Notre Dame Journal of Law, Ethics & Public Policy

Volume 13
Issue 2 *Symposium on Law and Religion*

Article 2

1-1-2012

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ARTICLES

INTERPRETING THE RELIGION CLAUSES IN TERMS OF LIBERTY, EQUALITY, AND FREE SPEECH VALUES—A CRITICAL ANALYSIS OF "NEUTRALITY THEORY" AND CHARITABLE CHOICE

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INTRODUCTION

Substantial arguments suggest that the charitable choice provisions of the recent welfare reform act may be unconstitutional under current Supreme Court authority.[1] An analysis based on current authority may only be of limited utility, however. The Court's interpretation of the Establishment Clause does not represent stable constitutional doctrine today. Change is in the wind, although the Court continues to be fragmented as to the direction in which doctrine should move.[2] Because of this doctrinal uncertainty, the focus of this article is less on what is and more on what ought to be. The requirements of existing precedent notwithstanding, several commentators have proposed alternative interpretations of the Free Exercise Clause and the

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1. *See* Alan Brownstein, *Constitutional Questions About Charitable Choice, in* WELFARE REFORM & FAITH-BASED ORGANIZATIONS 219 (Derek H. Davis & Barry Hankins eds., 1999).

2. *See, e.g.*, Agostini v. Felton, 117 S. Ct. 1997 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985) and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985) in a 5-4 decision permitting the provision of state-funded remedial educational services by public employees at parochial schools); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (requiring public university to fund sectarian religious periodical along with other student journals published in a limited public forum in a 5-4 decision limited by Justice O'Connor's narrow concurring opinion).

Establishment Clause that would allow the charitable choice provisions to be upheld against constitutional challenge.[3] This paper is a critical response to that commentary.

I. WHAT IS "NEUTRALITY THEORY"?

Professor Carl Esbeck, who participated in the drafting of the charitable choice provisions,[4] described one such constitutional model which he refers to as "neutrality theory" in a recent article in the *Emory Law Review*.[5] Other scholars have proposed variations of a neutrality theory that track Esbeck's description in some respects but differ from it in others.[6] Given Esbeck's role in developing the charitable choice legislation, however, it seems appropriate to focus on the interpretation of the Constitution that he endorses in discussing potential shifts in doctrine that might justify this statutory scheme.[7]

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3. *See, e.g.*, STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY (1996); Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1 (1997); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997); Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992).

4. *See* Laycock, *supra* note 3, at 44.

5. *See* Esbeck, *supra* note 3, at 20.

6. Professor Esbeck, for example, contends that neutrality theory justifies exempting religiously motivated conduct but not comparable secular acts of conscience from the application of neutral laws of general applicability. *See* Esbeck, *supra* note 3, at 23-27. Professor Laycock, on the other hand, has argued that it is "essential to the pursuit of religious neutrality [that] the law should protect nontheists' deeply held conscientious objection to compliance with civil law to the same extent that it protects the theistically motivated conscientious objection of traditional believers." Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 331 (1996). Similarly, Esbeck appears to suggest that under neutrality theory, government speech must follow "a separationist model" and cannot endorse or advocate religious beliefs. Esbeck, *supra* note 3, at 23 n.87. Professor McConnell, in contrast, would allow government speech that endorses religious beliefs. *See* McConnell, *supra* note 3, at 170-75.

7. The idea of neutrality as it relates to the religion clauses can mean so many different things to so many different people that it is impossible to write a relatively brief article criticizing neutrality theory without limiting discussion to one specific version of the model. *See generally*, Douglas Laycock, *Formal, Substantive, and Desegregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990) (describing the range of meanings attributed to neutrality in religion clause jurisprudence). In addition to focusing on the description of neutrality theory in Professor Esbeck's *Emory Law Journal* article, *supra* note 3, I also frequently refer to the *Amici Curiae* brief [hereinafter Brief] of the Christian Legal Society, the Coalition for Christian Colleges & Universities, and the Union of Orthodox Jewish Congregations of America filed in the U.S. Court of Appeals, Fourth Circuit in support of plaintiff-appellant in *Columbia Union*

The goal of neutrality theory, according to Esbeck, is to "maximize[ ] religious liberty."[8] That objective is best accomplished by

> the minimization of the government's influence over personal choices concerning religious beliefs and practices. The goal is realized when government is neutral as to the religious choices of its citizens. Thus, whether pondering the constitutionality of exemptions from regulatory burdens or of equal treatment as to benefit programs, in both situations the integrating principle is neutralizing the impact of government action on personal religious choices.[9]

Neutrality theory implements this integration by "distinguishing between burdens and benefits." Under its operational rules, minimization of government influence is achieved by "(1) allowing religious providers equal access to [state] benefits, and (2) allowing them separate relief from regulatory burdens."[10]

Pursuant to this distinction, when state regulations of conduct are at issue, the disproportionate impact, substantive inequality, and burdens on liberty that result from the application of ostensibly neutral laws of general applicability to people of different religious faiths are precluded under neutrality theory by a constitutional mandate requiring the state to grant exemptions from such laws for religiously motivated conduct. When government spending decisions are challenged, however, "the neutrality principle is not concerned with unintended effects among religions. Accordingly, the Establishment Clause is not offended should a general program of aid affect, for good or ill, some religious providers more than others, as long as any disparate effect is unintentional."[11] Thus, neutrality theory does not appear to recognize any distortion of incentives arising from the allocation of state funds to even pervasively sectarian religious organizations for the provision of secular public services as long as the funds are awarded on the basis of facially neutral criteria. Or at least it

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College v. Clarke, 988 F. Supp. 897 (1997). In *Columbia Union College*, the district court upheld the denial of state financial aid to a private college affiliated with the Seventh-Day Adventist Church on the grounds that the college was a pervasively sectarian religious institution. Professor Esbeck's name is on the brief although he is not listed as Counsel of Record.

8. Esbeck, *supra* note 3, at 27.

9. *Id.* at 26.

10. *Id.* at 24.

11. *Id.* at 38-39.

does not recognize that any such distortion of incentives would be constitutionally significant.[12]

What *is* unacceptable to neutrality theory is the denial of funding to pervasively sectarian religious organizations. This departure from neutrality between secular and religious organizations imposes a transformative burden on religious subsidy recipients. By conditioning governmental support on a religious organization not being pervasively sectarian, the state in essence requires that religious organizations must change themselves in a fundamental way into something they are not in order to be eligible to receive state grants. Religious organizations are not treated neutrally when they must surrender their identity to receive the same level of support as secular organizations performing comparable functions.

Indeed, under neutrality theory, the primary concern with the funding of religious organizations is ensuring that they be as unrestricted and free from regulation as possible in maintaining their sectarian character while using state resources for public purposes.[13] It is a departure from neutrality if, as a consequence of receiving state financial support, a religious organization must jeopardize the special protection of its institutional autonomy that religious institutions have traditionally been provided. Religion is not impermissibly advanced when sectarian religious organizations maintain their religious character while receiving state grants that are distributed under neutral criteria because state subsidies do not constitute special benefits to the organizations that receive them. As long as the public receives full value in secular services and results from the religious organizations' use of public funds, the effect of the subsidy on religion is, well, "neutral," and, therefore, constitutionally acceptable.

II. A CRITIQUE OF "NEUTRALITY THEORY"

While there are several conceptual and practical difficulties with neutrality theory and its goal of minimizing government's influence over personal choices relating to religious beliefs and practices, for the purposes of this paper, I intend to focus on three criticisms. First, despite its name and billing, neutrality theory really isn't very neutral. Far from minimizing government incentives relating to religious decisions, the theory tolerates and even encourages government decisions that will influence religious choices and behavior. Second, the theory is misdirected in its objective. In attempting to interpret the religion clauses solely

12. *See id.* at 21.
13. *See id.*

in terms of constitutional constraints on government interference with religious liberty, neutrality theory fails to take into account other important and relevant constitutional values. As an alternative to the goal of protecting liberty through a commitment to government neutrality, I suggest that the religion clauses should be interpreted to serve two primary substantive values, religious liberty and religious equality, while avoiding to the extent possible any undue distortion of a competitive marketplace of ideas regarding the basic beliefs of citizens. Third, with its emphasis on eliminating government influence on religious choices and behavior, neutrality theory pays inadequate attention to the positive role that government should play in promoting religious liberty and equality.

A. *The Lack of Neutrality in Neutrality Theory*

Perhaps the most glaring defect of neutrality theory is its lack of commitment to neutrality itself. In theory and practice, neutrality theory does not live up to its own ideals, whether we are talking about neutrality between secular and religious belief systems or neutrality among religious faiths.

Neutrality theory claims that its goal is "the minimization of government's influence over personal choices concerning religious beliefs and practices."[14] One would presume that this objective precludes government actions that create incentives for or against engaging in religious practices or adopting religious beliefs. The theory does not explain, however, how granting exemptions for religiously motivated conduct, but not acts of secular conscience, promotes such a neutral result.

A system of free exercise exemptions or statutory accommodations of only religiously motivated conduct promotes religious beliefs and practices in a variety of respects. As a general matter such a legal regime creates the impression that religious moral principles are more worthy of respect than secular beliefs. Further, religious moral convictions provide a more useful value system to the individual under this framework because they free the individual from the risks and burdens associated with being subject to inconsistent requirements. If a person influenced by both secular and religious values is told that the government will only respect the individual's acts of conscience if they are derived from religious sources, an incentive is created to look to one's religious beliefs to justify moral conduct.[15]

14. *Id.* at 26.

15. Christopher Eisgruber and Lawrence Sager discuss at length the ways in which broad-based constitutional or statutory exemptions for religiously

No one suggests that these general incentives will draw secular individuals irresistibly to spiritual life.[16] They operate incrementally on the margin and cumulatively. If the situation were reversed and only secular acts of conscience were exempted from general laws, however, I would be hard pressed to deny that such a framework created incentives favoring secular beliefs.

Recognizing that the provision of regulatory exemptions for religiously motivated conduct creates incentives that favor reli-

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motivated conduct favor religion in several articles. *See, e.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After* City of Boerne v. Flores, 1997 SUP. CT. REV. 79, 104-22 (1997) [hereinafter *Congressional Power*]; Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 444-60 (1994) [hereinafter *Unconstitutional*]. They conclude, I think correctly, that the exemption of religiously motivated conduct from general laws proposed by neutrality theory, standing alone, "radically favors religious motivation, by giving it and it alone a presumptive immunity from state regulation. It is precisely this favoritism which is normatively indefensible, and precisely this favoritism which makes exemption seem so much like subsidy. Redescribing it as neutrality does not solve the problem on either score." *Congressional Power* at 118.

As an alternative to "neutrality theory," Eisgruber and Sager offer an "equality theory" of the religion clauses under which "government's fundamental obligation is to treat all deep personal commitments equally, regardless of whether those commitments are secular or religious, mainstream or unusual." *Congressional Power* at 123. The foundation of this approach is the authors' contention that there is nothing sufficiently unique about religion that justifies assigning it a fundamentally distinct status in constitutional law. Thus, "there is no constitutional justification for the privileging of religion," *Unconstitutional* at 448, and no persuasive reason "why churches should not be eligible for government benefits on the same terms as comparable secular enterprises, including, for example, private schools and secular charities." *Congressional Power* at 138.

My own view, which might be described as a "liberty, equality and speech theory," recognizes religion to be special for constitutional purposes in a variety of ways that justify both exempting religiously motivated conduct from neutral laws of general applicability and treating religious institutions differently than secular ones with regard to the funding of public services. From Eisgruber and Sager's perspective, my view might be characterized as a form of *quid pro quo* approach, in which "the Free Exercise Clause gives back [to religion] some of what the Establishment clause takes away." *Congressional Power* at 121 (describing Abner Greene's analysis of the religion clauses in *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993)).

