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Gill, Emily R.

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5. Toleration and Religious Belief

Among the sorts of diversity that liberal societies have traditionally privileged is that of religious belief. On a standard account like that of John Rawls, the Protestant Reformation and subsequent controversies over religious toleration formed the historical origin of liberalism, as evidence accumulated that agreement on one comprehensive religious, philosophical, or moral doctrine was not in fact a necessary condition of social order and stability. More generally, the political and social conditions of modern democratic societies ensure not only that a diversity of reasonable comprehensive doctrines will persist as a permanent feature of the public culture but also that this diversity will develop if it does not already exist. Finally, the inevitability of diversity as a permanent feature ensures that frequently, shared agreement can be maintained only through coercion by the state. It is for these reasons, of course, that Rawls seeks a political conception of justice grounded in an overlapping consensus that can be endorsed by those holding widely different, often opposing, but still reasonable comprehensive doctrines.

Religious affiliation is a type of cultural membership in which members of particular religions, denominations, and sects are generally expected to adhere to particular beliefs and practices as a condition of continued membership. Liberal societies and governments have traditionally privileged religious belief, according toleration to practices that might not be accommodated if they did not emanate from such belief. Yet disagreement exists about the status of religious belief as a component of personal identity as well as about the correct rationale for tolerating a diversity of beliefs within the liberal polity. These issues are intertwined, as our views of the role of religious belief in individual identity may influence our perceptions of what practices should be tolerated and for what reasons. The liberal polity as I have described it is committed both to the maintenance of background conditions for individual autonomy and self-development and to a culture of diversity containing a plurality of options. Yet just as every state must necessarily be based on some set of determinate principles and commitments that reflect a particular cultural mix precluding legal and cultural neutrality, so also every state takes a particular stance toward religious belief. This in turn precludes religious neutrality by structuring the context of
choice within which we survey our options and revise or reaffirm our projects and goals.  

The circumstances of tolerance exist, first, where diverse practices obtain that some persons disapprove or dislike, and second, where those who disapprove refrain from using power they possess to interfere with or extirpate these practices.  

The objects of tolerance occupy a narrow space between practices that are intolerable because they are impermissible, on the one hand, and practices that are "intolerable" because they do not or should not arouse opposition in the first place, on the other hand.  

Although liberalism has been hospitable to diversity and has accordingly championed the merits of tolerance, the relationship between liberalism and tolerance is not devoid of controversy. Where some critics object that liberals tolerate only what does not conflict with liberal values and are therefore less permissive than they pretend, others contend that liberals are merely indifferent, refusing to make judgments, and are therefore more permissive than they ought to be.  

But true toleration, then, is not rooted in indifference or skepticism; it is the initial commitment to our own beliefs and practices and our ability and desire to suppress our rivals, after all, that give rise to the need for restraint.  

Toleration means recognizing the value of other persons who are committed to particular belief systems and who freely choose particular ways of life. It does not imply any lack of commitment to our own way of life.  

I shall first discuss variations in the meaning of tolerance and the functions that tolerance can perform in the liberal state. Next, I shall examine the nature of religious belief, focusing on ways in which its role as a particularistic feature of our identity can constitute an expression of autonomy. Belief may represent choice not only when we abandon our ancestral religion and embrace a different faith but also when we examine, question, and reaffirm our current faith, adhering to it for our own reasons rather than simply from custom and habit. If we can choose our faith by reaffirming it under conditions of critical reflection, the accommodation of particular religious sects can protect autonomy. I shall then discuss some of the functions served by this accommodation and how we might distinguish between practices that should and should not be so accommodated. Again, however these conflicts may be resolved, the settlement cannot be neutral.  

The Nature of Toleration

An attitude of tolerance and a practice of toleration toward a variety of beliefs and practices appear congruent with the values of both autonomy and diver-
sity. If we recognize human diversity and value the existence and perpetuation of a plurality of options, we should understand the need to tolerate that which we dislike. If, in addition, we value the human capacity to question, examine, and revise or reaffirm our projects and goals, which is central to personal autonomy, we should understand that this capacity must be exercised from the inside, as we each discover for ourselves what is a good life for us. From the liberal perspective, as Susan Mendus suggests, “The belief in autonomy and the requirement of neutrality both imply that ways of life, commitments, moral ideals, are at root matters of individual choice. Political toleration is then a necessity if such choice is to be fostered.”

If one justification for toleration is rooted in the value of individual choice, a second is based on what might be termed the value of communal integrity. This justification requires a perceptual shift in understanding those we tolerate not merely as the agents of particular beliefs or practices, but as persons like ourselves, motivated by a cognitive system in which our actions and beliefs are rooted. This approach to toleration appeals to second-order reasons or a larger context in which we may value ways of life independently of particular “wrong” beliefs or actions that others espouse. Tolerance then not only respects individuals but also promotes social cohesion. To put this differently, the demand for toleration represents a desire to belong to a larger whole, but on one’s own terms. Tolerance is a way of promoting and sustaining a sense of common citizenship, although it alone is not a sufficient condition. A feeling of belonging requires from others not simply grudging toleration of beliefs and practices, but respect and esteem for the individual persons who hold or act on them.

Policies of toleration and the grounding for these are often contingent matters, derivative from other goals rather than intrinsically constitutive of a particular political morality. This point should not surprise us, even with respect to liberalism. The commitment of liberals like Locke to popular governance, religious toleration, the rule of law, and other liberties was a means to the specific ends of peace, prosperity through economic growth, and intellectual progress. Locke himself exemplifies a transition from the view that mere outward conformity to imposed practice cannot adversely affect one’s spiritual fate and nevertheless fulfills the moral duty of civil obedience, to the view that because belief cannot be compelled, individuals must within limits be allowed to act on their beliefs as to what practices are necessary for salvation. The reasons for his shift to policies of toleration bear interestingly on the role that religious belief plays in individual identity.

Because he recognizes both the permanence of diversity and also the centrality of particularistic beliefs to individual identity, Locke in his early writing
tends to oppose policies of religious toleration. He views religious motivations and attachments as distinctive among beliefs that animate ethical sensibilities. Entailing ultimate concerns about the meaning of life, religious beliefs are characterized by an emotional commitment not subject to rational argumentation. The centrality of religious conviction to identity accordingly prevents the believer from envisioning alternative modes of thinking either for oneself or for others. In Sandelian terms, the believing self is encumbered and its beliefs are constitutive attributes of identity, rather than contingent features chosen by a detached and unencumbered self. A denial of civil jurisdiction in religious matters in favor of individual judgment too easily eventuates in a similar denial in civil matters, leading to conflict and potential anarchy. Although sovereign authority is not unlimited, if we must choose between the authority of a myriad of consciences and that of a single center of judgment, for Locke the common good admits only one answer. Lest this viewpoint be thought overly alarmist from a contemporary perspective, recall the discussion of forced marriage and female genital alteration in chapter 3. Moreover, under the Religious Freedom Restoration Act of 1993, before its partial overturning in 1997, about 200 decisions were handed down by courts in cases brought by prison inmates claiming that regulations on drug use, dress, and grooming infringed on their free exercise of religion, and there were periodic anecdotal reports of attempts by inmates to argue that their religious practice mandated the ceremonial use of weapons.

Eventually, however, Locke becomes convinced that the implementation of toleration will itself mitigate the dangers of religious identification, both by establishing boundaries between private and public and also by introducing psychological constraints on individuals. First, in the practice of what Ingrid Creppell terms "public privacy," Locke suggests that God should be publicly worshiped through the public presentation of one’s private beliefs before the larger community, despite the fact that the community witnessing the presentation is not a unified one. This practice legitimates an individuation of belief by protecting public presentation from interference and by creating a buffer zone between the purely private and purely public that combines communal expression and recognition with juridical distance and protection. Second, this sphere of public privacy facilitates and is complemented by the experience of psychological pluralism within individuals, who view themselves as loci of multiple experiences, allegiances, and points of view that can give meaning to their lives. If the earlier Locke is disturbed by the collapsing of distance between oneself and one’s beliefs, the later Locke’s solution is the creation of contingencies that encourage one to distance oneself from one’s beliefs, to envi-
sion enough detachment to understand alternative ways of thinking. In a soci­
ety open to diverse beliefs and identities, we may infer, constraints on unac­
ceptable levels of conflict may be internalized by encouraging individuals to
recognize that the commitments with which they identify are, in effect, but one
possible mode of self-interpretation. Such a grounding for toleration promotes
the values of both individual choice and communal integrity.

Nevertheless, religious toleration for Locke is circumscribed by civil author­
ity. Although the correct test for public interference with religious rituals and
practices, he believes, is that of actual bodily injury to the individual or the
body politic rather than offense to others’ sensibilities or beliefs (224), the de­
finite of injury is itself problematic and dependent on one’s beliefs and per­
spectives. Therefore, the civil authority must establish a civil criterion of
worldly injury to life, liberty, and property that then determines the appro­
priate scope of religious belief and practice. The line between the civil and the
religious is an object of civil determination, rather than one of conscientious
belief, and may change along with the demands of the public interest, which is
itself civilly determined. The criterion of worldly injury is an attempt to make
civil law neutral with respect to religion, but it does so by rendering irrelevant
any consideration of or reference to the validity or appropriateness of religious
practices on their own terms. Locke’s stance resonates with Martha Minow’s
social-relations approach to difference, which presumes that differences do not
necessarily reside in the person or object that is judged to be different but in­
stead are a function of the norms embedded in prevailing institutions. Because
the norms of believers often differ from those of unbelievers, as sacred norms
do from secular ones, no stance appears neutral to all.

Purported neutrality toward conceptions of the good itself constitutes a
metatheory of the good, as it eliminates conceptions that can only be realized in
communities that are not themselves neutral toward conflicting conceptions of
the good. In Locke, because civil authority determines the boundary of reli­
gious practice, civil law that is neutral with regard to the religious truth of par­
ticular practices is not neutral or politically indifferent toward the practical
embodiments of some religious visions of the good society. As Kirstie McClure
suggests, the difficulty is that “the civil discourse of facticity itself has become
a site riddled with conflicting interpretations of which particular sets of social
‘facts’ are to be considered indicative of the sort of ‘harm’ appropriately subject
to political jurisdiction.” Her examples include Marx on property and Catharine
MacKinnon on pornography, who characterize seemingly isolated practices as
embedded within systems “which operate to reconstitute as injurious, and hence
political, ‘facts’ which were previously understood as civilly benign” (384).
Although Locke's concern is religious practices that may be questionable from the standpoint of civil interest, his interpretation also applies to "civilly benign" practices that partisans of particular religious and ethical beliefs may view as injurious. People who believe abortion is wrong because the fetus is a human being from the moment of conception hold different worldviews and accept different sets of social facts about the nature of social morality and the proper role of women and children than do those who believe that abortion is a matter of personal choice. Pro-life proponents want to use their set of social facts to reconstitute as civilly injurious the legality of abortion that pro-choice advocates and civil law classify as benign. Similarly, those who believe that abortion is rightly a matter of personal choice argue that the severe limitation on reproductive choice represented by abortion's criminalization constitutes worldly injury to the civil interests of women, to their agency and their moral and personal autonomy. Because each side begins with a different set of social facts, they hold different views of what is injurious and what is civilly benign. Neither camp wants its viewpoint denied empirical validity and relegated "to the category of speculative truths without worldly effect."

