

REVIEW ESSAY

CHARITY FOR THE AUTONOMOUS SELF

CARL H. ESBECK

R. B. Price Professor Emeritus and Isabelle Wade and Paul C. Lyda Professor of Law Emeritus, University of Missouri

BOOKS REVIEWED

Charity Law and the Liberal State. By Matthew Harding. Cambridge: Cambridge University Press, 2014. Pp. 272. \$113.00 (cloth). ISBN: 978-1107022331.

Religion, Charity and Human Rights. By Kerry O'Halloran. Cambridge: Cambridge University Press, 2014. Pp. 542. \$144.00 (cloth). ISBN: 978-1107020481.

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Australia adopted the Charities Act of 2013, consolidating and restating the country's governing statutes on the registration and qualification of charities, but leaving to the future any reconciliation between faith-related charities claiming religious liberty and others demanding marriage equality and no discrimination based on sexuality. Concurrent to this development, but with an eye to the direction of charity law in common law systems throughout the world, major works have come to us from two Australian scholars. In this review I offer much about these two monographs, but the discussion that immediately follows concerns the law of charitable nonprofits in the United States, the basic structure of that law, and current issues implicating religious freedom.¹

THE STATE OF THINGS IN THE STATES

The several states of the United States broadly encourage philanthropic activity, and charitable entities receive favorable treatment, such as perpetuity and presumptive validity, in the common law and statutory codes on estates, trusts, and taxation. Encouraging private altruism not only helps to tamp down the growth of the state, but it rewards generosity and volunteerism while diversifying and vivifying civil society. Charity law is, if not anti-statist, certainly an enabler of the private sector so that civil government need not increase. In the United States, at least historically, limiting the need for government is regarded as a good thing.

For centuries churches have engaged in education, public health, and the collection of alms for the poor as central to their understanding of themselves and their calling to meet the physical and mental needs of humanity, along with the spiritual. Thus, religious charities were first to the task and longest in place when, in the previous century, government began to ramp up to do more for the poor and needy. The sensible thing was for the government not to push aside the existing

¹ With respect to terminology in the United States, the *law of nonprofit organizations* or *law of tax-exempt organizations* is used rather than *charity law*.

faith-related efforts, but to assist them. Some religious charities had more reservations than others in electing to take the proffered state assistance, given that receiving the aid risked a loss of control over the direction and spiritual integration of their mission. The total socioeconomic impact of religion in the United States is presently valued at \$1.2 trillion annually, with social services and health care comprising \$256 billion of that share.²

Today organized charitable activity in the United States, faith-related and secular, is provided by a variety of nonprofit entities formed under the corporation law of a state of the charity's own selection, usually the jurisdiction where the charity has its headquarters or principal place of business. A charity's exemption from federal income taxation is a matter addressed by the Internal Revenue Code, or IRC, with exemption from state income taxation usually pegged to the federal exemption. A nonprofit charity qualifying under IRC § 501(c)(3) is not only exempt from federal income taxes, but is able to receive contributions that are tax deductible by the donor. The latter is made possible by IRC § 170(c), permitting a donor to take a deduction on the donor's federal income tax return.³ It is the latter—being qualified to receive tax-deductible contributions—that is most prized by charitable nonprofits.⁴

Although not free from grammatical ambiguity, “charity” is interpreted in IRC § 501(c)(3) as an umbrella term embracing all of the multiple types of qualifying entities. IRC § 501(c)(3), along with its accompanying regulations,⁵ lists the approved purposes around which an entity must be “organized and operated” to be a qualified tax-exempt charity. Organizations typical of those purposes are religious, scientific, literary, and educational, as well as those formed to foster amateur sports or to prevent cruelty to children or animals. Categorically excluded from charitable purposes are for-profit entities, as are political parties, organizations primarily designed to influence legislation, and entities formed to campaign on behalf of or in opposition to a candidate for public office.

The “advancement of religion” has always been among the approved charitable purposes for favorable tax treatment. From its inception in 1913, the US income tax code presumed that churches and other faith-based organizations were exempt.⁶ As liberal theories have brought new pressures on these past practices, the tax exemption for houses of worship and other religious organizations became contentious. More narrowly and of more immediate concern is the debate over whether a religious charity should lose its tax-exempt status when it engages in employment discrimination, even as staffing with those of like-minded faith has proven essential. Religious charities employing those who remain faithful to biblical morality is believed necessary if they are to retain their religious character and avoid mission drift.

2 Brian J. Grim and Melissa E. Grim, “The Socio-economic Contribution of Religion to American Society: An Empirical Analysis,” *Interdisciplinary Journal of Research on Religion* 12 (2016), <http://faithcounts.com/wp-content/uploads/Summary-Sheet.pdf> and <http://www.relighjournal.com/pdf/ijrr12003.pdf>.

