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# PLURALISM, EQUALITY AND THE CHALLENGE OF FAITH BASED SERVICES

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**Abstract:** This article interrogates the increasing role of faith groups in the delivery of public services in England pursuant to the Big Society agenda. Specifically, it examines the potential impact on competing values such as equality between citizens. After a historical survey of the role of faith communities, the article reviews an example of protracted litigation in which the clash between faith based service provision and equality was at the forefront. It then adopts a comparative approach, turning to the extensive American experience of Charitable Choice. Finally, the issues are situated within a broader theoretical frame. The author concludes with recommendations for policymakers in what will likely be a field of growing importance.

**Key Words:** faith communities; Big Society; public services; equality; charities; Charitable Choice

## I. Introduction

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\* Dean and Professor of Law, The City Law School, City University London, England. The author thanks Ruthann Robson and Jason Chuah for invaluable feedback on an earlier draft, Faiza Patel for excellent research assistance, and Anton Cooray for editorial support and patience. Finally, the author thanks the organizers and participants at the Fifth International Conference on 'New Haven and Other Jurisprudential Perspectives on Conflict Resolution and Current Legal Problems', City University of Hong Kong, 17-18 September 2013, where an earlier version of this article was first presented.

The delivery of public services in England today is in a state of change and, some would argue, crisis. Government austerity has resulted in the scaling back of what were perceived by many to be core services, the receipt of which were thought to be central elements of modern citizenship. Closely related to the cutbacks are ongoing changes to the mode of delivery. Increasingly, the state has shifted its role from provider of services to an intermediary located between the citizen and a range of actors from both the profit and non-profit sectors. This phenomenon is growing in importance and has been harnessed to an ideological commitment to the Big Society agenda of the current Coalition Government.<sup>1</sup>

This article focuses on a particular element in this policy matrix—faith communities—when the state empowers them to provide services. This development challenges the public/private divide in the liberal polity and raises broader questions

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<sup>1</sup> See Pete Alcock, 'Building the Big Society: A New Policy Environment for the Third Sector in England' (2010) 1 *Voluntary Sector Review* 379; Sheila Furness and Philip Gilligan, 'Faith-based Organisations and UK Welfare Services: Exploring Some Ongoing Dilemmas' (2012) 11 *Social Policy and Society* 601; Steven Kettell, 'Thematic Review: Religion and the Big Society: A Match Made in Heaven?' (2012) 40 *Policy & Politics* 281; Debra Morris, 'Charities and the Big Society: A Doomed Coalition?' (2012) 32 *Legal Studies* 132. No less important (and at least as controversial) is the rapidly expanding role of the private for profit sector; see Daniel Boffey, 'The care workers left behind as private equity targets the NHS' *The Guardian* (London, 9 August 2014), available at [www.theguardian.com/society/2014/aug/09/care-workers-private-equity-targets-the-nhs](http://www.theguardian.com/society/2014/aug/09/care-workers-private-equity-targets-the-nhs) (accessed 20 August 2014). Faith based organizations also have a long history of involvement in the international development movement; see Gerard Clarke, 'Faith Matters: Faith-based Organisations, Civil Society and International Development' (2006) 18 *Journal of International Development* 835.

concerning pluralism and diversity in a society committed to liberal norms of equality. I interrogate why faith groups are thought to be well suited to a public role. The article examines the impact, not only on the citizen ‘consumer’ of services but also for the faith ‘provider’, which may find itself increasingly embraced by the state in a new relationship not of its choosing.

This investigation is timely given the current political climate. The influence of the church on public policy is, of course, central to English constitutional history. But my focus is on recent developments which became apparent under the Labour Government beginning in 1997.<sup>2</sup> Change has accelerated and been somewhat redefined under the Coalition’s Big Society theme.<sup>3</sup> Faith communities have a new found importance as key civil society players in the Government’s agenda which centres on localism, devolution of power, citizen choice, and community based service delivery.<sup>4</sup> The Government has repeatedly emphasized that people of faith are

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<sup>2</sup> Adam Dinham, *Faiths, Public Policy and Civil Society* (Palgrave Macmillan 2009); Rob Macmillan, ‘The Third Sector Delivering Public Services: An Evidence Review’ (2010) *Third Sector Research Centre Working Papers*, available at [www.birmingham.ac.uk/generic/tsrc/documents/tsrc/working-papers/working-paper-20.pdf](http://www.birmingham.ac.uk/generic/tsrc/documents/tsrc/working-papers/working-paper-20.pdf) (accessed 20 August 2014).

<sup>3</sup> Kettell (n.1).

<sup>4</sup> Jesse Norman, *The Big Society: The Anatomy of the New Politics* (University of Buckingham Press 2010). Whether the Big Society has proven successful is increasingly open to debate, as large private firms may have benefited more than community based initiatives; see Patrick Butler, ‘Big society policy not suited for deprived communities, says thinktank’ *The Guardian* (London, 9

*valued* by the state. In this way, the Government (or at least the Conservative Party section of the Coalition) attempts an ideological break from what it describes as the dominance of secularism under which the state was assumed to have a monopoly on both answers to intractable social problems and the delivery of solutions.<sup>5</sup>

The article begins with a historical overview of faith communities and public service delivery. This is inevitably bound up with the role of charity and the rise (and retrenchment) of the welfare state. Turning to the legal domain, I explore a protracted example of litigation directly involving faith and equality. The article then adopts a comparative approach focusing on the United States. In the US, faith based social services have become significant in recent years, leading to wide ranging debate about how this new pluralism in service provision can be reconciled with the separation of church and state. Although the American constitutional context is unique, the analysis nevertheless is informative beyond the US. Finally, I situate the issues theoretically and conclude with some provisional answers as to how the state might best engage with faith.

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December 2013), available at [www.theguardian.com/politics/2013/dec/09/big-society-deprived-david-cameron-charitable-wealthy](http://www.theguardian.com/politics/2013/dec/09/big-society-deprived-david-cameron-charitable-wealthy) (accessed 20 August 2014).

<sup>5</sup> Baroness Warsi, 'We stand side by side with the Pope in fighting for faith' *The Telegraph* (London, 13 February 2012), available at [www.telegraph.co.uk/news/religion/9080441/We-stand-side-by-side-with-the-Pope-in-fighting-for-faith.html](http://www.telegraph.co.uk/news/religion/9080441/We-stand-side-by-side-with-the-Pope-in-fighting-for-faith.html) (accessed 20 August 2014). Warsi, the first Muslim to sit in the cabinet, resigned her positions as Minister of State at the Foreign Office and Minister for Faith and Communities on 5 August 2014 in protest over Government policy on Gaza.

## II. From Welfare State to Big Society: Historical Overview

Faith groups are far from being new actors in service delivery. In fact, there is a long and important history of charitable provision in relation to education, hospitals, and support for the unemployed, disabled, widowed and orphaned. Victorian England ‘has been seen as a golden age for faith-based social action’.<sup>6</sup> This included an early form of partnership with government, which can be found in the ‘nineteenth-century practice of charities caring for delinquent and neglected children in return for payment by the state’.<sup>7</sup>

The growing acceptance of the inadequacies and unevenness of charitable responsibility for social services, combined with professionalization of key players such as social workers, led to the development of the welfare state. After 1945, that process accelerated, and ‘the idealism of universal welfare was too strong an influence for a disparate non-governmental matrix of service provision to elude’.<sup>8</sup> Paradoxically, during the same period, ‘the post-war welfare state heralded a growth,

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<sup>6</sup> Dinham (n.2), 122.

<sup>7</sup> Debra Morris, ‘Paying the Piper: The ‘Contract Culture’ as Dependency Culture for Charities?’ in Alison Dunn (ed), *The Voluntary Sector, the State and the Law* (Hart 2000) 123, 124-125.

<sup>8</sup> Dinham (n.2), 123.

not a decline, in charitable formation'.<sup>9</sup> Over time, Adam Dinham argues, a realization emerged that the idealism of a top-down driven welfare state had not resulted in the eradication of social problems. This gave rise in the 1970s to 'renewed enthusiasm for community-based policies rooted in neighbourhood and self-help', which opened the door again to faith groups.<sup>10</sup>

A major turning point came with the Thatcherite revolution in the 1980s. Conservative policy aimed at shrinking the state saw 'core state functions' shifted towards a broad range of actors, 'be they public/private or the voluntary and community sector'.<sup>11</sup> The value of faith groups was their perceived ability to provide services. They were also thought to possess a uniquely valuable 'moral or ethical ethos' combined with potential for innovation.<sup>12</sup>

Consequently, the state's role altered from the provider to the contractor for services on behalf of the citizen. This gave rise to a 'contract culture' in which the charitable sector as a whole became dependent on the award of contracts.<sup>13</sup> Through the 1990s, the shift continued and charities were increasingly reliant on government,

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<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*, 124.

<sup>11</sup> Alison Dunn, 'Demanding Service or Servicing Demand? Charities, Regulation and the Policy Process' (2008) 71 *Modern Law Review* 247, 249.

<sup>12</sup> Dinham (n.2), 120.

<sup>13</sup> Morris (n.7).

sometimes leading to ‘mission drift’ towards service provision.<sup>14</sup> This also meant that charities were bound by a regulatory structure which was perceived to demand ‘effectiveness and efficiency at every turn’.<sup>15</sup> However, the process of contracting out, which importantly also included the for profit sector, led to much publicized concerns regarding quality control, since the award of contracts was based on price.<sup>16</sup>

The New Labour period saw ‘a much more rapid outsourcing of services from the state’.<sup>17</sup> There were also ideological shifts. The Government introduced ‘best value’ in tendering, which was intended to ensure ‘that the best, not the cheapest, would win contracts’.<sup>18</sup> As well, the Voluntary Sector Compact was designed to ‘redress the asymmetry of power between funder and provider’.<sup>19</sup> It enhanced the role of non-state actors in decisions surrounding the commissioning of services. Social enterprise was featured in the Government’s agenda to encourage ‘greater self-sufficiency of service providers’.<sup>20</sup> An Office of the Third Sector was created within the Cabinet Office in 2006 to coordinate work across government.

