
THE FREEDOM OF FAITH-BASED ORGANIZATIONS TO STAFF ON A RELIGIOUS BASIS

BY CARL H. ESBECK, STANLEY W. CARLSON-THIES, AND RONALD J. SIDER

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As the French historian Alexis de Tocqueville once wrote of America in the mid-nineteenth century, “[t]he religious atmosphere of the country was the first thing that struck me on arrival in the United States.”¹ Interestingly, Tocqueville did not credit any national orthodoxy as the cause of such fervor, but rather an abiding tradition of freedom that makes both church and state strong, healthy, and mutually supportive.² To be sure, such a tradition continues to this day, notwithstanding a steady debate on its scope that runs from prayer in public school to President George W. Bush’s “faith-based initiative.” Indeed, throughout our nation’s history, religious liberty, whatever its contours, has truly been our “first freedom,” and not simply because of its primal order in the Bill of Rights.³

Nowhere has this tradition of religious freedom been stronger than in the notion that government should not interfere with the internal functions of religious institutions. As the Supreme Court opined in *Kedroff v. St. Nicolas Cathedral*,⁴ religious institutions should have “the power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”⁵ Although not absolute, this freedom, whether by statute or constitutional mandate, generally extends to employment decisions made by such organizations. The nature of this protection, particularly as it is affected (or not) by the President’s faith-based initiative is the subject of the new, much-needed work by Carl Esbeck, Stanley Carlson-Thies, and Ronald Sider, *The Freedom of Faith-Based Organizations to Staff on a Religious Basis*.⁶

This slim, yet effective book carefully summarizes the current state of religious freedom in the context of employment decisions by faith-based groups, primarily in the context of hiring those of like-minded faith. As the authors write in introduction, “[t]he purpose of this monograph is to set forth the applicable legislative and constitutional law and the rationale that undergirds it, as well as the important public policy reasons that support religious staffing by faith-based providers.”⁷ This goal, which is in keeping with the book’s title, is somewhat overbroad in that the bulk of the text, together with its rather expansive appendices of related legislative and executive materials, concerns the relevant issues more in the light of the faith-based initiative than in any generic sense of religious employer guidance – a task otherwise served by such publications as the American Bar Association’s *Religion in the Workplace* (which the authors cite).⁸ In any event, the book does an excellent job articulating and clarifying the various statutory, constitutional, and policy challenges facing religious employers who wish to retain hire/fire freedom while contributing to the social service needs of the nation. In so doing, the authors posit that

such challenges are resolved largely in favor of a wide range of freedom for these groups.

The Freedom of Faith-Based Organizations to Staff on a Religious Basis, which is divided into six sections with nine helpful appendices, treats the issue of religious hiring, largely in the context of federal funds, from both legal and policy perspectives. It begins by challenging the “controversy over religious staffing” and stressing the importance of Charitable Choice, which is both the name of a legal rule for many federal programs (first adopted under President Clinton)⁹ and its underlying principle of equal access for faith-based groups to provide social services without regard to hiring practices.¹⁰ The book then summarizes existing (i.e., without reference to public funds) protections for religious entities, most notably their exemptions from religious discrimination prohibitions in Title VII of the Civil Rights Act of 1964¹¹ and what the authors call that Act’s corresponding “acknowledgement . . . of the First Amendment autonomy of religious organizations.”¹² In their later discussion of state law, the authors note that analogous laws at that level similarly exempt religious employers in religious discrimination “[a]most without fail.”¹³

Proceeding from this summary of the rights of religious employers in the absence of public funds, the authors next discuss the status of these rights in light of the receipt of such funds. This is the heart of their book, and will likely prove its most enduring aspect. Here, the authors urge the continued legal vitality of faith-based hiring freedom based on the following: 1) the lack of any funds-based restriction in either Title VII or its relevant exemptions,¹⁴ 2) the constitutionality of offering public funds to religious groups in other contexts,¹⁵ 3) Charitable Choice rules, if they apply,¹⁶ and, if they do not, 4) the Religious Freedom Restoration Act for direct federal aid,¹⁷ and, arguably, the “hybrid” right of Free Speech/Free Exercise for federal aid passing through state agencies¹⁸ or, better yet, a state religious freedom restoration act, if it exists.¹⁹ As the authors confess, the matters here are “complex,”²⁰ and, at times, following the relevant law and policy can be a challenge. In response, however, their book does a remarkable job in offering a helpful and concise analytical map to navigate what can undoubtedly be a confusing legal landscape.

