of applying the *Lemon* criteria over three decades have given rise to modifications in these rules—sometimes termed "the new neutrality." In *Agostini v. Felton* (1997), the Supreme Court reversed its earlier decision that had prohibited the delivery of special education and remedial services by public school teachers in the classrooms of religious schools. To determine whether a government program advances religion, we must ask whether it results in government indoctrination, defines recipients in terms of their religion, or creates excessive entanglements, now defined in a fashion that obviates the need for pervasive scrutiny of publicly funded activities in sectarian settings.[10] In *Mitchell v. Helms* (2000), the Court allowed placement of publicly funded computers and other instructional equipment in religious school classrooms. This sort of aid benefits recipients without regard to religion and does not indoctrinate; therefore, it can be viewed as religiously neutral. Finally, in *Zelman v. Simmons-Harris* (2002), the Court allowed the Cleveland school district to offer vouchers to students in failing schools that could be redeemed either in other districts' public schools or in private schools, both nonreligious and religious. The thrust of these recent decisions is to support free exercise of religion in ways, it is hoped, that neither endorse nor penalize this choice.

Protection of independent religious choice, argues Michael McConnell, has been lost in our pursuit of the elusive goal of neutrality, resulting in a strictly secular public sphere that denies religious difference. He advocates instead a religiously pluralistic model that accords the same weight to ways of life grounded in tradition and conscience that it does to those based on rationalism and choice. In what I call a model of pluralist accommodation, McConnell "encourages communities of conscience to preserve the institutions necessary to perpetuate their distinctive ways of life and to pass these on to future generations."[11]

McConnell understands the religion clauses to "guarantee a pluralistic republic in which citizens are free to exercise their religious differences without hindrance from the state (unless necessary to important purposes of civil government), whether that hindrance is for or against religion." The proper question is not whether a law or practice advances religion, but, rather, whether its purpose or effect will "foster religious uniformity or otherwise distort the process of reaching and practicing religious convictions." Because individual believers must judge for themselves the dictates of conscience concerning their religious obligations, "the government must be 'religion-blind' *except* when it accommodates religion—i.e., removes burdens on independently adopted religious practice." When the government provides financial support, for example, to both religious and secular nonprofit organizations, it is not aiding religion but acting neutrally toward it. "Indeed, to deny equal support to a college, hospital, or orphanage on the ground that it conveys religious ideas is to penalize it for being religious." Although taxpayers may properly insist that government not favor religion as such, or one religion over another, they cannot constitutionally insist that no taxes support religious purposes, or even that religious organizations adhere to rules that burden their religious practices as the price of access to public programs.[12] McConnell's model, then, is pluralist because it encourages a wide variety of religious expression and practice; it is accommodationist because accommodation, even when public funds are involved, is a tool for promoting pluralism and discouraging uniformity.

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Generally, supporters of faith-based initiatives for implementing charitable choice act according to a model of pluralist accommodation. Monsma, for example, suggests that even if we attempt a conscientious distinction between secular and sacred aspects of particular programs, all programs are grounded in presuppositions and values that are subjectively arrived at, empirically unproven, and ultimately based on faith. Therefore, they should be treated similarly. If a religious nonprofit organization must downplay or abrogate religious practices to receive public benefits when similar nonreligious organizations may maintain their character, "public policy is interfering with its free exercise of religion." Nonprofit organizations should not have to choose between giving up either public funds or religiously based practices to qualify as not pervasively sectarian, just as individuals should not have to choose between giving up public benefits like unemployment compensation or religious practices like Sabbath observance.[13]

Monsma points out that in two crucial areas of self-definition—hiring policy and the ability to integrate religious beliefs and practices into their programs—religious nonprofit organizations face a trap that threatens their autonomy. Although the Civil Rights Act of 1964 and the laws of many states exempt religious organizations from general prohibitions against religious discrimination in employment, "If a school or other nonprofit is not religious enough it might not qualify for the religious exemption. . . . If it is highly religious its chances of attaining exemption is [*sic*] increased, but it runs the risk of losing all public funds since the courts have ruled pervasively sectarian nonprofits may not receive public funds." This dilemma inevitably results in subtle pressures on religious organizations to weaken or otherwise compromise their religious commitments and character.[14]

Although written before the inception of the faith-based initiative, Monsma's work is consistent with McConnell's model of pluralist accommodation. Monsma advocates a standard of "positive neutrality" that requires "certain positive steps that recognize, accommodate, or support religion," if the First Amendment is to be truly neutral "toward those of all faiths and those who subscribe to none." Under this standard, public funds would be awarded to religious organizations according to three criteria—purpose and precedent, social propriety, and accountability. Thus public money could "fund the programs and activities of religiously-based nonprofits that are of a temporal, this-world benefit to society, as long as public funds are supporting similar or parallel programs of all religious traditions without favoritism" as well as similar secular programs sponsored by private organizations or government. Money would be denied to entities "that teach hatred or intolerance or in other ways work to destroy the social fabric fundamental to civil society," such as the Ku Klux Klan, neo-Nazi organizations, and for some, the Nation of Islam. Minimal standards of accountability would ensure that the promised this-world services are indeed being provided. In the context of this model, that an organization hire only coreligionists is indeed proper: "Often it is the religious character of the religiously based nonprofit that helps enable it to play a valuable, effective public policy role." The benefits of positive neutrality include increased competition in the delivery of social services, enhancement of diversity among providers, and, most important to Monsma, "the honoring and encouraging of a sense of public morality or virtue that is essential to a free, peaceful society."[15]

This last point is the key, I believe, to much current support for a larger role for religiously based organizations in the public square, despite stated goals of pluralism or positive neutrality. The desire to honor public morality is characteristic of those whom Rosenblum calls integralists, who experience alienation in living "the divided life of believer and citizen." Integralists comprise those who desire either public recognition of the dominant faith or public endorsement of religious pluralism or spirituality in general. In their view, religious organizations deserve public support as autonomous groups whose moral effectiveness is rooted in "their uninhibited religious identity, precisely because they offer prayer along with job training, drug rehabilitation, schooling, and counseling," and whose promise is one of "general *moral regeneration* through faith."[16]