3 The IRC is found in title 26 of the United States Code, thus the preceding provisions are 26 U.S.C. §§ 170(c), 501(c)(3) (2012).

4 The Internal Revenue Service, as the administrator of the IRC and gatekeeper for tax-exempt organizational status, has discretionary power, power enhanced by the federal courts giving the IRS considerable deference. It is not without precedent that employees of the IRS, in a misplaced effort to advance the party in power, abuse their office. Consider, for example, the ongoing investigation into the IRS for slow-walking applications for nonprofit tax-exempt status received from those in the Tea Party political movement. See “The IRS Hit List,” *Wall Street Journal*, June 9, 2016, <https://www.wsj.com/articles/the-irs-hit-list-1465253251>; Kimberley A. Strassel, “The IRS’s Ugly Business as Usual,” May 19, 2016, *Wall Street Journal*, <https://www.wsj.com/articles/the-irss-ugly-business-as-usual-1463700465>.

5 U.S. Treasury Regulations, 26 C.F.R. §§ 1.501(c)(3)-1, 1.501(c)(3)-1T (2015).

6 See Bruce R. Hopkins, *The Law of Tax-Exempt Organizations* (Hoboken: Wiley, 2007), 12–15, 19–21.

Is a church or other religious organization's exemption from taxation pre-political? That is, does the assumed order presuppose that civil government and the church are separate centers of authority, and thus the tax exemption flows from church-state separation? If so, then the exemption is not a matter of legislative grace but merely an expedient way for the legislature to make clear that certain activities are deemed religious and so were never taxable in the first place. Put differently, are the religious activities of churches and other religious organizations simply not taxable events? The answer is pivotal. If tax-exempt status is a subsidy that the legislature, in its discretion, can grant or withhold depending on which organizations the government wants to advance and which retard, then conferring tax-exempt status on religious organizations is aid to religion, a prospect that would seem forbidden by the Establishment Clause.

This was the issue, largely answered, in *Walz v. Tax Commission of the City of New York*.⁷ The lawsuit entailed a claim that a municipal property tax exemption for churches and other houses of worship advanced religion and thereby violated the Establishment Clause. By a lopsided division of 8 to 1, the Court held that it did not. The Court in *Walz* reached two important conclusions of law. First, it said that the tax exemption for religious organizations was not a subsidy but the government electing not to impose a burden on religion and so to leave religion alone. In the Court's own words, the "grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but [it] simply abstains from demanding that the church support the state."⁸ The Court distinguished between an exemption and a subsidy saying it "cannot read New York's statute as attempting to establish religion: it is simply sparing the exercise of religion from the burden of property taxation levied on [others]."⁹ The proposition is simple enough: government does not establish religion by leaving it alone. As to the issue of "leaving churches alone" arising from the principle of church-state separation, the Court observed, "The hazards of churches supporting government are hardly less in their potential than the hazards of governments supporting churches: each relationship carries some involvement rather than the desired insulation and separation."¹⁰ Unlike a religious preference, a tax exemption for religious entities "tends to complement and reinforce the desired separation [thereby] insulating each from the other."¹¹

Second, as a justification for the tax exemption the Court in *Walz* rejected a quid pro quo argument, to wit: the exemption is compensation for religious groups generating considerable social capital through the provision of welfare services, education, and health care.¹² Religious charities do just that, of course, but viewing the tax exemption as a reward for "good works" would invite unconstitutional entanglement by way of "governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize."¹³ Moreover, a reward-for-works rationale would risk violating the rule against authorities resolving religious questions concerning the validity, meaning, or importance of religious beliefs and practices.¹⁴ The rationale behind the

7 397 U.S. 664 (1970).

8 *Id.* at 675.

9 *Id.* at 673.

10 *Id.* at 675.

11 *Id.* at 676.

12 *Id.* at 674.

13 *Id.* A separate concurrence by Justice Brennan did rely on the reward-for-works justification, but no other justice joined that opinion. *Id.* at 680, 687–88.

14 The rule denying civil authority to pass on religious questions arises frequently, and it appears in cases decided under the Free Exercise Clause, the Establishment Clause, and the Free Speech Clause. See *Thomas v. Review Board of Indiana*, 450 U.S. 707, 715–16 (1981) (Free Exercise Clause); *Hosanna-Tabor Evangelical Lutheran*

no-religious-questions rule is that government lacks the jurisdiction to make judgments concerning the temporal value of religious practices. If the state had such power, soon there would be churches “approved” by the state and those not. There are no heresy trials in the United States. To contemplate such a trial implies an established religion against which “unapproved” practices and “underperforming” doctrines are civilly weighed and found wanting. The courts are not theological umpires, scoring each church’s performance on a ten-point scale. Given the rule against courts passing on religious questions, the “public benefit” test for charitable status can have no place in US law when it comes to religious organizations. Because of this restraint, US courts elide the charity test by deeming religion a “public benefit” per se.