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<sup>14</sup> *Ibid.*, 129.

<sup>15</sup> Dinham (n.2), 126.

<sup>16</sup> *Ibid.*

<sup>17</sup> Macmillan (n.2), 6.

<sup>18</sup> Dinham (n.2), 126.

<sup>19</sup> *Ibid.*

<sup>20</sup> Dinham (n.2), 127.



With respect to legal developments, new charities legislation provided an expansive definition of ‘charitable purpose’, with explicit mention of citizenship. This helps to ensure that charities do not run afoul of the law of charities when embarking upon service delivery.<sup>21</sup>

The impact of change is demonstrated by the volume of activity and the overall dependence of the charitable sector on the state. In terms of funding, ‘by 2008, around 36% of total income for charities in England and Wales, just under £13 billion, was coming from statutory sources’.<sup>22</sup> Of no less importance is the shift in the nature of state funding: ‘the total amount of finance represented by contracts has increased (from £4.7 bn in 2003/04 to £9.1 bn in 2007/08), whilst the total amount represented by grants has fallen (from £5.0 bn in 2003/04 to £3.7 bn in 2007/08)’.<sup>23</sup> These developments led some critics—including those within the Conservative Party—to question the instrumental way in which the sector was viewed by the Labour Government. They argued that charities were being ‘co-opted as part of a “shadow

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<sup>21</sup> Charities Act 2011, s 3(1)(e).

<sup>22</sup> Morris (n.1), 135.

<sup>23</sup> Macmillan (n.2), 12.

state” in a relationship of dependency, increased bureaucracy, professionalization, lack of agency, and agenda distortion.<sup>24</sup>

Faith groups found themselves well placed to deliver on the ‘mixed economy of welfare’, and this was certainly recognized within government.<sup>25</sup> Labour took steps to embrace faith based communities within the policy making process. In 2003, the Faith Community Liaison Group ‘was created to instil their views across the civil service and chaired by the Home Office minister responsible for “civil renewal” within a wide remit’.<sup>26</sup> The expansion of state funded religious schools also characterized the Blair years. Stephen Hunt argues that this led to the anomalous situation in which the same government that was extending equality rights to lesbians and gay men (in opposition to some faith communities) was ‘courting’ faith groups. But this should come as no great surprise.<sup>27</sup> The Labour Party contains a strong current of what John Annette refers to as ‘Christian communitarianism’, in which faith has an important role in civic engagement.<sup>28</sup> This manifests itself in ‘a distinctive view of civic religion that sees religion as contributing to the creation of a more

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<sup>24</sup> *Ibid.*, 8.

<sup>25</sup> Dinham (n.2), 125.

<sup>26</sup> Stephen Hunt, ‘A Turn to the Rights: UK Conservative Christian Lobby Groups and the “Gay Debate”’ (2011) 6 *Religion and Human Rights* 291, 297.

<sup>27</sup> *Ibid.*, 297-298.

<sup>28</sup> John Annette, ‘Faith Communities, Communitarianism, Social Capital and Youth Civic Engagement’ (2011) 11 *Ethnicities* 383, 384.

dynamic civil society and the development of a more democratic political culture', but in which government also plays a central role (which differentiates it from neo-liberal understandings of the state).<sup>29</sup> As a consequence, the Labour administration is best characterized both in terms of continuity but also as having a distinctive understanding of faith groups grounded in its history and philosophy. Most importantly for the purposes of this article, the Labour years created the conditions for a re-articulation of the philosophical basis of the role of faith communities through the Conservative vision of the Big Society.

The Big Society is one of the key policy initiatives of David Cameron's leadership of the Conservative Party. It is also one of its most derided.<sup>30</sup> In short, it centres on the empowerment of communities and individuals and, in policy terms, the Big Society focuses on localism, volunteerism, support for the charitable sector, the transfer of power away from central government, and the fostering of individual choice. It was included in the Coalition Agreement for Government and is overseen by the Office of Civil Society within the Cabinet Office.

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<sup>29</sup> *Ibid.*

<sup>30</sup> See generally Alcock (n.1); Norman (n.4); Kettell (n.1); Morris (n.1). Prime Minister David Cameron's own faith would appear to have strengthened recently, having now declared himself as 'evangelical' about his Christianity; see Anne Perkins, 'David Cameron 'does God' and puts faith on the table' *The Guardian* (London, 18 April 2014) available at [www.theguardian.com/politics/2014/apr/18/david-cameron-god-faith](http://www.theguardian.com/politics/2014/apr/18/david-cameron-god-faith) (accessed 20 August 2014).

Its philosophical basis was developed by Jesse Norman, who describes the key themes as ‘social action, public service reforms and community empowerment, devolution of power to local government, and encouragement of cooperatives and mutuals’.<sup>31</sup> The Big Society is intended as a corrective to a view of the state (which is attributed to the Labour Party) as transmitter of values to the citizen, ‘as though a sense of community could only be achieved through shared dependence on the state’.<sup>32</sup> By contrast, the Big Society is characterized by a diffusion of power and ‘a three-way relationship between individuals, institutions and the state. It is when this relationship is functioning well that societies flourish’.<sup>33</sup>

This relationship has been analogized to a coral reef, ‘where the co-existence of the sea-bed (basic state services), the coral growths (social and private enterprises) and the fish (citizens and communities, swimming around, feeding on these) is presented as a metaphor for the Big Society’.<sup>34</sup> The metaphor, however, is not entirely compelling. The fish are not only consumers but also—when they group together as communities—active participants in the formation of the coral growth. Furthermore,

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<sup>31</sup> Norman (n.4), 196-197.

<sup>32</sup> *Ibid.*, 31.

<sup>33</sup> *Ibid.*, 165.

<sup>34</sup> Alcock (n.1), 383.

the distinction between sea-bed and coral growth is increasingly blurred, as the definition of basic state services becomes contested.

Faith communities have been a core component of Big Society thinking. The Government has stressed the importance of faith-based providers of public services and their crucial position in the Big Society agenda. Faith groups are held up as the emblematic example of the Big Society in practice.<sup>35</sup> But Conservative support for faith is based upon more than the instrumental capacity to deliver services. The Government also has sought to construct itself as the defender of faiths as distinct from the alternative (Labour) hostility and intolerance towards religion.

This position has been most vehemently articulated by Baroness Warsi who argues, echoing arguments that have been made particularly strongly by evangelical Christian groups in defence of religious freedom, that religion has been unfairly relegated to the private sphere.<sup>36</sup> This is blamed on ‘militant secularisation’<sup>37</sup> and ‘secular fundamentalists’.<sup>38</sup> It is attributed (inaccurately, I would suggest) to the previous Labour Government. Bringing religion back – unapologetically – into the

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<sup>35</sup> Kettell (n.1); Morris (n.1).

<sup>36</sup> See Baroness Warsi, ‘Britain must be a country where people can be proud of their religion’ *The Telegraph* (London, 28 October 2011) available at [www.telegraph.co.uk/news/religion/8853108/Britain-must-be-a-country-where-people-can-be-proud-of-their-religion.html](http://www.telegraph.co.uk/news/religion/8853108/Britain-must-be-a-country-where-people-can-be-proud-of-their-religion.html) (accessed 20 August 2014); Warsi (n.5).

<sup>37</sup> Warsi (n.5).

<sup>38</sup> Warsi (n.36).

public sphere will enable faith communities to play their full part in the Big Society. Warsi argues that the impact will be substantial because ‘religious people contribute more to society than the non-religious’.<sup>39</sup> Faith gives rise to a charitable mindset and a less atomistic and passive view of citizenship, which are conditions for a flourishing Big Society.

This discourse is connected to somewhat contradictory claims about citizenship and identity. First, it is unclear whether faith produces active citizenship or whether what is really of value is Christianity. While Baroness Warsi is careful to emphasize that ‘all the major religions ask their followers to stand up for their neighbours’, she simultaneously asserts the Christian heritage of Britain (and Europe): ‘I will be arguing for Europe to become more confident and more comfortable in its Christianity. The point is this: the societies we live in, the cultures we have created, the values we hold and the things we fight for all stem from centuries of discussion, dissent and belief in Christianity’.<sup>40</sup> Secularism has attempted to deny these ‘facts’.

The other contradiction within Conservatism concerns the role of rights discourse. The Big Society, in part, is designed to remedy a growing atomization of society, which is closely connected to the exponential growth of human rights. The

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<sup>39</sup> *Ibid.*  
<sup>40</sup> Warsi (n.5).

claims of minorities to rights—supported by sympathetic secularists—have led to the ‘closeting’ of religion so as not to offend sensibilities. Consequently, the good that could be performed by those of faith in the public sphere is lost because of their relegation to the private by a secularism that ‘demonstrates similar traits to totalitarian regimes’.<sup>41</sup> By unshackling faith groups, society will be enriched by acts of citizenship which will nourish the Big Society. Of course, what is ignored in this narrative is the readiness of individuals of faith to turn to human rights in defense of their presence in the public sphere.<sup>42</sup>

In sum, the Labour Government recognized the instrumental usefulness of faith groups both to the delivery of services and in advancing a Christian communitarian ethos (and perhaps a multicultural public sphere). Conservative support of faith communities is different. Faith communities—like other civil society actors—are to be freed from a servile relationship to the state. They are not only particularly well placed to deliver services. Their very ethos (or perhaps more accurately that of Christianity) makes their members ideal active citizens. This will lead to diversity and innovation in service delivery and, although this is not explicit, it is particularly useful in an age of state austerity. As well, this policy reverses anti-

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<sup>41</sup> *Ibid.*

<sup>42</sup> Hunt (n.25), 297.

religious prejudice against faith based groups. Such prejudice is grounded in fears that service delivery is a cover for the promotion of religion; that service delivery will favour those of the same faith; and that the method of service delivery will be informed by religious beliefs.<sup>43</sup> Within Big Society rhetoric, these fears are seen as misplaced and are designed to undermine the results which faith communities can achieve. The job of government is to facilitate civil society actors—such as faith communities—rather than to stand in their way.