A second model of "religion-blindness" is official noncognizance of religious belief and practice. This model might also enlarge the role of religious organizations in public life, but by default. In the view of Vincent Phillip Muñoz, James Madison was not a strict separationist who eschewed all public support of religion, a nonpreferentialist who allowed support for all religions without favoritism, or a defender of religious exemptions for those burdened by obstacles to religious exercise. According to Madison's "Memorial and Remonstrance," human beings necessarily form their own opinions about their religious duties and possess an inalienable and natural right to act in accord with these duties that is prior to and thus independent of the social compact. Consequently, religion lies outside the recognition or cognizance of civil society. "A government non-cognizant of religion, in other words, must be blind to religion. It cannot use religion or religious preferences as a basis for classifying citizens." Patrick Henry's 1785 bill in Virginia, against which the "Memorial and Remonstrance" was directed, would have supported teachers of Christianity. Whether granting benefits or imposing burdens, however, "any legal exemption or exception based on religious affiliation by definition takes religion into the state's cognizance," thereby recognizing religion in violation of the principle of religious liberty. Even nonpreferentialism, or applying the principle of equality to the treatment of all religions, "says nothing about the authority of the state to make those classifications in the first place." That is, the government is still taking authoritative notice of religion.[17] For the same reason, government cannot interfere with the internal governance of churches without rendering them religious establishments.

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For Muñoz, the principle of noncognizance as religion-blindness is simple to apply to particular cases. In establishment cases, where nonpreferentialism requires only that religions receive equal treatment, noncognizance "also requires that religious individuals and organizations stand in formal equality with nonreligious citizens and organizations, a demand that 'nonpreferentialism' does not make." The government may not "exclude individuals or organizations from generally available benefits" based on religious affiliation. Tax exemptions would apply and funding could be accorded both to religious schools and to faith-based social service organizations "as long as funding decisions do not require cognizance of religious affiliation."[18] In free exercise cases, government would not grant exemptions from neutral and generally applicable laws because to do so it would have to take cognizance of religion, in violation of the principle of religious liberty, which is not governed by the social compact. Under noncognizance, the state may neither support nor exclude religion or religious individuals in their practices, regardless of burden or benefit, simply because these practices are religious. In short, unlike pluralist accommodation, when religious organizations do partake of public benefits, they do so because their mission fulfills a secular purpose or social function that accords with public policy. Their basis in religious belief is irrelevant.

Charitable Choice

Many faith-based organizations now receive public funds, often through separate, nonprofit arms that specifically provide social services. Catholic Charities USA, for example, receives nearly two-thirds of its funds from a combination of federal, state, and local governments.[19] Citing government aid in the form of tax exemptions; fire and police protection; government-financed texts, computers, and remedial education; and public aid to citizens who may direct these funds to programs of their choice, David Cole states, "The Constitution does not require strict separation of church and state, because in a modern society in which virtually everyone benefits from some form of government support, that would amount to discrimination against religion."[20] The devil is in the details, though.

The "charitable choice" provision of the 1996 welfare reform law encourages states to "contract with nongovernmental and religious organizations to provide social services like job training, high school equivalency programs, courses in English as a second language, nutrition programs, homes for unmarried mothers, and drug and alcohol treatment. Religious groups have a right to retain their religious character by displaying religious symbols or using religious criteria in selecting employees."[21] On January 30, 2001, President Bush issued executive orders creating a White House Office of Faith-Based and Community Initiatives and established offices in five cabinet departments to ensure their greater cooperation with both religious and secular nonprofit organizations. "My administration will look first to faith-based and community groups, which have proven their power to save and change lives. . . . As long as there are secular alternatives, faith-based charities should be able to compete for funding on an equal basis and in a manner that does not cause them to sacrifice their mission."[22] Though unable to get his proposals through Congress, on December 12, 2002, Bush established offices in an additional cabinet department and in the Agency for International Development, stating, "If a charity is helping the needy, it should not matter if there is a rabbi on board, or a cross or a crescent on the wall, or a religious commitment in the charter. . . . The days of discriminating against religious groups just because they are religious are coming to an end."[23]

Current law pertaining to public funding for religious nonprofits is governed by *Bowen v. Kendrick* (1988), which clearly exemplifies the conflicting interpretations to which *Lemon* is subject. Chief Justice William Rehnquist wrote for a 5–4 majority that religious as well as secular nonprofit organizations were eligible for federal grants under the Adolescent Family Life Act, which funded the provision of services pertaining to teen sexuality and pregnancy. The Court should not presume, he affirms, that federal funds would primarily advance religion, that the authorized projects are themselves religious, and that they become so simply because they are implemented by religiously affiliated organizations. This opinion accordingly minimized the need for intrusive monitoring, in violation of the third prong of *Lemon*.[24] In his dissent, however, Justice Harry Blackmun pointed out that counseling pregnant teenagers differs from running soup kitchens and hospitals: "The risk of advancing religion at public expense, and of creating an appearance that the government is endorsing the medium and the message, is much greater when the religious organization is directly engaged in pedagogy, with the express intent of shaping belief and changing behavior, than where it is neutrally dispensing medication, food, or shelter."[25] This possibility seems to necessitate enough oversight that excessive government entanglement with religion would in fact result.

Purpose

Let us examine some of the central issues of the faith-based initiative, using Monsma's conditions for positive neutrality as a frame of reference, in order to exemplify one way to theoretically legitimate it. First, public funds may go to religious nonprofits whose activities are "of a temporal, this-world benefit to society," as long as these funds are going to all religious traditions and to secular private and public programs. Thus funds would go only to programs with proven results, as Bush himself has indicated. Even if public money does not support otherworldly activities, however, clients will still be exposed to some faith traditions at the expense of others. As one observer contended, "The