Both conclusions in *Walz* rest on the separation of church and state as codified in the restraint in the First Amendment on “mak[ing] . . . law respecting an establishment of religion.” Religious freedom vests not just in the individual but bespeaks a sphere of autonomy for the institutional church.¹⁵ *Walz* did note in passing that religious organizations were not alone in being tax-exempt under the city ordinance, but were joined by educational and poor-relief organizations. However, the Court never said that the inclusion of secular organizations in the exemption was necessary to its holding. Indeed, in cases like *Corporation of the Presiding Bishop v. Amos*,¹⁶ the Court has upheld an exemption that was exclusive to religious organizations.

Unlike the IRC § 501(c)(3) exemption, the tax deduction made available by IRC § 170(c) is a benefit or subsidy, but it is a benefit to the donor not to the religious charity. Because the tax deduction is a subsidy to the donor, church-state separation is not implicated.¹⁷ As a government subsidy the deduction is subject to being granted or withheld at the discretion of the legislature. This brings to the fore the possibility that the government could attempt to penalize a religious charity, one engaging in discriminatory employment practices or opposed to same-sex marriage, by withdrawing the charity’s ability to receive tax-deductible contributions. But such a step would be unwise, for reasons discussed below.

In addition to private charitable funding and taxes, there has been a galactic shift in the United States concerning government funding of religious organizations.¹⁸ In August 1996, under the

Church & School v. EEOC, 565 U.S. 171 (2012) (Establishment Clause barred question whether minister’s duties were exclusively religious or a mix of religious and secular.); *Widmar v. Vincent*, 454 U.S. 263, 269 n.6, 271 n.9, 272 n.11 (1981) (Free Speech Clause).

15 See, for example, *Hosanna-Tabor*, 565 U.S. at 188–92 (finding that a religious elementary school was autonomous with respect to matters of its internal governance, including the employment of ministers).

16 483 U.S. 327 (1987). See Carl H. Esbeck, “When Religious Exemptions Cause Third-Party Harms: Is the Establishment Clause Violated?,” *Oxford Journal of Church and State* (March 15, 2016), <http://jcs.oxfordjournals.org/content/early/2016/03/14/jcs.csw003.short?rss=1> (distinguishing between religious exemptions, which the Court has always upheld, and religious preferences, which are often unconstitutional).

17 Donors are incentivized to give because their contribution is deductible, thus IRC § 170(c) does indirectly benefit religious organizations. However, the Supreme Court has determined that such an indirect benefit to religion, when this occurs as part of a larger program where all sorts of organizations are benefited without regard to some being religious, does not violate the Establishment Clause. See, e.g., *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding, in face of Establishment Clause challenge, state income tax deduction for parental expenses of sending children to school, including private religious school); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding, in the face of Establishment Clause challenge, state voucher plan to enable parents to select school for their child, including selecting a private religious school).

18 Through the 1970s to the early 1990s, the conventional wisdom was that government funding of faith-based social service organizations was prohibited by the Establishment Clause. That began to breakdown with the decisions in *Bowen v. Kendrick*, 487 U.S. 589 (1988) (allowing federal aid to adolescent counseling centers, including religious centers), and *Agostini v. Felton*, 521 U.S. 203 (1997) (allowing federal funding of special education teachers that went to religious school campuses to provide services). The sea change was confirmed by *Mitchell v. Helms*, 530

rubric of “charitable choice” Congress passed and President Bill Clinton signed 42 U.S.C. § 604a, requiring that welfare grant monies, known as temporary assistance for needy families, were to be equally available to competing social service providers selected without regard to religion. Grant awards are now to go to the most capable providers. No longer is the question for faith-based grant applicants “Who are you?” but “Can you do the job?” If a faith-based provider can deliver the specified services to the poor or needy, then it may compete for a grant on a level playing field with secular providers. Importantly, when awarded a grant there is a guarantee that the faith-based provider will not be compromised in its religious character or have to forfeit its autonomy, including the protection of its right to religious staffing.¹⁹ Finally, the ultimate beneficiaries of a welfare program are promised that if they have a religious objection to being served by a faith-based provider, they can be reassigned to a provider to which they have no religious objection.²⁰ Charitable choice was expanded to three additional welfare programs during the remaining Clinton years. By executive order issued December 2002, President George W. Bush expanded charitable choice rules to cover all federal social service grants and cooperative agreements.²¹ Recently, during the presidency of Barack Obama, equal-treatment regulations were revised to add greater detail to the rights of beneficiaries.²²

In this century, charitable choice (or “faith-based initiative”) is the only bipartisan success within the US government having to do with religious freedom of charitable groups.²³ None of the equal-treatment regulations address the hiring rights of grantees that are religious organizations. However, those rights are already governed by Title VII of the Civil Rights Act of 1964, which has two exemptions for religious employers that use religious criteria in managing employees,²⁴ and by the federal Religious Freedom Restoration Act, known as RFRA.²⁵

U.S. 793 (2000) (plurality opinion) (allowing federal aid to primary and secondary schools, including religious schools), and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (allowing school vouchers for parents to select their child’s school, including religious school). Parallel to these case law developments, and a few years ahead of the courts, were the efforts by Congress and then the three presidential administrations pushing forward “charitable choice” as described in the text.