The Government's strategy was stated clearly in the Open Public Services White Paper: 'Wherever possible, we will increase choice by giving people direct control over the services they use. And where it is not possible to give people direct control, elected representatives should also have more choice about who provides services and how'.<sup>44</sup> This aim is to be advanced along three axes: individual services, neighbourhood services, and commissioned services. First, if feasible, individual service users should be provided with choice as to their service providers. The

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<sup>43</sup> Hannah Furness, 'Faith groups "prevented from doing vital community work by anti-religious prejudice"' *The Telegraph* (London, 20 March 2012) available at [www.telegraph.co.uk/news/religion/9156381/Faith-groups-prevented-from-doing-vital-community-work-by-anti-religious-prejudice.html](http://www.telegraph.co.uk/news/religion/9156381/Faith-groups-prevented-from-doing-vital-community-work-by-anti-religious-prejudice.html) (accessed 20 August 2014).

<sup>44</sup> Section 1.12. The White Paper, which sets out the Government's vision for public service reform, is available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/255288/OpenPublicServices-WhitePaper.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255288/OpenPublicServices-WhitePaper.pdf) (accessed 20 August 2014).



empowerment of individuals is designed to enhance competition and improve the quality of services. It is delivered through a range of mechanisms: ‘direct cash payments to individuals, personal budgets, vouchers, tariff payments, loans and entitlements’.<sup>45</sup> This is becoming an increasingly important (and controversial) feature of adult care provision, education, child and family services, health, and social housing.<sup>46</sup> Individual choice helps justify a role for a wide range of faith based and other charitable (as well as for profit) providers of services. The individual has the ability—if there is genuine choice and adequate information—to find the service most suited to her needs, outlook and orientation.

Second, the Government supports neighbourhood services when they are used collectively. Greater community input and control is promoted, particularly through the provisions of the Localism Act, which introduced the community right to buy, community right to build, community right to buy assets of value, and the community right to challenge.<sup>47</sup> For example, the right to challenge is intended to lead to greater diversity: ‘the right enables voluntary and community bodies, parish councils and local authority employees to express an interest in running a local authority service,

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<sup>45</sup> *Ibid.*, Section 3.2.

<sup>46</sup> *Ibid.*, Section 3.3.

<sup>47</sup> *Ibid.*, Section 4.2.

which may trigger a procurement exercise for the service'.<sup>48</sup> It has been argued that faith based community groups are well positioned to take advantage of this right (although the evidence of this is patchy). Should they then be awarded the right to provide the service, some fear that delivery could be shaped by religious doctrine and ethos.<sup>49</sup> This is a central issue of this article, to which I will return.

The third policy which furthers open public services is commissioning by central and local government. Here again, the Open Public Services White Paper focuses on devolution, innovation, diversity, and payment by results: 'the principles of open public services will switch the default from one where the state provides the service itself to one where the state commissions the service from a range of diverse providers ... [I]t encourages new, innovative providers to compete for contracts, allows payment by results and/or incentives for supporting particular social groups to be built into contracts, and enables the disaggregation of services into specialist functions'.<sup>50</sup>

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<sup>48</sup> National Association for Voluntary and Community Action (NAVCA), *The Localism Bill* available at [www.navca.org.uk/existing/NR/rdonlyres/fla19ea0-f410-401c-a386-a374aa8e5aa6/0/localismbillmpsbriefing.pdf](http://www.navca.org.uk/existing/NR/rdonlyres/fla19ea0-f410-401c-a386-a374aa8e5aa6/0/localismbillmpsbriefing.pdf) (accessed 20 August 2014).

<sup>49</sup> Kettell (n.1), 291.

<sup>50</sup> Section 5.2.

As well, the Government has sought to enhance the ability of social enterprises to engage in procurement exercises through the Public Services (Social Value) Act 2012, under which the ‘social value’ element has been made explicit in procurement decisions by local authorities. This is designed to strengthen the position of social enterprises when engaged in the bidding process.

Local authorities in England have been experimenting with the commissioning of services. For example, ‘co-operative commissioning’ in the London Borough of Lambeth is based on a partnership model between the Authority and local people in determining the most appropriate services for users.<sup>51</sup> There are also examples of local services having been turned over to faith groups. One of the more controversial was Richmond Borough Council's decision in 2011 to transfer a contract for teenage counseling from a secular group to the Catholic Children’s Society. This raised particular concerns about a religious ethos in service delivery.<sup>52</sup>

### **III. Faith Based Services and the Public Sphere**

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<sup>51</sup> London Borough of Lambeth, *Community Plan 2013-2016* available at [www.lambeth.gov.uk/sites/default/files/ec-community-plan-2013-16.pdf](http://www.lambeth.gov.uk/sites/default/files/ec-community-plan-2013-16.pdf) (accessed 20 August 2014).

<sup>52</sup> British Humanist Association, ‘Concerns raised about faith-based public services’ (30 August 2012) available at <https://humanism.org.uk/2012/08/30/news-1103/> (accessed 20 August 2014).

The legal implications of the new politics of service delivery is well illustrated by the clash between faith based provision and the principle of non-discrimination on the basis of sexual orientation: *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales*.<sup>53</sup> The *Catholic Care* case in some respects may be unique to its facts, but it nevertheless raises important questions for the Big Society.

The starting point is the law of charities and its intersection with equality law. Charities must comply with the ‘public benefit’ test, which has been given a statutory footing in the Charities Act 2011. The common law presumption that a charitable trust for the advancement of religion is for the public benefit has been displaced by a statutory list of charitable purposes, which includes ‘the advancement of religion’, but not a presumption.<sup>54</sup> Discrimination between potential beneficiaries has never precluded a finding of public benefit when a charity is for the advancement of

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<sup>53</sup> [2010] EWHC 520 (Ch); affd [2011] UKFTT B1 (GRC); affd [2012] UKUT 395 (TCC). The procedural history of this case is complex. It includes an earlier decision of the Charities Commission and successful appeal by Catholic Care to the High Court: *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales* [2010] EWHC 520 (Ch).

<sup>54</sup> Debra Morris, ‘Charities and the Modern Equality Framework – Heading for a Collision?’ (2012) 65 *Current Legal Problems* 295, 298.

religion. To suggest otherwise could undermine the object of the charity, which may be to benefit a particular faith community.<sup>55</sup>

A more difficult scenario is where the beneficiaries are restricted in a manner that appears unrelated to the objects of the charity. The situations in which this arises may be quite benign or, as in an infamous case, a direct product of racial or religious discrimination.<sup>56</sup> While courts across common law jurisdictions have employed various devices to eliminate unacceptable forms of beneficiary discrimination (such as *cy-pres* doctrine, finding a ‘public policy’ against discrimination, or the very specific statutory provision of the Race Relations Act 1976) it has never been held to negate an original finding of public benefit.<sup>57</sup>

This question may well have been superseded by the application of the Equality Act 2010. The Act includes a specific ‘charities exception’ in s 193, which governs the circumstances under which charities can ‘discriminate’ in terms of beneficiaries. Pursuant to ss 1, the restriction of benefits to persons who share a ‘protected characteristic’ is allowed provided that (a) ‘the person acts in pursuance of a charitable instrument’ and also, under (b), that the provision of benefits complies

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<sup>55</sup> *Ibid.*, 302.

<sup>56</sup> See eg *Re Dominion Students' Hall Trust* [1947] 1 Ch 183.

<sup>57</sup> Morris (n.54), 305-306.

with subsection 2. That subsection states that the provision of such restricted beneficiaries must be *either* (a) ‘a proportionate means of achieving a legitimate aim’ *or* (b) ‘for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic’. Although it may be theoretically possible to imagine circumstances in which the application of the public benefit test and the s 193 analysis lead to different outcomes, in practice the two inquiries will almost certainly reach the same result.<sup>58</sup> In any event, it suggests an approach through which the tenets of charities law and the well established principle of proportionality in equalities law are assimilated. It also underscores that beneficiary discrimination does not disappear simply because of the requirements of anti-discrimination law.

This is illustrated by *Catholic Care*, which directly raises the conflict between adherence to faith and non-discrimination on the basis of sexual orientation.<sup>59</sup> This high profile controversy concerned a charitable company which provided adoption services funded by both local authorities and charitable giving raised by the Roman Catholic Church. Pursuant to the Equality Act 2010—which had provided a period of transition for agencies in this position—the provision of adoption services could no longer be restricted to heterosexual married couples. That restriction constitutes

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<sup>58</sup> *Ibid.*, 309-310.

<sup>59</sup> n.53.

discrimination on the basis of sexual orientation. This would force Catholic Care to stop providing adoption services since, according to it, to do so would run counter to the tenets of the Church. The consequence, according to Catholic Care, would be the loss of a valuable service which provided adoption services for particularly hard to place children.<sup>60</sup>

In order to avoid this impact, Catholic Care sought to rely upon the charities exception. To repeat, this requires, first, that the action in question is taken pursuant to the charitable instrument. On these facts, this was the adoption agency's memorandum of association. It did not contain provisions which could be relied upon to limit services on the basis of sexual orientation. Therefore, Catholic Care sought to revise its objects clause to include provisions which made explicit that (amongst other things), 'the Charity shall only provide adoption services to heterosexuals and such services to heterosexuals will only be provided in accordance with the tenets of the Church'.<sup>61</sup>

The amendment of the objects clause of a charity requires the consent of the Charity Commission. The Commission refused its consent, holding that objective justification under the charities exception was lacking. An appeal to the First Tier

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<sup>60</sup> *Catholic Care* (2012, n.53), [12].

<sup>61</sup> *Ibid.*, [10].