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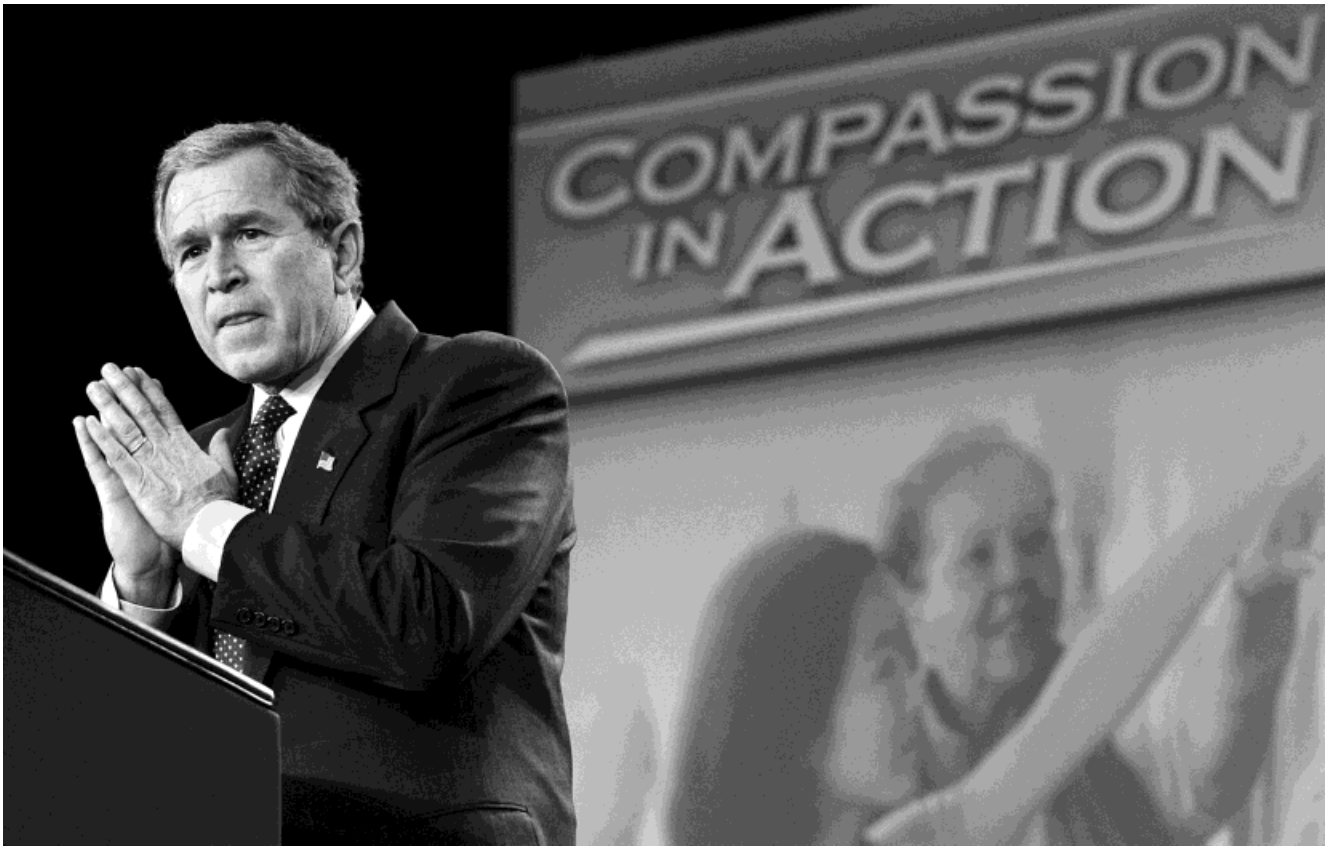

government one way or another picks its favorite provider. You can expect a lot of Baptist programs in Texas and a few Mormon ones, and the opposite in Utah. So what does equality mean under those circumstances?"[26]

Moreover, despite pronouncements that social problems cannot be addressed successfully without a focus on clients' spiritual lives, there is no empirical proof, notes Benjamin Soskis, that faith-based organizations work better than secularly based ones. Studies that seem to show promising results for the former turn out to be flawed by small sample sizes, reliance on self-reporting, inadequate reporting of dropout rates, the absence of secularly based alternatives, and mistaken inferences regarding causality. Fewer churchgoers may be criminals, for example, but whatever attracts them to church may also repel them from crime. The first head of Bush's program, John J. DiIulio Jr., admitted that in successful programs for youth, "the one constant is meaningful adult involvement in the life of a child. . . . We don't have data to prove that organic exposure to religious influence . . . leads young people to a more positive outcome."[27] Self-selection of clients may mean, as Jacob Hacker notes, that "people who turn to faith-based charities are likely to be particularly receptive to the message they deliver."[28] Additionally, faith-based organizations are themselves more likely to limit the clientele they serve; in that case even rigorous assessments of success rates would not prove that religious programs are more effective than secular ones.[29] If, overall, it is the sense of community that is crucial, proponents of faith-based initiatives may underestimate secular programs as well as exaggerate the achievements of religious ones.[30]

Propriety

The second condition of Monsma's positive neutrality—that public funds should not go to religious organizations that teach hatred or intolerance, or damage the social fabric of civil society—would further limit the scope of public aid to faith-based organizations, even among those with proven track records. This provision answers questions like "What if Matt Hale's Church of the Creator wants federal money to run a day care program for little bigots, or Nation of Islam leader Louis Farrakhan wants to operate an after-school program?"[31] Moreover, religious organizations themselves disagree about what constitutes intolerance.

Religious broadcaster Pat Robertson, for example, declared it "appalling" that charitable choice might result in contracts "for programs run by non-Western religions and newer religious movements like the Church of Scientology and the Unification Church."[32] Even before the terrorist attacks of September 11, 2001, Robertson was a persistent critic of Islam as well as Methodists, Presbyterians, and Episcopalians, who he said reflect "the spirit of the Antichrist." A week

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after the attacks, he contended in a television appearance that Muhammad was "a killer" and that the idea that Islam is a peaceful religion is "fraudulent."[33] In 2002, however, Robertson's Operation Blessing International received an award from the Department of Health and Human Services as one of 21 faith-based organizations funded as intermediaries to train other groups to write grant applications and run programs. Predictably, Robertson's award drew criticism from the Council of American-Islamic Relations, whose director stated, "Anyone who exhibits such bigoted views is unworthy to receive taxpayer dollars."[34] The award to Operation Blessing exemplifies the difficulty of defining which religious organizations might promote hatred or intolerance. In Robertson's view, Islam represents intolerance, while Muslims believe Robertson is intolerant. Either way, government agencies are left in the awkward position of somehow defining hatred and intolerance so they can deem which faiths are worthy of public support.