16. Similarly, when critics of the marginalization of religion in public life argue that eliminating religious displays from the public square creates incentives in favor of secular beliefs, *see* W. Cole Durham, Jr. & Alexander Dushku, *Traditionalism, Secularism, and the Transformative Dimension of Religion Institutions*, 1993 BYU L. REV. 421, 442-46, 455-60 (1993); McConnell, *supra* note 3, at 188-94, they are not suggesting that religious people in droves will renounce their faith if the government becomes less overt in celebrating religious holidays.

gion does not establish that such exemptions are constitutionally impermissible.[17] Indeed, in many cases I believe religious exemptions are constitutionally justified if not required. Evaluated in isolation, there is often a persuasive argument that granting an exemption for a religious practice distorts incentives in favor of religion far less substantially than the incentives against religious practice that are created if the exemption is denied.

This does not mean, however, that the incentives in favor of religion that the granting of exemptions creates are constitutionally irrelevant and never need to be taken into account. On the contrary, I suggest that the development of constitutional standards to further the goal of incentive neutrality requires a wider and more holistic perspective. If regulatory exemptions result in incentives favoring religion, the granting of exemptions creates an imbalance in the constitutional ledger that may help to justify other decisions, creating countervailing incentives, that move the system closer to equilibrium. It is this lack of attention to the consequences of granting religious exemptions that calls the commitment of neutrality theory to true incentive neutrality into question.

Even if we direct our focus exclusively to specific exemptions, it seems clear that certain religious exemptions, those that are of independent secular benefit to the individual being relieved of a legal burden, may powerfully influence personal behavior toward religion or a particular faith.[18] Conscientious objector exemptions from military conscription arguably create this kind of an incentive. Laws that require private or public employers to accommodate the religious practices of employees, such as a law requiring firms to provide religious employees time off from work to observe their Sabbath, may have a similar effect.[19] It is not too difficult to imagine a firm in which most employees desire weekend days off to be with their families, but only the religious employees are given Saturday or Sunday off so

17. Let me be absolutely clear that I strongly favor providing free exercise exemptions for religiously motivated conduct. I simply do not believe that providing these exemptions to religious individuals alone can be defended as "neutral" or as minimizing government influence over personal choices relating to religion. We do not maximize neutrality by evaluating the grounds for an exemption in isolation and then ignoring the incentive consequences that result when the exemption is granted.

18. *See* Laycock, *supra* note 7, at 1016-18 (recognizing the problem created by such exemptions and the need to subject such claims to special analysis).

19. *See, e.g.*, Thornton v. Caldor, 472 U.S. 703 (1985) (evaluating the constitutionality of a law requiring employers to give employees time off to observe the Sabbath).

they may comply with the obligations of their faith. If attending church or synagogue services for an hour some Saturdays or Sundays is sufficient to establish eligibility for this accommodation, it would not be surprising to discover that some individuals discover a renewed interest in attending religious services when that is the price to pay for having the rest of the day off with their families.[20]

Neutrality theory is even more deficient in its approach to government spending and the disproportionate impact of facially neutral spending programs among various religious faiths. Surely, all the criticism of the Supreme Court's decision in *Employment Division v. Smith*[21] and the battles over the federal Religious Freedom Restoration Act ("RFRA")[22] established one important principle of religion clause jurisprudence. Formal neutrality in government decision making does not adequately protect or promote religious liberty or equality. This principle is as true for government spending decisions as it is for regulatory laws.

It is true that formally neutral laws and spending decisions do not distinguish between secular and religious beliefs or among different religious faiths on their face. In a superficial sense these laws require that everyone must be treated the same way. In that formal sense, such government decisions are neutral and evenhanded. But we know that this kind of neutrality is a sham. Because different religious groups and individuals are not similarly situated, these formally neutral laws undermine reli-

20. Exemptions for the kinds of activities funded through charitable choice clearly create incentives that favor religious providers. For this reason, Thomas Berg notes that a particularly difficult case for exemptions "is presented by not-for-profit educational and social service activities of churches, such as schools, shelters, soup kitchens, child care centers, and so forth. Here churches undeniably compete with secular alternatives, and exemption can potentially create an incentive to use religiously affiliated services." Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 49 (1994).

Berg would still permit exemptions in these situations despite the incentives they create, *id.*, and as a general matter I am inclined to agree with his position. My point is not that the exemptions should be denied. It is that the incentives created by granting such exemptions cannot be ignored in determining religion clause doctrine relating to state funding of religious organizations. If the goal of neutrality theory is to minimize incentives, it is not clear to me why constitutional requirements governing the award of direct subsidies to religious organizations should not take account of the incentives that are created when these organizations receive regulatory exemptions that are unavailable to similarly situated secular groups.

21. Employment Div. v. Smith, 494 U.S. 872 (1990).

22. 42 U.S.C. §§ 2000bb to bb-4 (1994).

gious liberty and promote inequality. For religious liberty and equality to be meaningfully protected, we have to look behind the formal neutrality of the law and examine its real world effects and consequences.

Yet Professor Esbeck seems to ignore this important lesson when government spending is at issue. Far from incorporating the doctrinal structure of pre-*Smith* Free Exercise law and RFRA into the review of government spending programs, neutrality theory seems to track the analysis of *Employment Division v. Smith* quite comfortably. As long as state grants are distributed according to some neutral criteria that on its face allows both religious and secular organizations to compete for funding, Free Exercise and Establishment Clause requirements are satisfied.[23]

It is difficult to understand the justification for this doctrinal bifurcation between regulation and spending. When the government denies unemployment compensation to a Seventh Day Adventist or a Jewish person because they will not accept work on Saturday,[24] the incentives created by this decision and the burden it imposes on religious liberty seem obvious. Surely, similar incentives are created when the criteria the government uses in deciding whether to fund particular religious organizations for the provision of welfare services requires the grantee to operate its program on Saturday. Both decisions are formally neutral. Both decisions are substantively unequal and unfair to religious faiths that recognize Saturday as the Sabbath. Yet neutrality theory apparently condemns the former and upholds the latter.[25]

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23. *See* Esbeck, *supra* note 3, at 38.

24. *See* Sherbert v. Verner, 374 U.S. 398 (1963) (holding that it is unconstitutional to deny member of the Seventh-Day Adventist Church unemployment compensation because she refuses to accept jobs that require her to work on her Sabbath).

25. While proponents of neutrality theory support the reasoning and holding of *Sherbert v. Verner*, it is far less clear that they are willing to extend its holding to require the review of neutral funding criteria that may make it more difficult, if not impossible, for certain minority faiths to successfully apply for contracts to provide social services. There is a continuum of burdens here. The example in the text of a grant condition that requires the contracting party to operate a program on Saturday is a particularly blatant illustration of a requirement that would handicap Sabbatarians. Allowing such a direct burden to be challenged under the authority of *Sherbert*, however, only begins the inquiry. The decision to require a program to operate on Saturday may accurately reflect beneficiary demand for the program and conventional efficiency concerns as much as it suggests insensitivity to the religious needs of a minority faith. Would it also be unconstitutional only to award contracts to organizations that either operate on Saturday or demonstrate that they can service a comparable number of welfare recipients at an equivalent cost as those organizations that do operate on Saturday? Many religious organizations that

By accepting without review all neutral spending decisions, neutrality theory appears to ignore the fact that a religious majority may be just as likely to create incentives that burden the choices of religious minorities as secular decision makers. It is an odd oversight.[26] *Sherbert v. Verner*[27] may be the strongest Supreme Court decision protecting a religious individual from

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recognize Saturday as their Sabbath in many communities could not successfully compete for contracts under this criteria.

26. Some commentators on the meaning of the religion clauses understate the dangers to religious liberty and equality that may result from competition among religious faiths. They argue that the primary risks to religious freedom result from the subordination of the interests of serious believers of all faiths to an increasing secular social and political environment, not from friction between religious groups. *See, e.g.*, David M. Smollin, *Regulating Religious and Cultural Conflict in Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067, 1091-96 (1991). *See generally* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991). While I agree that religious intolerance has declined in the United States during the last half century, I believe these commentators understate the extent to which it continues to influence personal beliefs and behavior.

Moreover, in my view, this perspective mistakenly construes the *relative* absence of serious religious rivalry and antagonism in the United States during the last few decades to be an enduring condition. A more comprehensive view of history suggests that the absence of religious conflict in a society for one generation provides little guarantee that the intolerance among faiths that has plagued countries throughout the world for several millennia and American society for most of its existence has been permanently stifled.

Moreover, while it is always problematic to ignore the lessons of history and assume the continuation of current social conditions, basing a challenge to existing Establishment Clause doctrine on the assumption that social peace among the diverse religious sects that populate America will endure seems particularly unrealistic. Establishment Clause critics, after all, condemn both Supreme Court doctrine over the last forty years and the secular culture that has allegedly prospered in its wake. *See, e.g.*, Richard John Neuhaus, THE NAKED PUBLIC SQUARE (1984); Smollin, *supra*. This is the same period, however, in which religious toleration in American society has flourished and many minority faiths have been able to shed much of their outcast status. Social conditions have diverse causes, of course, and it would be foolish to attribute current ecumenical attitudes among many faiths to any one factor, such as religion clause doctrine over the last four decades. It also seems unrealistic, however, to ignore the possibility that the very cultural conditions and legal standards that the critics of current doctrine hope to change may have contributed to the existing environment of religious toleration—the very environment on which these critics ground their lack of concern about religious conflict. *See generally* Christopher L. Eisgruber, *Madison's Wager: Religious Liberty in the Constitutional Order*, 89 N.W.U. L. REV. 347, 348 (1995) (challenging the assumption that "the benign character of American religion owes no debt to the forces (constitutional or otherwise) that have tended to dilute or marginalize . . . religion in America").

When the "SLOW DOWN—DANGEROUS BLIND CURVE AHEAD" sign falls down in a storm, it may not be a wise decision for a Highway Authority to save money by refusing to repair it on the grounds that there were very few

incentives created by neutral law. But there is no reason to believe that the good people of South Carolina who forced the Sabbatarian petitioner in *Sherbert* to choose between unemployment compensation benefits and the observance of her Sabbath were part of a hostile secular elite, habitually insensitive to religious concerns. On the contrary, South Carolina's laws were structured in a way that guaranteed that no Sunday Sabbath observer would have to confront the kind of predicament its system created for Seventh-Day Adventists and Jews.[28]

An additional hypothetical concerning the funding of religious and secular schools should help to illustrate the problem here. Assume that the government in addition to funding the public schools, allows different private groups, including religious groups, to bid for communitywide contracts to provide secular educational services to children. Tracking the charitable choice provisions, the law providing such funding allows any religious group receiving a contract to promote its faith at school through private funding and to discriminate on the basis of religion in hiring teachers and staff. There are several religious schools in the community already, but, not surprisingly, the largest school, let us say it is Methodist, is able to underbid its competitors and receives the contract.[29] Now there will be two state-funded schools in the community. One is a secular public school and the other is a pervasively sectarian Methodist school that

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accidents on the curve during the last ten years—the exact period when the sign was in place.

27. 374 U.S. 398 (1963).

28. *See id.* at 406, 421 n.3 (noting that "South Carolina expressly saves the Sunday worshiper from having to make the kind of choice which we here hold infringes the Sabbatarian's religious liberty" through statutes mandating Sunday as a day of rest and exemptions from Sunday work requirements imposed during times of national emergency).