19 42 U.S.C. § 604a(b), (d)(B), and (f) (2012).

20 42 U.S.C. § 604a(e) (2012). The faith-based initiative assumes a federal program, federal funds to operate the program, and program beneficiaries. A beneficiary is extended a statutory right to not receive services from a religious provider to which he or she has a religious objection. This “choice” in charitable choice is an accommodation to any sensitivity among beneficiaries, be that sensitivity rooted in religion or in a rejection of it.

21 Executive Order 13279, “Equal Protection of the Laws for Faith Based and Community Organizations,” 67 Fed. Reg. 77,141 (December 12, 2002), as amended by Executive Order 13672, 79 Fed. Reg. 42,971 (July 20, 2014).

22 See “Final Regulations Implementing Executive Order 13559, Fundamental Principles and Policy Making Criteria for Partnerships with Faith-Based and other Neighborhood Organizations,” 81 Fed. Reg. 19,353 (April 4, 2016).

23 See Carl H. Esbeck and Stanley Carlson-Thies, “Two Decades of Bipartisan Cooperation on Government Funding and Religion ... This Can’t Possibly Be about the U.S.,” *Cornerstone* (blog), August 22, 2016, <http://www.religiousfreedominstitute.org/cornerstone/2016/8/22/two-decades-of-bipartisan-cooperation-on-government-funding-and-religion-this-cant-possibly-be-about-the-us>. The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-2 to 2000cc-5, was signed into law September 2000, still the twentieth century.

24 Sections 702(a) and 703(e)(2) of Title VII, 42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(2) (2012), exempt religious employers from employment discrimination claims when using religious criteria in their employment practices. See Carl H. Esbeck, “Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?” *Oxford Journal of Law and Religion* 4, no. 3 (2015): 368–97 (discussing the case law and those issues that remain contested).

25 42 U.S.C. §§ 2000bb-2 to 2000bb-4 (2012). The Office of Legal Counsel at the US Department of Justice has determined that an employer’s RFRA claims override in cases of religious staffing by a federal grantee. See Office of Legal Counsel, Opinion of June 31, 2007, http://www.justice.gov/sites/default/files/olc/opinions/2007/06/31/worlddivision_o.pdf.

TWO FROM DOWN UNDER

In *Charity Law and the Liberal State*, Matthew Harding, a professor of law at Melbourne University, develops an analytical framework for the critique of charity law, as informed by a philosophical theory he terms “autonomy-based liberalism.” In *Religion, Charity and Human Rights*, Kerry O’Halloran, an experienced lawyer and social worker at the Australian Centre for Philanthropy and Nonprofit Studies, Queensland University, chronicles recent developments in charity law in the United Kingdom, Ireland, the United States, Canada, Australia, and New Zealand. O’Halloran takes up the autonomy of religious charities when competing with egalitarian claims such as those involving reproductive rights, employment discrimination, and same-sex marriage.

The heart of Harding’s monograph is chapter 2, where he propounds a liberal theory, one by which in later chapters he scrutinizes various policy choices in charity law. Harding assumes that the state should be liberal (43, 75), which is different than saying it is liberal. So there is limited acknowledgment that liberalism is but one point of view selected over others.²⁶ In proceeding to survey various theories of liberalism and rejecting them (44–49), Harding eventually settles on “autonomy-based liberalism” as espoused by Joseph Raz (43, 49–50). The justification for elevating Razian theory is that it “enables us to avoid committing ourselves to the view that the promotion of charitable purposes is misguided insofar as it is non-neutral” (49). Raz has a point of view as to how best to flourish and attain “the good,” namely, personal autonomy. Indeed, Raz has no qualms about vesting in people a right not only to negative liberties but to positive liberties (Harding, 49),²⁷ as well as attributing to the state affirmative duties to promote individual autonomy (54–55). A non-neutral theory is needed, explains Harding, because it will be used to critique charity law which is non-neutral (55), that is, charity law makes many substantive choices as to what is good and what is not (2), and Harding does not want to overthrow all of them.

This prompts the reader to inquire of Harding: Can a non-neutral theory be liberal? Is it not illiberal for the state to impose on its citizens its conception of the good? As we shall take up below, Raz claims he is not imposing a value-laden perspective on what is good and ultimately fulfilling, only a means to attaining it.