At the other end of the political spectrum from Robertson, Beryl Satter, a Jewish lesbian, notes in her opposition to a Pentecostal drug rehabilitation program the ironic "possibility that homeless gay teenagers, thrown out of their home by their parents, may find that the most accessible lifeline is Bible study led by government-financed ministers who may themselves support an anti-gay agenda."[35] Because the faith-based initiative allows the integration of religious themes into publicly funded programs, the religious stance that homosexuality is morally wrong appears to many liberals as tantamount to teaching intolerance. Some of these concerns undoubtedly influenced a March 2001 announcement that programs emphasizing religious conversion would not be eligible for direct grants, but would instead be funded indirectly through vouchers for needy clients who could direct this money as they choose.[36]

This adjustment, however, still does not address the objections of those who, whether on strict separationist or nonpreferentialist grounds, do not want public money even indirectly to support the teaching of some religious tenets over others. As Rosenblum notes, "After all, government support is ultimately inseparable from endorsement of the value, if not the truth, of religious tenets and practices."[37] The results of a 2001 Pew Research Poll led one observer to conclude that it is "clear that competing claims for public funds by diverse religious institutions will inevitably lead to the kind of fractiousness that the American tradition of church-state separation was meant to avoid."[38] As we have seen, however, McConnell believes that taxpayers may not constitutionally insist that no taxes support religious purposes. Moreover, he contends that the argument from political divisiveness, or the notion that the Supreme Court should invalidate any benefit to religion that proves contentious even if otherwise constitutional, is a red herring.[39] The courts' invalidation of benefits to religion simply because granting them is politically divisive is not a sufficient justification, he contends. On the other hand, in distinguishing religion from artistic or scientific projects whose merit government-appointed experts may assess, McConnell elsewhere writes, "We respect the rights of dissenters not to be forced to contribute to the dissemination of religious messages, and realize that government power to determine the most worthy recipients of public largesse would be a threat to the freedom of religion."[40] At the very least, these considerations indicate that any public funding of faith-based programs should proceed with the utmost caution.

Accountability

Monsma's third condition for positive neutrality is minimal standards of accountability. Paul Weber suggests that religious affiliation provides no guarantee against fraudulent diversion of public funds, that the record-keeping necessary to measure outcomes will prove no more cost-effective than traditional means of providing social services, and that we can expect resource shifting as religious organizations move their own funds away from publicly funded social services to the more directly religious aspects of their missions.[41] While it must be admitted that shifting resources is a legal and rational response to the prospect of public funding for this-world aspects of one's mission, it complicates accountability. Another complication occurs when organizations indirectly use public funds for spiritual activities by integrating religious themes into this-world programs.

A possible policy shift announced in January 2003 by the Department of Housing and Urban Development underscores the difficulty with accountability. Whereas current policy prohibits religious groups from using federal housing and community development money for building structures, the new rules would "allow the use of federal aid to acquire, rehabilitate or build centers used for religious and specifically approved nonreligious activities, so long as no HUD money is used for the religious section." That is, public money can finance the portion of a building used for social services, while private funds cover the sanctuary. HUD officials themselves noted that a system for the allocation of funds at "mixed use sites" would have to be formulated and then applied case by case. This would require close monitoring to determine which parts of buildings are used for which activities. As Massachusetts Representative Barney Frank wondered, "Are we going to start sending in the inspector general to charge people with committing a bar mitzvah?"[42]

InnerChange Freedom Initiative, a "Christian-based, immersion-style rehabilitation program" offered by Charles Colson's Prison Fellowship Ministries provides another example.[43] Although state money in the three states that provide public funding goes only to secular parts of the voluntary programs, such as vocational skills, substance abuse, and job counseling, two federal lawsuits were filed challenging the constitutionality of the program as run at a prison in Newton, Iowa. Understandably, it is difficult to distinguish

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the secular from the religious portions of a program described in a brochure thusly: "All programming—all day, every day—is Christ-centered."[44]

Overall, public funding under charitable choice has a secular purpose, thereby complying with the first prong of *Lemon*. To comply with the second prong, however, that its primary effect must neither advance nor inhibit religion, the requisite monitoring will impale it upon the third prong—that of excessive entanglement of government with religion. Even if scrutinized under the so-called new neutrality, moreover, public funding may have the effect of indoctrinating clients.

From both McConnell's and Muñoz's standpoints, the criticisms I have adduced of the faith-based initiative result not from the weakness of the initiative itself, but from current jurisprudence governing such partnerships between government and religiously based nonprofits. According to McConnell's pluralist accommodation, government is neutral and religion-blind when it accommodates independently adopted religious practices, thereby avoiding the fostering of religious uniformity. By this logic, although publicly funded service providers possess no unlimited right to engage in controversial religious *or* secular speech that is not part of the structured content of the program itself, taxes may support religious purposes, as we have seen, even when religious organizations maintain practices that would be illegitimate under the law for secular organizations.[45] However, McConnell allows governmental hindrances to the exercise of religious difference when these hindrances serve important purposes of civil government. If public funds go only to programs with proven results, or do not go to religious organizations that teach hatred or intolerance, these qualifications arguably serve important purposes of government. But they risk inducing homogeneity and increasing religious uniformity, contrary to his overall philosophy. Moreover, making these distinctions requires discretionary judgments, whether through the law or executive orders, that might easily approach the complexity of current law. Finally, although McConnell states that public funds may not favor one religion over another, his formulation clearly does so; government is not neutral *within* the category of religiously based organizations. Neither is it religion-blind in the sense of accommodating a full range of independently adopted religious practices.

According to Muñoz's model of noncognizance, government is neutral and religion-blind when it takes no authoritative notice of religious affiliation or lack thereof in classifying citizens, whether in imposing burdens or granting benefits. If laws happen to favor the practices of some religious organizations while burdening others, for the noncognizance model this poses no difficulty. The major difference between the pluralist accommodation and noncognizance models, in my view, is that under the former, religious organizations may be exempted from rules that burden their religious practices as the price of access to public programs. Under the latter, however, exemptions could not be granted without government taking notice of the religious affiliation of these programs as such. This contrast has particular relevance to the desire of many religious nonprofits, endorsed by President Bush, not only to compete with the secular nonprofits for funds, but also to do so without sacrificing their religious missions and their autonomy in hiring. It is to this issue that I now turn.