The book closes with a set of policy arguments and recommendations in support of the rights of religious groups in the faith-based initiative.²¹ One of the more powerful points begins, somewhat ironically, with a quote from the liberal Supreme Court Justice William Brennan calling faith-based hiring “a means by which a religious community defines itself.”²² Restricting this right, the authors argue, “would harm

not only the faith-based organizations but the millions of people and thousands of neighborhoods that count on their services.”²³ This section of the book, like some of the discussion before it, casts the work more in the mode of a persuasive piece than a neutral overview, which can lead to fairly aggressive policy and legal arguments. And yet, the authors are free to take this line because, frankly, almost all of their conclusions are correct. The book opens with a caveat “encourag[ing]” religious groups “to seek legal counsel,”²⁴ although through this book, such groups (and their lawyers) are offered invaluable support in their cause.

There is no question that the authors lend a professional gravitas to the discussion provided in their book. Professor Esbeck, now a law professor at University of Missouri-Columbia, was a senior Justice Department official and a primary drafter of faith-based legislation. Dr. Carlson-Thies, now Director of Social Policy Studies at the Center for Public Justice, was a key member of President Bush’s White House Office of Faith-Based and Community Initiatives. Dr. Sider, now President of Evangelicals for Social Action, is a prolific scholar on faith in the public arena. This latest contribution will only enhance their reputation in their respective fields. This thoughtful, well-researched work is a welcomed addition to understanding the continuing tradition of religious freedom in America. Mr. Tocqueville would be impressed.

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Footnotes

¹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 295 (J.P. Mayer, ed., Harper & Row 1969).

² *See id.* at 287-95 (describing mutual strength of church and state in American experiment of freedom).

³ *See generally* Michael W. McConnell, *Why is Religious Liberty the “First Freedom”?*, 21 CARDOZO L. REV. 1243 (2000) (discussing the historical and theoretical dimensions of American religious freedom).

⁴ 344 U.S. 94 (1952).

⁵ *Id.* at 116.

⁶ CARL H. ESBECK ET AL., *THE FREEDOM OF FAITH-BASED ORGANIZATIONS TO STAFF ON A RELIGIOUS BASIS* (The Center for Public Justice 2004).

⁷ *Id.* at 22-23.

⁸ MICHAEL WOLF ET AL., *RELIGION IN THE WORKPLACE: A COMPREHENSIVE GUIDE TO LEGAL RIGHTS AND RESPONSIBILITIES* (American Bar Association 1998).

⁹ *See* 42 U.S.C. § 604a (effective July 1, 1997) (2000).

¹⁰ *See* ESBECK ET AL., *supra* note 7, at 15-23 (describing Charitable Choice and its implications).

¹¹ *See* 42 U.S.C. § 2000e-1(a) (2000) (religious employers generally); *and id.* at § 2000e-2(e)(2) (religious schools and colleges).

¹² ESBECK ET AL., *supra* note 7, at 35. It is an open question whether the constitutional autonomy described as grounds for the Title VII exemption extends to “generally applicable” state non-discrimination laws in light of the Supreme Court’s holding in *Employment Div. v. Smith*, 494 U.S. 872 (1990), though the authors appear to reject such a limit. *See* ESBECK ET AL., *supra* note 7, at 79 n.128 (discussing *Smith*).

¹³ *Id.* at 67.

¹⁴ *See id.* at 34-35 (discussing the lack of a public funds condition in Title VII’s religious exemption).

¹⁵ *See id.* at 35-47 (addressing constitutionality of public funding of religious institutions for various secular purposes in other contexts, including school vouchers in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) and school materials and equipment in *Mitchell v. Helms*, 530 U.S. 793 (2000)).

¹⁶ *See id.* at 70-77 (describing role of Charitable Choice where funds pass through state and local agencies).

¹⁷ *See id.* at 58-64 (positing the continued vitality of the Religious Freedom Restoration Act of 1993, which requires a “compelling interest” if imposing a “substantial burden” on religion (*see* 42 U.S.C. § 2000bb-1 (2000)), despite its lack of application to states (*see* *City of Boerne v. Flores*, 521 U.S. 507 (1997))).

¹⁸ *See id.* at 78-85 (discussing the free speech and free exercise dimensions of neutral state treatment). *See also generally* Julie Manning Magid & Jamie Darin Prekert, *The Religious and Associational Freedoms of Business Owners*, 7 U. PA. J. LAB. & EMP. L. 191 (2005) (addressing similar arguments).

¹⁹ *See* ESBECK ET AL., *supra* note 7, at 78 n.125.

²⁰ *Id.* at 25.

²¹ *See id.* at 87-102.

²² *Id.* at 90 (citing *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring)).

²³ *Id.* at 98.

²⁴ *Id.* at 26.