Tribunal (FTT) was dismissed. A further appeal to the Upper Tribunal (Tax and Chancery) was dismissed. For my purposes, the reasons of Sales J in the Upper Tribunal provide a valuable illumination of the issues central to this article.<sup>62</sup>

Sales J held that, in interpreting s 193, Article 14 of the European Convention on Human Rights provided a ‘powerful analogy’.<sup>63</sup> That analysis begins with the question whether there is a legitimate aim; if so, whether it could be achieved by the method proposed; and, finally, ‘whether the discrimination on ground of sexual orientation proposed by the Charity would constitute a proportionate means of achieving’ it.<sup>64</sup> Sales J dismissed the appeal largely because he found no compelling evidence of a ‘realistic prospect of increasing adoption placements if the Charity were permitted to do as it wished’.<sup>65</sup> However, his reasoning also suggests that a proportionality analysis will *not* necessarily prevent faith groups from acting in a discriminatory fashion.

In the judgment, Sales J first held that availability of other services open to the individual could not in itself justify discrimination. Nevertheless, he also recognized that ‘if the Charity could establish that by discriminating against homosexuals it could

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<sup>62</sup> *Catholic Care* (2012, n.53).

<sup>63</sup> *Ibid.*, [13].

<sup>64</sup> *Ibid.*, [21].

<sup>65</sup> *Ibid.*, [25].



materially help children in need of adoption (as it sought to argue), I think it would be relevant to the question whether that discrimination was justified that homosexuals would have adoption services readily available to them from other sources, since that would tend to reduce the detrimental impact on them flowing from such discrimination as compared to a situation in which they might be cut out from receiving adoption services altogether'.<sup>66</sup>

Second, Sales J held that 'prejudices about or negative attitudes towards homosexuals', *could* be relevant to the proportionality analysis if 'some real detriment to the general public interest (of sufficient weight) might arise unless a practice discriminating against them were adopted'.<sup>67</sup> For example, if it could be demonstrated that donors to a charity would be deterred from making donations, which in turn could be shown to undermine successful adoptions, that could be material.<sup>68</sup> This would not be an inappropriate legal recognition of prejudice contrary to public policy: 'donors motivated by respect for Catholic doctrine to have a preference to support adoption within a traditional family structure cannot be equated with racist bigots ... Such

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<sup>66</sup> *Ibid.*, [28].

<sup>67</sup> *Ibid.*, [38].

<sup>68</sup> *Ibid.*, [44].

views have a legitimate place in a pluralist, tolerant and broadminded society'.<sup>69</sup> Nevertheless, Sales J added the caveat that 'convincing and weighty reasons' would be required.<sup>70</sup> On these facts, Catholic Care failed to establish that there was a 'material probability' that adoptions would be increased by its work.<sup>71</sup> But the determination of objective justification might have been different had Catholic Care shown that it was 'likely that its adoption service would remain closed (or even that there is a real possibility of that happening)'.<sup>72</sup>

Finally, the fact that same sex couples would have access to other adoption services, while it would reduce the detrimental impact upon them, 'did not remove the harm that would be caused to them through feeling that discrimination on grounds of sexual orientation was practised at some point in the adoption system nor would it remove the harm to the general social value of promotion of equality of treatment'.<sup>73</sup> Once again, this finding highlighted the need for 'weighty and convincing reasons' in order to provide the objective justification for discrimination, which had not been established.<sup>74</sup> Nevertheless, Sales J reiterated that 'a desire to promote traditional

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<sup>69</sup> *Ibid.*, [45].

<sup>70</sup> *Ibid.*, [48].

<sup>71</sup> *Ibid.*, [55].

<sup>72</sup> *Ibid.*, [63].

<sup>73</sup> *Ibid.*, [66].

<sup>74</sup> *Ibid.*

family life is a legitimate point of view in a pluralist democratic society' which deserved respect.<sup>75</sup>

I would argue that Sales J's reasons are ambiguous in terms of the delivery of services by faith communities. On the one hand, he upheld the determination of the Charity Commission that an amendment to the objects of the charity, which would lead to discrimination based on sexual orientation, should not be granted. Catholic Care failed to satisfy the 'weighty' burden of demonstrating that this was a proportionate measure to achieve what was recognized as a legitimate charitable aim.

But the failure to satisfy that burden was significantly determined by the particular facts, in terms of the way in which adoption provision is organized locally through voluntary agencies. An agency is paid an 'inter-agency fee' of about £24,000 for a placement and it was found by the FTT that there was 'a surplus of potential adoptive parents on the books of voluntary adoption agencies, because local authorities did not seek to tap into and use their full capacity'.<sup>76</sup> Thus, the argument that the withdrawal of Catholic Care from adoption activity would undermine the aim of placing children was factually unsustainable. However, Sales J noted that the inter-agency fee did not fully cover the costs of Catholic Care in arranging an adoption,

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<sup>75</sup> *Ibid.*, [67].

<sup>76</sup> *Catholic Care* (2011, n.53), [18].

‘and therefore would have to be supplemented at the rate of about £13,000 per placement by charitable fundraising by the Charity relying on its links with the Roman Catholic Church’.<sup>77</sup>

The fact that local authority funding does not cover the cost of the voluntary sector provider is far from unique to this case. This can create its own difficulties in terms of charities law for trustees. For my purposes, it highlights how donors’ desire to support ‘traditional family life’ could provide support for a policy of discrimination in service provision pursuant to s 193 (and Article 14). The failure to discriminate would lead to a diminution in charitable giving and undermine the service. Thus, I submit that, as a result of *Catholic Care*, the door is *not* firmly closed to upholding discrimination based on sexual orientation for services provided by the faith based charitable sector. Of particular relevance likely will be whether lesbians and gay men had access to alternative providers. The discriminatory mindset of the donors—at least in the case sexual orientation—is a legitimate factor to be considered when determining justification.

On the other hand, *Catholic Care* could be read as unique to its facts, and discrimination *was* found to be disproportionate. Moreover, Sales J emphasized the

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<sup>77</sup> *Catholic Care* (2012, n.53), [16].

need for ‘particularly convincing and weighty reasons’<sup>78</sup> and that this was a ‘heavy onus’.<sup>79</sup> Furthermore, the failure to satisfy the proportionality test presumably would mean that the charity would find it difficult to satisfy the ‘public benefit’ requirement. However, Sales J also made clear that tests which require a charity to show that voluntary income ‘would inevitably be lost’ and that termination of the service ‘was the inevitable consequence’ would be too strict.<sup>80</sup> Instead, ‘it would ... be relevant if the Charity could show that it is likely that its adoption service would remain closed (or even that there is a real possibility of that happening), with it being recognised that the greater the probability that that might happen the stronger the Charity’s case on objective justification might become’.<sup>81</sup>

It could be argued that the *Catholic Care* problem is not one that should arise in practice in the provision of services on behalf of the state (in particular, local authorities) by faith communities or other bodies. Although a charity *may* not be subject to the duty on a ‘public authority’ under the Human Rights Act,<sup>82</sup> the Charity Commission most definitely is bound by the Act. Therefore, its determination of

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<sup>78</sup> *Ibid.*, [66].

<sup>79</sup> *Ibid.*, [58].

<sup>80</sup> *Ibid.*, [63].

<sup>81</sup> *Ibid.*

<sup>82</sup> Dunn (n.11), 267.

charitable status will need to be HRA compliant. That could be of particular importance with respect to charities established with the primary object of service delivery.<sup>83</sup> Second, *The Compact* between Government and civil society organizations outlines undertakings to which both have agreed in relation to the promotion of a fair and equal society.<sup>84</sup> Government promises to ‘to take practical action to eliminate unlawful discrimination, advance equality and to ensure a voice for under-represented and disadvantaged groups’.<sup>85</sup> Moreover, it acknowledges ‘that organisations representing specific disadvantaged or under-represented group(s) can help promote social and community cohesion and should have equal access to state funding’.<sup>86</sup> In the case of a faith community delivering services, it is not difficult to imagine situations in which a service aimed at a particular historically disadvantaged group could result in the exclusion (whether explicit or because its ethos makes potential users uncomfortable) of members of other historically disadvantaged groups. Adding to the complexity would be the experience of those who identify across historically disadvantaged groups, who could find that their service needs were unmet.

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<sup>83</sup> Morris (n.54), 328-329.

<sup>84</sup> Office for Civil Society, *The Compact* (2010) available at [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/214617/the\\_compact.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214617/the_compact.pdf) (accessed 20 August 2014).

<sup>85</sup> *Ibid.*, s 5.3.

<sup>86</sup> *Ibid.*, s 5.2.

*The Compact* contains further undertakings by civil society organizations: ‘if receiving funding from a government body, show how the value of the work can help that body deliver its public sector duties on promoting equality and tackling discrimination’,<sup>87</sup> and ‘take practical action, such as through funding bids, to eliminate unlawful discrimination, advance equality of opportunity and build stronger communities’.<sup>88</sup> Here again, these aims may suggest that service delivery needs to be genuinely open to all potential users. But they could equally be understood as ushering in a funding environment in which services are fragmented and targeted at particular communities of disadvantage, leading to concerns of balkanization.<sup>89</sup>

*The Compact* makes reference to the Public Sector Equality Duty, which arguably provides the strongest protection against discrimination in service provision. The duty requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity, and foster good relations between different people when carrying out their activities. It is debateable whether the duty

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<sup>87</sup> *Ibid.*, s 5.4.

<sup>88</sup> *Ibid.*, s 5.5.