Freedom of Conscience: Groups, Individuals, and Civic Values

A recurring theme among those who want to remove perceived obstacles to the full participation of religious citizens and their organizations in the shaping of our common life is that religious groups are discriminated against just because they are religious. The proposed remedy for those like McConnell, Monsma, and Bush is to treat them like secularly based organizations. It seems, however, that they do not want to be treated *exactly* like secular groups. They wish to maintain their religious character by integrating religious beliefs and practices into their this-world programs; they also, as a component of maintaining this character, want to use religious criteria in selecting their employees. Although under charitable choice secular alternatives must exist and organizations must serve clients of all faiths who present themselves, they need not hire staffs of any and all faiths. Although these qualifications may appear defensible under the rubric of freedom of association, protecting the conscientious beliefs of members of religious associations can infringe upon the conscientious beliefs of individuals, both within and outside organizations, who may be vitally affected by its policies. Because, as even McConnell grants, the state may interfere with the exercise of religious difference when this serves important purposes of civil government, I suggest that much of the controversy over the faith-based initiative is centered on *which* purposes are important enough to warrant such interference—that is, which possible infringements on beliefs must be prohibited.

According to Chandran Kukathas's somewhat libertarian definition of freedom, freedom of association is not characterized by the individual freedom to enter associations of one's choice. Christian organizations, for example, should be able to exclude militant atheists, and some communities into which people are born do not themselves prize freedom. Rather, the important trait of freedom of association "is the freedom to accept or reject the restriction on one's freedom."[46] Kukathas thus concludes that freedom of association is grounded on liberty to *leave* associations whose restrictions one rejects, especially because freedom of exit implies freedom to form new associations whose principles are more congenial. Because a liberal society generally includes a diversity of groups, not all of which may be inclusive, freedom to relinquish one's current allegiances and to form new ones is certainly a mainstay of liberal freedom of association.

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It is imperative that society allow the potential for other opportunities of association—or the slack, as it were—that makes freedom to leave meaningful. Even classic arguments for religious toleration, like John Locke's, recognize that civil authority must establish a civil criterion of worldly injury to life, liberty, and property that then determines the appropriate scope of religious practice. That is, to avoid harm to this-world rights or interests of citizens, the line between what is secular and what is religious must be determined by civil government, not by the advocates of one or another type of conscientious belief. Moreover, this line may change along with the demands of the public interest, which is itself civilly determined.[47] When Locke argues that no religious organization need retain individuals whose practices offend its principles, he is defending the freedom of the like-minded to associate without threat from those who might alter these principles through their membership, either new or continuing. When he argues that no individuals should be denied ordinary civil enjoyments because of their religious beliefs, however, he is indirectly addressing the importance of maintaining a forum that provides alternative opportunities. If the first point addresses the free exercise of conscientious belief and practice, the second takes up the danger that establishment of an orthodoxy can pose to the exercise of alternatives.

McConnell himself wishes to foster pluralism by accommodating independently adopted religious practices; those adhering to his stance should thus appreciate the necessity of a context that provides meaningful choice. But McConnell also fears public policy that may discourage the exercise of religious difference—apparently failing to notice that the policies of private organizations, secular or religious, may exert the same effect. If enough religious organizations or communities hold similar beliefs, the adherence to which precludes the very existence of alternatives, then the context of choice—the crucial slack—cannot exist. Even the civil enjoyments of those whose conscientious beliefs do not allow them to adhere to the tenets of particular faith-based organizations may be jeopardized. And an already problematic situation is exacerbated when these organizations receive public funds.

The need for alternatives

President Bush has suggested that faith-based organizations should be able to compete for funds on an equal basis with secularly based organizations, *as long as* there are secular alternatives. In some situations, individuals in need of help must, for want of transportation or information, turn to the closest source, which may turn out to be religious in character. What alternatives do these individuals really have? To ensure alternatives, some public entity would have to provide a central clearinghouse, where potential clients could learn about all publicly funded programs within their area, and transportation would have to be provided.

It may be argued that under current policies, religiously oriented clients may have no choice but to use a *secular* program. The obligation to provide alternatives, however, does not require public provision of the widest possible *range* of alternatives. Even with public funding, social services of every conceivable faith tradition will never exist in every locale, and some religious clients might prefer a secular program to a religious program with which they vehemently disagree. Commenting on McConnell's advocacy of educational pluralism, Rosenblum notes that in addition to money, leadership, organizational skill, and motivation, "Pluralism also depends on whether educational entrepreneurs reflect or create the market for alternative educational forums and goals."[48] The point also applies to social service programs: accommodation of independently adopted religious practices does not require public provision of compatible forums for every practice.

Even the provision of public funds for separately incorporated hospitals associated with particular faith traditions imposes costs on others. In recent years, a number of secular hospitals have merged with Roman Catholic institutions. This has meant that Roman Catholic doctrine regarding reproductive health care has been extended to hospitals that formerly provided contraceptives, sterilizations, abortions, and varied infertility services, but no longer do.[49] There may be no alternative hospitals near enough for patients to obtain these services. Moreover, many Roman Catholics, not to mention individuals of other faiths, disagree with the official position of the Roman Catholic Church. Under charitable choice, a proliferation of faith-based service providers might lead to a decrease in the number or a change in the distribution of secularly based service providers, meaning that individuals seeking services might be compelled by circumstance to seek aid from faith-based providers with whom they disagree. This outcome is made more plausible by the increase in health maintenance and preferred provider organizations, which restrict the range within which services are available to patients, who are thus often limited at the outset by their employers' health plans. In other words, publicly funded faith-based service providers may deliver this-world benefits, but thereby circumscribe rather than to expand clients' alternatives. Those who oppose secular providers' health care options need only decline the objectionable services, whereas those who desire unavailable services in a faith-based setting are stuck. Such a scenario implicitly fosters religious uniformity.