Continuing this fixation on personal autonomy, Harding proceeds to fill out Razian theory. To be autonomous a person must be able to develop “inner capacities” necessary to make use of autonomy, such as good health and intellectual discipline; a person must be free of coercion and manipulation; and a person must have meaningful options from which to exercise this power of choice (Harding, 51–52). Autonomy is the core value, explains Harding, but not the only value or the ultimate value (52). Rather, autonomy is the means that “enables” a person to do the things that in the end are good. So what is considered “good”? Razian theory does not define the good, leaving that for persons to decide for themselves. But it does posit three things about the proper path to reaching ultimate fulfillment. First, a person has to believe that autonomy is not the measure of the good but that there is something truly good as measured independent of one’s own choosing it. Second, there are choices that are valueless and they need not be supported by the state. Third, a

26 If being transparent, Harding could have at least acknowledged various alternatives such as conservatism (tradition), nationalism, democracy (populism), and socialism. See David T. Koyzis, *Political Visions and Illusions: A Survey and Christian Critique of Contemporary Ideologies* (Downer’s Grove: InterVarsity Press, 2003).

27 The US Bill of Rights, for example, is composed of negative liberties. It tells the state what it cannot do. It does not tell the state what it must do. The latter is “positive liberty,” and is best understood in the United States as an entitlement. Negative liberty makes the state smaller. Positive liberty requires taxes to pay for the entitlement, so the state is stimulated and grows.

person needs to commit to “value pluralism,” which is a belief that there are many values, values can conflict, and such conflict is not necessarily bad (Harding, 53–54). It seems there are a variety of valuable values (as distinct from valueless values), all within a larger set of “the good.” Harding plunges on: autonomy-based liberalism seeks persons committed to its cause, which is not only the attainment of a private good but personal autonomy for all others (55). Thus, it is not just a philosophy for one’s interior life but one to be taken up by the political community and promoted by the state. So Razian theory entails an ambitious project of collective self-improvement, the advent of which is an infusion of more autonomy all around. That seems upside down: from the consumption side, charity is about the needy, say a drug addict requiring rehabilitation, and often it was autonomy that got the addict into the fix where help is now needed. For the needy, loving authority and structure may very well be the better path forward.

Harding insists Razian theory is liberal because it claims not to impose a particular view of the good, only a means to the good. But dictating the proper means to the good cannot help but determine the range of possible trajectories and their eventual outcomes. A theory is illiberal that limits one to a particular means that in turn limits the available ends. Harding does not attempt to explain this paradox. But it seems that Raz (and, hence, Harding) is not committed to autonomy but to a “reasonable” autonomy. And what Raz deems “reasonable” is gauged by his commitment to something other than classical liberalism.

Razian theory will be experienced as coercive by some. If the only approved means to the good is more autonomy, traditional religion will come up short, for such religion counsels self-sacrifice, self-denial, and self-subordination. That prediction comes to pass in chapter 5 with Harding’s finding of a conflict between the “master value” of religion and the Razian advancement of autonomy (54, 156–57). The shortfall appears again in chapter 7 with the conflict between religion’s employing people of like-minded faith and the new norms of gay and transgender antidiscrimination. Harding even denounces the widespread practice in the United States of writing religious exemptions into antidiscrimination legislation (236–37).

On the first-order question of whether religious activities of churches and other faith-based organizations are simply not taxable events, Harding assumes the statist view: a baseline where all activity is taxable, including churches (38–39). That means entities or activities are exempt from taxes only if the state extends legislative grace to the organization. Harding takes a respectful, even generous view with respect to those who are religious. Ultimately, however, his position is that of an outsider looking into a religious world he rejects as pre-modern. When a Razian-approved purpose to promote charity conflicts with traditional religious practice, the state may—and sometimes must—deny charitable status to the religious organization (Harding, 158–59, 174).

Harding writes beautifully, with a prose that is both tight and accessible to the non-expert. But he ends up imposing an alien philosophy on religion, a Gospel of Raz, where final authority is relocated to the will of each individual (156). Notwithstanding the claim by the book’s title, *Charity Law and the Liberal State*, this philosophy is illiberal, imposing as thick a concept of the good, or more precisely a means to it, every bit as much as does the Acts of the Apostles.²⁸ Ultimately the argument reduces to Harding’s claiming that his values are better than your values. The theory cares not that most claims of religious conscience are by small groups or minorities, some brutally

²⁸ The fifth book of the New Testament, appearing in the biblical canon directly after the four Gospels. The Acts of the Apostles is a historical account of events in the first century church.

suppressed.²⁹ Harding would add to their suffering when their faith is not autonomy enhancing. To his credit, Harding is candid about Razian theory being secular and that secularism is not neutral (157–58). He acknowledges that secularism will rollback religion at crucial points. Religion does not always lose out to the Razian State, but it does lose when it matters, that is, when in sharp conflict with the latest majoritarian hegemony (174, 236–37). This is not religious liberty. It is not even toleration. It is sufferance of religious practice at the behest of a Razian Establishment.