Although the tradition of the Protestant Reformation sanctions individual freedom of conscience, wherein individuals may choose to adhere to, change, or reject religious affiliation altogether, religious toleration need not be equated with freedom of conscience. Another version of religious toleration is a group-rights model, which grants official status and a degree of self-government to several religious communities. The latter may enforce internal religious orthodoxy, allowing little individual dissent or freedom to change one's affiliation. Will Kymlicka's primary example is the Ottoman millet system between 1456 and the Ottoman collapse during World War I, during which time the Greek Orthodox, Armenian Orthodox, and Jewish non-Muslim minorities were officially recognized as self-governing communities or millets, which together were, "in effect, a federation of theocracies."

Modern variations on this legal arrangement include the self-government rights of Native American tribes, partial exemption from mandatory education laws granted to some religious groups in the United States and Canada, and requests from some British Muslim leaders for milletlike protections for culturally traditional educational and family practices that violate current law against coercive arranged marriages and sexual discrimination.

These two models of toleration together reflect the overall tension between toleration grounded in the value of individual choice, on the one hand, and toleration based on the protection of communal integrity, on the other. Liberals who value autonomy perceive autonomy and tolerance as mutually reinforcing. For Kymlicka, "What distinguishes liberal tolerance is precisely its com-
mitment to autonomy—that is, the idea that individuals should be free to assess and potentially revise their existing ends.”

Liberal toleration, then, is grounded in the value of individual choice. This in turn may require not only toleration but also a fostering of diversity as a context of choice and a precondition for autonomy.

Alternatively and “by contrast, toleration may simply involve accommodating those diverse forms of life which already exist.” Toleration grounded in the value of communal integrity concentrates on the accommodation of existing diversity, as in the millet system. Such a system “assumes that people’s religious affiliation is so profoundly constitutive of who they are that . . . they have no interest in being able to stand back and assess that identity.” In fact, Moshe Halbertal questions whether the millet system even exemplifies toleration. Existing historically for the convenience of and on terms defined by the Muslim majority, it did not exhibit the political manifestation of “an attempt to shape a common political structure shared by radically diverse groups.” Yet the Lockean model, as we have seen, does not accord decisive authority to liberty of conscience. And the millet system’s guarantee of collective freedom of worship rendered recognized minorities better off than they would otherwise have been, affording them membership in the wider community without requiring that they totally assimilate to its values. If the model grounded in freedom of conscience is more bounded than we sometimes think, the group-rights model also offers advantages. If toleration includes the accommodation of already-existing diversity as well as individual choices producing new manifestations of diversity, the group-rights model qualifies.

If the freedom-of-conscience model, grounded in the value of individual choice, is the “gold standard” of liberal toleration, however, it must be grounded in the capacity of individuals to examine, question, and possibly revise their current projects and goals. Rawls believes that citizens can espouse autonomy as a political value while rejecting it as a comprehensive and ethical value that shapes both public and private life. If, however, we view our religious and other moral commitments as constitutive of our private identities, how, as Kymlicka asks, do we divest ourselves of these commitments for purposes of exercising political judgment? Or if we are indeed successful in this endeavor, how, I would ask, do we prevent our public identities from permeating the private identities that may reject revisability as a core value? Because liberal toleration is grounded in the value of individual choice, its own value is derivative from a context of independent thought and critical reflectiveness.

In short, we cannot simultaneously defend both the nonrevisability of nonpublic commitments and also the political value of autonomy, which arguably
is itself a necessary condition for the shaping of a common political structure under conditions of diversity. As we have seen, however, Locke believes that religious motivations and attachments are distinctive in their emotional appeal, in their imperviousness to rational argumentation, and in their tendency to block out alternative modes of thinking by believers. If religious beliefs are qualitatively different from other forms of diversity, as attachments so constitutive of the self that this precludes any interest other than that of protecting and advancing this form of identity, then religious factionalism and diversity cannot be considered in the same manner as the cultural membership discussed in chapter 3.

Choice and Religious Belief

One of the two justifications for toleration to which I have alluded is that grounded in the value of individual choice. If we value the human capacity to examine, question, and revise or reaffirm our current projects and goals, we must also value the existence of the range of options necessary to our exercise of this capacity from the inside, as we decide for ourselves individually what constitutes the good life for us. As we have seen, Rawls describes the capacity to take responsibility for our ends and to adjust these as necessary as "part of the moral power to form, to revise, and rationally to pursue a conception of the good; and it is public knowledge conveyed by the political conception [of justice] that citizens are to be held responsible," whether or not our tastes and preferences have arisen from our actual choices. Rawls is implying that although we experience first-order desires that we have not chosen to experience, we also experience second-order desires that may mitigate, enhance, and otherwise order the former, thus enabling us to take responsibility for them. Liberal toleration in particular is grounded in the liberal commitment to autonomy, to the revisability of our projects and goals.

Liberal toleration may, however, lay claim to an alternative ground. Yael Tamir makes a distinction between autonomy-based liberalism, which "tolerates and respects only autonomy-supporting cultures—namely, liberal ones," and rights-based liberalism, which focuses on individual rights regardless of whether these are grounded in autonomous choice. Whereas autonomy-based liberalism promotes the conditions of autonomy and the assimilation of illiberal cultures to liberal ones, rights-based liberalism "places at its core a commitment to equal concern and respect for individuals, their preferences and interests, regardless of the way these were formed." With respect to religious
belief, Tamir’s formulation suggests that toleration may be grounded in individual rights and interests regardless of whether these include choice, just as in the millet system toleration is accorded regardless of the way beliefs and values are generated. Moreover, traditional liberalism “was committed to protecting a set of freedoms which were meant to allow individuals to pursue their preferences, desires and interests, regardless of whether these were formed autonomously or were forced upon individuals by their culture or tradition” (168). In the latter circumstance, I infer that Tamir includes interests grounded in unthinking habit, perpetuated neither by conscious reaffirmation nor by actual coercion in the face of resistance.

Alternatively, then, perhaps toleration of religious belief is most properly grounded not in choice but in its absence. For a characterization of religious belief with which many persons of faith would probably agree, I should like to quote in full the words of an Episcopal hymn.

In your mercy, Lord, you called me
Taught my sin-filled heart and mind,
Else this world had still enthralled me,
And to glory kept me blind.

Lord, I did not freely choose you
Till by grace you set me free;
For my heart would still refuse you
Had your love not chosen me.

Now my heart sets none above you,
For your grace alone I thirst,
Knowing well, that if I love you,
You, O Lord, have loved me first.

These verses make clear that in the minds of many believers, they do not choose initially to have faith in God. Rather, he chooses them, inspires them, and in some manner invites them into relationship with him. Although this invitation may constitute a transformative experience, they still exercise agency in their responses. In the second verse, the writer did not freely choose God until grace freed him from worldly entanglements, enabling him to perceive a better way of life. Subsequently, however, he does choose to respond to God’s invitation, always mindful of the fact that he could not have exercised this choice without the bestowal of grace. Although other religious faiths will not give the priority to grace that we find in Christianity, for any that ground faith
on personal interaction between human beings and a deity, the role of choice in religious belief is not a simple one.

According to Andrew Murphy, early advocates of toleration argued that because conscience was a faculty of the understanding rather than the will, liberty to follow the dictates of conscience required religious voluntarism. But “Voluntarism is not the same thing, strictly speaking, as choice: in other words, tolerationists did not claim that one chose one’s beliefs, but rather that the understanding was persuaded, inexorably so, of the truth of a given faith.” Individuals were to follow God’s will but “voluntarily and without threat of punishment for nonperformance, or else the obedience lacked merit.” In the twentieth century, conscience-based belief, whether sacred or secular, is viewed as “extravoluntary,” and therefore “sacrosanct” (7).

Although I agree that beliefs and many of the practices that attach to them are appropriate objects of toleration in the face of others’ disapproval, whatever the degree to which they are chosen, I disagree, however, that they are as unchosen as many suppose. I have argued that Kymlicka, by privileging cultural membership as a precondition of autonomy in one’s culture of origin over membership in cultures of choice, implies that cultural membership is a nonrevisable commitment. Moreover, to protect this context of choice, his conception of cultural rights potentially accords the most protection to groups that do not value individual autonomy as the capacity to reexamine and possibly to revise one’s projects and goals. I agreed instead with Geoffrey Brahm Levey that cultural membership is best conceived not as a precondition of autonomy but as an expression of autonomy. With respect to the realm of conscience, adherence to a religious faith may not be “chosen” in the same way that ordinary preferences are said to be chosen, but I believe that religious faith and practice, like cultural membership, can also constitute an expression of autonomy. Therefore, where toleration is appropriate to protect individuals’ beliefs and values, these are “sacrosanct” not because they are “extravoluntary” but because they are a feature of identity to which individuals attach great importance and that may function as an expression of autonomy. Moreover, individuals must decide for themselves the claims of their particularistic identities or faiths, working out their meanings over time, because meaning is not self-defining or self-interpreting. Therefore, in the end religious faith, like cultural membership, functions as an expression of autonomy. Let us turn now to the issue of how belief and conscience may both be viewed as aspects of identity that are constitutive, yet also operate as expressions of autonomy.
CONSTITUTIVE CHOICE

Susan Mendus observes that in discussing religious beliefs, we correctly favor references to recognizing, seeing, and acknowledging them over descriptions of choosing, opting for, or deciding on them. This point is paralleled by Michael Sandel’s observation that liberal theorists overemphasize the voluntarist dimension of human agency, which stresses choice, at the expense of the cognitive dimension, which focuses on recognition or understanding of an already-existing situation. We often fail, he suggests, to recognize the extent to which attributes we think we choose as detached selves are in fact constitutive features of our identities that encumber us from the start, although ones that we may not immediately recognize. Human agency, however, requires the self not only to choose but also to reflect, “to turn its light inward upon itself, to inquire into its constituent nature, to survey its various attachments and acknowledge their respective claims... to arrive at a self-understanding less opaque if never perfectly transparent,” as over a lifetime the self participates in constituting its identity. We must examine this contrast between choice and understanding if we are to arrive at a true appreciation of the nature of freedom of conscience.

For Sandel, the liberal polity’s insistence on governmental neutrality among moral beliefs and values is grounded on the assumption that individuals choose their projects and goals from a detached and unencumbered viewpoint. But this framework is not truly neutral. It overlooks the possibility that individuals are encumbered by beliefs and ties that are constitutive attributes of identity. The reality that the perceived neutrality of a public stance depends on which set of social facts is used to measure the acceptability of a particular practice reveals itself in Supreme Court opinions. As Sandel argues, even dissents from opinions striking down religious practices have valorized neutrality by arguing that the majority has established a religion of secularism incompatible with “true” neutrality. In other words, a purportedly neutral stance will appear neutral only on some interpretations of the factual circumstances, but not on other interpretations. Moreover, even if this stance did appear neutral to all concerned, it presumes a self that is detached from its professed beliefs rather than constituted by them, and it is thus nonneutral with regard to competing conceptions of the self.