<sup>89</sup> British Humanist Association, *Submission to the Public Administration Select Committee Inquiry on ‘Smaller Government: ‘Bigger Society’* available at <http://humanism.org.uk/wp-content/uploads/bha-submission-pasc-inquiry-big-society-final-03-11.pdf> (accessed 20 August 2014).

applies directly to charities carrying out a contract to deliver public services.<sup>90</sup>

However, it *does* apply to the decision by Government—central or local—to subcontract.<sup>91</sup> Debra Morris argues that the implications are highly significant. In her view, the duty requires that the public body ensures that the contracted out service does not involve unlawful discrimination and that public money ‘is used to promote equality of opportunity and good relations’.<sup>92</sup> In fact, there is concern about the Public Sector Equality Duty and its potential impact upon faith communities from amongst those who defend religious freedom.<sup>93</sup>

In the wake of *Catholic Care*, it is not entirely clear when discrimination is unlawful. Moreover, the promotion of good community relations is capable of competing interpretations. For example, Lucy Vickers suggests that, with the extension of the public sector duty to religion and belief under the Equality Act 2010, public authorities might prioritize the needs of faith based communities, which could

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<sup>90</sup> Morris (n.54), 329; see also James Gray, ‘Faith in the Big Society’ (2011) *New Humanist* available at <https://newhumanist.org.uk/2656/faith-in-the-big-society> (accessed 20 August 2014).

<sup>91</sup> Morris (n.54), 329-330.

<sup>92</sup> *Ibid.*, 329.

<sup>93</sup> Julian Rivers, ‘Promoting Religious Equality’ (2012) 1 *Oxford Journal of Law and Religion* 386.



have unintended consequences for the advancement of the principles of equality.<sup>94</sup> It has been argued that ‘authorities may feel under pressure to contract with religious groups in preference to inclusive secular groups if they exercise their new “right to bid”, in a mistaken attempt to meet the “needs” of faith groups’.<sup>95</sup> Government *has* made clear that delivery of public services by faith communities *cannot* be limited to members of that group or to those of faith generally.<sup>96</sup> This is a different scenario from faith based provision of social services financially supported by the state (such as care homes for the elderly). These services often are restricted to community members and might not be welcoming to same-sex couples.

Even less clear is the extent to which faith based, publically funded services can retain a distinctive faith based ethos. On the one hand, some argue that the ethos of faith can be a unique strength and one of the reasons behind creating diversity of provision.<sup>97</sup> The difficulty arises when faith manifests itself in ways which could be exclusionary. This is a variation of the problem of private and public—belief and

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<sup>94</sup> Lucy Vickers, ‘Promoting Equality or Fostering Resentment? The Public Sector Equality Duty and Religion and Belief’ (2011) 31 *Legal Studies* 135, 157.

<sup>95</sup> British Humanist Association (n.89).

<sup>96</sup> Charity Commission, *Equality Act Guidance for Charities: Restricting who can benefit from charities* available at [www.charitycommission.gov.uk/detailed-guidance/protecting-your-charity/equality-act-guidance-for-charities-restricting-who-can-benefit-from-charities/](http://www.charitycommission.gov.uk/detailed-guidance/protecting-your-charity/equality-act-guidance-for-charities-restricting-who-can-benefit-from-charities/) (accessed 20 August 2014).

<sup>97</sup> Kettell (n.1), 284-285.

action—which has proven troubling for law to accommodate in other contexts involving people of faith in the public sphere.<sup>98</sup> On this point, once again, supporters of the Big Society argue that faith can provide a much needed challenge to existing delivery models, leading to innovation and improved outcomes.<sup>99</sup>

However, the significance of a faith based ethos can be overstated. Research suggests that, in the case of faith organizations, ‘it seems that some of the larger public sector deliverers have professionalised themselves into separate space’,<sup>100</sup> making them quite different bodies from the faith groups from which they emanated. In terms of professional culture, they may find themselves far closer to the public sector which previously delivered the service. This raises the question as to whether the claimed benefits of contracting out of service delivery will materialize.<sup>101</sup>

In fact, faith based providers argue that they must 'secularize' (or, perhaps more accurately, de-Christianize) in order to obtain and manage public sector contracts.<sup>102</sup> This is necessary in order to overcome prejudice against them on the part

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<sup>98</sup> See Carl F Stychin, ‘Faith in the Future: Sexuality, Religion and the Public Sphere’ (2009) 29 *Oxford Journal of Legal Studies* 729.

<sup>99</sup> Annette (n.28); Kettell (n.1).

<sup>100</sup> Dinham (n.2), 136.

<sup>101</sup> Kettell (n.1), 286.

<sup>102</sup> Dinham (n.2), 137.

of local authorities, stemming from the fear of proselytism and lack of inclusivity.<sup>103</sup> Sarah Johnson has investigated this phenomenon in the context of services for homeless people.<sup>104</sup> She concludes that in many cases there has been a disassociation of service provision from faith. Moreover, the extent of the association to a faith group at times may be strategically determined: '[a] small proportion remain strongly linked with a faith community. ... Others, however, are now faith-based “in name only”, with their faith origins barely evident in palimpsest. A number of former FBOs now self-identify as “secular” and are publicly rebranding (by removing religious referents from their title and mission statement, for example) to disassociate themselves from formalized religion. ... It is very common for FBOs, together with some secular projects that grew out of faith initiatives, to emphasize or de-emphasize their project’s faith affiliation or history according to their audience: “playing it up” when seeking support from faith communities and “playing it down” when applying for public funding’.<sup>105</sup> Johnson also found that, in many cases, it is difficult for the service user to actually determine whether a provider is faith based: ‘only a very small minority of service users reported that they had ever been subjected to unwelcome

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<sup>103</sup> Furness (n.43).

<sup>104</sup> Sarah Johnson, ‘The Role of Faith-based Organizations in Service Provision for Homeless People’ in Linda Woodhead and Rebecca Catto (eds), *Religion and Change in Modern Britain* (Routledge 2012) 295.

<sup>105</sup> *Ibid.*, 296.

proselytism (“bible bashing”) by a faith-based service, and then never in a publicly funded project’.<sup>106</sup>

This observation raises a number of concerns. While it is reassuring that service users only infrequently reported ‘bible bashing’ (although ‘never’ would be more conclusive), there may be indirect ways of transmitting faith. The British Humanist Association, for example, has focused upon the transfer of the contract for teenage counseling to the Catholic Children’s Society by the Richmond Borough Council. It expresses concerns ‘at this organisation’s ability to provide information on contraception and unwanted pregnancies, and to meet the needs of clients suffering from homophobic bullying’.<sup>107</sup> This is the problem of the compatibility of religious doctrine with the full range of social problems and potential solutions.

Faith may also provide a particular interpretation of the desirable solutions to personal challenges which are rooted in personal transformation rather than in social structures. As I will argue in the next section, this is an issue in the American evangelical context, in which it is difficult to divorce some faith based services from

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<sup>106</sup> *Ibid.*, 297.

<sup>107</sup> British Humanist Association (n.52).

the antidote of accepting Jesus Christ as personal saviour.<sup>108</sup> This provides an extreme example of the difficulty of distinguishing public and private in service provision, although it seems not to be a significant feature in England. In fact, Johnson's research suggests, perhaps surprisingly to some, that 'FBOs typically eschew coercive or enforcement approaches, while secular agencies tend to be more sympathetic towards the "rehabilitative" measure promoted by central government'.<sup>109</sup>

A closely related concern is the extent to which state funded service provision by faith based providers can be separated from their other activities. Is it realistic to expect that the former can be secularized while the latter is explicitly religious? Although this may be a difficult exercise in line drawing, it is essential in order to maintain services that are truly *public*. Otherwise, 'a moral claim that conflicts with an essential public value' could be attributed to the state.<sup>110</sup> Examples can be devised in order to illuminate this problem: 'the Salvation Army's theological views, which includes a belief that homosexuality is immoral, should not categorically preclude its affiliated social service agencies from receiving government funds. However, if the

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<sup>108</sup> Robert J Wineburg, Brian L Coleman, Stephanie C Boddie, and Ram A Cnaan, 'Leveling the Playing Field: Epitomizing Devolution through Faith-Based Organizations' (2008) 35 *Journal of Sociology & Social Welfare* 17, 39.

<sup>109</sup> Johnson (n.104), 297.

<sup>110</sup> Robert K Vischer, *Conscience and the Common Good* (CUP 2010) 145.

Salvation Army were to operate an AIDS hospice in which residents were asked to repent from any homosexual conduct as part of making peace with God, the government would not be overreaching morally to deny funding to such a programme'.<sup>111</sup>

While such a demarcation is easy in theory, it may prove far more difficult in practice. On the one hand, we might ask whether the service user realistically can, or should be expected to, engage in a line drawing exercise. That is, unless the faith community 'rebrands' a service such that it is completely devoid of associations with faith, it may be unfair to expect the nonbelieving user to partake.

On the other hand, is it appropriate to expect this strict demarcation from faith communities? The Government's position is that proselytization is unacceptable but that 'it's perfectly reasonable for faith groups to be open about their religious motivation, or explain more about their faith to those who ask'.<sup>112</sup> Given that the Big Society presupposes that people of faith possess particularly well developed skills of active citizenship, it becomes difficult to then demand that those attributes are 'closeted' when delivering services. But faith communities *do* have a genuine choice

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<sup>111</sup> *Ibid.*

<sup>112</sup> Gray (n.90).

as to whether to pursue service delivery contracts and, once they do so, they ‘make themselves accountable to the collective norms pursued by the state, rather than the conscience-driven norms of their constituents’.<sup>113</sup> In response, however, we need to recall that the Big Society is founded on the value of pluralism, and questions the wisdom of a single set of norms propagated by the state.

For some faith based charities, there is justifiable scepticism as to their Big Society role. Having been lauded for their unique capacity to deliver services (and the Government’s agenda), they then may be required to eschew (in the public sphere) the very ethos which was supposed to make them valuable. There are also concerns regarding the capacity of faith groups to deliver; the extent to which public funding may hinder their ability to criticize government and to engage in advocacy; the need for professionalization and bureaucratization which can undermine a culture of volunteerism; and the creation of a culture of dependency on government contracts leading to mission drift (which may not even represent the full economic cost).<sup>114</sup> These are strong countervailing factors which may prompt many faith groups to avoid public service delivery.

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<sup>113</sup> Vischer (n.110), 145.

<sup>114</sup> See Dinham (n.2).