29. One of the criticisms directed at the charitable choice provisions is that it will result in the disproportionate funding of larger, well-established, religions to the disadvantage of minority faiths. *See, e.g.*, Derek H. Davis, *Editorial: The Church-State Implications of the New Welfare Reform Act*, 38 J. CHURCH & ST. 719, 724 (1996). Recent research by Professor Monsma suggests that these concerns may be well-founded. In describing the results of his study of government funding of religious organizations providing public services, Professor Monsma notes that "the smaller [religious] organizations—and especially very small ones—clearly reported receiving much smaller proportions of their budgets from public sources than did the medium-sized and large organizations. This is true of all three types of nonprofit organizations surveyed. Presumably the larger nonprofits, with their more professional nature and more internal resources, are better equipped to pursue and qualify for public funds. Or it may be a matter of the very small organizations having less need for public funds due to their lower budgets and, perhaps, stronger local support bases." MONSMA, *supra* note 3, at 67.

teaches religion along with secular subjects (although the former instruction is privately funded).

I recognize that the problem of state funding of religious schools is a difficult question that is beyond the scope of this paper. But surely a constitutional theory that identifies its primary goal as minimizing government incentives that influence religious decisions should consider this result to be problematic. Neutrality theory, however, appears to be "neutral" between this kind of a funding decision and more egalitarian arrangements.[30] If the goal of neutrality theory is to try to recreate as closely as possible the religious decisions that would be reached by private parties acting individually or through private agreement if the government was not involved, these "neutral" arrangements for funding secular social or educational services through religious institutions seem starkly inconsistent with that objective.[31]

Neutrality theory also ignores the incentives created by allowing a religious organization to discriminate on the basis of

30. The rhetoric of neutrality theory continually conflates the process of facial neutrality in the award of benefits with the result of an evenhanded allocation of funds among diverse religious faiths. Thus, proponents argue, "If a program of aid is truly neutral, then each individual's religious choices are maximized while government's influences over those choices is minimized." Brief, *supra* note 7, at 25. Similarly, it is suggested in the context of public financial support for religious schools that neutrality theory will reduce religious divisiveness in communities because by "permitting evenhanded funding of a diversity of schools . . . neutrality diffuses the need to quarrel and contend." *Id.* at 29. One searches in vain when reading discussions of the theory and its real-world operation for any principle that requires such evenhanded diversity of funding among religious faiths or any empirical analysis explaining why anyone should believe that equality in the allocation of funds is likely to result from the use of neutral, but politically determined, funding criteria. Certainly, critics of charitable choice from both the left and the right have been dubious about the way funds will actually be distributed under the legislation. *See, e.g.*, Robin E. Blumner, *Perspective—And Now, Welfare for Churches*, ST. PETERSBURG TIMES, Sept. 1, 1996, at 4D (Florida ACLU director arguing that charitable choice will disrupt the "harmony of America's religious pluralism" because in many communities "the favored religion will get the biggest piece of the taxpayer pie" and "resentment by the unfavored is inevitable."); Timothy Lamer, *I Gave at Church*, WKLY. STANDARD, Jan. 15, 1996, at 13 (conservative critic condemning charitable choice because "raw political power will prevail" in distributing support and "whichever sects have the most influence in each state will get the coveted funds").

31. Of course, absolute substantive neutrality or equality in spending decisions among religious individuals, institutions, or faiths may be impossible to achieve in practice. The government may need to have certain job functions performed on Sunday, for example, and religious persons and institutions observing that day as their Sabbath will be unable to provide those services. While some inequality is unavoidable, the religion clauses can and should limit the extent and impact of unfair allocations among diverse faiths.

religion in hiring employees to perform public functions it has contracted with the state to provide. Assume the public functions at issue had previously been provided by the state itself or by secular organizations prohibited by law from discriminating on the basis of religion and that individuals of diverse faiths were employed in the delivery of those services. Then the state substantially reduces the funding available to government or secular providers and uses the funds it has saved to subsidize religious organizations that have demonstrated their ability to successfully administer similar services. Those individuals previously employed by the state or secular organizations, who lost their jobs when the state's funding was redirected, are told that jobs requiring their expertise and background are now available from the newly subsidized religious organizations—however, applicants must pass a religious test governing both their beliefs and behavior to be eligible to be hired. Where their previous employers had some obligation to reasonably accommodate the religious needs of employees on the job and no authority to discriminate against employees on the basis of their religious activities off the job,[32] now these employees must comply with the religious mandates of a different faith on and off the job. Apparently, from the perspective of neutrality theory, this change in job opportunities and working conditions does not create incentives that influence religious decisions.[33]

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32. *See, e.g.*, Heller v. EBB Auto Co., 8 F.3d 1433 (9th Cir. 1993) (explaining Title VII provision requiring employers to reasonably accommodate the religious practices of employees); WHITE HOUSE OFFICE OF COMMUNICATIONS, GUIDELINES ON RELIGIOUS EXPRESSION IN THE WORKPLACE, Aug. 14, 1997, *available in* 1997 WL 475412 (describing requirements of religious accommodation that apply in the federal workplace).

33. Proponents of neutrality theory suggest that the Court's decision in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 479 U.S. 1052 (1987) resolves the issue of discrimination in hiring on the basis of religion. *See* Esbeck, *supra* note 3, at 26 n.99. *Amos*, of course, involved discrimination in hiring employees who would be paid with the religious organization's own funds, not state subsidies. Indeed, the *Amos* decision has been powerfully defended on precisely that basis. *See* Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 114 (1989) (explaining how the use of tithing funds to pay an "unfaithful" employee would undermine "the powerful concept that tithing is the sacred means by which Mormons build the Kingdom of God").

More importantly, extending the holding in *Amos* to justify discrimination in hiring with state funds ignores the fact that *Amos* was a difficult decision precisely because there were religious liberty interests on both sides of the dispute. *See* Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 92 (1990) (noting that "the regulation being lifted to avoid

The charitable choice provisions of the recent welfare reform act implicate virtually all of the incentives ignored by neutrality theory that are discussed above. The statute permits funds to be allocated according to facially neutral criteria without regard to the allocation of resources among different faiths. There are no constraints on programmatic requirements that have the effect of precluding particular religions from participating. No attention is paid to the possibility that religious beliefs and practices may increase the cost or impair the efficiency of certain religious providers making it highly unlikely that those faiths will receive contracts from the state. The incentives created by any disparity of allocation among faiths are not taken into account in any way. Similarly, charitable choice allows publicly funded job opportunities to be offered or withheld on the basis of religious beliefs or practices without regard to the coercive effect of such inducements on the religious decisions of employees. Thus, the same criticisms that apply to neutrality theory are equally applicable to the charitable choice framework which serves as a concrete manifestation of this constitutional model in action.

B. *Moving Beyond Liberty—The Role of Equality and Instrumental Speech Values in Interpreting the Religion Clauses*

Neutrality theory presupposes that the exclusive objective of the religion clauses is the maximization of religious liberty. In doing so, it portrays an incomplete picture of the Constitution's normative structure. Religion crosses constitutional boundaries. The protection provided religious liberty overlaps and must be reconciled with other important normative principles that form the foundation of the Constitution's value system.

Religion is a multi-dimensional constitutional interest. In its varying aspects, it implicates personal liberty, group equality, and freedom of speech. In addition to protecting the freedom of religious individuals and the autonomy of religious institutions to follow the dictates of their faith, the Constitution affirms the equal status and worth of religious groups and the faiths that sustain them. Further, it protects the rights of religious and secular individuals to espouse their beliefs on an equal basis with others and to influence personal and public policy in a competitive mar-

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burdening the free exercise of religion [in *Amos*] is a regulation protecting the free exercise of religion").

For a more detailed discussion of the constitutionality of allowing religious organizations to discriminate on the basis of religion in hiring staff with state funds to provide public services, see Brownstein, *supra* note 1, at 231-39.

ketplace of ideas. A theory for interpreting the religion clauses that concentrates exclusively on personal liberty and ignores these equality and speech values is inherently incomplete and will often be mistaken in its application. Equality and freedom of speech interests are simply too essential a part of the constitutional framework relating to religion to be dismissed as irrelevant or secondary.[34] Yet neutrality theory appears to ignore both of these interests.

1. Religion and Equality

Determining how the Constitution protects religious liberty, equality, and speech is particularly difficult because it involves two separate analytic functions. One job requires the development of rules of demarcation among different constitutional provisions including the religion clauses, the Equal Protection Clause, and the prohibition against abridging freedom of speech.[35] The other job function relates to the interpretation of the religion clauses themselves. Religious equality and instrumental speech values inform our understanding of the religion clauses and help to give them meaning. The Establishment Clause, for example, operates to protect religious equality in important respects. In doing so, it subsumes and serves as a substitute for the development of equal protection doctrine addressing religious discrimination.[36]

The Constitution guarantees religious individuals and groups and the beliefs on which they base their identity an equality of standing very much like the racial and gender equality commanded by the Equal Protection Clause of the Fourteenth Amendment.[37] While a constitutional theory designed to protect

34. I have discussed many of these ideas at length in an earlier work. *See* Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89 (1990).

35. *See, e.g.*, Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (attempting to resolve whether constitutionality of tax statute providing a preference for religious periodicals should be determined under Free Exercise, Free Speech, or Establishment Clause doctrine); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 651-55 (1981) (reconciling requirements of the Free Exercise Clause with free speech doctrine); Cruz v. Beto, 405 U.S. 319, 324 (1972) (Rehnquist, J., dissenting) (arguing that prisoner's claim that authorities provided support for religious services of other faiths, but not Buddhism, does not raise issue under First Amendment but may support equal protection review).

36. *See* Brownstein, *supra* note 34, at 102-74.

37. In discussing religious equality, I am primarily considering equality among religious groups identified by their faith, not equality between the classes of those who hold religious as opposed to secular beliefs. As I have

religious liberty will incidentally promote religious equality in many cases, the values at issue here are entirely independent. Because of this essential distinction, a liberty model cannot be an adequate substitute for a constitutional principle that recognizes the unique significance of equality as a constitutional value.

Religious equality is not premised on the right to choose to be Jewish or Christian any more than racial equality is premised on the right to be black or Asian. Its focus is on group membership rather than belief, on religious status as opposed to religious practice.[38] Religious and racial equality recognizes a person's racial and religious identity as a given characteristic and denies the state the power to favor or disfavor individuals on that basis. Discrimination is prohibited with regard to tangible benefits and burdens and more intangible inequalities related to stigma and status. Under equality principles, the government cannot promote a religious hierarchy by identifying people of a particular faith or their beliefs as superior or inferior to others—even if in doing so the government does not substantially burden the ability of a person to practice his or her faith.[39]

It is difficult to deny the necessity of recognizing religious equality as a constitutional value of independent significance.

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argued elsewhere, the classes of those individuals who hold religious or secular beliefs are too diffuse in nature to invoke the kind of equality analysis provided under equal protection doctrine. *See* Brownstein, *supra* note 34, at 112.

38. For equality purposes, a person *is* a Catholic or a Jew. For liberty purposes, a person practices Catholicism or Judaism. Religion, for constitutional purposes, encompasses both concepts. Both status and conduct are intrinsic to the nature of religion and the relationship between religion and the state. Indeed, for some religions, status, conduct, and belief cannot easily be differentiated. *See* BETTE NOVIT EVANS, INTERPRETING THE FREE EXERCISE OF RELIGION: THE CONSTITUTION AND AMERICAN PLURALISM 122 (1997) (recognizing that "[f]or members of some religions, probably Jews and Muslims, the sense of 'peoplehood' is an overarching object of religious commitment"); William P. Marshall, *Religion as Ideas: Religion as Identity*, 7 J. CONTEMP. LEGAL ISSUES 385, 386 (1996) (explaining that "religion clause issues do not easily meld into traditional modes of constitutional analysis because religious rights are often group rights and . . . part of the interest that the individual seeks to preserve by the protection of her religious liberty is her identity with a religious group").