To the framers of the Constitution, writes Sandel, freedom of conscience suggested freedom to act according to the dictates of one’s beliefs without civil penalty. The modern form of freedom of conscience, however, suggests freedom to choose one’s religious beliefs without interference and is rooted in
respect for the individual capacity and right to make this choice (85–86). Most explicitly, Justice John Stevens’s majority opinion when the Supreme Court struck down the moment of silence for voluntary prayer in public schools claims “support not only from the interest in respecting the individual’s freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful.” For those of the founding generation, by contrast, “It is precisely because belief is not governed by will that freedom of conscience is unalienable.” That is, “Where freedom of conscience is at stake, the relevant right is to exercise a duty, not make a choice” (88). Religious duties are not matters of choice but of conviction, serving constitutive ends inseparable from personal identity.

Sandel’s example of the modern Court’s view is the case of *Thornton v. Calder, Inc.*, in which a Supreme Court majority of eight to one struck down a Connecticut statute that guaranteed to Sabbath observers the right to take their weekly entitlement of one day off on their Sabbath. The Court believed that the law unfairly advantaged Sabbath observers over nonobservers, as only the former could select a coveted weekend day for their guaranteed day off. “But this objection confuses the right to exercise a duty with the right to make a choice. Sabbath observers, by definition, do not select the day of the week they rest; they rest on the day their religion requires.” Because the Court had earlier upheld Sunday closing laws on the grounds that these now serve a secular purpose and carry a recreational rather than a religious character, *Thornton* points to a perverse conclusion. “A state may require everyone to rest on Sunday, . . . so long as the aim is not to accommodate the observance of the Sabbath. But it may not give Sabbath observers the right to rest on the day of the week their religion requires. . . . It aptly reflects the constitutional consequences of seeing ourselves as unencumbered selves” (89–90).

More palatable from Sandel’s perspective is the viewpoint expressed in *Sherbert v. Verner*, in which a Supreme Court majority overruled the denial of unemployment compensation to a Seventh-Day Adventist fired for refusing to work on her Sabbath of Saturday. A state attending to Sabbath observance on this view is not violating neutrality but is enforcing it in the light of religious differences. To force workers to choose between their religious convictions and their means of support would itself violate the imperatives of neutrality, advantaging those without religious duties over those with duties the exercise of which may conflict with secular expectations. “In this case at least, the Constitution was not blind to religion but alive to its imperatives.” It could be argued that *Sherbert* embodies neutrality by securing equal opportunities for Sabbath-observant and also Sabbath-nonobservant workers to live by or advance their
conceptions of the good without penalty or civil disability. Even for Rawls, although the priority of the right over the good “allows that only permissible conceptions (those that respect the principles of justice) can be pursued,” nevertheless, “the state is to secure equal opportunity to advance any permissible conception.”  

Under *Sherbert*, those for whom religious duties are constitutive of selfhood are not receiving special treatment but instead may secure accommodation for their conceptions of the good in the same way as those who do not understand themselves as thus obligated. Just as allowing women to resume prior jobs after unpaid pregnancy disability leave may be interpreted to suggest that women *and* men should be allowed to rear families without risking their jobs, Sandel’s example suggests that the observant *and* the nonobservant should be allowed to live according to their convictions without risking their means of support. The Sabbath-observant are burdened in the workplace by their religious convictions in ways that the nonobservant are not.

The two cases exemplify the alternative meanings of freedom of conscience. In Kirstie McClure’s terms, the set of social facts grounding *Thornton* classifies Sabbath observance as a choice; therefore, according more freedom to observant than to nonobservant workers in selecting a day off is not a civilly benign practice but is civilly injurious to people with less choice. The set of social facts grounding *Sherbert*, however, classifies Sabbath observance as a duty; thus according freedom to observant workers to refuse work on their Sabbath without forfeiting employment benefits is civilly benign across the board. Although applicants must accept available work to be eligible for benefits, Sabbath work is *not* “available” in the sense that observant workers may choose to perform it. In view of these social facts, it is civilly injurious to penalize Sabbath-observant workers, who have less choice than do the nonobservant, who can choose to accept available work at any time. The same conflict is reflected in *Wisconsin v. Yoder*, in which the Supreme Court exempted the Old Order Amish from state law requiring school attendance until a child is sixteen.

In sum, accommodation of practices stemming from religious belief is not neutral and is thus civilly injurious to the nonreligious when religious practices are viewed as matters of personal choice. On the other hand, this accommodation does seem neutral, and failure to accommodate would itself be nonneutral, when religious practices are perceived as matters of duty beyond the scope of personal choice. Because the appearance of neutrality is a function of one’s interpretation of the factual circumstances, there can be no policy that all parties perceive as neutral.

I agree that religious belief can function as a core constituent of identity and that therefore we must be free to engage in a range of practices flowing from
these beliefs in all the diversity to which these beliefs give rise. But freedom of conscience requires more than the liberty to exercise duties, a liberty emphasized by Sandel but also compatible with the Ottoman millet system. If we are not to view ourselves as passive carriers of beliefs, in Rawls’s terms, we must be as open to the possibility of questioning, examining, and revising our beliefs as to affirming or reaffirming them. Both sorts of activity must be protected. I agree with the view of David A. J. Richards that the First Amendment’s free exercise and antiestablishment clauses are grounded in different but complementary aspects of equal respect for human moral powers. The free exercise clause protects current conscientious belief against state coercion of the observance or expression of beliefs, whereas the antiestablishment clause focuses on “the formation and revision of conscience,” protecting “the processes of forming and changing such conceptions.” Moreover, even individuals who share a faith often have different and conflicting interpretations of what duties and obligations flow from these shared convictions. And all who share an interpretation of what their convictions require do not place the same priority on these obligations in their individual hierarchy of values. In sum, unless we wish to relegate religious faith to a series of watertight compartments like the Ottoman millets, I am convinced that religious belief is not a precondition, in the sense of an encumbrance or an ineluctably constitutive feature, of our identity but is instead an expression of it, and more specifically, an expression of autonomy.

For example, consider the interpretation of religious belief suggested by Tamir, who does not accord protection to unchosen constituents of identity, like membership in a minority culture, because membership is unchosen, as Kymlicka does, but because minority status is unchosen. Whatever our original frameworks or contexts of choice, we can engage in critical reflection, exercise choice regarding future commitments, and define the meaning of membership regarding current commitments. Cultural membership and religious affiliation then are matters of choice, as are the ways in which we interpret the meanings of our cultural and religious identities. From this perspective Tamir criticizes Sandel’s lament that the Supreme Court in Goldman v. Weinberger upheld an Air Force prohibition that prevented an Orthodox Jewish captain from wearing a yarmulke while serving in a health clinic, regardless of whether the Air Force could show that the religious exception would impair military discipline. For Sandel, in Goldman as in Thornton, the tendency to conflate religious duty with personal choice “forgets the special concern of religious liberty with the claims of conscientiously encumbered selves.”

Tamir argues, however, that although Sandel is correct to want to defer to the free exercise of religious obligations, he is incorrect as to the grounds for
doing so. First, if Goldman were to convert to a different faith or to become nonobservant while remaining a Jew, we would not force him to wear a yarmulke or to abstain from Sabbath work on the argument that he is perpetually encumbered by these duties. Second, if Goldman had converted to Judaism and had thereby assumed responsibility for these religious observances, would we accord less weight to his request because it does not stem from a birthright encumbrance? "If it cannot be proven that this ought to have made a difference, then the issue is not that Captain Goldman’s Jewish feelings are so deeply embedded that he cannot but act in a particular way, but that he has chosen a certain course of action.” Tamir identifies freedom of conscience with what she terms constitutive choice. Membership in a religion or culture is chosen, but we may subsequently view such membership as imposing particular duties on us. “It should be recognized that, by making a religious choice, people have expressed a readiness to follow the practices and traditions constitutive of a particular religion. Hence, proof that a certain practice plays a constitutive role in the history of a certain religion should count as an argument in favor of allowing individuals to adhere to it.” Membership is not a precondition of autonomy, because membership is itself neither a necessary nor a sufficient condition of autonomy. Membership and the fulfillment of obligations we see as flowing from that membership are, however, expressions of autonomy.

To return to the Episcopal hymn, we could say that the writer sees himself as encumbered before God’s call, enthralled by the world and blind to divine glory, as the first verse describes. Thus encumbered, he cannot “choose” God until God has first ‘chosen” him through the bestowal of divine grace. Grace frees him from his former encumbrances, but it does not simply replace one sort of enthrallment with another. Grace, rather, opens the possibility of an alternative way of life. But this alternative must be chosen, or, if the notion of choice seems inappropriate, it must at least be affirmed. Duties will stem from this new way of life, and he will see these as welcome encumbrances that are constitutive of his identity. But his freedom of conscience is more than simply the liberty to perform duties with respect to which he now believes he has no choice. Instead, his freedom of conscience represents the liberty to make a constitutive choice, the choice of a way of life, and the duties and obligations that are incurred by this choice then become constitutive of his identity. He is an encumbered self, but he is encumbered because he has allowed himself to become encumbered. If, on the other hand, the writer had religious convictions from his earliest memories, we would expect that there were still points at which he became aware of different, perhaps more secular, alternatives. And
at some level, he considered and reaffirmed his original encumbrance, thus allowing himself to remain encumbered.

To put this differently, constitutive choice can be equated with second-order desire. A life encumbered by duties grounded in religious conviction is not simply a life we desire to pursue, or a first-order desire, but it is also a life we want to desire to pursue. The capacity for reflective self-evaluation involves both second-order desires and second-order volitions. In the present context, religious convictions typically animate individuals both to want to prefer certain desires over others and to want those desires to constitute their wills, or to be the desires on which they act. Thus, although these desires possess the constitutive status of being inseparable from the way individuals interpret their identities, they emerge from constitutive choices about the set of desires with which individuals want to be encumbered. Additionally, these choices may represent a degree of reflective evaluation that is consistent with autonomy. Certainly there are believers who may never question or examine religious convictions with which they would say they have always identified. My point, however, is that encumbrance and choice are not mutually exclusive groundings for freedom of conscience and that the concept of constitutive choice helps us to understand how this can be the case.

APPLICATIONS

Belief and conscience, then, function much like other constituents of personal identity. Like cultural membership, religious conviction is in some sense chosen, defined, and interpreted by the individuals who possess such conviction. It is therefore subject to question, examination, and revision or reaffirmation like other projects and goals that are central to personal autonomy. Yet there are instances of individuals whose accounts of religious belief seem alien to any sort of engagement in rational deliberation and critical reflection and thus seem impossible to square with the exercise of personal autonomy. Moreover, to base religious toleration and individual freedom on respect for autonomous choice may exclude those who do not value autonomy. I shall argue, however, that individuals may engage in critical reflection even in unlikely circumstances and that therefore their revision or affirmation of belief may indeed still flow from the exercise of personal autonomy.