Hiring

Many believe that faith-based organizations should be able to use religious criteria in selecting employees to run their social service programs, that is, to discriminate in hiring. As we have seen, *Corporation of the Presiding Bishop v. Amos* exemplifies this approach. Concurring Justices William Brennan and Thurgood Marshall worried that

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authorized discrimination "puts at the disposal of religion the added advantage of economic leverage in the secular realm," thereby going beyond reasonable accommodation and furthering religion in ways that violate the establishment clause. They worry even more, however, that the case-by-case analysis required to determine whether a particular activity is of a religious character that merits the exemption not only involves an unacceptable entanglement of state with religion, but also might encourage religious organizations to narrow the scope of activities they see as religious. "The community's process of self-definition would be shaped in part by the prospects of litigation," thereby "chilling religious activity" by a kind of self-censorship. To avoid this problem, religious nonprofits incurring close scrutiny warrant "an exemption [that] demarcates a sphere of deference with respect to those activities most likely to be religious . . . in those instances in which discrimination is most likely to reflect a religious community's self-definition."[50]

Although the expressed concern for the chilling of religious activity is legitimate, Brennan's "sphere of deference" is overly broad. Too much is grounded in supposition: the activities of religious nonprofits are "most likely" to be religious, and employment discrimination is "most likely" to reflect the community's self-definition. I do not believe it exaggerates, in fact, to compare the Court's deference here to its traditional deference to the executive branch regarding immigration policy, actual or threatened war, and foreign policy in general.[51] I believe that Locke, who argued that no individual should be denied worldly goods or ordinary civil enjoyments because of religious belief, would have classified the ability to earn one's living as a vital secular good and an individual interest that should not be thwarted by deference to the collective interest (or right) of a religious organization.

Moreover, just as Justice Brennan conceded that authorized discrimination gives religious organizations economic leverage in the secular realm, the associational autonomy of religious organizations may alter individuals' incentives by rendering some faiths more costly to adhere to than others. For example, in *Sherbert v. Verner* (1963), the Court implied that by requiring Seventh-Day Adventists to be available to work on their Sabbaths as a condition of receiving unemployment compensation, the state of South Carolina had rendered it more costly to be Sabbath observant than not.[52] Private entities as well as public ones may increase the costs of particular choices. As Rosenblum writes, "At some point, a religious association, especially when it is the dominant establishment and economic force in a region, may wield practically inescapable economic power over members and nonmembers. Or the general proliferation of religious-owned enterprises, large and small, in every area of social and economic life, can have a significant impact on the distribution of jobs overall."[53] In noting with reference to *Amos* the widespread ownership of economic enterprises by the Church of Jesus Christ of Latter-day Saints, Jeff Spinner-Halev observes that allowing church-owned or partly church-owned businesses to discriminate in whom they serve or hire may curtail opportunities: "Throughout much of American history people have hidden behind their religious principles to justify discrimination."[54] Without the case-by-case analysis that Brennan would eschew, we are granting a general exemption to religious organizations that requires a compelling state interest in order for government to mandate compliance automatically binding on other associations. Religious organizations want to have it both ways, enjoying the same benefits as secular organizations but simultaneously receiving exemptions from law to which the latter must adhere. Rosenblum has it right that associational autonomy does not "justify allowing religious associations to define for themselves what falls within the scope of activity that is *conceivably* part of their self-definition."[55]

Consider the following examples. In 2002 a Jewish psychological therapist sued the United Methodist Children's Home in Decatur, Georgia, which receives approximately 40 percent of its financing from the government, when he was refused a job because he was not a Christian. Another therapist joined the suit when fired on the discovery that she was a lesbian. The home objected to her nonconformity with its religious doctrines, including its not condoning the practice of homosexuality. Although neither federal nor Georgia law protects against discrimination based on sexual orientation, her lawyer contended that civil rights laws "protect against religious discrimination that takes the form of requiring an employee to lead the kind of life and subscribe to the kinds of beliefs that assert there is only one true and virtuous path." The case was settled out of court in 2003 on terms requiring nondiscrimination in hiring at social service agencies receiving public funding.[56] If the settlement had gone otherwise, if these therapists were based in an area where a majority of opportunities were in faith-based settings, and if most of these settings were Christian and/or committed to the belief that homosexuality is morally wrong, the scope of their civil enjoyments would have been significantly narrowed. The protection of associational autonomy, in short, may impinge upon the liberty of conscience of individuals.

The faith-based initiative, then, reveals a potential conflict between freedom of association and freedom of speech. Under freedom of association, religious social service providers want to maintain the integrity of their religious character. But the message they convey, whether to clients without alternatives, to potential employees who would render the social services, or to taxpayers who finance them, affects many individuals who are not members and who cannot easily exercise their freedom to exit these associations and form new ones. Therefore, service providers' "speech," as exhibited in hiring decisions, may, in my view, properly be curtailed when they receive public funding. Jeffrey Rosen disagrees, writing that although religious organizations may seem to demand special treatment, "[I]t's

obvious on reflection, that without the ability to discriminate on the basis of religion in hiring and firing staff, religious organizations lose the right to define their organizational mission enjoyed by secular organizations that receive public funds." Rosen compares this issue to the Boy Scout claim, upheld by the Supreme Court in 2001, that if it could not reject gay scoutmasters, its message and the integrity of its values would be compromised, suggesting that all private associations should be exempt from discrimination laws "whenever necessary to preserve their distinctive character."[57]

Since the Scouts have been deemed a discriminatory organization by the Court, however, governmental entities in a number of locales have withdrawn in-kind benefits, such as troop sponsorship by local fire departments or city officials working with troops on city time clocks. Even Rosen believes that religious organizations should be explicit about why their beliefs mandate discrimination, and that they should not be exempt from having to defend their hiring practices in court. As Samuel Marcosson observes, in a faith-based context Rosen is arguing that religious organizations are not situated similarly to secular ones: "Precisely to the extent they assert their dissimilarity in an effort to maintain a religious identity and avoid oversight and substantive regulation, they have established their dissimilarity for purposes of defeating their claim to have been treated discriminatorily when they were excluded in the first place. You want to participate equally? Bear the burdens equally."[58]

Religious neutrality?