39. *See* EVANS, *supra* note 38, at 134-37. Justice O'Connor's "Endorsement" test for understanding and applying the Establishment Clause comes close to expressing an explicit commitment to religious equality. *See* Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984), for the proposition that "direct government action endorsing religion or a particular religious practice is invalid [because] it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community").

Assume, for example, that a city passes a law prohibiting any non-Christian religion from building a house of worship taller than the highest Christian church in the community.[40] Surely, such a law is unconstitutional on its face. Striking the law down as a burden on religious liberty, however, stretches the idea of religious freedom in an unpersuasive way. Few religions, if any, require that their house of worship must be of a particular height or that they must tower over the sanctuaries of competing faiths. It also makes little sense to suggest that a law such as this one will have any substantial impact on any person's religious beliefs or practices. No one is likely to change faiths or alter the number of times they attend services because of the comparative height of their house of worship. The law is unconstitutional because it communicates a message of religious favoritism and inequality that suggests the superiority of one faith over others. The law constitutes status discrimination and is unconstitutional on that basis, not because of its attenuated impact on religious liberty.

Reconciling the Constitution's commands regarding religious liberty and religious equality involves a great deal more than simply adding one mandate to another. Liberty and equality interests are often in tension with each other. In specific circumstances, maximizing one interest may involve the subordination of the other. Imagine that a school district announced that student assignments for different schools would be determined under the following policy. To maximize student choice, no student would have to attend school with students of another race unless they elected to do so. To achieve that goal, the district will provide racially integrated and racially exclusive schools as demand requires.

I have no doubt that this policy violates the Equal Protection Clause.[41] While it allows students the liberty to choose the racial composition of the school they attend, it is unequal in its effect on racial minorities. For equality purposes, majority and minor-

40. Historically, according to traditional Islamic law in certain countries, "[i]nfidels should be forbidden to have houses [and, perhaps, houses of worship] higher than those of their Moslem neighbors." MAHIUDIN ABU ZAKARIA YAHYA IBN SHARIF EN NAWAWI, MINHAJ ET TALIBIN, A MANUAL OF MUHAMMADEN LAW ACCORDING TO THE SCHOOL OF SHAFFI (E.C. Howard trans., from French trans. of L.W.C. Van Den Berg, 1977).

41. *See* Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, 475 (M.D. Ala. 1967) (noting that "a state may neither operate and maintain two school systems—one integrated, one segregated—giving public school students a choice between the two, nor simply go out of the business of running schools in some school districts and allow that function to be undertaken by private persons" in an attempt to avoid providing integrated school facilities for all children).

ity status matters. Maximizing personal liberty for the majority may isolate the minority in educational ghettos. If we substitute religion for race in this example, I would argue that a similar analysis should apply.

I do not suggest that racial and religious exclusivity are exact analogies for moral or constitutional purposes. While there are some situations in which the motives and effects of religious discrimination closely parallels racial discrimination as an expression of prejudice,[42] there are obviously other situations where there is a dramatic difference between the two. The point is not that race and religion are always the same for equality purposes. It is that equality and liberty are often conflicting values and that the conflict between them commonly exists when either race or religion is at issue. For both race and religion, at some point, liberty interests may have to be limited to further equality concerns.

Determining how religious equality is to be protected under the religion clauses is a complicated understanding which can only be sketched in this article. Infringements of equality for religious groups mirror infringements of equality for racial, ethnic, and gender groups to some considerable extent. Stigma and lack of respect are cognizable harms in both contexts.[43] Similarly, the fragmentation of public life along racial, ethnic, or religious lines is a matter of constitutional concern because of its exclusionary consequences for the members of minority groups.

Religion is not like other suspect classifications such as race, national origin, or gender in important respects, however. It has a belief and behavioral dimension that is lacking in other suspect classifications. Also, there is a distinct sociological and legal history of religion in American culture that underlies the protection religious practices and groups will receive from the Constitution. For the most part, issues relating to religious equality have been subsumed under Free Exercise and Establishment Clause doctrine. Thus, equal protection jurisprudence, the primary source of constitutional analysis relating to equality, has largely ignored religion and the status and treatment of religious groups. While I believe equal protection doctrine developing out of race and ethnic discrimination cases provides a useful starting place for understanding religious equality, existing equal protection case

42. *See infra* note 48.

43. *See* Kenneth L. Karst, *Religious Freedom and Equal Citizenship: Reflections on Lukumi*, 69 TUL. L. REV. 335, 351-52 (1994) (describing status harms, stigma, and the "hurt of exclusion" as "injur[ies] to equal citizenship" that raise Free Exercise and Establishment Clause concerns).

law cannot be conclusive in this area and many analogies will be relevant but imperfect.

For example, unlike race, which is acknowledged to be an irrelevant characteristic of individuals and an unreasonable basis for government distinguishing between persons, religion is a legitimately recognized and protected aspect of an individual's identity. Accordingly, for racial equality purposes we promote equality by ignoring racial differences, but for religious equality purposes sometimes it may be necessary to take religious differences into account. Blacks and whites are similarly situated in a way that Jews and Catholics are not.[44]

In doctrinal terms, this means that the government does not necessarily treat individuals unequally when it facially discriminates between them on religious grounds. No impermissible discrimination occurs when only the Christian child is granted an excused absence from school on Good Friday and only the Jewish child is excused on Yom Kippur. In other circumstances, however, facial discrimination among religious faiths may violate equality guarantees even when the state's goal in treating religious individuals differently is to accommodate religious beliefs and practices. When the granting of an exemption from a general law confers substantial material benefits on an individual or a group, as would be the case if the members of a particular faith were excused from paying an onerous, but generally applicable, tax, the state's action raises both religious liberty and religious equality concerns. A religious liberty issue arises because the exemption creates incentives that influence religious choices, and religious equality is arguably undermined because the mem-

44. "Equal common citizenship" involves the subtle relationship between identity and differences. Sometimes equality means ignoring irrelevant differences, sometimes it means taking relevant ones into account. The problem, of course, is knowing which is which. Differences are relevant, not in the abstract, but within social context. Background conditions, such as economic status or political power, may affect religious ones. In the United States, the difference between Catholics and Protestants may be simply a difference; in Ireland, the difference is one that conveys a power inequality. Once we are aware of the background conditions surrounding religious exercise, we recognize problems of status domination, selective indifference, and downright animus as part of the context that must be taken into account in order to preserve religious equality. These observations help us appreciate what is often at stake when religious freedom is threatened. Religious minorities are vulnerable to both intentional exclusion and "selective indifference." The insistence upon a genuine equality for a variety of religious expressions demands more than a mere formal neutrality in government policy.

EVANS, *supra* note 38, at 237.

bers of one faith are relieved of burdens that members of other faiths must shoulder.

For related reasons, race and religion may differ with regard to the constitutional analysis of facially neutral laws. Because the constitutional understanding of racial equality is grounded on a presumption of fungibility, neutral laws or spending decisions that disproportionately burden or favor particular racial groups are tolerated despite their incidental consequences. While more members of one group or another may benefit from the law, the benefit does not formally accrue because of a group member's race. Thus, a facially neutral land use regulation may have a racially exclusionary effect in a community because racial minorities are disproportionately represented in the lower economic classes, but a person's race is not a direct cause of that consequence. Disproportionate impact of this kind violates constitutional equality guarantees only if the state deliberately intends to bring about such results.[45]

Religion is different. Unlike the disproportionate impact of neutral laws on different racial groups where the disparate effect of the law is entirely unrelated to the racial characteristics of group members, neutral laws that disproportionately impact members of different faiths often do so precisely because of the differing religious beliefs and practices of religious groups. There is nothing unexpected or fortuitous about the impact of a decision to provide subsidies to organizations that operate programs on Saturday on religious groups for whom that day of the week is the Sabbath.[46] Similarly, while a neutral law such as the

45. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976).

46. In rejecting constitutional challenges to facially neutral laws unless plaintiffs can establish invidious intent on the part of the legislature, the Court appears to evaluate legislative motives in an unreasonably narrow way. To the Court, laws that disproportionately burden a suspect class are adopted either "because of" their discriminatory effect, an unconstitutional purpose, or "in spite of" their disproportionate impact, a constitutionally permissible goal. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979). There is a third alternative, however. The legislature may not intend the disproportionate impact, but it may be supremely indifferent to the fact that the effect of the challenged law will substantially burden a particular group. And this indifference itself may be discriminatory. The same burden that would persuade the legislature to modify the law if it impacted the majority would be cavalierly tolerated if it falls exclusively or predominately on the minority.

There is a strong argument that this kind of discriminatory insensitivity to the unequal effects of a law warrants the Court's attention in equal protection cases alleging race-based disproportionate impact. The Court's reluctance to take disproportionate impact cases suggesting such insensitivity seriously in race cases, however, may be explained, if not justified, on three grounds. First, because of the overrepresentation of racial minorities in the lower economic

land use regulation mentioned earlier may disproportionately impact the people of one race more than another, it will not burden every member of the adversely affected group. Some racial minorities will still be able to purchase property in a community with regulation-inflated housing prices. All seriously religious individuals for whom Saturday is the Sabbath will be burdened by a law requiring work on Saturday, however, and no Sunday Sabbath observers will experience any burden on the exercise of their faith.[47] Thus, unlike the equal protection analysis of race, in certain circumstances neutral governmental decisions may

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classes, affirming the rigorous review of neutral laws that disproportionately impact blacks and other racial groups would require close scrutiny of virtually all laws that discriminate on the basis of wealth. *See Washington v. Davis*, 426 U.S. at 248 (expressing concern that the rigorous review of laws that disproportionately impact racial minorities "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white"). Second, undue attention to the effect of neutral laws on different racial groups reinforces the belief that racial differences exist in fact and that government must take account of them in enacting law, a contention that is fundamentally inconsistent with the Court's colorblind jurisprudence. Third, it is hard to identify a way to measure discriminatory insensitivity. On what basis can a court conclude that land use regulations that have an exclusionary effect on blacks living in a community would not be adopted if they had a similar exclusionary effect on whites?

None of these arguments, however, supports judicial tolerance for such legislative insensitivity when religious equality is at issue. Here, there is far less of a correspondence between religious identity and economic class so that the Court's fears about wealth becoming an implicitly suspect classification are misplaced. Moreover, unlike the colorblind principle underlying the contemporary understanding of racial equality, the Constitution does not suggest that religious beliefs and groups are fungible or that it is always impermissible to take account of religious differences. Finally, there may be sufficient examples of government accommodations of the beliefs and practices of majority faiths, such as legislative attempts to mitigate burdens on Sunday Sabbath observance, to suggest discriminatory insensitivity when laws are adopted that substantially and exclusively impact religious individuals who observe Saturday as the Sabbath.

47. A useful analogy here might be to gender, not race. In *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Supreme Court concluded that the exclusion of pregnancy and childbirth from the conditions covered by California's disability insurance system did not constitute gender discrimination despite the obvious fact that only women were in the class at risk from the exclusion. Just as many commentators were unpersuaded by the Court's argument that the insurance system was "neutral" as to gender, *see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-29, at 1577-85 (2d ed. 1988) (characterizing the Court's decision in *Geduldig* as "so artificial as to approach the farcical"), one might argue that it makes little sense to construe a law requiring employees to work on Saturday but not Sunday to be "neutral" among religious faiths and consistent with religious equality requirements.

raise important constitutional questions if they disproportionately impact people of different faiths, whether that impact is deliberately intended or not. A law that requires public school attendance on Saturday, while closing the schools on Sunday, is facially neutral, but obviously operates unequally among religious groups.