Halbertal argues that Paul’s conversion on the road to Damascus is “a paradigm for a nonautonomous revision of the concept of the good.” First, Paul did not simply revise his projects and goals but was completely transformed, becoming a different self through conversion. Second, this conversion was
forced on him by God, and his own role was merely that of a passive receptacle for this inspiration. Third, the conversion did not stem from rational assessment or critical reflection on his options but represented a leap of faith. Finally, once converted, Paul did not view himself as open to continual questioning and reexamination of his projects and goals but saw his conversion as final. We should respect nonautonomous revisions like Paul’s, argues Halbertal, neither because they are achieved through rational assessment, nor because such individuals might in future engage in critical reflection after all. Rather, Paul’s right to Christianity “is rooted in the fact his present state is of enormous importance to him, because that state shapes his identity, and forcing him out of it means destroying his individuality and violating what for him is perhaps the most important and meaningful aspect of his being.”

By valuing toleration primarily for its capacity to enable the revision of our projects and goals, suggests Halbertal, theorists like Kymlicka and Rawls minimize its role in protecting our present lifestyles. To return to Richards’s classification of the First Amendment, if the antiestablishment clause protects our ability to form and revise our beliefs, while the free exercise clause protects our current beliefs, Kymlicka’s formulation amounts to a First Amendment without a free exercise clause. Many facets of our identities are worthy of respect regardless of whether they are products of rational choice or any choice. Education, suggests Halbertal, may be aimed either at “producing a chooser...who has the skills to make informed and rational judgments about different goals and forms of life,” or, as in the approach of the Old Order Amish, at “transmitting a particular tradition and developing a strong commitment to that particular way of life” (111). Where the autonomy argument for toleration senses intolerance in threats to the ability to form and revise one’s beliefs, the harm argument for toleration imputes harm to the violation of deeply held beliefs and therefore senses intolerance in threats to the maintenance of one’s current beliefs. Although the community should not penalize the choice of alternative ways of life, “the value of toleration does not obligate a community to pose that alternative to students and present it as a legitimate option for choice” (112). In general, “The basic wrong that coercion produces is not failing to allow for revision of one’s ends but forcing people away from what is important and central in their life, thus causing tremendous pain and harm” (110).

Halbertal is certainly correct to attribute harm to failure to respect people’s current beliefs. Given my argument, however, that the capacity for autonomy encompasses affirmation of one’s current beliefs as well as revision of one’s projects and goals, I believe that Halbertal defines autonomy too narrowly. Geoffrey Levey suggests that although Paul’s own conversion does not represent the
rational revision typically associated with autonomy, he subsequently engages in argument with others and seeks to persuade them to change their ways of life also, even though their change will respond to persuasion rather than to a sudden revelation. “In a very clear sense, Paul remains an autonomous agent, fully capable of giving an intelligible account of his ends to himself and to others and of taking responsibility for his ends.” Moreover, whether or not Paul views himself as open to reexamination of his new way of life, “respect for persons is predicated on their capacity for self-reflection and self-direction as a matter of principle and they are to be treated as if one day they may want to change their mind.” Finally, both the harm and the autonomy arguments for toleration protect individuals against penalties for their adherence to current deeply held beliefs, because they protect the will of those who have already converted from one set of beliefs to another.

Autonomy is a broad enough concept, then, to encompass critical reflection that is followed either by revision of one’s projects and goals or by affirmation of them. We must of course take care that autonomy does not become such a protean concept that it covers any exertion of agency at all. In my view, however, the independent variable that identifies the exercise of autonomy is engagement in rational deliberation and critical reflection as a prelude to action, not necessarily the revision of one’s current projects and goals as opposed to their affirmation. Persons who are impelled to revise their way of life from heedless impetuosity and whim are no more autonomous than are those who remain unthinkingly in a way of life they have never thought to question or examine. Correspondingly, those who upon reflection examine and reendorse their current projects and goals are as autonomous as those who make radical changes as a result of this examination. Although a change in one’s way of life may be more likely to reflect critical reflection than is a simple continuation of one’s present course, both revision and reaffirmation are compatible with critical reflection and self-direction.

In the example of Paul’s conversion, then, we can look not only at the manner in which he was impelled to change his way of life in order to determine whether his freedom of conscience represents an exercise of autonomy. We can also look at his manner of life after his conversion. Here we find a continuous effort to persuade others of the truth of his experience and to make representations as to why others should follow him in changing their own lives as well. Each effort at persuasion represents a reaffirmation of his current beliefs and practices as a Christian. Because he must make sense of his experience to others if he is to have any hope of persuading them, he must give an intelligible and therefore rational account of this experience. Although any experience
predicated on revelation probably requires a leap of faith at some level for one adopting the convictions associated with it, these individuals must first decide whether or not to make the leap.

Paul apparently did not "decide" in the conventional sense of engaging in a rational assessment of his options. For him, conversion would be more accurately described as the experience of recognizing, seeing, and acknowledging the truth of God’s revelation in his experience on the road. But in recounting this experience to others, he must explain it in terms that impel others to choose, to opt for, or to decide on that leap of faith. And by so doing, he is also reinforcing his own convictions. By giving a rational account of his experience that he hopes will persuade others, he is simultaneously reaffirming his own faith in these terms. We might equate the leap of faith with a first-order desire or volition: as I make the leap, the desire to do so determines my will. But the decision to make the leap is a second-order desire or volition: I want the desire to make the leap to determine my will. Once I have indeed made the leap, I then become encumbered by duties that I view as constitutive of my identity. But my initial action was one of constitutive choice. Both Paul and those he later persuades exercise constitutive choice. The difference is that where others exercise this choice in the revision of their current projects and goals by becoming Christians, Paul does so by continually reaffirming over time his current project and goal, that of professing Jesus as the Messiah. His freedom of conscience, then, indeed represents an exercise of autonomy.

Another way in which the affirmation of one’s projects and goals can function as an exercise of autonomy is found in Amy McCready’s account of conscience in the writings of John Milton. Milton in writing his tracts was apparently torn between his desire to focus on poetry and his call to become involved in advocacy of church reform. For McCready, the conscientious or ethical individual differs from the liberal self because it feels impelled to act against its own inclination and for the common good. Yet this self also differs from the communitarian self, because conscience is a personal reference point and authority that prompts questions about the legitimacy of social institutions. In one sense, Milton in his writing against the established church acts on promptings not entirely his choice. He must do so if he is to validate and affirm himself in his own eyes (193). Yet the new identity that follows on his actions he recognizes as his own. Conscience “freed him from external powers, civil and divine, by providing an alternative source of authority and identity. It enabled him to possess himself and to be conscious of himself as self-possessing” (94). Conscience integrates parts of the self, and in doing so it promotes self-knowledge (97–100).
McCready’s account suggests that we need not choose, in Sandel’s terms, between the role of willing subjects confronted by objects of choice and that of knowing subjects presented with objects of understanding. Our understandings may be shaped by contingencies beyond our direct control, like Paul’s experience on the road to Damascus, like Milton’s exposure to the controversy over church reform, or like any circumstances that disturb our complacency and call forth a perhaps reluctant response. But through this response we bring to bear our agency on the circumstances confronting us, thereby altering both the circumstances themselves and also our identities and self-understandings. If we continue on our course thus set, we are potentially not simply knowing subjects reflecting on objects of understanding but also willing subjects rationally deliberating on objects of choice. Reflexivity exists in the relationship between knowing and willing, understanding and choosing. Contingent circumstances may become essential constituents of self-definition, thereby affecting and defining the scope of future choices, just as chosen courses of action influence future self-understandings.

Moreover, although we are apt to connect revision of our projects and goals more readily than affirmation of them to the states of willing and choosing, as we have seen, we can deploy will and choice in affirming a course of action, however we came to pursue it at the start, if rational deliberation and critical reflection play a role in this affirmation. Additionally, we can deploy these qualities in the activity of knowing and understanding, as well as in that of willing and choosing. Insofar as we each possess many possible constituents of identity, we must survey these various attachments, as Sandel suggests, and “acknowledge their respective claims” if we are to enhance our self-understandings. Finally, when freedom of conscience represents the exercise of autonomy, McCready’s account suggests that the result is “an ethical self ... cognizant of its dependence on its community and cognizant of its own morality.” Modern interpretations of conscience or the self often focus on an inevitable opposition between individual and community, or on an independent and choosing self opposing a self largely determined by its social identity. McCready’s interpretation of conscience, however, both opens and closes distance between the individual and the social order (98). For Milton, obeying the conscience means obeying oneself, as denying it “would be denying one’s identity.” Yet conscience also reinforces social identity through a self-imposed duty to enter into social engagement and public action (99). Such a self “is neither radically situated nor radically free” (100).

This account recalls Creppell’s discussion of “public privacy,” according to which one is impelled to express, to present, and to witness the nature of one’s
faith before the community as a whole, even when belief is individuated and perhaps protected as such. Another example of the public role of conscience might appear in Martin Luther’s defense of his beliefs at the Diet of Worms when he said, “Here I stand; I can do no other. God help me. Amen.”

In all of these cases, the principals evidently feel that in one sense they have no choice in their courses of action but are compelled to embrace particular projects and goals. What is especially clear in McCready’s account of conscience, however, is the extent to which this embrace is still a voluntary one, chosen because only affirmation and action in accordance with this way of life will express the self-understanding that each principal possesses. Paul in theory could have rejected the implications of his experience on the road, Milton could have opted to confine his writing to poetry rather than engaging in political and religious writing, and Luther could have avoided proclaiming his understanding of Scripture and also avoided endangering his personal safety. But each chooses a new way of life, or chooses to affirm a way of life now central to his self-understanding. Duties flow from these understandings and encumber each. But each choice or affirmation, complete with its encumbrances, is at the second-order level a constitutive choice. Those with religious convictions may experience a divine revelation that affects the trajectory of their lives. But their response to this revelation is neither automatic nor a given. Rather, they must interpret the meaning of this revelation as it applies to their own lives.

I have argued that although liberal societies have traditionally privileged a range of religious beliefs, they have not always agreed on the principles that might ground this sort of toleration. Some scholars suggest that because beliefs are unchosen constituents of our identities, concern and respect for the individual dictate policies of toleration. I am suggesting, instead, that we may take responsibility for our ends even in the area of conscience, which represents the expression of autonomy when the affirmation or revision of religious belief results from rational deliberation and critical reflection on one’s beliefs. But toleration is best grounded not only on the idea that we originally chose our beliefs but also that we choose to affirm particular beliefs, to order our lives by them, and to treat them as constitutive choices that affect our self-understandings. Not all beliefs are expressions of autonomy, as they may be arrived at or sustained unthinkingly, and we do not always know which is the case. But when we tolerate beliefs and the practices that flow from them, we are honoring and respecting the possibility or potential they possess for the expression of autonomy.