Applying our two models of religion-blindness to the hiring issue, I believe that neither actually permits the sorts of accommodation that religious social service providers desire along with public funds. Although McConnell's pluralist accommodation would exempt religious organizations from adhering to burdensome nondiscrimination laws, these exemptions render it more costly for those of the "wrong" faith tradition (or sexual orientation) to find employment or to be open about their identities. The exemptions do not coerce individuals; nevertheless, they publicly sanction the private placement of burdens on independently adopted religious (or personal) practices. While pluralist accommodation may be religion-blind toward faith-based organizations, it is anything but religion-blind, at least indirectly, when it allows these organizations to use litmus tests in hiring individuals who provide social services that are not themselves intrinsically religious in nature. Although it may encourage the exercise of religious difference by communities of faith, thereby enhancing pluralism, it may hinder this exercise by individuals, lessening the degree of pluralism, from the perspective of the citizen.

Muñoz's model of noncognizance takes no authoritative notice of religion, and would thus seem ideally suited to the faith-based initiative, as it accords religiously based social service providers public benefits on the same terms as secular providers. This qualification cuts both ways, however. Noncognizance, on the one hand, will not allow government to deny public funds to religious nonprofits when they fulfill a secular function simply because they are religious. Noncognizance, on the other hand, will not allow government to grant exemptions from generally applicable laws to social service providers simply because they are religious. If there is no secularly based right to discriminate on the basis of religion or sexual orientation, there is similarly no *religiously based* right to discriminate. Purely privately funded service providers may decide that particular faith traditions or sexual orientations are bona fide criteria for hiring policies, but those that accept public funding may not. Freedom of association, when backed by public funds, limits freedom of speech.

Consider another problem with neutrality. According to McConnell, when public officials award or withhold funding "based on their judgments about the relative worthiness of competing projects, there are great dangers that the power of the fisc will be used to reward or penalize religious activity. . . . When subsidies are distributed according to objective, neutral criteria, by contrast, there is no substantial danger that this criteria [*sic*] will create incentives to make particular religious choices."[59] Opposing McConnell, Kathleen Sullivan argues that the First Amendment requires that government yield to objections against public support of religion as it need not yield to objections against its subsidizing advocacy of abortion, for example. One is a constitutional mandate, while the other "is a matter of political grace."[60] Both McConnell and Sullivan, however, believe that religious neutrality is an achievable goal. In my view, it is not. Where McConnell would achieve neutrality through a broader support of religious difference, Sullivan would do so by strengthening the wall of separation between church and state: no support means no possibility of influencing religious choice. In my view, however, all public policy is grounded on judgments about the "relative worthiness" of the options before us. Varying policies may influence the exercise of religious difference, but in varying ways and among varying communities of faith. Therefore, in determining policy we need first to determine which public purposes we wish policy to serve—a qualification even McConnell admits may trump the exercise of religious difference.

Debate over public funding for school choice may elucidate this point. Stephen Macedo argues, for example, that the idea that public institutions can be neutral among varied worldviews "is a nonstarter. . . . It is important that the values taught in public schools should be publicly defensible; it is impossible that they should be equally attractive to the different worldviews and religious views that people espouse in America." We are not obligated to fulfill citizens' particular desires, but to provide them with "a fair measure

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of basic goods that can be justified from a public point of view." Although people may pursue nonpublic interests on their own, "it would be inappropriate to pursue these nonpublic values and aspirations in public institutions that *we support and share as fellow citizens*."[61] To me, this means that public funding should not be used to promote pluralism that counteracts public purposes to which we are collectively committed. Nondiscrimination in hiring is surely one of these. In *Rust v. Sullivan* (1991), the Supreme Court upheld public funding for a family planning program that was contingent on private social service providers' silence about abortion as an option, ruling that "the government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."[62] Although I disagree vehemently with what is sometimes called "the gag rule," the point stands. Public authority may with democratic input determine the scope of our public purposes and may render public funding contingent upon recipients' conducting their programs in accord with those purposes. And as a public purpose, nondiscrimination in hiring is at least as publicly defensible as discouragement of abortions.

Those who claim that encouraging pluralism, even by abrogating public purposes, will achieve the ideal of neutrality are mistaken. Amy Gutmann notes that although school voucher advocates like McConnell distrust those who claim to know what educational principles are best for democracy, their advocacy of market choice with minimal standards is itself a claim about what principles are best for democracy. Rather than promoting neutrality, educational pluralists are simply making a different claim. "If the time comes when citizens of a constitutional democracy should not as citizens say what principles we think are best for the education that we are publicly funding, then we will probably be ready for the end of public funding of schooling. This would be a sad day for constitutional democracy."[63]

Those who argue that public funding of faith-based organizations with exemptions from antidiscrimination laws will promote a neutral ideal of unfettered and independent religious choice are similarly mistaken. Greater associational autonomy for publicly funded faith-based organizations may promote more religious choice for some, but will curtail it for others. In my view, freedom of association means that the right of exit from associations with which one disagrees must be complemented by a social field that provides alternatives. The resulting balance will not be neutral. But it is surely a public purpose worth pursuing.

Conclusion

Although charitable choice has thus far been implemented through executive orders rather than legislation, these issues are very much alive. In 2003 John DiIulio deplored the fact that religious conservatives had called for "new laws permitting religious organizations to proselytize with public funds and enjoy virtually unfettered rights to discriminate against employees on the basis of religion," thereby arousing opposition that caused a valuable opportunity to legislate charitable choice to be lost.[64] Simultaneously, the Bush administration sent a position paper to Capitol Hill arguing that faith-based service providers should be allowed to discriminate on the basis of religion or sexual orientation in hiring: "Faith-based organizations must be protected from the kind of discrimination that would prevent us from hiring the people who are best equipped to fulfill our mission and do the work. . . . This discrimination is a violation of the civil rights of religious groups that would effectively prevent the delivery of services to this country's black and brown urban poor."[65]

If we wish to promote pluralism, we should encourage varieties that enhance the free-exercise and free-speech rights of individual conscientious believers. I shall close with two cautionary observations. First, Gutmann notes that in a nation with a religious establishment like Israel, in religious matters the state speaks not simply in the name of Judaism, but "in the name of a 'state establishment' of Orthodox Judaism over and often against other interpretations of Judaism." Even Orthodox Jews may "take religious exception to the idea that state officials can be entrusted to determine what counts as the correct practice of Orthodox Judaism." In the United States, potential clients and employees of faith-based service providers may lose this-world benefits if they do not conform to the dominant interpretation of a faith—that is, to the interpretation put forth by the government-funded service provider. As Gutmann says, "Just as separation [of church and state] protects nonbelievers from the pressures to conform to a religion they reject, it also protects believers from pressures to conform to an interpretation they reject of a religion they accept."[66]

Second, Martha Nussbaum writes, "To be able to search for an understanding of the ultimate meaning of life in one's own way is among the most important aspects of a life that is truly human." Because even the most communal religious traditions are dynamic and exhibit internal diversity and conflict, "it is the person whose freedom of conscience and freedom of religious practice we should most fundamentally consider. Although religious functioning is usually relational and interactive . . . , the capabilities involved are important for *each,* and it is *each person* who should not be prevented from having access to these capabilities."[67] From this perspective, we should hesitate not only in giving legal effect to purportedly authoritative interpretations of a tradition against its own believers, but also in doing so when nonbelievers are likely to be affected. The resulting pluralism on the individual level is both publicly defensible and a public purpose worthy of adoption.