#### IV. Disentangling Choice: The Citizen as Consumer

In this section, I turn to the American experience of faith communities and public services. Although the specificity of the US Constitutional context must be acknowledged, recent American history provides valuable comparative insights. As has often been noted, the United States is paradoxical when it comes to faith. It is a highly religious society in which religion routinely enters the public sphere. But the constitutional separation of church and state has textured the ways in which faith traverses the public/private dichotomy. For example, there is a long tradition of the provision of services by faith groups. However, support for those services from state actors was constrained by the constitutional requirement for state neutrality in relation to religion.<sup>115</sup>

The extent to which the state can place burdens on the free exercise of religion consistently with the Establishment Clause was most famously articulated by the Supreme Court in *Sherbert v Verner*.<sup>116</sup> The *Sherbert* doctrine was significantly narrowed by the Court in *Employment Division, Department of Human Resources of*

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<sup>115</sup> *Ibid.*, 154-155.

<sup>116</sup> 374 US 398 (1963).



*Oregon v Smith*.<sup>117</sup> The majority upheld ‘neutral laws of general applicability’ which had an incidental impact on religion, even in the absence of a compelling state justification. The political fallout from *Smith* led to the enactment of the Religious Freedom Restoration Act, which restored the *Sherbert* standard with respect to federal law. The attempt at raising the standard with respect to state law was found to be unconstitutional. As a consequence of *Smith*, state anti-discrimination laws of general application which prohibit sexual orientation discrimination may prove more difficult to challenge as a violation of the free exercise of religion in terms of their impact upon faith based social service agencies. This issue arose in Massachusetts, where Catholic Charities was providing adoption services.<sup>118</sup> In that particular case, it has been argued that ‘if Catholic Charities were to be given a statutory exception to the anti-discrimination statute, it is likely that the Massachusetts courts would find such an exception to be a violation of the equal protection conferred by the Massachusetts State Constitution’.<sup>119</sup>

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<sup>117</sup> 494 US 872 (1990).

<sup>118</sup> See Colleen Theresa Rutledge, ‘Caught in the Crossfire: How Catholic Charities of Boston was Victim to the Clash Between Gay Rights and Religious Freedom’ (2008) 15 *Duke Journal of Gender, Law and Policy* 297.

<sup>119</sup> *Ibid.*, 304-305. This field is subject to ongoing legal development in the United States. Most recently, in *Burwell v Hobby Lobby Stores, Inc* 573 US \_\_ (2014), 134 S.Ct. 2751, WL 2921709, 2014 US Lexis 4505, a majority of the Supreme Court held that closely held for profit corporations are ‘persons’ for the purposes of the Religious Freedom Restoration Act. This result allows them to make a

Limitations on religious freedom also have been upheld with respect to the ability of the state to determine charitable status and thereby preclude the claiming of tax exempt status for organizations which violate ‘public policy’. In *Bob Jones University v United States*,<sup>120</sup> the Supreme Court famously upheld the determination by the Internal Revenue Service that Bob Jones University—a faith based institution—be denied charitable status. Its (faith based) rule against interracial dating on campus was found to be contrary to a fundamental public policy against racial discrimination firmly embedded in the nation’s history. Similarly, in *Christian Legal Society v Martinez*,<sup>121</sup> the Supreme Court upheld a public university’s choice not to exempt a Christian student group from the university’s antidiscrimination policy. This has been interpreted as a ‘subsidy case’ in which the state may choose to ‘decline to support the disfavoured conduct’ without contravening the right to free exercise of religion.<sup>122</sup> Linda McClain interprets these cases as upholding an overriding unitary (rather than pluralistic) conception of the public interest, particularly when it touches

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religious objection to a federal requirement that employers provide health insurance that includes contraceptive coverage to employees.

<sup>120</sup> 461 US 574 (1983).

<sup>121</sup> 561 US \_\_ (2010), 130 S.Ct. 2971.

<sup>122</sup> Linda C McClain, ‘Religious and Political Virtues and Values in Congruence or Conflict?: On *Smith*, *Bob Jones University*, and *Christian Legal Society*’ (2011) 32 *Cardozo Law Review* 1959, 1991-1993.

upon equality.<sup>123</sup> It is the same tension which underscores the problematic relationship between equality and diversity in the Big Society.

While American constitutional interpretation has relaxed the extent to which the state is prevented from burdening the free exercise of religion, political developments have expanded the role of faith communities in the delivery of services. On this point, constitutional interpretation has proven to be permissive regarding the ability of the state to devolve service provision to religious groups without running afoul of the Constitution.

These developments form part of a historical trajectory in which the traditionally important role of churches in the provision of charity was displaced by government beginning in the 1940s. Parallel processes of ‘regulation and professionalisation’ had the combined effect of marginalizing non-governmental providers in ways similar to what occurred in the United Kingdom with the growth of the welfare state.<sup>124</sup> At the same time, the tradition of state support for private provision is evidenced by the Hill-Burton Act which, in 1946, provided public funding for private hospitals ‘if they met conditions for public service, such as

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<sup>123</sup> *Ibid.*, 1993.

<sup>124</sup> Dinham (n.2), 154.

maintaining emergency rooms in which anyone could be treated'.<sup>125</sup> By the 1960s, those services which continued to be provided by faith communities largely had rebranded themselves as 'faith-affiliated', so as to ensure that any connection to their religious roots was not apparent to users.<sup>126</sup> The motivation was the continued receipt of public funding while 'relying on cheaper paraprofessional bureaucracies to deliver services'.<sup>127</sup>

The model of federal welfare delivery most associated with the Great Society of the Johnson administration saw its demise through a series of ideological developments in subsequent decades. The New Federalism agenda emerged under Nixon, with 'a plan to send federal tax revenue back to the states so states would have more discretionary money to address social concerns'.<sup>128</sup> This change was partnered with the 'devolution of service responsibility' under Reagan, under which a range of providers—both profit and not for profit—were encouraged to participate.<sup>129</sup> With

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<sup>125</sup> Stephen Edward McMillan, 'Faith-Based Social Services: From Communitarianism to Individualistic Values' (2011) 46 *Zygon* 482, 485.

<sup>126</sup> Dinham (n.2), 155.

<sup>127</sup> McMillan (n.125), 486.

<sup>128</sup> Wineburg, Coleman, Boddie and Cnaan (n.108), 19.

<sup>129</sup> *Ibid.*

time, this led to ‘government by proxy’, in which the state, rather than being the provider of services, became the purchaser from a range of sources.<sup>130</sup>

Despite the different political orientation, the Clinton administration advanced the same agenda with the welfare reform legislation of 1996. Famously, at this point the entitlement principle was broken and programme design was devolved to states and localities.<sup>131</sup> Less well known is the fact that, during Clinton’s presidency, Charitable Choice legislation was enacted. This law removed barriers to the provision of social services by *explicitly* faith based organizations as part of a devolutionary approach to government. Previously, it was assumed that public funding for faith based initiatives required that the religious character of the organization be ‘closeted’, so that it resembled a non-faith based provider: ‘the prevailing normative conditions for contracting with the government were that a faith-based organisation had to suppress its religious character by removing all religious symbols from the room where service was provided; foregoing any religious practices or rituals (such as prayers at meals), accepting all clients, even those opposed to the beliefs of the providers; hiring staff that reflected society at large and not the organization’s spirit and belief system; adhering to government contract regulations that restrict the

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<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*, 24.

organization's religious expression; and incorporating separately as a ... nonprofit organization'.<sup>132</sup>

Charitable Choice is closely associated with George W Bush, along with his establishment of the White House Office of Faith-Based and Community Initiatives. By virtue of these developments, the requirement for the closeting of faith was largely removed. In addition, organizations can now hire and fire employees based on religious beliefs, which has been described as a 'radical retrenchment of public services into the arms of religion'.<sup>133</sup>

It is important to recognize that Charitable Choice has been used mostly by 'the larger and mostly Christian organisations with the organizational capacity to handle reporting and evaluation requirements' (such as the requirement that public money be used solely for the social services under contract and that the cost of religious activities must be covered by other sources of funding).<sup>134</sup> In this way, an attempt is made to maintain the separation of church and state. The result is that church affiliated agencies are able to compete in the market for social services 'from a

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<sup>132</sup> *Ibid.*, 29.

<sup>133</sup> McMillan (n.125), 487.

<sup>134</sup> Wineburg, Coleman, Boddie and Cnaan (n.108), 30.

privileged position' because of the backing of the church, allowing them to act much like subsidiary corporations.<sup>135</sup>

Allowing a faith based ethos to permeate the provision of social services not surprisingly troubles those who favour the traditional American constitutional separation of church and state.<sup>136</sup> Charitable Choice comes dangerously close, in this view, to an endorsement of religion by the state and it forces faith on citizens receiving public services. For supporters of Charitable Choice, these concerns are misplaced. They argue that diversity in services will produce better results.<sup>137</sup> Choice should include explicitly faith based provision which, it is argued, has a track record of success, particularly in difficult cases.<sup>138</sup> To require that faith is closeted risks losing the advantages of that service, rendering it instead a carbon copy of the existing (failing) model. Concerns regarding the forcing of faith on service users are invalid, provided that a diversity of services is available from which the citizen is able to exercise genuine choice. In this way, a model of citizenship is grounded in consumer choice rather than in the shared experience of universal service delivery.

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<sup>135</sup> McMillan (n.125), 487-489.

<sup>136</sup> Kathleen M Sullivan, 'The New Religion and the Constitution' (2003) 116 *Harvard Law Review* 1397; Linda C McClain, 'Unleashing or Harnessing "Armies of Compassion"? Reflections on the Faith-Based Initiative' (2007-2008) 39 *Loyola University Chicago Law Journal* 361.

<sup>137</sup> See Dinham (n.2), 156.

<sup>138</sup> David Cole, 'Faith and Funding: Toward an Expressivist Model of the Establishment Clause' (2002) 75 *Southern California Law Review* 559, 562.