If beliefs are in fact subject to constitutive choice, policies of religious toleration may appear less defensible than would be the case if beliefs are regarded as unchosen constituents of identity. We might expect less consideration from
society toward individuals who, after all, can simply choose not to affirm beliefs the implications of which are inconvenient to the unity or stability of the social order. I think, however, that this would be a mistaken conclusion. As we have seen, in the *Letter* Locke asserts that although individuals should be allowed to act on the basis of their religious beliefs, the line between public and private, or between matters civil and religious, must still be civilly determined. Whether a practice is civilly benign or civilly injurious must be determined by public authority, and the set of social facts taken into account in making this determination will affect the outcome. Thus, even the conviction that belief is unchangeable need not sanction a broad liberty of conscience when belief becomes practice. In Rawlsian terms, even if as believers citizens are seen as passive carriers of desires, they must still adjust their ends to what they anticipate the civil authority will reasonably accommodate. Belief is not privileged by representing itself as unchangeable. Rather, beliefs are among the many components each of which may be partially constitutive of identity. But each of us must order and interpret these constituents for ourselves. If public authority recognizes our capacity to engage in this ordering and interpretation, it will exhibit not only toleration toward beliefs that are chosen but also respect for the expression of autonomy.

Belief, Toleration, and Autonomy

If regarding religious belief as in some sense chosen allows us to consider religious practices as an expression of autonomy, as I believe it does, in theory we should allow broad scope for the expression of this belief and for the practices that flow from it. As individuals we have chosen or affirmed obligations that we value highly, and these choices and affirmations should be respected. Guarantees of autonomy to some individuals or groups, however, appear to interfere with the autonomy of others. Moreover, just as the determination of whether the accommodation of a particular religious practice is civilly injurious or civilly benign, or whether it violates neutrality or instantiates it, may vary with the set of social facts considered, so also will the impact of particular practices on the individual development and/or expression of autonomy vary with these social facts. Therefore, arguments about the merits of toleration for particular practices must include discussion of the merits of emphasizing some sets of social facts over others. This point can be illustrated by two different approaches to the permanence of diversity in our comprehensive religious, philosophical, and moral doctrines.
Rawls, for example, attempts to broaden the appeal of political liberalism and to maximize the possibilities for an overlapping consensus by eliminating comprehensive doctrines as components of public reason. Because he wants to alienate as few individuals and groups as possible, public reason must be guided by values that all can endorse, and its independence of comprehensive doctrines renders the political conception of justice "freestanding." Although Rawls acknowledges the potential comprehensiveness of private commitments, he believes that citizens will gain more than they lose in policy debates by eschewing the deployment of arguments that are comprehensively grounded.

Although Rawls intends to foster inclusivity, his concern for preserving the integrity of public reason often forces him to retreat from it. As Murphy notes, he expects individuals with attachments to comprehensive doctrines that are marginal or outside the mainstream either to abandon these doctrines, to be disingenuous about the true reasons that motivate them, to engage in divisive action to change the scope of public debate, or to deploy only the publicly acceptable elements of their comprehensive doctrines. Because of the diversity of comprehensive doctrines that we espouse, Rawls holds "that politics in a democratic society can never be guided by what we see as the whole truth. . . . The only comprehensive doctrines that run afoul of public reason are those that cannot support a reasonable balance of political values." Rawls is correct to suggest that we can never agree on "the whole truth." But what reasons we might "reasonably" be expected to endorse and what constitutes "a reasonable balance of political values" will often depend on what set of social facts is considered in determining what is reasonable. We may be hard-pressed to agree that his conception of public reason extends the ideal of liberty of conscience when individuals are apparently largely prohibited from bringing to bear their most deeply held values in the forum of public or political activity.

If one solution to the permanence of diversity is the creation or discovery of an overlapping consensus through the use of public reason, another alternative is to clarify or strengthen a seemingly existing consensus that is in danger of disappearing or of being lost. According to Charles Taylor, Americans enjoy a collective religious consciousness or civic theism that is independent of specific confessional allegiances. That is, religion as religious consciousness does not necessarily decline when its institutionalized expression in churches does. Although Americans often seek to redefine foundational ideas in the light of contemporary understandings, "the original nonconfessional theism still resonates with many Americans" to the extent that "to excise God is to eviscerate the common purpose, as they understand it." Liberal or individual
freedom may be endangered without civic freedom, or without the guarantees of “a political system that enshrines common purposes still held in reverence by the citizens” (108).

Where Rawls seeks an overlapping consensus through the use of public reason that will not admit argument based on comprehensive doctrines, Taylor moves in the opposite direction, suggesting that the elimination of certain seemingly foundational moral doctrines is a cause of dissension rather than consensus. He perceives widespread agreement on two of three major implications of the separation of church and state. Citizens should not be excluded from “the public process or opportunities” because of religious difference. They should not be forced to support “religious forms they do not adhere to, as often happens with an established church.” And citizens should “define symbols and forms of expression that all can recognize themselves in” (110). But if Rawls’s project prohibits the deployment of some of our most deeply held values in public debate, Taylor’s framework assumes a consensus on values about which I believe he is overly sanguine. First, agreement on the implications of the separation of church and state is more elusive than he supposes. Second, the protection of liberal freedom carries positive obligations of a substantive nature that do enable it to serve as a worthy common purpose.

According to Taylor, first, citizens should not be excluded from the public process or from opportunities because of religious difference. “The public process” covers public life, including the political process and all elected and appointed offices. Taylor is probably correct to assert this principle, unsupported even by Locke, as uncontroversial in Western democracies today. But “opportunities” also suggests a broad range of activity in civil society, encompassing membership in private organizations as well as more common implications such as employment in the private sector. For example, participation in the Boy Scouts is thought by many people to provide training that may lead to enhanced career opportunities for these young men. But the traditional requirement that Boy Scouts affirm a belief in God, however conceived, excludes those who cannot affirm this belief from opportunities they could otherwise enjoy.

Second, citizens should not have to support “religious forms they do not adhere to.” Certainly there is implicit agreement that taxes should not support particular communities of faith or their rituals. But disputes often center on which set of social facts should be heeded in deciding whether a specific policy constitutes establishment within the meaning of the First Amendment. With respect to Sherbert v. Verner, for example, one can argue that religious believers may secure unemployment compensation under circumstances in which nonbelievers cannot: they may refuse to work on the Sabbath they observe and
still receive benefits if they lose their jobs. Because unemployment compensa­
tion is funded by tax revenues, taxpayers who are not Seventh-Day Adventists,
as in this case, are being forced to support a religious form to which they do
not adhere. Although this exemption is open to any employees who might oth­
wise be forced to choose between their religious convictions and their means
of support, in the United States a minority of communities of faith observe
their Sabbaths on a day other than Sunday. Therefore, the exemption is more
likely to apply to minority faiths, which means in turn that a greater percent­
age of taxpayers is being forced indirectly to support alien religious forms.
Although this does not constitute establishment in the conventional sense, it
does illustrate the point that avoiding the support of religious forms to which
one does not adhere is more problematic than Taylor indicates.

Moreover, if we entertain the suggestion that religion need not be defined
by the substantive criterion of theistic content but may encompass any com­
prehensive belief system or conception of moral order, this interpretation raises
doubts as to whether nonconfessional theism is as central to our common pur­
poses as Taylor suggests. If humanism is a nonconfessional nontheism that
functions like a religion, this suggests that the jurisprudence Taylor would see
as burdensome to theistic belief is now civilly benign, whereas jurisprudence
now considered benign or neutral would appear to burden nontheistic belief
systems like humanism.

For example, for Taylor the right to observe the Sabbath according to the
dictates of one’s conscience would be civilly benign as congruent with the
national religious consciousness of nonconfessional theism and would in fact
be essential to this consciousness as part of our common purpose. Therefore,
Thornton v. Calder, by overruling the state law that allowed Sabbath observers
to choose their day off, unfairly burdens theistic belief over nontheistic beliefs
that do not require any particular day of observance. Adherents of humanism,
however, would agree with the Court, arguing that practices that flow from
their belief systems were burdened under the law because these could not com­
mand the same support that theists could command for theirs. Thornton thus
places humanists and theists on an equal footing because neither can enjoy
exemptions on the basis of belief. For humanists, the result in Sherbert is not
civilly benign but instead allows theists who claim Sabbath observance to refuse
work without forfeiting unemployment compensation where humanists can­
not. Why should theistic beliefs be privileged through exemptions granted for
practices flowing from them, when other types of deeply held beliefs are not?
In this case, it is theists who agree with the Court. In sum, if humanism is not
deemed a religion, policies that in effect support it over theism appear to be
neutral. But if humanism is regarded as a nontheistic belief system that functions as a religion, policies that potentially privilege humanists over theists appear to constitute an establishment—in this case, of humanism.

The question of the status of humanism as a religion exemplifies a dispute over what set of social facts shall be accepted as the basis for judging whether a particular policy is neutral or whether it favors one manifestation of belief over another. Any stance toward religious belief will appear nonneutral from some viewpoint, and the prevailing stance structures the context of choice within which we survey our options and revise or reaffirm our projects and goals. Therefore, it is not surprising that Taylor himself admits lack of consensus on the third implication of the separation of church and state that he discusses, that citizens “should define symbols and forms of expression that all can recognize themselves in” (110). Although he cites the issue of support for sectarian schools as an area of particular controversy, we have just seen that the seemingly simpler issue of Sabbath observance defies efforts to define symbols with which all can identify. Taylor suggests that widespread agreement on nonexclusion from opportunities on the basis of faith and on noncompulsion of support for religious forms to which citizens do not adhere perhaps lessens need for agreement on forms and symbols (111). But the lack of consensus we have seen on the first two principles both renders controversy on the third difficult to avoid and raises the stakes therein. Citizens who think they are compelled indirectly to support questionable religious forms, for instance, may invest symbols with greater importance than otherwise. It is no wonder, then, that Taylor concludes that perhaps the best we can hope for is that each side of the debate recognize the legitimacy and good faith of the other and that this in turn “could lead to the recognition that it is part of the public philosophy of America that this very philosophy should be a matter of continuing discussion and debate” (113).

If this is his conclusion, however, is it nonconfessional theism itself that is central to our common purpose? Or is it continuing discussion and debate in an atmosphere of mutual respect that is central to our common purpose? I suggest that it is the latter question that resonates. Taylor notes that we often seek to redefine foundational ideas in the light of contemporary understandings. This sort of debate is part of that redefinition. This brings me to my second area of disagreement with Taylor, which is that the protection of liberal freedom is itself a positive obligation of a substantive nature and that this enables it to serve as a worthy common purpose. Even a liberal political society cannot avoid espousing some common moral standpoint, despite the thin conception of community of theorists like Chandran Kukathas. I suggest that this com-
mon moral standpoint serves as an adequate common purpose, despite Taylor's thick definition of common purposes. Michael Walzer argues that the nature of political society is not fixed at one moment in time but instead emerges as the product of ongoing negotiation, which represents "the gradual shaping of a common . . . political life," renegotiated over time as new groups make their presence felt.59 When we debate and redefine foundational ideas in the light of contemporary understandings, as Taylor suggests that we often do, this activity constitutes the continuing negotiation or renegotiation of our common political life.

