

Religious Rights: Why the Catholic Church shouldn't have to hire gays.

By Jeffrey Rosen

At the end of January, President Bush signed an executive order removing impediments to charitable choice, which allows religious as well as secular organizations to administer federal social service programs. In the mid-'90s, when an aide to then-Senator John Ashcroft first proposed charitable choice, its opponents claimed it was an unconstitutional merger of church and state. But today most of them, thankfully, have abandoned that argument. In a series of cases over the past decade, the Supreme Court has replaced the rigid church-state separationism of the Warren and Burger eras with a healthy vision of religious neutrality. This vision holds that when the government delegates welfare services to the private sector, it must allow secular and religious organizations to compete on equal terms for contracts. As long as appropriate safeguards are in place—there must be genuine choice, that is, no beneficiary should be forced to receive government benefits in a religious setting—the Supreme Court is likely to uphold charitable choice in its current form. And it should.

Recognizing this new legal reality, most opponents of charitable choice have narrowed their attack. Instead of challenging the constitutionality of charitable choice as a whole, they now focus on its implementation. Continuing a policy that dates back to the civil rights era, Bush proposes to exempt religious organizations that receive government funds from federal civil rights laws that prohibit discrimination on the basis of religion. "Faith-Based Prescription for Discrimination," shrieks the ACLU's website. "Under the Bush initiative, for example, a Catholic church receiving public funds for literacy programs could fire a teacher for getting pregnant outside of marriage." But that's OK. In fact, preserving churches' ability to fire or refuse to hire people who reject their religious values is central to charitable choice; it is necessary to protect religious autonomy and state neutrality. As churches become more enmeshed in the welfare state, the exemptions Bush proposes from anti-discrimination laws shouldn't be scaled back. They should be expanded.

It may seem that religious organizations are asking for special treatment when they demand the right to engage in discrimination with public money, accepting public funds but not the restrictions that usually accompany them. But it's obvious, on reflection, that without the ability to discriminate on the basis of religion in hiring and firing staff, religious organizations lose the right to define their organiza-

tional mission enjoyed by secular organizations that receive public funds. As Ira C. Lupu of George Washington University Law School has argued, Planned Parenthood may refuse to hire those who don't share its views about abortion; equal treatment requires that churches, mosques, and synagogues have the same right to discriminate on ideological grounds. The Supreme Court accepted this reasoning in 1988, when it upheld religious nonprofits' exemption from the federal law prohibiting religious discrimination.

And by extending this exemption to religious groups that receive government funds, the charitable-choice law is careful to insist that these groups can discriminate in the hiring of staff but not in the treatment of beneficiaries. In other words, a Baptist church may refuse to hire Jews as drug counselors, but it may not refuse to serve Jews who ask for drug counseling. Under charitable choice, the requirements of anti-discrimination law extend not to providers but to beneficiaries.

It's not hard to understand why faith-based organizations need to discriminate on the basis of religion to maintain their essentially religious character. A Jewish organization forced to hire Baptists soon ceases to be Jewish at all. Moreover, at the beginning of the twenty-first century, discrimination on the basis of religion seems different from discrimination on the basis of race and gender, because religion is becoming more a matter of choice and less a matter of birth. There are now black Jews and Asian evangelicals; and it's hard to see religion as immutable, or religious discrimination as invidious, when in a multicultural age religious identity is increasingly self-constructed. If you want to work in a Baptist soup kitchen, all you have to do is become a Baptist.

The harder question is whether faith-based organizations should be free to discriminate not only on the basis of religion but also on the basis of gender. In announcing the formation of the White House Office of Faith-Based and Community Initiatives, John DiIulio, its new director, emphasized that religious groups receiving federal dollars would be prohibited by federal law from engaging in all sorts of other illegal discrimination, including discrimination on the basis of race, color, national origin, sex, age, disability, HIV infection, or visual impairment. "Those things are a good part of the law, and no one's talking about changing those," DiIulio said at the Pew

Forum on Religion and Public Life on January 30. “If they were, I wouldn’t be here.”