Notes

1 Rosenblum 2000b, 12–13, 13, 14.
2 Soifer 2000, 253. See also 251–53 and 261–63.
3 Monsma 1996, 174. See also 18–21, 163. On the constitutive character of belief, see Sandel 1990, 75–89. See also Carter 1993, 35.
4 *Romer v. Evans,* at 631, 635.
5 Richards 1998, 357, 360.
6 Eisenach 2000, 147.
7 Galston 2002, 23. See also 20–24.
8 *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* (1987), at 327, 337, emphasis original.
9 *Employment Division v. Smith,* at 873.
10 For an illuminating discussion of this neutrality, see Weber 2003, 64–74.
11 McConnell 2000a, 105; see 100–105.
12 McConnell 1992, 168, 175, 177, 184, emphasis original. See also 134, 169, 185–86.
13 Monsma 1996, 117–19, 126. The classic example of the latter dilemma is *Sherbert v. Verner* (1963) in which the Supreme Court overruled the denial of unemployment compensation under South Carolina law to a Seventh-Day Adventist fired for refusing to work on her Sabbath.
14 Monsma 1996, 160. See also 155, 159, 161–66.
15 Ibid., 178, 181, 185, 193.
16 Rosenblum 2002b, 15, 17, 16, emphasis original. See 18–20 for other types of integralism.
17 Muñoz 2003, 23, 24. See also 28.
18 Ibid., 30, 31.
19 Hacker 1999. On public funding of this nature, the Supreme Court ruled that public aid to a District of Columbia Catholic hospital was legitimate because the hospital was separately incorporated, and therefore a secular corporation managed by persons who adhered to the doctrines of the Roman Catholic Church (*Bradfield v. Roberts*).
20 Cole 2001, A25. The details of New Jersey's faith-based community development initiative, launched by Governor Christine Todd Whitman in 1998, are exemplary in that it uses traditional rules for public funding of nonprofit social service agencies like Catholic Charities or Lutheran Social Services. Any funded program must be a separately incorporated 501(c)3 nonprofit group, it must not proselytize, funding cannot go for bricks and mortar, and it must follow civil rights laws in its personnel practices. See Segers 2002; see also Formicola 2003, 46–50.
21 Goodstein 1997, A16.
22 *New York Times* 2001, A18.
23 Stevenson 2002, A28. For a good summary of the development of the faith-based initiative, see Segers 2003, 5–15.
24 *Bowen v. Kendrick,* at 610–16.
25 Ibid., at 641. See also 650–51.
26 Goodstein 2001a, A18.
27 Soskis 2001, 24. See also Formicola, Segers, and Weber 2003, 172.
28 Hacker 1999, 17.
29 Goodstein 2001e. See also Kennedy et al. 2003.
30 Soskis 2001, 23.
31 *Peoria Journal-Star* 2001a, A04.
32 Goodstein 2001b, A10.
33 Americans United for Separation of Church and State 2002.
34 Richardson 2002. See also Guerrero 2002.
35 Satter 2001.
36 Goodstein 2001c.
37 Rosenblum 2000b, 18.
38 Bahat 2001, A22. See also Goodstein 2001d.
39 McConnell 1992.
40 McConnell 2000b, 37.
41 Weber 2003.
42 Lichtblau 2003, A01, A21. See also *New York Times* 2003.
43 Niebuhr 1998, A12.
44 Goodstein 2003, A23.
45 McConnell 1992. In his view, if religious organizations are granted a constitutional right to equal access to public programs, the conditions of access must not burden their religious practices unless these conditions "are closely related to the purposes of the program" (p. 186).
46 Kukathas 1995, 10–13. See also Kukathas 1992a; Kukathas 1992b; Kukathas 1997.
47 Creppell 1996. See also McClure 1990, 373–81; Locke 1950, 39–40.
48 Rosenblum 2002, 153.
49 *Peoria Journal-Star* 2001b. See also Boston 1999, *New York Times* 2002. In 2003, moreover, suits were in progress in both California and New York in which Catholic Charities requested exemptions from state laws requiring that contraceptives be included in employee prescription drug plans. A successful outcome will impose Roman Catholic doctrine on thousands of non-Catholic women (Kravets 2003).
50 *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,* at 343–45.
51 Lewis 2003.
52 Stephen Carter observes that religions properly function as independent centers of power and bases of resistance to the prevailing ethos. The separation of church and state originated "to protect religion from the state, not the state from religion" (Carter 1993, 105; see also 116–17, 142).
53 Rosenblum 2000a, 186.
54 Spinner-Halev 2000, 184.
55 Rosenblum 2000a, 189.
56 Scott and Badertscher 2003.

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57 Rosen 2001, 16, 17.
58 Marcosson 2003.
59 McConnell 2000b, 40.
60 Sullivan 1992, 11.
61 Macedo 2003, 55, 56.
62 *Rust v. Sullivan,* at 193. See also Weber 2003, 71–75, for free speech issues raised by the faith-based initiative.
63 Gutmann 2003, 135.
64 DiIulio 2003.
65 National Gay and Lesbian Task Force 2003. See also Allen and Cooperman 2003.
66 Gutmann 2000, 157, 158, 160. On a related point in the United States concerning the preparation of kosher food in accordance with state law that favors a particular interpretation of Judaism, see Purdy 2003.
67 Nussbaum 2000, 342, 347, emphasis original. See also Greenawalt 2000, 224–27.

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