Even when a society attempts to be neutral toward religious belief, the varying sets of social facts that may be the basis for a purported neutrality renders this term susceptible to differing definitions and points toward different strategies. The common moral standpoint represented by Thornton views theistic religious belief as private; Sabbath observance should not receive public exemption, and any resulting individual disadvantage relative to particular observances is not a public concern. The standpoint represented by Sherbert, however, views theistic belief as an allegiance that, if not public, at least should not incur penalties for those who engage in observances that may flow from it. This viewpoint need not derive from an argument like Sandel's that observance is a duty beyond the realm of choice, but it may derive from the conviction that religious belief, however originated, is a central constituent of identity that individuals may choose to emphasize and affirm. Our understandings of the appropriate role of religious belief shift and change over time. But what continues is discussion and debate. In other words, our common purpose is served by determining some role for religious belief, but this purpose does not require that we settle on any particular role.

Moreover, although Taylor implies that the prospect of continuing debate in an atmosphere of mutual respect is second best, as it were, to the definition of symbols and forms of expression with which all can identify, I believe that this mutual respect and acknowledgment of good faith that he correctly desires is more difficult to attain than he implies. What Jeff Spinner calls the "hard work" of liberal citizenship60 comprises enough substance to constitute a common purpose. According to Spinner, liberal citizens must often treat others as equals even when they dislike the practices of these others, but this does not mean that all cultural practices automatically merit protection. As a matter of constitutive choice, religious belief raises the same issues as cultural identity in a liberal polity. Membership in a community of faith, like membership in a culture, must be interpreted by the members themselves. And overall, both cultural and religious membership afford opportunities for the expression of autonomy.
But which practices are protected and which are not is subject to civil determination. And whether particular practices are considered as civilly benign or civilly injurious will depend upon the set of social facts used as the basis for making that determination. The relevant set of social facts is best decided, when there is disagreement, through discussion and debate, not by default to an existing consensus. But this is hard work, both in Spinner's sense and in and of itself. It requires that citizens listen to one another and that they consider carefully the question of whether the protection of particular practices enhances or diminishes both the value of diversity, as the existence and perpetuation of a plurality of options, and the value of autonomy, as the development of the capacity to question, examine, and revise or reaffirm our projects and goals.

In general, I believe that the protection of the broadest possible scope for the expression and practice of religious belief enhances both diversity and autonomy. Because religious belief, at least of the theistic type, typically involves membership in a community of faith, both freedom of conscience and freedom of association point toward liberty from interference by the larger community. Noninterference enhances diversity by encouraging a wide variety of options for choice, and it enhances autonomy in religious practice both by the group as a corporate body and by its individual members who ostensibly subscribe to its practices. Because no one is compelled to remain, freedom of conscience implies the right to choose a different affiliation if one can no longer affirm the beliefs and practices of one's original attachment. It also implies that current members subscribe to the beliefs and practices of the corporate body, or at least that they interpret their memberships in ways that do not threaten their compatibility with this body. Cultural and religious membership differ in this respect, because one may view cultural membership as a part of one's identity without the sorts of obligations or duties typically attached to religious affiliation. However, I want to discuss the harder sort of case in which liberal values are at stake because they appear to conflict with one another.

**FREEDOM OF ASSOCIATION**

Situations exist in which the protection of diverse communities of faith seemingly conflicts with the autonomy of individuals who do not subscribe to these communities' beliefs and practices but who for various reasons believe that their worldly or secular interests are compromised by their exclusion from these groups. In his *Letter Concerning Toleration*, Locke argues with respect to corporate belief that "no church is bound, by the duty of toleration, to retain any such person in her bosom as, after admonition, continues obstinately to
offend against the laws of the society.” Without the freedom to expel recalcitrant members, faith communities could not maintain a forum within which they may express and practice their shared values. Locke cautions, however, that this separation may not be accompanied by any action that would constitute civil injury, as “civil goods . . . are under the magistrate’s protection.” With respect to individual belief, “no private person has any right in any manner to prejudice another person in his civil enjoyments because he is of another church or religion. All the rights and franchises that belong to him as a man or as a denizen are inviolably to be preserved to him. These are not the business of religion.”

Under permanent conditions of diversity, however, the religious convictions of some individuals lead them to engage in practices that do appear to prejudice others in their civil enjoyments. We want to protect a diversity of beliefs and also the practices of those for whom the expression of religious belief is an expression of autonomy. Yet we also want to protect the autonomy of those whose own beliefs do not accord with these.

To put this differently, a liberal society and polity favor two kinds of diversity. They favor inclusiveness or admission to the social mainstream of previously excluded individuals and groups who desire inclusion. But they also favor groups who wish to form or maintain a forum in which they may express and practice shared values that are not common to the larger society. As Spinner states, “When diversity [in the first sense] is taken too far, it flattens the rich associational life that ought to characterize a healthy liberal society. But the idea that a rich associational life means that discrimination is always acceptable will destroy the idea of equal opportunity and citizenship.”

Spinner favors a classification of society into public, market, voluntary, and private sectors, allowing less discrimination for those closer to the public realm, but more for those closer to the private sector. If every group or institution must exhibit diversity within itself, reflecting “a mirror image of society” at large, “eventually it makes society more homogeneous rather than heterogeneous.”

Ironically, “A society that has only diverse institutions will be more homogeneous than a society with some diverse institutions and some homogeneous ones. Respecting religious faith and allowing religious communities to exist means allowing for discriminating religions” (18).

Here I want to consider the often murky line between the market and voluntary associations through an examination of the Boy Scouts of America, classified by Spinner as a voluntary association. The Boy Scouts believes that its mission is one of building character and fostering good citizenship, and it views belief in God as a necessary condition of this enterprise. It is also exclusively male and is intended for males whose sexual orientation is heterosexual.
Spinner suggests that church youth groups are rightly allowed to discriminate as a part of the building of their own communities of faith and that the Boy Scouts should be able to do so also. Liberal citizens do not have the right to join any voluntary organization they choose; these organizations are entitled to regulate their membership in line with their grounding principles. But because the Boy Scouts discriminate against atheists and gays, Spinner believes that public institutions should not support the Scouts by allowing them free use of public school facilities for meetings. A liberal society should be inclusive not only of a diversity of individuals but also of a diversity of groups, some of which may not themselves practice inclusivity. “Like many people I think the scouts are simply wrong to argue that gay people cannot be good scout leaders, but it is one [thing] to think that their rules are mistaken, another to think they should be illegal” (30).

Chandran Kukathas argues that because individuals should be able to form associations that reflect their liberty of conscience, their freedom is determined not by their liberty to enter associations but by their liberty to leave associations whose restrictions they reject, which also implies freedom to form new associations whose principles are more congenial. I have argued that by providing equality and the scope for autonomy not afforded by membership in particularistic groups, the liberal polity also provides a broader forum or context of choice that makes meaningful the opportunity to exit. As long as we believe that a liberal polity should include not only a diversity of individuals but also a diversity of groups, not all of which may themselves practice inclusivity, I think we must agree with Kukathas that freedom to relinquish one’s current attachments and to form new ones is a mainstay of liberal freedom with respect to freedom of association.

On the other hand, it is imperative that the larger society provide the potential for other opportunities, or the slack, as it were, that makes this freedom meaningful. When Locke argues that no religious organization need retain individuals whose practices offend its principles, he is defending the freedom of the like-minded to associate without threat from those who might alter these principles through their membership, either new or continuing. When he argues that no individuals, however, should be denied ordinary civil enjoyments because of their religious beliefs, he is indirectly addressing the importance of maintaining a forum that provides alternative opportunities. If the first point addresses the free exercise of conscientious beliefs and practices, the second point takes up the danger that establishment of an orthodoxy can pose to the exercise of alternatives. In this second point, Locke refers to private per-
sons, not to corporate bodies like communities of faith or organizations founded on particular moral commitments. Yet if enough individuals or corporate bodies hold similar beliefs the adherence to which curtails the very existence of alternatives, then the context of choice or the slack that is crucial is lacking. In other words, diversity can be flattened in more than one way. If every organization must reflect the wider society, diversity is compromised. But if the larger political society is an association of associations most of which closely parallel one another spontaneously in their religious, ethical, and moral stances, diversity is equally compromised. And either circumstance in turn compromises individuals’ capacities to question, examine, and revise or reaffirm their projects and goals.

THE BOY SCOUTS

The Boy Scouts of America is an organization that is internally diverse, as Spinner notes. Moreover, the nontheists and gays who have challenged Scout policy seek only to join the organization, not to change its focus. Scout statistics indicate that although the public schools sponsor more individual Scout members than any single sponsor, the largest single sponsor is the Church of Jesus Christ of Latter-day Saints, or Mormons. Others sponsoring large numbers of Scouts include Methodist, Roman Catholic, Presbyterian, Lutheran, and Baptist churches. Smaller numbers are sponsored by parent-teacher groups, service organizations, citizens’ organizations, fire departments, and law enforcement groups. “Officials say the organization was founded for boys who believe in God and should remain true to those principles. But while the organization accepts Buddhists, who do not believe in a Supreme Being, and Unitarians, who seek insight from many traditions but pointedly avoid setting a creed, it does not tolerate people who are openly atheist, agnostic, or unwilling to say in the Scout oath they will serve God.”

In Illinois in 1992 and 1993, a federal district court ruled and an appeals court affirmed that because the Scouts is a private organization, not a public accommodation, the organization was within its rights to refuse admission to an agnostic boy who would not acknowledge a duty to God. The appeals court ruled that regulation that “scuttles” the Scouts’ founding principles would risk “undermining one of the seedbeds of virtue that cultivate the sorts of citizens our nation so desperately needs.” Although the boy’s attorney argued that discrimination on the basis of belief was akin to racial discrimination, an editorial on the subject notes that “religious beliefs are chosen, not passed along
Its support for the Scouts is implicitly grounded in the assumption that an aspiring Scout might alter his beliefs if scouting were a priority.

Meanwhile, twin boys in Orange County, California, were in 1991 expelled from their Cub Scout den when, as agnostics, they would not affirm God in the Cub Scout Promise. The American Civil Liberties Union Foundation of Southern California successfully sued in state court for their reinstatement on grounds of religious discrimination, and this decision was upheld by a state appellate court in 1994. At that time, however, even a longtime atheist criticized the attack on the religious liberty of a private and voluntary organization, noting that an atheist organization would rightly protest against a claimed Christian “right” to membership. “Decent people should resolve disputes through reason and persuasion, not force, including the force of government . . . Abandoning reason and persuasion, they have allied themselves with government power. For shame.”

During this period, the Girl Scouts voted to alter their Promise, amid protests, to allow individual girls to substitute words with which they feel more comfortable for “God” if they wish.

A second trajectory of protest against Scout policies has come from individuals favoring the inclusion of gays as Scouts and Scout leaders. National Scout policy “defines homosexuals as poor role models.” In California in 1991, a superior court judge upheld the rejection of a gay applicant for the post of volunteer assistant scoutmaster as congruent with a group’s right to exclude unwanted members, an inherent function of freedom of association. In the same state in 1992, the Boy Scouts threatened to withdraw the charter of a troop that passed a resolution that it would not reject homosexuals as members. It eventually renewed the charter because the troop had accepted no homosexuals and had agreed not to seek any. Meanwhile, in 1992 the United Way of the Bay Area withdrew its support for six Boy Scout councils in five counties because of the policy barring membership to homosexuals. Also in 1992, two San Francisco–based companies whose corporate charters prohibit donations to organizations discriminating on the basis of religious belief and sexual orientation ceased donations to the Boy Scouts but were targeted for protest by Christian and family groups, and a third such company that had ceased donations but later resumed them was then targeted by the gay community.