In his monograph, Kerry O'Halloran postulates that charity law has recently undergone reform in a number of common law countries,³⁰ a movement away from a four-hundred-year old model based on settled case law originating in Mother England (2–3, 142–43). With that apparent coincidence as background, the monograph is about developments in charity law that are parallel across common law countries, especially with respect to conflicts experienced by religiously affiliated charities concerning the emerging social issues of same-sex marriage and gay-rights claims of employment discrimination and access to wedding services (O'Halloran, 2–3, 110, 509). In part one, O'Halloran provides background in charity law but concludes with a chapter on international human rights as it emerged after World War II and the teeing-up of the conflicts within charity law between religion and liberal causes (O'Halloran, 110). In part two, O'Halloran offers a case law and statutory survey of developments in charity law covering six common law nations, including the United States. The idea is to uncover issues and conflicts between charity law and religious practices in each of these six countries; in turn, this will enable O'Halloran to draw comparisons and identify trends. Finally, in part three, O'Halloran offers a proposed resolution of the questions raised by what he calls religion's "moral imperatives," a resolve by O'Halloran that would decidedly reduce pluralism by requiring religious charities to act in ways contrary to what they believe (467, 512–13).

O'Halloran is a first-rate scholar of charity law who has taken up one of the more difficult and rapidly changing domestic conflict-of-rights in the modern West: religious liberty versus gay rights. He admits at the outset that his knowledge of theology will disappoint readers (5), and parts of the monograph do read as if authored by one experienced only with Catholicism and from a nation once decidedly Catholic (468–77). However, it is not theology that he lacks but a working familiarity with the variety, breadth, and effectiveness of faith-based social service providers, from community development projects, to world disaster relief organizations, to drug addict rehabilitation centers, to those who would interdict women and children being trafficked, to church-affiliated shelters for victims of domestic violence, to placement of children in foster homes, to programs to ease the reentry of prison inmates back into the population.

At the outset, O'Halloran confuses religion's contribution to pluralism with religion having the purpose of promoting social equality and civic cohesion (1, 478–79). This presumes religion is in service of the state. Religion surely adds to a nation's pluralism, but it does so by multiple competing sects each seeking to expand its own monism. To be sure, religion has utilitarian benefits (O'Halloran, 478–79), but ultimately religion does not exist to promote political cohesion or virtuous citizens but to serve each sect's concept of God. A Caesar may try to capture the church to

29 I have in mind Native American and aboriginal religions, as well as Orthodox Judaism, Amish, Seventh-day Adventists, and Islam. All report how they experience modernity as an ever present gravitational force pulling them away from religious obedience. None are characterized by their individualism.

30 O'Halloran later acknowledges that apart from England and Wales any ambitious reforms—as distinct from attempts at reform—have been spotty, more a codification of the case law, an expansion of the definition of religion, and an upgrading of the regulatory machinery (47–53).

unite the polity in a civil religion, but that is why there is church-state separation to arrest such a state-attempted co-optation of the church.

O'Halloran's usage of terms pits religious freedom against international human rights, which is unfortunate because during the period after World War II religious conscience was among the first of acknowledged preferred rights. Indeed, his usage of categories and terms throughout puts religion at a rhetorical disadvantage, with tax-exempt status a mere "privilege,"³¹ statutory religious exemptions also characterized as "a privilege,"³² the ability of a church to appoint its own clergy on a basis such as sex or sexual orientation as "discretionary" with the state,³³ and religious social services characterized as having a "secular arm" rather than being understood as fully integrated social service providers that are motivated at their very core by what it means to respond in faith to a neighbor's needs (O'Halloran, 281). For O'Halloran, religion knows not rationality because "matters of belief remain impervious to argument." He is seemingly unfamiliar with that closely reasoned scholarship known as Christian apologetics. O'Halloran views religion as "only too capable of generating a strident and often virulent moralism" (1-3, 467), rather than another voice to be heard and respected within the larger mix of a nation's rich and celebrated pluralism.

Because the law of international human rights came into ascendance following World War II, in chapter 4 O'Halloran's rightly places religious freedom among the highest order of human rights, rights expressly detailed in international conventions (117-29). However, he then pivots 180 degrees by placing at odds religious belief and international human rights, calling them "mutually exclusive" (123). By relocating "religious liberty" outside the set of "human rights" (5, 123), he can then claim gay nondiscrimination in employment as an emerging human right (133-34, 495-96, 512), one to rival the autonomy of faith-based organizations that staff with those of like-minded faith (141).³⁴

In most of the countries studied here the reform of charity law has not been comprehensive, but spotty and more a codification of the common law than leaps of ambitious reform.³⁵ In chapter 7, O'Halloran surveys the US law of charity and religious freedom.³⁶ There were attempts in the US Congress at charitable law reform through various incentives in the IRC,³⁷ but they were

31 As discussed above, the US Supreme Court held in *Walz v. Tax Commission of the City of New York* that the First Amendment prohibits a "public benefit test" to qualify for a tax exemption. See notes 7-13 and accompanying text.