Racial and religious equality are different in another fundamental way. Racial discrimination and differentiation is condemned in both the private and public sector. Except for limited remedial exceptions, no state or private institutional interest in taking race into account in civil life receives or deserves respect today. Religion and religious differences are more complicated. At least in the private sector, it is not at all problematic for people of a particular faith to gather together and establish a house of worship or school that is exclusively sectarian in operation and membership. Indeed, many of us would affirm such activities as a positive and good thing.

Recognizing that there is a good and necessary side to religious exclusivity, however, does not deny that there can be a bad side to religious discrimination as well. Religious bigotry is just like other kinds of discredited bigotry and prejudice and its manifestation in discriminatory admission, hiring, and business practices, for example, deserves comparable condemnation and regulation.[48] What distinguishes racial and religious equality is the good side of religious exclusivity—a condition that rarely if ever exists in the racial context.

Of course, not every law that burdens one religious faith more than another violates the Constitution. The challenge is to develop standards of review and rules of decision that distinguish laws that raise serious equality concerns from those where the state did not take religion into account in reaching its decision and the status of different religious groups are not directly subordinated by the laws' effect.

48. A recent article in *The New York Times*, for example, described the history of anti-Semitism at Dartmouth College during the 1930s and 1940s. In an exchange of letters between Ford H. Whelden, an alumnus from Detroit, and Robert C. Strong, the Dartmouth Director of Admissions, "Mr. Whelden complained that 'the campus seems more Jewish each time I arrive in Hanover.' . . . Mr. Strong replied: 'I am glad to have your comments on the Jewish problem, and I shall appreciate your help along this line in the future. If we go beyond the 5 percent or 6 percent in the Class of 1938, I shall be grieved beyond words.'" William H. Honan, *Dartmouth Reveals Anti-Semitic Past*, N.Y. TIMES, Nov. 11, 1997, at A16.

The President of Dartmouth is quoted as saying, "Dartmouth is a Christian College founded for the Christianization of its students" to explain the College's decision to turn down Jewish students who applied for admission solely because they were Jews. *Id.*

Because it is sometimes reasonable and desirable to treat people differently because they are of different religious faiths, equality among groups defined by gender or national ancestry may provide a better basis for understanding religious equality than racial analogies. Unlike race, most of us see something of a good side to taking national ancestry into account for private sector purposes in some circumstances. Sometimes national ancestry-specific decisions may be appropriate even in the public sector. Gender is even a more open-ended classification. Here, government regulations that would be immediately rejected as unconstitutional if racial classifications were used are arguably valid if gender is substituted for race. Single-sex schools are one obvious example. Racially segregated public schools are *per se* unconstitutional. Single-sex schools raise much more difficult constitutional questions.[49]

If neutrality theory is deficient in ignoring group equality concerns, how would recognizing an equality dimension to the religion clauses influence an analysis of charitable choice? Put simply, there would be far more of an emphasis on equality rather than neutrality. In part, this alternative emphasis would recognize an essential difference between facially neutral regulations or spending decisions that disproportionately impact religious as opposed to racial groups. More specifically, and from a more conventional equal protection perspective, state funding of sectarian religious organizations to perform public services might be compared, for equality purposes, with the funding of organizations oriented around national ancestry or gender.

Assume that private organizations ideologically committed to espousing the virtues or perspective of a particular ethnic culture or a particular gender apply for grants to provide services to the public. Federal law prohibits states from discriminating against such applicants because of their ethnocentric or gender-specific orientation. Government restrictions on the organization's structure and expression are also prohibited. While the services to be provided must be made available to everyone on a non-discriminatory basis, discrimination on the basis of gender or national origin in hiring workers with state funds is explicitly permitted without regard to whether a person's national ancestry or gender is even remotely relevant to the successful performance of the jobs at hand. Finally, contracts may be awarded on

49. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 534 n.7 (1996) (suggesting that the Court would "not question the State's prerogative evenhandedly to support diverse educational opportunities" by creating single-sex schools); William Henry Hurd, *Gone With the Wind? VMI's Loss and the Future of Single-Sex Public Education*, 4 DUKE J. GENDER L. & POL'Y 27 (1997).

the basis of facially neutral criteria even if that results in organizations affiliated with only one ethnic group or gender in an area receiving support. And this is true even if the one-sided allocation of funds is entirely predictable from the "neutral" criteria employed to select grantees—as long as no one can prove that the criteria used was deliberately selected to achieve a discriminatory result. On equality grounds, I suggest that the state funding of a Men's Job Training Center (but not a "less efficient" Women's Job Training Center) or a Mexican Counseling Center (but not a counseling center focusing on other ethnic cultures) of the kind described above would be subject to constitutional challenge, notwithstanding the fact that neither Center discriminated on the basis of gender or ethnicity in admitting applicants to its program.[50] Religious institutions receiving charitable

50. Even if a religious organization facially complies with nondiscrimination requirements by admitting members of another faith to a welfare program, it may be argued that the services themselves are not being made equally available to everyone regardless of their faith. It may well be that there are advantages to receiving services from a religious provider of the same faith as the benefit recipient because, for example, the resonance of belief between the provider and recipient creates trust and reinforces values that contribute to the effectiveness of the program. Conversely, there may be disadvantages that result from receiving services from a religious provider of a different faith than the welfare recipient because the dissonance of belief between the provider and the recipient creates suspicion and misunderstanding that undermine the inculcation of values that would contribute to the success of the program.

An admittedly imperfect analogy to the issue of single-sex schools may be useful in considering this issue. Under current Supreme Court authority, a public military college, such as VMI, operates in violation of equal protection requirements if it refuses to admit women. Arguably, the school would also violate equal protection requirements if it changed its policy and admitted women, but took no steps whatsoever to accommodate gender differences, on the grounds that it failed to provide an equal education to women students. Certainly, Justice Ginsburg's majority opinion in the VMI case presupposes that some changes would be necessary in the military college's operation if admitting women was to be a meaningful attempt to provide both sexes equal educational opportunities. *See* United States v. Virginia, 518 U.S. at 551 n.19 (noting that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs").

At least one commentator has argued that the Court's recognition that VMI must do more than simply "admit women" to comply with constitutional equality guarantees is a critical aspect of this decision. A judicial decree requiring no more than VMI's "admitting women to an institution designed for men's physical skills and unisex barracks living" would not adequately respond to plaintiffs' equal protection claims because "it would put women in an impossible position. Many women otherwise capable of meeting VMI's goals might not be able to perform certain physical requirements designed for men.

choice awards would also be vulnerable to challenge on similar grounds.[51]

They might also resist living in barracks that provide no privacy protection . . . ." Candace Saari Kovacic-Fleischer, United States v. Virginia's *New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting, and Title VII*, 50 VAND. L. REV. 845, 862 (1997). To avoid the inherent inequality of such a result, "the [VMI] decision requires not only that VMI admit women who are fit, but also that VMI make institutional changes in barracks living and physical skill requirements to provide equal opportunity to women." *Id.* at 878.

51. The argument here is a bit convoluted but I think it raises important issues. Using the example of gender as a guide again, it may certainly be argued that if the state is going to directly support single-sex educational institutions, it must subsidize both men's academies and women's academies. In order to satisfy constitutional equality requirements, opportunities for single-sex education must be at least roughly equivalent to be upheld. *See* United States v. Virginia, 518 U.S. at 551-54 (rejecting the creation of military program for women as a remedy for VMI's gender-discriminatory policies on the grounds that "Virginia has not shown substantial equality in the separate educational opportunities the State supports"); *see also* United States v. Virginia, 44 F.3d 1229, 1243-50 (1995) (Phillips, J., dissenting).

If the state does not operate the single-sex schools itself, but substantially subsidizes private single-sex institutions, this equality mandate may still apply to some considerable extent. Justice Scalia in his dissent in *United States v. Virginia*, for example, argued that an honest application of the equal protection principles set out in the majority opinion would require the invalidation of public subsidies provided private single-sex colleges because "the government itself would be violating the Constitution by providing state support to single-sex colleges." United States v. Virginia, 518 U.S. at 599 (Scalia, J., dissenting). Scalia cites *Norwood v. Harrison*, 413 U.S. 455, 465 (1973), for the proposition that the Court will not "distinguish between state operation of racially segregated schools and state support of privately run segregated schools," United States v. Virginia, 518 U.S. at 599, and suggests that a similar analysis would apply to state funding of single-sex schools.

Admittedly, there is some doubt that this analogy can be extended to religious institutions providing secular services. Indeed, the Court's opinion in *Norwood* itself distinguishes between state aid to racially segregated academies and state financial support to sectarian religious schools. Thus, the Court explains that "[h]owever narrow may be the channel of permissible state aid to sectarian schools, it permits a greater degree of state assistance than may be given to private schools which engage in discriminatory practices that would be unlawful in a public school system." Norwood v. Harrison, 413 U.S. at 470 (citations omitted).

It is also important to note, however, that the kind of support envisioned by the charitable choice legislation is significantly different than the subsidies for sectarian schools that the Court distinguishes from state aid to segregated academies in *Norwood*. First, as the Court explicitly explains, it is "the leeway for *indirect aid* to sectarian schools [that] has no place in defining the permissible scope of state aid to private racially discriminatory schools." *Id.* at 464 n.7 (emphasis added). Charitable choice, in contrast, involves direct financial subsidies to the religious institutions themselves. Second, the school aid programs referred to in *Norwood* provided support to students attending any private school. *See id.* at 469. Thus, to the extent that state aid indirectly

2. Religion and Speech

While freedom of speech is in some respects a dignitary and autonomy right, the primary purpose for protecting freedom of speech is an instrumental one. Freedom of speech is the foundation of a democratic system of government. Accordingly, government must not be permitted to distort the marketplace of ideas.[52]

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benefitted religious schools, that benefit was available to all the religious schools in the community. Again, charitable choice is different. Under the "neutral" funding criteria it allows, state funds may be used to support social service providers of some faiths, but not others, as long as the resulting allocations of funds are not deliberately discriminatory. Third, and finally, the Court in *Norwood* recognized that state aid to sectarian religious schools would not be constitutional if the schools discriminated in admission on either racial or religious lines. *See id.* at 464 n.7.

This final point is the most critical one. While there is little case authority on the issue, it may be argued that this equality mandate extends beyond the formal admissions policies of a program. Thus, to return to our gender analogy, a state-funded service program that is identified as a men's or women's program, that is explicitly directed at satisfying the needs and interests of one gender alone, that extols the virtues of a particular gender, that discriminates on the basis of gender in hiring all of its staff, and that overwhelmingly provides benefits to persons of a particular gender may be subject to the same equality mandate that is applied to schools that discriminate on the basis of gender in admissions. If the state supports programs of the kind described above for men, it must provide similar support and opportunities for women in the same or comparable institutions. The fact that a state-supported "men's" program of this kind is facially open to people of both sexes may not be enough to satisfy constitutional equality concerns. *See* Kovacic-Fleischer, *supra* note 50, at 878 (casting doubt on the constitutionality of a state-supported college offering gender-neutral admission to all men and "all women willing to live without privacy in the military style barracks and able to perform feats of great upper body strength" in light of the Court's analysis in *United States v. Virginia*). Nor would equal protection requirements be satisfied if it could be demonstrated that the "men's" program was more efficient than a comparable "women's" program and therefore more deserving of support.

Arguably, a similar analysis applies to religious service providers. If pervasively sectarian religious institutions are going to receive state support for the provision of services, as the charitable choice legislation appears to contemplate, constitutional equality values require that the funding of such institutions be distributed among the religious faiths represented in a community so that opportunities for state-subsidized services in a religious environment are equally available to people of different religious backgrounds and beliefs. Mere neutrality in allocation criteria (where in theory the allocational chips simply fall where they may and in practice allocations are subject to political manipulation) is simply not enough for equality purposes, and it is not enough if the proponents of neutrality theory are serious about minimizing government incentives that influence the religious beliefs and practices of citizens.