But is it really so obvious that these requirements shouldn’t be relaxed? The way some courts now interpret the federal prohibition on sex discrimination, for example, threatens the ability of churches to define their religious mission as much as bans on religious discrimination would. Two federal courts have refused to dismiss suits against church schools that fired employees who gave birth out of wedlock. A court in Michigan ruled against a Christian school that refused to hire women with small children. In the best-known case, a federal appeals court in Ohio held that the Dayton Christian School might be immune from suit for gender discrimination, when it told a teacher who became pregnant that she couldn’t return to her job because school officials believed that mothers with small children should stay at home. The court invoked a judicial doctrine dating to the 1970s, which holds that applying Title VII’s prohibition on sex discrimination to the relationship between a church and its ministers violates the First Amendment’s protections for religious association.

Traditionally, this doctrine has allowed churches to discriminate on the basis of gender only in hiring and firing those with ministerial responsibilities; it hasn’t protected their ability to fire custodial and non-ministerial staff who refuse to conform to traditional gender roles. In many religions, this distinction is consistent with religious practice: Conservative Jews, for example, refuse to ordain openly gay rabbis but welcome gay congregants. Nevertheless, it’s not hard to imagine a situation in which a religious organization is forced to hire choir directors or drug counselors or secretaries whose lifestyles offend its conception of appropriate behavior, changing the group’s character in the process. As charitable choice makes an increasing number of churches susceptible to federal regulation, courts and Congress might consider extending the exception to allow churches to discriminate on the basis of sex and sexual orientation when hiring and firing non-ministerial employees as well.

In this sense, the Dayton case poses a dilemma similar to the Boy Scouts case that the Supreme Court decided last June, in which the Court properly refused to prevent the Scouts from discriminating against a gay scoutmaster. Forcing the Scouts to hire those who reject their values, the Court held, would turn the group into something it isn’t. To protect the integrity of their religious message, faith-based organizations, too, should be able to refuse to hire drug counselors whose lifestyles conflict with their traditional beliefs—that single women should remain chaste before marriage, for example, or shouldn’t work without their fathers’ consent. The Boy Scouts case suggests that religious and nonreligious private

associations should receive exemptions from sex-discrimination laws whenever necessary to preserve their distinctive character.

This doesn’t mean faith-based organizations should suffer no consequences if they discriminate on the basis of gender in hiring and firing. After the Boy Scouts won their Supreme Court case, there was a political firestorm, and several civic organizations broke their ties with the group, which is now openly associated with homophobia. Along the same lines, individual welfare recipients should be perfectly free to refuse drug counseling from churches that discriminate on the basis of gender or sexual orientation. To get an exemption from Title VII, churches should be forced to own up to the beliefs and practices that, in their view, prevent them from complying with the civil rights laws. In recent cases, some churches have taken the disingenuous position that they don’t discriminate on the basis of sex but should be spared the requirement to defend their hiring and firing practices in court because the First Amendment gives them a blanket exemption from having to answer to the Equal Employment Opportunity Commission. In the spirit of the Boy Scouts case, faith-based organizations should be free to discriminate only if they are willing to take the political heat.

In opposing faith-based organizations’ right to discriminate on the basis of sex and religion, opponents of charitable choice are being more tactical than principled. In today’s political climate, openly opposing charitable choice—which was supported by Bill Clinton and Al Gore and is already embedded in four federal laws—is no longer tactically feasible. So its opponents are trying a stealth attack. As Nathan Diamant, public policy director of the Union of Orthodox Jewish Congregations, puts it, “If the goal of charitable choice is to leverage the unique capacities of faith-based institutions with government grants, to force them to dilute their religious character in order to participate is a way of saying that you really don’t believe in the whole notion.”

But it’s now time for defenders of charitable choice to go on the offensive. As faith-based organizations become increasingly subject to federal regulation, they should be exempted not only from the federal prohibitions on religious discrimination but from those on sex discrimination as well. There is an irreconcilable conflict between the democratic logic of anti-discrimination law and the hierarchical values that make faith-based organizations what they are. If faith-based organizations are to compete against secular ones on equal terms, they must be protected from anti-discrimination law to avoid being transformed into something they are not. Sometimes neutrality requires a little special treatment after all.