In 1996, however, with the approval of the national Boy Scouts, the San Francisco Bay Area Council of Boy Scouts, representing 33,000 Scouts in two counties, approved a policy akin to the armed forces’ policy of “don’t ask, don’t tell”: gays can participate in Scout activities if they do not openly advocate homosexuality. “The Boy Scouts of America does not ask prospective members
about their sexual preference, nor do we check on the sexual orientation of boys who are already in scouting.” Though local spokespersons explained that the new policy redefines scouting as “asexual and apolitical,” national leaders asserted that this represented no change, as “we don’t allow registration of avowed homosexuals.”

More recently, a New Jersey state appeals court in 1998 ruled that because the Boy Scouts publicly recruits nationwide and troops often meet in public places, it is a public accommodation and violated the state antidiscrimination law by excluding a gay Eagle Scout and former assistant scoutmaster who wanted to participate in adult scouting. The majority went beyond narrow points of law to state, “There is absolutely no evidence . . . supporting a conclusion that a gay Scoutmaster, solely because he is homosexual, does not possess the strength of character necessary to care for or to impart B.S.A. humanitarian ideals to the young boys in his charge. . . . Plaintiff’s exemplary journey through the B.S.A. ranks is testament enough that these stereotypical notions about homosexuals must be rejected.” The plaintiff, James Dale, realized in college that he was gay, became an activist, and was featured in a news article that led to the revocation of his Scout membership. He argued that scouting involves no explicit message about sexual orientation and that the scoutmaster handbook refers sex and sexuality issues “to the child’s parents or pastor. It isn’t something that’s discussed.”

Reactions to the ruling were mixed. Syndicated columnist Dennis Byrne argues that as a returning Scout leader, Dale would have to choose between teaching “the complete Scouting agenda,” despite public knowledge of his own status, and violating Scout principles by saying that homosexuality is legitimate. If he takes the second option and is terminated, will he assert free speech rights and will the courts then force the Scouts to reinstate him? If parents then establish a parallel organization that does exclude homosexual leaders, will the courts in turn invalidate the exclusivity of the new organization? By ruling not only on the membership but also on the leadership of a private organization, the court “assaults more than the right of parents to decide how their children will be reared. It also assaults every American’s right of association and conscience.” Other commentators assert, however, that most fights for civil rights center on winning the right to participate in typical or ordinary activities when the individuals wishing to participate differ from the norm. Individuals who have become “so visibly gay” desire assimilation, not segregation. “They have come out so that they can stay out, if they choose, or go back in—on their own terms, as themselves. If they succeed, they may surprise their critics by becoming largely invisible again.”
Final dispositions of such cases at the state level have thus far conflicted. The California Supreme Court in 1998 ruled in two cases argued together that because the Boy Scouts is a private and selective group, it is not governed by state civil rights laws and can therefore exclude agnostics, theists, and gays. "Scouts regularly meet in small groups . . . that are intended to foster close friendship, trust, and loyalty. . . . The Boy Scouts is an expressive organization whose primary function is the inculcation of values in its youth members." The New Jersey Supreme Court in 1999, however, "based on little more than prejudice," unanimously ruled in the Dale case that the Boy Scouts is a public accommodation and that Dale's expulsion violated state antidiscrimination laws. The Boy Scouts, states the court opinion, is not selective in its membership, is neither an intimate nor an expressive association, and does not "associate for the purpose of disseminating the belief that homosexuality is immoral." Therefore, retaining gay Scouts does not violate the organization's expressive rights. Reactions to these opinions have been both mixed and predictable. The president of Gays and Lesbians for Individual Liberty has stated, most interestingly, that the New Jersey ruling is harmful to the rights of all associations, including homosexual ones, who seek to provide "safe" spaces for persons who are different. Moreover, public discrimination that regulates intimate associations through state antisodomy laws and prohibitions on same-sex marriage is best combated through broad definitions of the private sphere and narrow definitions of the public sphere.

The common thread running through these controversies involving the Boy Scouts is the question of whether the organization is a public accommodation that must therefore be inclusive or a private association that can unilaterally establish its criteria for membership. Two relevant tests may be applied to determine an organization's status. First, in Roberts v. United States Jaycees, the Supreme Court ruled not only that Minnesota's interest in eradicating sex discrimination was a compelling one but also that offering the Jaycees' advantages to women would neither "impede the organization's ability to engage in these protected activities or to disseminate its preferred views," nor would it "change the content or impact of the organization's speech" in more than minimal ways necessary to accomplish the state's legitimate purposes. In her concurring opinion Justice Sandra Day O'Connor argued, however, that the constitutional protection of membership selection should depend not on the content or rationale of its message but on a second distinction. In an expressive association, its very formation "is the creation of a voice, and the selection of members is the definition of that voice" (633). In a commercial association, however, activities enjoy only minimal protection, and such an association is defined by default
“when, and only when, the association’s activities are not predominantly of the type protected by the First Amendment” (635). O’Connor argued that although the Jaycees did engage in political and public advocacy, it was primarily engaged in recruiting and selling memberships (639) and was therefore a commercial association. She implied, then, that even if the public regulation of membership does alter the group’s message, this regulation is legitimate for a predominantly commercial association. A predominantly expressive association, however, should enjoy full autonomy in its membership selection, even if absence of this autonomy would not change the message.

An association, then, may comprise both expressive and commercial elements. At one extreme, a church or other community of faith would be an expressive association, as its formation and maintenance are grounded in a shared viewpoint or set of principles. At the other extreme, a hotel or restaurant would be a commercial association; the patrons of a place of public accommodation do not converge on the basis of shared principles. The Boy Scout Oath and the Scout Law do set forth principles that are affirmed at every troop meeting. One who affirms the Oath promises on his honor “To do my duty to God and my country and to obey the Scout law; . . . To keep myself physically strong, mentally awake, and morally straight.” According to the Scout Law, “A Scout is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent.”

The Boy Scout Handbook explains that one’s family and religious leaders teach one how God is served and that “as a Scout, you do your duty to God by following the wisdom of those teachings in your daily life, and by respecting the rights of others to have their own religious beliefs” (550). The explanation of reverence in the law is similar: “A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others” (8). Boys generally join the Scouts for the fun and camaraderie, and perhaps for the training in skills and leadership, not because they want to focus on religious expression and practice. Nevertheless, the theistic orientation is clear and public.

Although nothing prevents Scouts from taking the Oath with mental reservations, the Handbook’s explanation of trustworthiness in the law is that “a Scout tells the truth. . . . Honesty is a part of his code of conduct” (7). Moreover, the Oath’s “on my honor” means that one is giving one’s word; the Handbook instructs that “you must hold your honor sacred” (550). The conflict posed by intellectual dishonesty means that those whose nontheistic convictions are strongest will experience the greatest difficulty; those who are unconcerned may go along with the Oath without experiencing a conscious sense of conflict. One cannot simply choose a religious belief that is convenient for other purposes without being persuaded of its truth. Yet as I have argued, we
do decide on the priority and importance of religious belief and of the practices that flow from it in our lives, and in that sense we do “choose.” Those for whom nontheistic belief is a central constituent of identity but who also want to be Scouts may raise the issue publicly, as in the preceding cases; by implication they are choosing their religious beliefs over the lure of scouting, as they will have to abide by the outcome of the challenges they pose. Like Spinner, although I believe that the Boy Scouts is mistaken in its insistence on a public affirmation of theism, because many nontheists could contribute to and benefit from other focuses of scouting, I also believe that with respect to religious belief, the Boy Scouts is an expressive association within the meaning here discussed. It is ironic, however, that those in scouting who view secular humanism as a religion do not include this belief system among religious beliefs to be respected in other Scouts.

Its status is murkier, I believe, on the issue of sexual orientation. Scouts promise in the Oath to keep themselves “morally straight,” which in the Handbook means “to be a person of strong character; guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant” (551). The values here expressed are quite general in nature. Those who believe that nontheists and gays have at least a moral right to join an organization in which they seek only to participate, not to change fundamentally, will see irony in the admonition to respect and defend the rights of all. No heterosexual affirmation parallels the theistic affirmation in the Oath, and therefore there is not the same possibility of hypocrisy. The California troop that resolved not to reject homosexuals as members, and whose charter was renewed because it had not accepted homosexuals and had agreed not to seek any, had simply not accepted any known homosexuals and would not seek anyone simply on the basis of sexual orientation. That is, the troop might already contain homosexuals and might unknowingly admit some in future. And the San Francisco Bay Area Council policy of “don’t ask, don’t tell,” adopted with the approval of the national organization, admits as much.

Further evidence of the lack of any clear and public affirmation of heterosexuality, apart from national leadership statements against allowing the registration of “avowed homosexuals,” is found in the 1998 statement of James Dale, the Eagle Scout and assistant scoutmaster in New Jersey. If sexual orientation and related issues are referred to parents and pastors and are not discussed at Scout meetings, it is difficult to conclude that with respect to sexual
orientation, the Scouts is an expressive organization in the sense that its forma-
tion created a voice and membership selection defines that voice. That is, its formation and maintenance does not seem grounded in a readily accessible, publicly stated, shared viewpoint and set of principles. In Creppell’s terms, the Boy Scouts’ beliefs about sexual orientation do not have the status of public privacy. They are not expressed, recognized, or presented in public before a community in the same way that theism is in the Oath.

From this perspective it is not surprising, I believe, that the New Jersey appeals court majority here suggested that there is no evidence that a gay scoutmaster is unqualified to lead or will undermine the Scouts’ fundamental beliefs. If it is not explained in the Handbook, how fundamental can the emphasis on heterosexual orientation be? And if it is not explicit, how can it be undermined? Anecdotal evidence appears in a letter to the editor from an Eagle Scout, who remembers an emphasis on civic responsibility “but not being taught to adopt any particular political philosophies. . . . I learned that true civic responsibility doesn’t mean thinking what someone tells you to think, and that it certainly doesn’t mean silencing minority perspectives. Rather, it means being able to think critically about social issues by considering all viewpoints.” Similarly, when Dennis Byrne objects that Dale must either teach “the complete Scouting agenda” in violation of his own identity or must stand by his convictions in violation of Scout principles, if matters concerning sexuality are not specifically discussed, there is no “agenda” to teach in this area. Discussions of sexual orientation and practice are not a part of the duties and obligations of leadership. Therefore, no conflict of interest exists between Dale’s convictions and the agenda he is to teach. Byrne also objects to the court’s dictating the leadership of a private organization. But there is a difference between such “dictation” when it may affect the publicly stated, shared viewpoint that an organization teaches, as if a church were forced to accept a candidate for the priesthood who espoused agnostic beliefs, and dictation when a leader’s beliefs and practices need not impinge on the performance of official duties. Moreover, when the national office of the Boy Scouts accepted the “don’t ask, don’t tell” compromise, this change did more than publicly acknowledge that gays might be admitted, even if unknowingly. It also implied that one’s sexual orientation alone need have no bearing on one’s qualifications to participate in scouting.