52. *See* Geoffrey R. Stone, *Content Neutral Restrictions*, 54 U. CHI. L. REV. 46, 55 (1987); *see also* Geoffrey R. Stone, *Content Regulation and the First*

In furtherance of this objective, the First Amendment prohibits government from discriminating against competing private viewpoints. No other government regulation of speech is as strictly reviewed or as likely to be struck down. Indeed, in conventional terms it is generally preferable to prohibit more speech on a content-neutral basis than it is to prohibit less speech pursuant to a viewpoint-discriminatory law.[53] Thus, the Court's antipathy to viewpoint discrimination seems premised on the understanding that what is so reprehensible about viewpoint discrimination is that it manipulates and distorts the marketplace of ideas in favor of one set of ideas and against opposing messages.[54]

Amendment, 25 WM. & MARY L. REV. 189, 198 (1983) (arguing that the First Amendment limits "the extent to which the law distorts public debate").

53. *See* Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1643 (1998) (holding that viewpoint discrimination is presumptively unconstitutional even in a limited public forum or non-public forum in which content discriminatory regulations might be justified). *Compare* Frisby v. Schultz, 487 U.S. 474 (1988) (upholding content-neutral ban on residential picketing), *with* Carey v. Brown, 447 U.S. 455 (1980) (striking down content-discriminatory ban on residential picketing that exempted labor picketing from its application).

54. Viewpoint discrimination also infringes personal liberty interests by burdening or encouraging the individual's expressive choices. In the *Rosenberger* case, 515 U.S. 819 (1995), cited by Professor Esbeck in support of neutrality theory, *see* Esbeck, *supra* note 3, at 30-37, for example, one may argue that by subsidizing secular but not religious periodicals with student fees, the University of Virginia influenced religious students to couch their expressive messages in secular terms. *See* Laycock, *supra* note 3, at 71 n.168. While the University's funding system may well have created such an incentive, surely that was not the primary constitutional defect with Virginia's allocation scheme. What was most problematic about the refusal to fund religious periodicals was its viewpoint-discriminatory nature and the resulting impact on public discussion on the University campus. Government cannot favor or disfavor private speakers on the basis of their viewpoint because doing so empowers one side of a debate or disables the other. *See id.* at 72.

The Court's opinion in another important First Amendment case, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (requiring the rigorous review of content- and viewpoint-discriminatory regulations within a category of unprotected speech), makes this point with particular clarity. For constitutional purposes, the individual has a barely cognizable interest in expressing unprotected speech, such as obscenity or fighting words. The application of strict scrutiny review to content- or viewpoint-discriminatory regulations within a category of unprotected speech is justified not by the impact of the regulation on the individual speaker's expressive choices, but rather by the one sided distortion of public discourse the law creates. *See id.* at 387-88; *see also* Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests*, 29 U.C. DAVIS L. REV. 553, 590-93 (1996) (arguing that content- and viewpoint-discriminatory laws are constitutionally objectionable because they distort public discourse).

Under the Supreme Court's freedom of speech analysis in *Rosenberger v. Rector & Visitors of the University of Virginia*,[55] private religious and secular expression may constitute opposing viewpoints.[56] When they do so, under conventional free speech doctrine both viewpoints must be subject to equally burdensome regulations and must receive comparable support. The same analysis applies to the sectarian messages of specific faiths. Each religion constitutes a viewpoint in competition with alternative belief systems and must receive equal treatment.

It is not clear from the *Rosenberger* decision that religious and secular activities must always be construed as a formal matter to constitute competing viewpoints so that government attempts to treat them differently will necessarily implicate the prohibition against viewpoint discrimination. The Court's analysis in *Rosenberger* left many questions open as to when the holding of the case should apply. It may certainly be argued, however, that the reasoning of *Rosenberger* extends far beyond the formal application of free speech doctrine to discrimination among subsidized periodicals in a limited public forum.

Indeed, proponents of neutrality theory see *Rosenberger* and a line of free speech cases preceding it as establishing a principle of even-handed treatment when government subsidizes secular and religious private activities.[57] Even if government support for secular, but not religious, charities providing services to the poor did not formally violate freedom of speech requirements, they argue, constitutional antipathy to viewpoint discrimination informs our understanding of the religion clauses and undermines the legitimacy of such funding arrangements. Religious and secular beliefs are in competition across a broad spectrum of American culture and the Constitution should not be interpreted in a way that distorts the marketplace of ideas by favoring one world view or the other. At a minimum, this principle should permit government to make financial support available to religious and secular institutions on a non-discriminatory basis.[58]

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55. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).

56. *Id.* at 831-32.

57. In addition to *Rosenberger*, neutrality proponents cite *Capital Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); and *Widmar v. Vincent*, 454 U.S. 263 (1981); among other cases.

58. *See* Brief, *supra* note 7, at 22-25 (arguing that Establishment Clause constraints on the funding of pervasively sectarian religious organizations "punish those religions that resist conformity to culture while rewarding those groups willing to march in tune with the evolving cultural norms").

Grounding a constitutional commitment to neutral funding requirements on a freedom of speech foundation, however, raises serious questions that neutrality theory does not adequately address. The recognition that religious and secular perspectives constitute competing viewpoints creates a disturbing tension between neutrality theory's two central principles: the exemption of religiously motivated conduct from neutral laws of general applicability (and the protection of religious institutions from regulatory intrusions), and the insistence that religious and secular individuals and organizations must be provided equal access to government benefits and subsidies. The problem, of course, is that providing special regulatory exemptions and institutional autonomy for the proponents of one viewpoint but not the other raises constitutional concerns about the distortion of the marketplace of ideas that are as serious as those that result from one-sided funding arrangements.[59]

Freedom from regulatory burdens empowers institutions. It reduces their costs, and increases their ability to exercise control over their members, attract new adherents, fulfill their normative mission and, perhaps most importantly, maintain their sense of continuous and distinct identity.[60] The ability

59. *See* William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 389 (1990) (arguing that the "favoritism toward religious organizations [exhibited by free exercise exemptions] violates the central principle in speech jurisprudence that every idea has equal dignity in the competition for acceptance in the market-place of ideas").

60. The value of institutional autonomy to belief-based and expressive organizations operating within a social environment among competing belief systems can be described from a variety of perspectives. I summarize several below in this note. Ironically, some of the arguments that demonstrate most convincingly that exempting only religious organizations from regulatory burdens distorts the marketplace of ideas are suggested by writers who contend that religious groups and institutions must be free from state intrusion. These accounts establish the importance of organizational independence and integrity to the maintenance of religious belief systems and values and the difficulty of sustaining a religious identity without adequate institutional support. Many of these same arguments, however, apply with substantial if not equal force to secular beliefs and institutions. Regulatory burdens and interference undermine the power and ability of nonreligious groups to influence their own members and others to the same extent that they disable religious groups and messages. Thus, a regime that exempts only religious institutions from regulatory intrusions and burdens handicaps one side, the secular side, of many debates and not the other.

Bette Novit Evans' recent book on the free exercise of religion performs a valuable service in gathering and summarizing commentary that advocates protecting the autonomy of religious institutions. As Evans explains, religious groups and organizations serve "'as value generating and value maintaining

agencies in society.'" EVANS, *supra* note 38, at 40 (quoting PETER L. BERGER & RICHARD JOHN NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 6 (1977)). To fulfill this function, they must be able to distinguish and reinforce their own identity. Both requirements are essential. Thus, "'Groups . . . [must be able] to create boundaries between the outside world and the community . . . in order to maintain the jurisgenerative capacity of the community's distinct law.'" *Id.* (quoting Robert M. Cover, *The Supreme Court 1982 Term: Foreword: Nomos and Narrative,* 97 HARV. L. REV. 4, 33 (1983)). Of equal importance, the group's social institutions must be protected.

> *[A]ll* religious traditions . . . require specific communities for their continuing plausibility . . . . The reality of the Christian world [for example] depends upon the presence of social structures within which this reality is taken for granted and within which successive generations of individuals are socialized in such a way that this world will be real to them. When this plausibility structure loses its intactness or continuity, the Christian world begins to totter, and its reality ceases to impose itself as self-evident.

Id. at 43-44 (quoting PETER BERGER, THE SACRED CANOPY, 46-47 (1967)) (alteration in original).

Because "a religion depends upon the communities and institutions that sustain and propagate it," *id.* at 121, interference with institutional autonomy may threaten the survival and the integrity of the religion itself. Some intrusions are obviously debilitating. As Frederick Mark Gedicks explains, "When the government intervenes in religious membership decisions on behalf of nonmembers or nonconforming members, it 'kills' the group [by] causing it to change a fundamental aspect of its character or even physically to disband." *Id.* at 157 (quoting Gedicks, *supra* note 33, at 150). But the cost of intrusion is not always apparent to outsiders.

> State intervention into the affairs of a religious community frequently destroys the daily development of a group's historical and theological narratives. Accordingly, government regulation may seriously distort the spiritual life of the community even when the state's demands would not violate clearly identifiable doctrines, beliefs, or practices. Such intervention breaks the link between evolution of group meanings and group authority, and thus reinterprets and recasts such meaning.

Id. at 163-64 (quoting Gedicks, *supra* note 33, at 144-46).

I find much of this analysis to be powerful and persuasive. But I suggest that it applies to nonreligious belief systems and institutions as well as religious ones. To the extent that religious and secular world views are in conflict in some general sense, protecting the autonomy of religious institutions alone substantially distorts that competition in favor of religious beliefs.

Institutional autonomy and freedom from burdensome regulations empowers and advantages religious groups in more mundane and material ways as well. What is at issue here is not direct incentives, but rather relative advantages that accrue to organizations exempt from costly regulations. As a general matter, the anti-competitive burdens of government regulations are widely recognized, *see generally* RESOURCES, COMMUNITY AND ECON. DEV. DIV., U.S. GEN. ACCT. OFF., REGULATORY REFORM—AGENCIES COULD IMPROVE DEVELOPMENT, DOCUMENTATION, AND CLARITY OF REGULATORY ECONOMIC ANALYSES 1 (1998) (noting that in 1996 OMB estimated the cost of federal regulations to be $200 billion per year); GENERAL GOV'T DIV., U.S. GEN. ACCT. OFF., REGULATORY REFORM—IMPLEMENTATION OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL

to engage in conduct that satisfies moral requirements and to perform rituals that demonstrate allegiance to a belief system or deity without state interference reinforces viewpoints and demonstrates their force and authority.[61]

REQUIREMENTS 1 (1998) (explaining that "small businesses . . . can be disproportionately affected by federal agencies' regulatory requirements, and agencies may inadequately consider the impact of those requirements on small entities when the requirements are implemented").

From an economist's perspective, these constraints can influence "religious" and "political" markets as well as economic ones. As Iannaccone, Finke, and Stark suggest:

> People can and often do change their religion or levels of religious participation. As with other commodities, this ability to choose constrains the producers of religion. Under competitive conditions a particular religious firm will flourish only if it provides a commodity at least as attractive as its competitors'. And as in other markets, government regulation can profoundly affect the producers' incentives, the consumers' options, and the aggregate equilibrium.

Laurence R. Iannaccone et al., *Deregulating Religion: The Economics of Church and State,* 35 ECON. INQUIRY 350, 351 (1997).

> William Marshall makes a similar point in more conventional terms: [When] a religious organization invests in a business, seeks legislative action, or promotes the candidacy of particular individuals for public office, it is engaging in an activity in direct competition with secular individuals and organizations. To exempt religious institutions from strictures governing these activities is to place those enterprises not excluded at a competitive disadvantage. . . . [This] favoritism concern is most evident with respect to those regulations affecting the political process, the media, or other channels for the dissemination of ideas.