But if we take the claimed ability of faith groups to solve social problems seriously, we must answer more challenging questions about their appropriate role in service delivery. What makes their methods successful? For some, the ability of faith to solve problems is centred on the power of accepting Jesus Christ as personal saviour. But this antidote inevitably has the consequence that *social* problems become *individualized* and resolvable primarily through the very personal act of religious rebirth.<sup>139</sup> It also suggests, if true, that to require the closeting of faith definitely will undermine the efficacy of the service. Most importantly, it should make us sceptical as to whether faith based services realistically can be made to appear secular.<sup>140</sup>

This also raises the issue whether the state should be supporting personal religious conversion and the atonement of sin, especially in a society in which religious freedom and anti-establishment are constitutionally fundamental.<sup>141</sup> It is hardly surprising that ‘faith-intensive social services’ were strongly endorsed by George W Bush, given the support which he himself famously received from the

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<sup>139</sup> *Ibid.*, 576.

<sup>140</sup> McClain (n.136), 392.

<sup>141</sup> *Ibid.*, 419.



power of personal faith to treat his alcoholism.<sup>142</sup>

The constitutionality of faith based initiatives began to be clarified by the Supreme Court's decision in *Bowen v Kendrick*,<sup>143</sup> the case which opened the door to Charitable Choice. At issue was the constitutionality of the Adolescent Family Life Act, which made government grants available to non-profit organizations—including faith communities—for teenage sex education. The Court ruled that so long as grants were not aimed at ‘pervasively sectarian’ groups, government funding of religious organizations was permissible in order to combat social problems.<sup>144</sup>

The law was further clarified by the Supreme Court in *Zelman v Simmons-Harris*,<sup>145</sup> which concerned a controversial programme to combat the allegedly poor performance of the public school system in Cleveland, Ohio. A Federal District Court order had placed the Cleveland School District under the control of the state legislature because of a ‘crisis of magnitude’ around educational standards.<sup>146</sup>

Amongst the initiatives that the state legislature enacted was the Pilot Project

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<sup>142</sup> *Ibid.*, 377.

<sup>143</sup> 487 US 589 (1988).

<sup>144</sup> *Ibid.*, 608. For a detailed discussion of this jurisprudence, see Michele Estrin Gilman, ‘Fighting Poverty with Faith: Reflections on Ten Years of Charitable Choice’ (2007) 10 *Journal of Gender, Race and Justice* 395.

<sup>145</sup> 536 US 639 (2002).

<sup>146</sup> *Ibid.*, 644.

Scholarship Program. This provided students with financial assistance through the provision of vouchers ‘to attend a participating public or private school of their parent’s choosing and tutorial aid for students who chose to remain enrolled in public school’.<sup>147</sup> Private schools were required under the program ‘not to discriminate on the basis of race, religion, or ethnic background, or to “advocate or foster unlawful behavior or to teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion”’.<sup>148</sup> The vast majority of vouchers were directed by parents to religious schools, leading to the constitutional question whether the program violated the Establishment Clause of the First Amendment.

Five members of the Supreme Court upheld the voucher scheme. Writing for the narrow majority, Chief Justice Rehnquist reasoned that the program had a ‘valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system’, and the constitutional issue was whether the program ‘has the forbidden “effect” of advancing or inhibiting religion’.<sup>149</sup> Crucial to the holding that there was no unlawful effect was the fact that ‘government aid reaches religious schools only as a result of the genuine and independent choices of

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<sup>147</sup> *Ibid.*, 645.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*, 649.

private individuals’.<sup>150</sup> Although the majority of participating private schools had a religious character, this did not undermine the genuine choice which had been granted to parents. For the majority, it is choice which provides the necessary buffer between church and state.

By contrast, the dissenting judgment of Justice Souter interpreted choice in a more nuanced manner. He found it particularly significant that ‘96.6% of all voucher recipients go to religious schools’, suggesting that the only realistic alternative to the public school system was faith based.<sup>151</sup> If ‘the criterion is one of genuinely free choice on the parts of the private individuals who choose’, then this program failed, even without an intent on the part of the state to channel public money into religious schools.<sup>152</sup> Moreover, the dissent expressed broader concerns about programs that provide indirect aid to religion. Justice Souter highlighted the dangers of reliance on state funds and the potential for ‘friction’ between religious communities in competition for funding; and the potential disenchantment of ‘taxpayers who take their liberty of conscience seriously’.<sup>153</sup>

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<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.*, 703.

<sup>152</sup> *Ibid.*, 707.

<sup>153</sup> *Ibid.*, 715.

In a separate dissenting judgment, Justice Breyer focused upon the importance of primary school education and its potential as a site for religious indoctrination. He concluded that this program could lead to ‘social division’, and he explicitly mentioned the status of religious minorities as well as those opposed to religious education.<sup>154</sup> For Justice Breyer, this ‘entanglement’ undermined the important role of the Religion Clauses of the First Amendment in protecting against ‘religious strife’.<sup>155</sup> He contrasted the American separation of church and state in the context of public education with the willingness of other countries, such as the United Kingdom, to provide state funding for religious schools. Justice Breyer’s analysis adopts an understanding of citizenship that depends upon a shared, unitary, neo-republican, quintessentially American space of public education. Moreover, the valuable autonomy of the ‘partial publics’ that are faith communities are best protected by remaining free of the constraints which will result from dependency on the state.<sup>156</sup>

In sum, the boundary between church and state in the context of public services in the United States has become increasingly blurred. The model of social

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<sup>154</sup> *Ibid.*, 728.

<sup>155</sup> *Ibid.*, 725.

<sup>156</sup> Sullivan (n.136), 1397.

citizenship associated with the Great Society of the 1960s has been fragmented by the politics of the New Federalism; the ideological repudiation of welfare entitlement; and the promotion of diversity in service provision including by faith communities. These important political developments have been supported to some degree by judicial interpretation of the Religion Clauses, with a focus on consumer choice as the key determinant of the legality of state funding. Furthermore, as evidenced by the majority in *Zelman*, choice has been understood formalistically. By viewing the citizen as the intermediary and characterizing her position in terms of a choice as to how to spend her vouchers, the consumer becomes the constitutional buffer. This enables faith communities to legally participate in public service provision and to maintain a faith based ethos while doing so. Of course, the point at which the nexus between government and faith becomes too direct and unmediated remains to be resolved in individual cases.<sup>157</sup> It should come as no surprise that these developments continue to give rise to both debate and litigation.

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<sup>157</sup> See eg *Lown v Salvation Army, Inc.*, 393 F. Supp. 2d 223 (SDNY 2005) [held that the state was not responsible for the conduct of the Salvation Army in delivering a service, despite the fact that the program being administered by the Salvation Army received ninety percent of its funds from government contracts]. A major practical difficulty in this area is the problem of standing to bring constitutional challenges against faith based initiatives, particularly after the US Supreme Court decision in *Hein v Freedom from Religion Foundation, Inc.*, 551 US 587 (2007). For a discussion of the standing problem, see Mark C Rahdert, 'Forks Taken and Roads Not Taken: Standing to Challenge Faith-Based Spending' (2011) 32 *Cardozo Law Review* 1009.

## **V. Privatization, Public Values and the Politics of Pluralism**

The American experience of faith based social services provides a valuable study.

Although the limits of comparative analysis, particularly with respect to constitutional issues, need to be kept firmly in mind, the insights are wide ranging and touch upon fundamental questions of liberalism, pluralism, and citizenship.

For proponents of the current American approach, the relaxation of the boundary between church and state is welcomed on the basis of innovation, devolution, pluralism, efficiency, and choice. Evidence is amassed to suggest that state delivery can only be improved by welcoming diverse new actors into the sector including faith based participants with their proven track record. This is a model characterized by partnerships and participation. The citizen not only makes choices as to service provider. As an active consumer, she also practices citizenship through participation in delivery. Rather than a single public sphere in which the citizen receives services from the state, we should conceive of multiple public spheres which will enhance social cohesion. With proper oversight and conditions, the citizen can be assured that standards will be maintained while choice and participation will be enhanced.

For opponents, the benefits of privatization are disputed. First, arguments regarding service quality and innovation are challenged on empirical grounds.<sup>158</sup> To what extent, it is asked, can the benefits that are attributed to small scale, civil society organizations be maintained when the state contracts with private agencies? In fact, large scale, often bureaucratic and professionalized (probably for profit) organizations will be the main beneficiaries.<sup>159</sup> Rather than fostering innovation, these agencies may face the same difficulties that are attributed to the state. As well, to the extent that agencies in receipt of state funds are obligated to separate their faith based activities from their state funded service provision (and the degree to which that separation is enforced may be questionable), the benefits attributed to faith based provision may be undermined. Critics also argue that the maintenance of standards (and equality between citizens) in a devolved model is more difficult in practice than advocates suggest, because service provision becomes fragmented across a wide range of providers in the profit and not for profit sectors.<sup>160</sup> Rather than providing the utopia of choice, the reality may be a patchwork of services in which gaps and unevenness increasingly appear. For example, the impact of choice on perceived ‘failing’ schools

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<sup>158</sup> Kettell (n.1), 291.

<sup>159</sup> Dinham (n.2), 147.

<sup>160</sup> Kettell (n.1), 291.

(and their remaining students) deserves close scrutiny. As a consequence, the citizen is at the mercy of chance. More perniciously, choice can depend upon whether the citizen's particular circumstances present challenges which are not appealing (or cost effective) to providers.