32 In an unbroken line of six cases, the US Supreme Court has held that statutory religious exemptions are constitutional. See Esbeck, "When Religious Exemptions Cause Third-Party Harms." Rather than thought of as affirmatively advancing religion, statutory religious exemptions are seen as the state choosing to leave religion alone. Exemptions thereby expand liberty by reducing entanglement between church and state, and thereby reinforcing the desired distance between the two.

33 In the United States, a religious organization's authority to appoint clergy of its own choosing is not a privilege but a constitutional right. See *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). In this unanimous decision, the Supreme Court held that a religious school had an unmitigated First Amendment right to select its clergy and other ministers, notwithstanding a conflicting civil rights statute prohibiting discrimination on the basis of disability.

34 In this push to usher "religious freedom" out of the set of international "human rights" so as to make room for a liberty of sexual expression, O'Halloran is altogether riding the wave of modern populism. See Mary Ann Glendon, "Reclaim Human Rights," *First Things* no. 265, 19 (2016).

35 See note 30 and accompanying text.

36 For the reader looking for a current and thorough overview of US law concerning individual religious liberty as well as church-state relations, see Daniel O. Conkle, *Religion, Law, and the Constitution* (St. Paul: Foundation Press, 2016); Boris I. Bittker, Scott Idleman, and Frank S. Ravitch, eds., *Religion and the State in American Law* (New York: Cambridge University Press, 2015).

37 See notes 3-5, 17 and accompanying text.

unsuccessful. Rather, modest gains have been made in expanding the transparency of charities and in the monitoring of lobbying activity. These reforms were by the IRS, acting unilaterally, via regulations that increased the information required in annual filings by nonprofits that are tax-exempt. O'Halloran says nothing about these actions by the IRS, nor does he note the many state Charitable Solicitation Acts that regulate charities in comprehensive ways, albeit in some instances these acts exempt religious charities.³⁸

The most comprehensive reform in US charity law has been the adoption of "charitable choice" regulations. This began in 1996 with a bill signed by President Bill Clinton³⁹ and was expanded under presidents Bush and Obama.⁴⁰ These have been largely conservative in nature because they were meant to preserve and expand participation by faith groups in federal social service funding, not to push religion to the margins. O'Halloran is aware of the charitable choice initiative in the United States, for he gives frequent reference to it (142–43, 146–52, 274, 283, 287, 288–89, 324). But clearly he does not realize its substance and reach. For example, he retains an outdated view of American church-state relations where religious charities "separate their social service functions from their purely religious function: a bright line that represents the separation of Church and State" (281).⁴¹ Further, O'Halloran calls for a thorough "review [of] the public role and social value of religious entities ... [in order] to have clear basic ground rules for managing the State-Church relationship" (512). That, of course, is exactly what has been done in the United States by way of the twenty-year process called charitable choice.

The US federal government has extensive funding programs to assist people with health care and social needs.⁴² Religious and secular private-sector charities seek these monies via competitive grant applications. Charitable choice (or the "faith-based initiative") implemented three principles with respect to these federal programs when it comes to grant applications: (1) there will be no discrimination in the award of these grants on account of the religious character of the provider; (2) when receiving such a grant, faith-based providers do not forfeit their religious integrity or autonomy, including their ability to staff on a religious basis; and (3) the people who ultimately are to benefit from the programs of aid must be served without discrimination as to their religion, while at the same time these beneficiaries are vested with a right to object to being served by a religious provider and referred to another (the "choice" in charitable choice).

With respect to the second principle, when the grant funding goes directly to the provider then the Establishment Clause of the First Amendment requires that no federal money go for explicitly religious programming such as worship or proselytizing. In such instances, any such explicitly religious activities would have to be privately paid for and separated in time or location from the government-aided program. On the other hand, when the federal aid is indirect, such as by a voucher or scholarship, full compliance with the Establishment Clause is accomplished by the choice

38 See William W. Bassett, W. Cole Durham, and Robert T. Smith, eds., *Religious Organizations and the Law* (Eagan: Thomson West, 2013), §§ 18:35–43.

39 See 42 U.S.C. § 604a. See notes 19–20 and accompanying text.

40 "Charitable choice" safeguards are a matter of regulation, albeit the authority for the regulations is executive orders by presidents Bush and Obama, as opposed to congressional legislation. See notes 19–24 and accompany text.