Although the Scouts do not now put forward a clear and public statement, regularly affirmed, on the centrality of heterosexuality as they do on the importance of theism, they could in theory develop such a statement in the future. If so, I would then reluctantly have to support the Boy Scouts’ right as an expressive association to set the qualifications of its own members. This
would not prevent homosexuals from becoming members if they were willing
disingenuously to affirm the value of heterosexuality, just as nontheists may
now join if they are willing to affirm a belief in God. I should prefer that the
Scouts change its stance on sexual orientation. But Byrne displays a legitimate
concern when he wonders whether the courts insisting that the Scouts admit
gays might also invalidate the policies of any parallel organization established
exclusively for heterosexuals. In the two state decisions, exclusivity is supported
in California and inclusivity is buttressed in New Jersey. But whichever side of
the controversy may receive support nationally, in a liberal polity like-minded
individuals should be able to associate to express and practice their beliefs in
private organizations without fear of being coerced to accept those who dis­
agree. This is especially true for those who need a refuge, whose belief may be
“out of favor” in mainstream organizations. In fact, Nancy Rosenblum sug­
gests that an association is expressive and that its membership selection should
be protected regardless of “whether public expression is regular and consistent
or spontaneous and sporadic.” In the case of the Scouts, the messages of the­
ism or heterosexuality merit protection not because either or both define the
association but because the members have created them. “Expression has to do
with who we are and are perceived to be, not just what we say.”

The importance of freedom of association as a refuge for individuals out­
side the mainstream may be illustrated by the examples of the current status of
Christianity in the People’s Republic of China and in Russia. The Chinese gov­
ernment allows religious worship and the existence of official religious orga­
nizations. But these official churches “are rigidly managed by the state.
Preachers must be registered with the government’s Religious Affairs Bureau.
They are not allowed to preach outside their own province. They are not
allowed to speak about the second coming of Christ. They are not allowed to
baptize anyone under eighteen years of age.” Underground churches also exist.
But their leaders’ homes have sometimes been raided, religious texts have been
confiscated, unofficial meeting places have been closed, and members have
been sent to reeducation camps where starving, beating, and torture are not un­
known practices. On occasion, “priests from government-run churches have
even testified against members of the underground church and been present
during police interrogations.” Although leaders in the National Council of
Churches have reported that these incidents stem only from overzealous local
officials, evangelistic interference by outsiders, or “the wish to preserve authen­
tic religious and cultural traditions,” they still provide a cautionary tale.

In Russia in 1997, the Parliament passed a bill granting favorable treatment
to religious associations recognized fifteen years previously when Russia was
part of the Soviet Union, including the traditional Orthodox Church, plus Jewish, Islamic, and Buddhist organizations. But it restricts Roman Catholics, unofficial Baptist groups, Pentecostals, Seventh-Day Adventists, dissident Russian Orthodox groups, and newer Islamic and Buddhist sects. Where established organizations can own property, control radio and television stations, receive tax exemptions, distribute religious literature, run schools, and conduct services in hospitals and cemeteries, other organizations must register annually, and this only entitles them to engage in financial transactions and charitable activities, rendering them less influential. In a liberal polity, however, all expressive associations should enjoy the same legal status. This at least means that they should exercise internal autonomy in determining whom they will admit as members.

In accordance with the inevitable common moral standpoint of the larger society, however, public aid to or sponsorship of organizations that discriminate in a manner contrary to public policy should cease. For example, in 1998 the city of Chicago declined to continue its sponsorship of Boy Scout programs until or unless the group changes its stance toward nontheists and gays; formerly it simply paid the salaries of city employees involved in career-focused Explorer Scout programs. The withdrawal of financial support, either directly or in kind, as in the participation of public employees or in allowing Scout troops to meet in public schools, does not interfere with the membership or the actual practices of private organizations. They may secure the participation of employees in the private sector or of public employees on their own time, and they may be sponsored by churches or other voluntary organizations, meeting on the premises of these associations. Individuals must possess the freedom to form associations on the basis of their convictions and to exclude those who do not share these, as Locke asserts. But if individuals are to be accorded the ordinary civil enjoyments that Locke also states must not be denied on the basis of belief, the larger society as represented through the liberal polity must be able to assert its beliefs in the form of a common moral standpoint that prohibits discrimination in the public sector and does not render aid to organizations that discriminate in ways prohibited in the public sector.

EXCLUSIVITY, INCLUSIVITY, AND THE COMMON MORAL STANDPOINT

Expressive associations grounded in convictions that accord with the common moral standpoint of the larger society may do better than those whose convictions conflict with it. But because such a standpoint is unavoidable and inevitable, as I have argued, this will always be the case. Although the liberal commitment to diversity requires freedom for associations that are not them-
selves inclusive internally, it also allows for greater encouragement of those that are inclusive. Although the diversity that is a permanent feature of liberal society renders this eventuality unlikely, if enough voluntary organizations or associations held parallel beliefs, this would curtail the very existence of alternatives. If, hypothetically, most organizations were internally inclusive, I would not be overly concerned even though this would flatten, in Spinner’s terms, the diversity of “the rich associational life” of a liberal society. Individuals would still enjoy access to a broad array of alternatives, which would provide a broad context of choice or forum within which individuals may exercise their autonomy by questioning, examining, and revising or reaffirming their projects and goals. Those who desired more exclusive alternatives could still form them in association with others of similar viewpoint.

If, however, most organizations were internally exclusive, and exclusive in the same way, I believe we would have greater cause for concern. If very few organizations of any kind wanted to admit agnostics, atheists, or homosexuals, the combined effect would be to curtail drastically the breadth of the forum or context of choice within which individuals exercise their autonomy. As we have seen, Taylor perceives widespread agreement on the proposition that citizens should not be excluded from the public process or from opportunities because of religious difference. I have noted that these opportunities suggest a broad range of activity encompassing civil society, or in Spinner’s terms both the voluntary and the market sectors. Because participation in organizations like the Boy Scouts provides training in skills, leadership, and character, which translate into enhanced career opportunities for members, and if the vast majority of such organizations excluded agnostics, atheists, or homosexuals who were honest about their status, I would be gravely concerned about the prejudice toward these individuals, in Locke’s terms, in their civil enjoyments, or in their career opportunities as compared to those of others not excluded on the basis of important constituents of their identities.

We might then want to revisit the Roberts case. When Justice O’Connor argued that the correct distinction is between commercial and expressive associations, the implication was that it is legitimate to regulate a commercial association, even if this alters its message, but not to regulate the membership of an expressive association, even if this would not change the message disseminated. One strategy would be to argue that because religious belief does not touch the actual activities of the Boy Scouts but is confined to the regular declamation of the Oath, activities are then untouched by the admission of nontheists, and there is no cogent rationale for protecting the message. This strategy is on stronger ground with respect to the exclusion of homosexuals,
however, as there is no clear public statement on that subject as there is on religious belief. But in both instances, expression is severely curtailed.

Alternatively, a less drastic strategy would be to argue that given the critical mass of exclusive organizations with parallel criteria of exclusivity, the resulting curtailment of opportunities for individuals renders many of these organizations more commercial than expressive in nature. That is, with less diversity, the formation and maintenance of these organizations is less than otherwise the creation and definition of a distinctive voice. And the access that these organizations function to provide or deny to individuals is such that they become more like public accommodations. I would not welcome such developments. But if a critical mass of organizations truly did share parallel criteria of exclusivity, we might have to admit that we no longer possess the context of choice or the forum that should be characteristic of a liberal political culture.

I have argued that neither nonconfessional theism nor any other particular formulation of religious, philosophical, or moral belief is permanently central to our common purposes as a nation. Instead, it is continuing discussion and debate, deliberation and reflection that is central as over time we negotiate and renegotiate the terms of our common life. This requires, however, that we be allowed to be straightforward about our religious identities in the same way that we are increasingly straightforward about our cultural identities and the imperatives that these present. As an example, the Clinton administration in 1997 issued guidelines requiring that civilian executive branch agencies respect religious as well as nonreligious speech by employees. Muslim women can wear headscarves, Christian employees may keep Bibles on desks and read them during breaks, workers can discuss their faiths as long as coworkers do not object, and agencies must accommodate the observance of holy days as much as possible. This directive was partly a reaction to earlier attempts by the Equal Employment Opportunity Commission to define religious harassment so broadly that it seemed to ban any religious discussion and symbols from the workplace altogether.

On the other hand, because I have argued that religious identity, like cultural identity, is not a given but is instead a matter of constitutive choice, I may appear to have weakened the case for accommodation of individual religious beliefs. This tension appears in actual disputes. In 1997, the application for employment as a manager by a Sikh, religiously prohibited from cutting his hair, was rejected by Domino's Pizza because the enterprise wanted clean-shaven employees. Although the man claimed religious discrimination, Domino's argued that the issue was not one of civil rights because, while "race . . . is not a choice, . . . [but] something we're born with . . . religion is a choice." A representative of an Orthodox Jewish group, however, countered that "when it
comes to people’s religions, we don’t view that as a ‘choice.’ Religion is part of what people are, who they are.” I have argued, nevertheless, that religious identity, like cultural identity, should be accommodated not because it is an unchosen or unalterable constituent of identity, but because it is an expression of autonomy. Whatever our religious beliefs or lack of them, we must define and interpret for ourselves individually what they mean to us and their place in our lives. In this sense, then, religious identity is a constitutive choice. It requires not only the same concern and respect as unchosen constituents of our identities but perhaps more, precisely because it is an expression of autonomy.

It is true that regarding religion as a matter of constitutive choice means that the protection of religious beliefs and practices may evoke less sympathy than otherwise. What is to prevent any of us at any time from asserting that some seemingly bizarre practice should be accommodated and respected simply because we choose to engage in it? On the other hand, the hard work of liberal citizenship, as Spinner reminds us, is a two-way street. We need to learn about and in many cases to accommodate expressions of both religious and cultural identity. Simultaneously, those expressing this identity need to take responsibility for their ends, in Rawls’s sense, including responsibility for the tastes and preferences that they view as means to these ends. That is, some kinds of tastes and preferences may be accommodated with relatively minimal inconvenience, whereas others are incompatible with the common moral standpoint of a liberal polity. It is impossible to determine categorically which tastes and preferences characterize each category. As we have seen, the existence of competing sets of social facts means that the status of particular practices is often determined by which set of facts is taken into account.

I have argued that religious beliefs and practices may constitute an expression of autonomy when their adherents engage in critical reflection on their spiritual projects and goals. Because we cannot know when adherents have actually engaged in this reflection, we should err on the side of accommodation. At the same time, however, the liberal polity is entitled to regulate, limit, or even ban practices that interfere with the capacity for autonomy. Viewing religious belief as a matter of constitutive choice means that neither individuals nor communities of faith can assert that particular practices are religious imperatives that no one should deny to those who believe in them. Practices incompatible with liberal citizenship must be rethought. I do not believe that this approach trivializes religious belief and practice. Instead, it potentially deepens the deliberation and reflection that affect both the definition of our individual identities and the negotiation of our common purposes.