William P. Marshall & Douglas C. Blomgren, *Regulating Religious Organizations Under the Establishment Clause,* 47 OHIO ST. L.J. 293, 324 (1986).

Other commentators focus specifically on the cost savings that result from regulatory exemptions. *See Congressional Power, supra* note 15, at 104-09 (1997) (characterizing religious exemption claims as "patent fiscal favoritism" that are no different in effect than financial subsidies provided exclusively to religious organizations); Greg J. Matis, *Dilemma in Day Care: The Virtues of Administrative Accommodation,* 57 U. CHI. L. REV. 573, 574 (1990) (suggesting that "providing extensive exemptions could disadvantage secular day care providers, with whom the church-sponsored providers compete"); Laurie Reynolds, *Zoning the Church: The Police Power Versus the First Amendment,* 64 B.U. L. REV. 767, 798 (1984) (explaining how "exemptions from land use regulations and zoning laws may provide a significant economic benefit to religious uses [and organizations that confer] an economic advantage over [their] secular counterparts").

61. Once again, Bette Novit Evans' work, EVANS, *supra* note 38, provides concise summaries of source material on this point. Thus, Evans emphasizes the role of religious practices in communicating and strengthening religious beliefs when she describes such practices "as ways we create, express, and reinforce meanings," *id.* at 43, that are valuable to individuals precisely because "they sustain shared meanings and identities" with a group or community, *id.* at 109. Indeed, Evans concludes that the importance of religious practices to the maintenance of religious belief systems cannot be overstated. "'[R]itual is often central to the ability of religious systems to transmit values and apply

These rights have substantial utility for speakers in competition with conflicting viewpoints.[62]

Because in so many contexts, religious individuals and institutions are speakers with a distinct message to communicate not only to believers, but to the public, it is not easy to isolate the religious practices of individuals and the institutional autonomy of religious organizations from the messages that they both express. Religion and speech are too closely connected and intertwined to ignore the effect of protecting religious liberty on freedom of speech concerns. I take it as self-evident that a law providing adherents of left-wing beliefs regulatory exemptions

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those values to control the conduct of adherents,'" she explains. *Id.* at 103 (quoting Howard M. Friedman, *Rethinking Free Exercise: Rediscovering Religious Community and Ritual*, 24 SETON HALL L. REV. 1800, 1819 (1994)). "Without participating in a social group that makes plausible the religious claims of the believer, without its rituals, myths, and other legitimating practices, the individual finds it exceedingly difficult to sustain the religion." *Id.* at 169-70 (discussing Peter Berger's analysis in THE SACRED CANOPY (1967)).

Studies of religion in such diverse disciplines as anthropology, sociology, ethnology, and religion itself recognize the functional value of ritual in reinforcing beliefs and maintaining group identity. *See, e.g.*, Naomi Gale, *Religious Involution: Sacred and Secular Conflict Among Sephardic Jews in Australia*, 36 ETHNOLOGY 321 (1997) (noting arguments of functionalists such as A.R. Radcliffe-Brown and Bronislaw Malinkowski that "belief and rituals reinforce tradition, strengthen ties between individuals, and enhance group solidarity"); Melissa A. Pflug, *"Pimadaziwin": Contemporary Rituals in Odawa Community*, 20 AM. INDIAN Q. 489, 496 (1996) (noting that traditionalists "regard ritual . . . both as an ahistorical act tied to the classic practices of religious experts, and as a contemporary practice with vital social, economic, and political effects"); John F. Priest, *Myth and Dream in Hebrew Scripture, in* MYTHS, DREAMS, AND RELIGION 48, 50-51 (Joseph Campbell ed., 1970) (noting the relationship between ritual and myth such that "when the ritual ceased to be performed myth became denuded of its original force and power and quickly was reduced to a form of literary art").

62. As noted previously, proponents of neutrality theory apparently recognize the importance of the freedom of speech principle that requires rigorous scrutiny of viewpoint discrimination at least as it applies to government spending. Indeed, free speech cases appear to be the foundation of their insistence that government support to private organizations for the performance of public services must be allocated on a non-discriminatory basis without regard to the secular or religious character of the grantee. *See* Esbeck, *supra* note 3, at 23-27. The principle is largely ignored, however, when government regulations are the subject of analysis. Here, if neutrality theory is taken to its logical conclusion, speakers and institutions espousing religious viewpoints may be relieved of burdens imposed on their secular counterparts. Yet expressions of concern about even-handed treatment between competing viewpoints and perspectives in the marketplace of ideas are strangely absent when neutrality theorists propose that religious practices and institutions should be favored with regulatory exemptions that are not available to secular organizations and activities.

and a degree of regulatory autonomy not available to adherents of right-wing beliefs would be struck down as blatant viewpoint discrimination. Similarly, if a statute such as RFRA applied only to Protestants and was unavailable to protect the religiously motivated practices and rituals of Catholics, Jews, and Muslims, the law would violate the Free Speech Clause of the First Amendment as well as other constitutional provisions.[63]

How then can Free Exercise exemptions or a statute such as RFRA be justified under either the Free Speech Clause or the Establishment Clause of the First Amendment? As a formal, doctrinal matter, the special religious autonomy endorsed by neutrality theory arguably challenges the most basic proscriptions of free speech doctrine.[64] Indeed, if free speech doctrine prohibits viewpoint-discriminatory restrictions on the state's subsidizing of private religious organizations despite the Establishment Clause prohibition against direct state support for religious activities, as the *Rosenberger* decision suggests according to some neutrality proponents,[65] it is difficult to understand why free speech doctrine does not also prohibit viewpoint-discriminatory regulatory exemptions for religious institutions and individuals notwithstanding whatever Free Exercise or legislative accommodations of religion are asserted to justify different treatment.[66] Similarly,

63. *See* Leo Pfeffer, *What Hath God Wrought to Caesar: The Church as a Self-Interest Interest Group, in* James E. Wood, Jr., READINGS ON CHURCH & STATE 127, 129 (1989) (analogizing religious groups to ideological interest groups because "avowedly or not, [they] seek to translate their own particular hierarchy of values into categorical imperatives for the community at large, including those members of the community outside of their own respective folds").

64. William Marshall states the principle here as effectively as anyone:

> Religious beliefs should not be entitled to special exemption from neutral laws under the free exercise clause (unless similar exemptions were allowed for nonreligious beliefs) because preferring one set of beliefs over another violates the speech equality principle . . . . Giving special protection to religion thus gives the views advanced by religion a false vitality in the political marketplace and skews political debate.

Marshall, *supra* note 38, at 393, 401.

65. *Amici Curiae* in *Columbia Union College* argue, for example, that the district court's upholding of the denial of state funds to a pervasively sectarian religious institution is "in conflict" with the First Amendment principle established in *Rosenberger* that "Government may not discriminate on the basis of private religious speech content or viewpoint." *See* Brief, *supra* note 7, at 2-3. More specifically, they argue that the "application of the 'pervasively sectarian' test necessarily caused the [state] commission to deny assistance to and hence penalized the expressional identity of fervently religious colleges." *Id.* at 3-4.

66. I think the holding of *Rosenberger* is more limited, but it is limited in both respects; *Rosenberger* does not undermine religious exemptions from neutral laws of general applicability and it does not require neutrality in government spending except in narrow circumstances.

if free speech principles compel an interpretation of the religion clauses which allows, but does not require, government to subsidize (or refuse to subsidize) religious and secular institutions on an evenhanded basis, it is difficult to understand why these same principles do not justify similar discretion and evenhandedness when regulatory exemptions are at issue. Under this latter analysis, the Constitution would not prevent government from funding religious organizations once it elected to fund secular ones, and it would not prevent government from denying religious exemptions once it concluded that exemptions should not be available for secular acts of conscience.

Again, I do not challenge the constitutional propriety of providing Free Exercise exemptions for religious practices from general laws or Free Exercise protection of the autonomy of religious institutions. I believe that *Employment Division v. Smith* was wrongly decided and that the Free Exercise Clause often requires that such exemptions be granted. My point is that the rigid formal neutrality required by free speech doctrine in prohibiting viewpoint discrimination is only an appropriate basis for evaluating differing treatment of secular and religious activities and institutions in a narrow set of circumstances of the kind that were at issue in the *Rosenberger* case itself. To apply this standard of neutrality more expansively to review all governmental distinctions between the secular and the sacred cannot help but jeopardize Free Exercise exemptions and institutional autonomy as well as important Establishment Clause requirements.

A more nuanced, alternative approach recognizes that religious and secular beliefs and practices need not always be treated in the exact same way by government. Sometimes religious liberty concerns justify treating religious beliefs, practices, and institutions more favorably than their secular counterparts. Sometimes religious equality (and liberty) concerns justify treating religious activities and organizations in a facially less favorably way than secular ones. Moreover, under this analysis, there is no fair and logical way to adopt only one side of the equation. Once the former conclusion is accepted regarding the special status of religion for Free Exercise purposes, Establishment Clause constraints on the funding of religious organizations cannot be summarily rejected on the grounds that such a regime facially disfavors religious perspectives.

Instead of insisting on neutrality between religion and secular beliefs and practices when spending decisions are at issue while trying unsuccessfully to argue that religion should be relatively favored in granting exemptions from general regulations, an adequate theory of the religion clauses must take the special

protection accorded religious practices and institutions by the Free Exercise Clause into account in determining Establishment Clause doctrine. This kind of holistic analysis is necessary in order to avoid unacceptable distortion of the marketplace of ideas and to maintain some semblance of consistency with the rest of the First Amendment. The spirit if not the doctrinal core of the First Amendment does not require that religious and secular beliefs and practices must always receive exactly comparable treatment. It does require that on balance neither religious nor secular perspectives should be so substantially favored or disfavored that the ability of either to influence the polity or the community suffers unfair interference.

I recognize that this balance may be difficult to determine if formal neutrality is rejected as the controlling standard. However, by arguing that Free Exercise exemptions are constitutionally mandated or should be adopted by statute, we *are* rejecting formal neutrality. Having tampered with one side of the equation, there is no way to avoid the hard substantive work that must be done on the other side to resolve the constitutional relation between religious liberty and equality values and freedom of speech.[67]

It is not clear that neutrality theory even recognizes this issue, much less that it provides an adequate response. Certainly, the proposition that religious practices and institutions should be treated as the exact equivalents of their secular counterparts when government spending decisions are reviewed, while religion receives a uniquely favored status when it is burdened by regulatory legislation, does nothing to achieve the kind of neutrality between viewpoints and speakers that we associate with free speech values. Indeed, under conventional free speech principles, if a departure from neutrality is ever justified, we would expect courts to require a result exactly contrary to the thesis of neutrality theory. Government typically is permitted to depart from content and viewpoint neutrality requirements when it is spending state resources to communicate its own message. It is in the regulatory context that viewpoint neutrality is most adamantly required.[68] In the inside-out framework of neutrality the-

67. The balancing process is particularly difficult because the rule against funding religious organizations has positive as well as negative implications for the communication of religious perspectives. The rule maximizes the purity and independence of the religious message while reducing the amplification of the voice with which it is expressed.

68. *See* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2182-84 (1998) (Scalia, J., concurring) (arguing that government does not abridge freedom of speech when it engages in viewpoint discrimination in spending

ory where free speech principles require spending neutrality but permit regulatory discrimination, the relation between free speech doctrine and the religion clauses becomes entirely unfocused. One cannot even be certain under neutrality theory whether free speech principles justify the denial of regulatory exemptions of religious speech from content-neutral restrictions that limit the time, place, and manner of expression.[69]

The charitable choice provisions magnify this contradiction. On the one hand, according to the statute, funding for public welfare services must be made available to secular or religious organizations on a non-discriminatory basis. On the other hand, religious organizations and religious speech alone receive special immunity from speech regulations imposed by government as a condition for the receipt of funds, and religious organizations alone are permitted to discriminate on the basis of religion in hiring employees to perform publicly funded functions. If religious and secular beliefs and institutions are competing for the hearts and minds of citizens, it is difficult to understand how this system can be characterized as non-discriminatory, evenhanded treatment of these two conflicting perspectives.