41 See note 18 and accompanying text.

42 The US government lists more than 1,500 active social service programs. See Executive Office of the President of the United States, Office of Management and Budget, *Catalog of Federal Domestic Assistance* (Government Printing Office, 2016), <https://www.cfda.gov>. Add to that number the Affordable Care Act, Social Security, Medicare, Medicaid, and the Veterans Administration. Counting state and local governments, along with private-sector charities, only increases this number.

initially exercised by the beneficiary in his or her selection of the provider (religious or secular). Hence, in the case of indirect funding there is no requirement that faith-based providers separate their explicitly religious programming.⁴³

With charitable choice, the autonomy of faith-based providers is guaranteed by specific ways in which providers retain their religious character: (1) religious providers do not have to alter their polity or form of internal governance, thus retaining requirements such as all board members subscribing to a religious creed; (2) religious providers do not have to remove religious art or icons from their place of business, or eliminate religious words from their name; (3) religious providers do not waive their exemption from employment nondiscrimination laws; and (4) while subject to government financial audit as to federal grant monies, religious providers can limit the scope of that audit by keeping separate accounts of their use of federal monies and private-source funds. The result has been a richness of providers that are diverse institutions motivated by a variety of particular faiths but open to serving all in need.

In part three, O'Halloran makes no attempt to reconcile how international conventions expressly protecting religious liberty must recede in the face of gay rights.⁴⁴ His sympathy lies with the claims of lesbian, gay, bisexual, and transgender persons for nondiscrimination in employment over the claims by a religious organization to employ only those of like-minded faith (495–96, 512–13). O'Halloran's solution is not to outright prohibit such discrimination, but to eliminate such a faith-based provider from eligibility for government grants (496, 513). But the loss of government aid will just as surely drive out of business many religious providers. Not only is that solution anti-pluralist, but it will harm the poor and needy who desire to be served by those of their faith.

CONCLUSION

In one important dimension, O'Halloran and Harding agree that it is right and proper for government to use its powers to tug religious people and their charitable ministries into modernity. But they have somewhat differing conceptions as to this brave new world.

In the clash between religious freedom and international human rights, the latter now understood as gay rights, O'Halloran predictably takes the liberal side, namely, that government funding of religious charities requires that such charities forfeit their faith character and act like deputized government agencies. The use of government money in that coercive fashion will result either in these religious charities closing their doors or in their becoming nonreligious. That is hopelessly anti-pluralistic, a result that will reduce choice and harm the poor and needy. Peace between these two contending forces is possible only if neither side seeks to utilize the coercive power of the state to have the other act in ways contrary to their core beliefs. The charitable choice regulations in the United States point to a better way, a path to both a civil society that is truly diverse and a maximization of liberty all around. This is genuine pluralism. Instead, O'Halloran would preference LGBT persons in their demand to have law coerce the religious into violating core values by forcing them into either hiring LGBT persons, thereby losing control over their institutional integrity, or foregoing the opportunity to compete for government grant funding. A ministry simply

43 This funding arrangement was upheld as consistent with the Establishment Clause in *Freedom from Religion Foundation v. McCallum*, 324 F.3d 880 (7th Cir. 2003) (indirect funding to religious drug treatment center) and *Columbia Union College v. Oliver*, 254 F.3d 496, 508 (4th Cir. 2001) (direct funding to religious college).

44 See note 34 and accompanying text.

cannot retain its essential religious character when it cannot control the character of its employees. And to cut off the religious provider from government funding is only to punish the poor and needy, all while reducing the number and diversity of providers.

There is certainly nothing wrong in Harding's mission to subject charity law to criticism when it fails his liberal preferences. But his monograph implies more, namely that charity law ought to be modified to conform to his image. Because Razian theory is illiberal, matters quickly reduce to the unconvincing claim that Raz's path to a fulfilling life is better than that of the reader. Moreover, to subject all of charity law to a single theory is misguided. Charity is a coat of many colors. Religion *qua* religion is different from supplying food and housing to the poor, which is different from donations in support of the local symphony, which is different from the Red Cross's effort to teach children to swim or the Conservation Land Trust's acquiring wilderness so that the land remains undeveloped. Harding acknowledges religion is unique (169, 172), but subjects it to the same Razian standard. So it is not surprising that he has discomfort with "the advancement of religion" as a charitable purpose (169–70). While respectful of Harding's devotion to Raz, religious people can be expected to regard the prospect of more autonomy as a temptation, and one that will, if yielded to, prove as unfulfilling as such ersatz gospels have in the past. The traditionally religious can be expected, rather, to continue to find profitable the moral principles that Jesus taught: that people must first empty themselves even to the point of losing all that the world has to offer, for in that act of serving others—not out of compulsion but in a love made possible because God first loved them—they find life abundant.