The critique of faith based services extends beyond the empirical to the normative. For critics, a pluralistic model of services contains within it the seeds of social division and exclusion. Consumer choice is at the price of a unitary sphere of shared citizenship based on public services. That public sphere is inevitably undermined by programs such as Charitable Choice, leaving social citizenship compromised. The state, in this narrative, becomes an 'amoral shell' and the idea of a shared experience of 'belonging' is a fiction.<sup>161</sup> In response, however, it is claimed that mechanisms can be devised by which 'public values', such as equality, can be enshrined within a devolved model of service delivery. This might include agreed minimum standards and a common ethos of service. In other words, pluralism does not necessarily require the abandonment of commonality, and the state has a crucial

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<sup>161</sup> Vischer (n.110), 146.



role in ensuring both genuine choice *and* the protection of core ‘public values’.<sup>162</sup>

This position has been vigorously advocated by Martha Minow, who favours what she calls ‘nontoxic pluralism’ which ‘can encourage virtues of participation, self-governance, mutual aid, and care for others, while allowing freedom from the controlling force of a powerful government’.<sup>163</sup> Nontoxicity, she argues, requires that groups must be willing to support those ‘public norms’ and values which we identify with the public sphere, including non-discrimination and the opportunity for group members to embrace multiple identities and to exit the group.<sup>164</sup> These are the characteristics which make a group nontoxic. Thus, it is not just choice that protects the citizen but also the requirement to comply with fundamental public values.

Critics also argue that the assumption that privatized public services promote pluralism and diversity is far from proven. The American experience suggests that only a narrow range of organized faith groups have taken advantage of the opportunities arising from Charitable Choice, namely, those with the infrastructure

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<sup>162</sup> Martha Minow, ‘Public and Private Partnerships: Accounting for the New Religion’ (2003) 116 *Harvard Law Review* 1229.

<sup>163</sup> *Ibid.*, 1245.

<sup>164</sup> *Ibid.*

and capacity to contract for services in what remains a regulated environment.<sup>165</sup> As a consequence, rather than generating diversity, Charitable Choice may have reinforced the hegemony of Christianity. The result—as predicted by Justice Breyer in *Zelman*—might well be an increase in social division and disharmony in a (not very plural) public sphere.

Another concern is the danger that essentialized communities and identities will be reinforced by faith based provision. Diversity in services is sometimes justified in terms of tailoring provision to the particular needs of each social group. But this benefit can be disputed to the extent that conceiving of a service as provided to a community (rather than to individuals) can reinforce traditional hierarchies and power dynamics within those communities.<sup>166</sup> That is, existing leaders may be unilaterally articulating the needs of the wider group. As a consequence, citizen consumers can come to be viewed in terms of stereotypes even from within the communities to which they belong. The possibility of multiple identities and complex needs can be lost as the citizen is required to fit the particular identity to which service is targeted. The complexity of service needs resulting from intersectionality may not

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<sup>165</sup> Wineburg, Coleman, Boddie and Cnaan (n.108), 30.

<sup>166</sup> See Margaret Davies, ‘The Future of Secularism: A Critique’ in Nadirsyah Hosen and Richard Mohr (eds), *Law and Religion in Public Life* (Routledge 2011) 52.

be met when the provision of services to well defined groups becomes the basis for claiming that equality is advanced. As well, the possibility of 'escape' from constricting private communities into an overarching public sphere will be reduced. While Minow's vision of nontoxicity may be laudable, the reality may fall short.

Furthermore, proponents and critics disagree about the impact on the faith group. For supporters, faith based service provision is constructed as a benign choice for groups who can determine whether to pursue contracts (with conditions) and can always 'structure their internal affairs to minimize the conditions' norm-altering effects'.<sup>167</sup> However, it is debatable whether the choice open to faith groups (like the choice open to parents in *Zelman*) is genuinely unconstrained, or whether financial imperatives will dictate whether contracts are pursued.

So too, critics ask whether it is realistic to believe that (supposedly public) faith based service provision can be separated from the rest of faith based activity. This argument is the mirror image of the exposure of the citizen to unwanted religion. Here the issue is whether the faith group inevitably will find itself bureaucratized, colonized and disciplined by the liberal public values that may come to inform all aspects of the faith based organization. In this way, the state will undermine the very

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<sup>167</sup> Sullivan (n.136), 1414.

pluralism that was being nurtured through the faith based initiative: ‘supporters of privatization underestimate the corrosive force of public strings on religious pluralism ... bleed normative pluralism of its color and vibrancy, undermining the dynamism that arises from a mix among diverse modes of being and conceptions of the good’.<sup>168</sup> As a consequence, faith based services may well suffer to the extent that ‘the miracle-inducing stuff of prayer and worship’ has been cleansed by public values.<sup>169</sup> In other words, what makes faith based services valuable will be undermined by the very act of enfolding it within the state.

The impact of colonization of faith by the state can take many forms. Most obviously, by ‘choosing’ to engage with service delivery, faith groups report that they have lost control of their own agendas. They experience depoliticization as they become, not advocates for social change, but efficient providers of services.<sup>170</sup> The ability to mount political challenges to social inequalities can be undermined by reliance upon the state for contracts. Moreover, cooperation with other groups may be less likely in a competitive funding environment. The bureaucratic reporting and governance requirements of service provision undermine the efficiencies that had

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<sup>168</sup> *Ibid.*, 1415.

<sup>169</sup> *Ibid.*, 1418.

<sup>170</sup> Johnson (n.104), 297.

previously characterized the sector.<sup>171</sup> This is compounded by the need to determine whether contracts with the state represent the full economic cost of the service to be provided.

For my purposes, however, the key issue concerns the imposition of ‘public values’ as a condition for the award of contracts. It is here that the potential clash between faith and equality seeking groups such as gays and lesbians can be felt. Faith groups express concern that the ‘strings attached’ to contracts result in the triumph of liberal, secular values.<sup>172</sup> This is the homogenizing effect of liberalism of which Kathleen Sullivan warns.<sup>173</sup> For others, this form of colonization is not a concern and should be encouraged. From a liberal standpoint, Stephen Macedo argues that ‘we should do what we reasonably can to insure that publicly subsidized civil society institutions serve liberal democratic values’<sup>174</sup> precisely *because* faith communities ‘are not necessarily seedbeds of good citizenship’.<sup>175</sup> In terms of public values, Macedo highlights ‘popular enlightenment, the capacity for reflective and self-critical

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<sup>171</sup> Dinham (n.2), 146-147.

<sup>172</sup> Johnson (n.104), 296.

<sup>173</sup> Sullivan (n.136).

<sup>174</sup> Stephen Macedo, ‘Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations and Liberal Public Values’ (1999-2000) 75 *Chicago-Kent Law Review* 417, 418.

<sup>175</sup> *Ibid.*, 428.

deliberation, and broad forms of social cooperation.’<sup>176</sup> The colonization of the private realm to advance those values, he claims, is not objectionable. The principle of non-discrimination would seem to fall squarely within the set. A similar point has been made by Jody Freeman, who takes a pragmatic approach to the benefits of privatization, while also advocating the potential for a simultaneous process of ‘publicization’.<sup>177</sup> Through this interaction, ‘private actors increasingly commit themselves to traditionally public goals as the price of access to lucrative opportunities to deliver goods and services that might otherwise be provided directly by the state’.<sup>178</sup> In this way, privatization can operate in ‘democracy-enhancing ways’.<sup>179</sup>

While sceptics might question the empirical basis of the benefits of publicization—particularly in the United Kingdom—the principle of non-discrimination in the supply of faith based services might provide one example where the phenomenon has considerable traction. What the American experience suggests is that it is important for the state to attach public value strings to contracts. In addition, the state must ensure that there is genuine choice on the part of the citizen,

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<sup>176</sup> *Ibid.*, 426.

<sup>177</sup> Jody Freeman, ‘Extending Public Law Norms Through Privatization’ (2003) 116 *Harvard Law Review* 1285.

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*, 1290.

particularly if there are concerns that public values may not be fully protected. The importance of a vibrant public sphere becomes heightened in a context in which social citizenship can easily become fragmented or, to use a more loaded term, balkanized.

## **VI. Concluding Thoughts**

In this article, I have explored a timely and increasingly important issue: the implications for liberal values such as equality in a political environment characterized by the Big Society and economic austerity. I have turned both to recent litigation in England and to comparative American developments in order to more fully understand what is at stake. Fundamentally, I have described a tension between pluralism and liberalism. But the way in which that tension plays out draws upon a range of discourses about the state, citizenship, the value of faith, and the role of the public sphere.

By way of conclusion, this analysis leads to an indeterminate outcome. While I agree that citizens should have genuine concerns about the impact of the Big Society agenda with respect to the deployment of faith communities in the delivery of public services, the evidence of the marginalization of liberal values is mixed. For example, in the realm of education, faith based free schools may be of more immediate concern

than social services. In fact, faith communities themselves may have at least as much to fear as equality seeking groups. Nevertheless, what is clear is that these issues will not disappear.

This is an arena in which insights drawn from theory can assist in devising public policy. My analysis suggests that, in judging Big Society initiatives, we focus on whether there is genuine choice on the part of citizens; whether public values are sufficiently protected in the arrangements surrounding service delivery; whether assumptions are made regarding services delivered to communities which privilege traditional conceptions of the group and erase multiple identities; and whether the availability of contracts for service delivery result in increased pluralism (including those citizens who are not members of faith communities) or the reinforcement of Christian hegemony.

Furthermore, we need to carefully test empirical claims regarding innovation, efficiency and grassroots delivery. While we can all recognize moments in which the state has failed in the delivery of services, we should be under no illusions regarding the performance of other sectors. In addition, through its engagement with civil society actors, the state may undermine the very advantages that they bring to the table, through bureaucratic requirements, professionalization, and contract



compliance. We also need to be wary of exaggerated claims that those of faith necessarily make ‘better’ citizens and how this might translate into service delivery. For faith communities, they too need to be cautious about their deployment as deliverers of services and the impact this may have on their agendas for social change, political critique, and activism.

Recent history has demonstrated that the role of the state has changed and it is probably unrealistic to call for a return to a utopian past (which never actually existed in reality). In this article, I have tried to start a process of developing criteria and tests by which we might evaluate the current agenda in action. Ultimately, I approach the new culture of contracting out to faith communities pragmatically, but with certain core values – such as equality and non-discrimination as key components of shared citizenship – firmly in view.