C. *Challenging the Core Objective—Why Government Should Not Always Minimize Its Interference with Religious Choice*

The preceding discussion challenges neutrality theory on the grounds that there are important constitutional constraints on government other than the protection of religious liberty that must be taken into account in interpreting the religion clauses. There is a separate defect in neutrality theory that arises from an entirely different perspective, however. Not only must the Constitution be interpreted to do more than limit government influence over religious choices, but minimizing government influence over religious choices may not always be the best constitutional policy.

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public funds because "[i]t is preposterous to equate the denial of taxpayer subsidy" with regulations restricting speech).

69. It would seem that the exemption of religious speech from content-neutral speech regulations should follow logically from the premises of neutrality theory. Once it is accepted that free speech principles require (or at least permit) government to subsidize religious institutions and activities whenever it elects to fund comparable secular institutions and activities, but no such free speech limitations preclude government from exempting only religious beliefs and practices from neutral laws of general applicability, it is hard to understand how or why providing such exemptions from laws restricting expression to religious speech alone should violate free speech guarantees.

Sometimes government has an important and positive role to play in promoting constitutionally cognizable values related to religion that require it to impose some limits on private liberty. Two of these values have longstanding constitutional traditions that I have already discussed: equality for discrete and insular minorities and freedom of speech. Respect for these values not only requires that there be constitutional limits on what government can do, it also justifies government intervention that restricts the exercise of personal liberty.

An equal protection analogy may help to illustrate this point. Suppose someone suggested that the Constitution requires government to be neutral with regard to race relations in the United States. The goal of the Equal Protection Clause would now be to minimize government interference with the way that people of different races interact with each other. Under such a principle, government discrimination on the basis of race would be prohibited, as would mandatory racial segregation. But private racial discrimination in employment, private education, business, and housing would all be permissible and protected from government intervention. While the government would be acting in a formally neutral manner pursuant to this policy, the impact of this new interpretation of the Equal Protection Clause would not be neutral, of course. Its effect would be far more damaging and burdensome to racial minorities than majority groups. If we were trying to describe the harm that would result from this new constitutional standard, we would probably conclude that it undermines racial equality.

Now consider an identical constitutional provision that requires government neutrality with regard to relations among the many religious faiths practiced in the United States. As noted previously, because race is an immutable characteristic, there is no racial liberty analogy to religious liberty. One does not speak of the freedom to be a member of a race. Accordingly, we might describe one harm that would result from rigidly promoting the goal of religious neutrality theory through a constitutional standard of this kind as the undermining of religious equality. Certainly, there is some parallel between the treatment of racial and religious minorities in American history. Catholics, Jews, Muslims, and other religious groups have been victimized by private discrimination in employment, education, and housing that is often religiously motivated, at least in part.[70] These religious minorities have depended on government intervention to receive equality of treatment in civil society.

70. *See* Brownstein, *supra* note 34, at 106.

Unlike race, however, there is also a liberty dimension to religious discrimination. Discrimination against certain religious groups by people of other faiths or adherents of secular beliefs may well influence an individual's religious choices. If valuable employment, housing, and educational opportunities will be denied to individuals if they openly practice their religion, the disincentive to their doing so seems apparent. Of course, the loss of religious liberty here does not directly result from any government conduct, just as unrestricted private discrimination on the basis of race does not constitute state action. My point is that minimizing government intervention in these areas maximizes minority vulnerability to the private infliction of the liberty and equality harms I have described. Because of these costs, we reject constitutional principles that require the minimization of government intervention when private racial, gender, or national ancestry discrimination is at issue. Because private religious discrimination imposes equally powerful equality burdens as well as liberty burdens on religious minorities,[71] we should also be wary

71. At least one predictable response to the race and religion analogy in the text is that it unfairly treats racial and religious discrimination as moral equivalents. *See supra* notes 42-48 and accompanying text. Private racial discrimination is almost always immoral and bad, according to this argument, while religious discrimination is normatively neutral if not good. There is nothing inappropriate about a house of worship restricting its membership to only those persons who accept the religious beliefs of the congregation.

The argument is not as persuasive as it first appears to be. To begin with, the problem is not religious exclusivity in religious congregations. It is religiously restricted jobs, housing, and educational opportunities. A Catholic or a Jew probably has no interest in joining a Methodist church and suffers no injury if he is denied admission. If the Methodist Church owns and operates the largest factory in town, skilled Catholic and Jewish assembly-line workers may have every reason to seek employment there and will suffer significant harm if they are denied employment because of their faith.

It is true that the sincere desire to operate a factory according to religious principles and the desire to have a religiously homogeneous work force to facilitate that goal may be neither invidious nor hateful and can be distinguished from racial discrimination on that basis. That is only half the story, however. It is also true that not all ethnic- or gender-based discrimination in employment or housing or education is invidiously motivated. Of equal, if not greater importance, some religious discrimination in these areas *is* invidiously motivated. *See supra* note 48. In all of these circumstances, it may be difficult to distinguish the benign purpose from the malevolent one. Finally, whether the private actor's purpose is invidious or benign, the person denied a valuable opportunity because of his religion suffers a real injury. A theory that ignores both the possibility of invidiously motivated discrimination and the harm to individuals denied valuable benefits because of their religion that may result from efforts to minimize government interference with religious choices is an inadequate basis for interpreting the religion clauses.

of constitutional theories that limit government's ability to prohibit such conduct or redress the injuries that it causes.

A freedom of speech analogy demonstrates the same problem with neutrality theory from a slightly different perspective. One of the reasons courts uphold content-neutral, time, place, and manner restrictions on speech, such as a permit system determining the time and location at which different groups may hold rallies at a public park, is that these speech restrictions facilitate freedom of speech for everyone. Without some kind of rules governing who may speak in a particular place at a particular time, public discourse degenerates into shouting matches in which the largest and rudest group dominates the discussion by force of numbers. It is important to recognize that the state's interest in these rules is not simply the general goal of promoting civil order. The state's purpose is also to facilitate and protect the meaningful exercise of the right to speak and to be heard.[72] The state recognizes that it is sometimes necessary to restrict the speech of some individuals in order for meaningful speech opportunities to be available for others. A constitutional principle requiring government to minimize interference with the freedom of speech of competing speakers would undermine this objective.

Both of these constitutional analogies suggest that any complete theory of interpretation for the religion clauses must recognize that other substantive values in addition to freedom from government interference must be taken into account in order to understand these constitutional provisions. The goal of minimizing government interference with religious choice is important but incomplete. The government also has a critically important and positive role to play in promoting religious liberty and equality by regulating private conduct. Minimizing government influence over religious choices may leave religious minorities vulnerable to private coercion and discrimination.

Indeed, it is not only religious minorities that require affirmative government intervention to promote religious liberty. Laws requiring private employers to accommodate the religious interests of employees provide important legal protection for members of religions of substantial size working for employers of other faiths, of no religion at all, or who simply care more about their profit margin than the spiritual needs of their workers. One would think that a theory committed to minimizing govern-

72. *See In re* Kay, 464 P.2d 142, 149 (Cal. 1970) (noting that the "[f]reedom of everyone to talk at once can destroy the right of anyone to effectively talk at all").

ment incentives that influence religious behavior would repudiate such laws. After all, were it not for the government's intervention, many employers would award days off according to facially neutral criteria that further their business interests rather than the religious needs of employees.

In enacting a law such as the one struck down in *Estate of Thornton v. Caldor*,[73] which required employers to provide priority in taking time off to religious employees who observed a Sabbath day, the government was obviously engaged in removing private disincentives that interfere with religious practice. There is nothing neutral or minimal about the effect of such a law on religious practice. Yet some neutrality theory proponents argue that the law in *Caldor* should have been upheld or that its only defect was that it favored certain religions over others.[74] In doing so they implicitly recognize that the focus of the religion clauses should not be universal government deference to private sector decisions relating to religion, but rather a substantive constitutional vision that supports specific values.

While this criticism of neutrality theory is not as directly related to problems created by charitable choice, because its primary focus is on government regulation, not spending, it does relate to the general question of privatizing government services through the use of private organizations performing public functions. It is simply a mistake to ignore the role that public institutions have played in integrating many religious minorities into American public life. Private institutions, particularly private religious institutions, are often self-consciously homogeneous. Taken to its logical extreme, systems that extend private exclusivity into public life and are completely respectful of majority homogeneity provide little in the way of "choice" for many minorities, charitable or otherwise.

CONCLUSION

Neutrality theory and the charitable choice provisions of welfare reform are directed at real problems in constitutional doctrine and in American society. But both the theory and the legislation leave too many unresolved gaps for either to be accepted as an adequate response to the issues they address. Neutrality theory simplifies religion clause jurisprudence by

73. Estate of Thornton v. Caldor, 472 U.S. 703 (1985).

74. *See* Esbeck, *supra* note 3, at 24-25 n.93; *see also* McConnell, *supra* note 3, at 181 (noting that the holding in *Caldor* "deviated from the usual principles of constitutional adjudication" in striking a law down on its face when it might be reasonably applied in many circumstances).

ignoring important constitutional values. Indeed, it does not even fairly and adequately protect religious liberty. State funding of religious organizations is problematic and controversial because of legitimate concerns about the fairness of allocation arrangements and the fear that politically powerful groups will aggrandize state resources. The risk that funding mechanisms may disproportionately favor certain religions and exclude others raises serious issues about the incentives created by such apportionments. Given the diversity of religious faiths in the United States, a constitutional guarantee that only requires that subsidies must be distributed according to formally neutral criteria does not come close to adequately addressing this problem.

Neutrality theory ignores equality concerns entirely. Fragmenting public services along religious lines raises serious equality concerns for minority faiths. Neutrality theory ignores this issue. Discrimination in hiring on the basis of religion that denies qualified persons valuable job opportunities solely because they are of the wrong religious faith goes to the core of constitutional equality principles. Yet under neutrality theory, government may authorize private religious organizations that contract with the state to perform secular public functions to use the state funds they receive to hire only those employees who satisfy sectarian religious standards. Leaving aside the traditional separationist concerns—that allowing religious groups to compete for government funding to hire persons of only one religious faith to perform public functions generates political divisiveness, creates opportunities for religious coercion, promotes dependency by religious institutions on state support, and entangles government and religion—there is nothing in neutrality theory that suggests that the potential exclusionary effect of such policies is of constitutional significance. The burden on people of minority faiths of a system that allows majoritarian religious organizations to exercise their liberty by reserving jobs funded by state resources for persons of their own faith is not recognized in any way.

Neutrality theory also ignores the likelihood that combining regulatory exemptions for religious groups with state support for their activities will distort the marketplace of ideas. There is nothing neutral about immunizing religious voices or religious activities and institutions from regulatory restrictions that limit the expression of secular messages and speakers. This freedom of speech problem is only exasperated when private organizations are permitted to use government largess as an incentive to capture audiences for the receipt of their messages.

Finally, neutrality theory avoids the reality that the members of minority religions need government to police private conduct that interferes with their ability to find employment, places to live, educational and recreational opportunities, and all the other goods and services provided by the private sector that make up so much of American life. Minimizing the role of government in influencing religious choices only maximizes the liberty of those religious groups that are powerful enough to protect their own interests against private interference with their faith. Other values need to be taken into account in determining the appropriate role of government relating to religion if the substantive objective of our constitutional vision is a society in which the people of diverse religious faiths worship as they choose while living and working together on the basis of equal worth and mutual respect.