Religious Diversity And Democratic Institutional Pluralism

Veit Bader

Political Theory 2003; 31; 265
DOI: 10.1177/0090591702251012

RELIGIOUS DIVERSITY AND DEMOCRATIC INSTITUTIONAL PLURALISM

VEIT BADER
University of Amsterdam

Strict separation of church from a presumed 'religion-blind' and strictly 'neutral' state still is the preferred model in liberal, democratic, feminist, and socialist political theory. Focusing on the full, reciprocal relationships between society-culture-politics-nation-state and (organized) religions, this article makes a case in favor of 'nonconstitutional pluralism' in general, associative democracy in particular. Associative democracy recognizes religious diversity both individually and organizationally; it stimulates legitimate religious diversity; it prevents a hidden majority bias; and it provides a legitimate role for organized religions in the provision of a wide range of services, including education, on one hand, and in the political process, on the other hand. That organized religions should be informed, heard, and consulted in contested issues should be a crucial component of democratic participation. This also might help prevent the development of religious fundamentalism.

Keywords: *secularism; state-religion relationships; religious diversity; religious minorities; types of institutional pluralism; nonconstitutional pluralism; associative democracy*

Debates on the relationships between religion and society, politics and the state in recent political philosophy in the United States show two characteristics. First, there is a focus on limitations of religious arguments in public debate and political decision making. The more or less radical *exclusion of religious reasons and arguments from public debate and politics* in political liberalism has been extensively criticized as morally arbitrary, unfair, and

---

AUTHOR'S NOTE: My special thanks to my friend and colleague Ton Korver. Without his contribution I would not have succeeded to cut back overly long drafts of the article into manageable proportions. Thanks also to Rainer Bauböck, Ewald Engelen, Tariq Modood, Bhikhu Parekh, Pieter Pekelharing, Melissa Williams, and two anonymous referees from Political Theory. *More elaborate and much better documented versions of this article (Bader 2000) have been presented at the ENCS conference in Bremen: Recasting European and Canadian History (18-21 May 2000) and at the workshop 'Religious Pluralism' in Amsterdam (30 June 2001).*

POLITICAL THEORY, Vol. 31 No. 2, April 2003 265-294
DOI: 10.1177/0090591702251012

practically counterproductive (Greenawalt 1995; Bader 1999; Parekh 2000; Murphy 2001). The consequences of an emerging, broadened, and pluralized perspective on public reason for mutual understanding, decision making, and democratic legitimacy, however, have not been clearly spelled out yet, and the institutional requirements of public debate and democratic decision making under 'nonideal' conditions of serious inequalities have not been adequately dealt with.

Second, we find a predominantly legal discourse focusing on the constitutional relationship between state and churches. Secularist interpretations of liberal democratic constitutions and strict or formal neutrality as a guiding meta-legal principle have been criticized (Smith 1995) and proposals have been put forward to replace them by 'priority for democracy' (Bader 1999, 612-19) and by 'relational', 'substantive', or 'positive neutrality' (McConnell 1992; Laycock 1990; Monsma 1993; Bader 1999). In response, the hard core of a liberal understanding of the *church-state relationship* is getting ever more minimalist: something like 'voluntarism' and "separationism minimally understood" (Rosenblum 2000a, 179-83; Eisenach 2000, 135; Shah 2000, 137). The almost exclusively legal discourse is weakening and a plea for a more multidisciplinary approach with a more comparative perspective can be heard more often (Rosenblum 2000b; Marquand and Nettler 2000; Robbers 2001). Yet two main obstacles prevent the elaboration of a political theory of the complex relationship between religions and societies, cultures, politics, nations, and states from becoming both empirically more adequate and morally more satisfying. (1) It still looks as if there are only two options that really matter: 'accommodationism' or 'structural pluralism', on the one hand, and 'separationism' or 'civil libertarian liberalism', on the other hand (Rosenblum 2000a, 179-83; McConnell 2000, 100 ff). (2) The debate is still too focused on the state-church relationship instead of addressing the full, reciprocal relationships between *society-culture-politics-nation-state and (organized) religions*.

We begin at elaborating a typology of different institutional and policy arrangements for the purposes of a more complex practical evaluation of existing and alternative ways of institutionalizing religion (section I). As *standards of evaluation*, we use the interrelated second-order principles of 'priority for democracy', 'relational neutrality', and 'fairness as evenhandedness' explicated in earlier articles: (1) *Priority for democracy* takes into account, first, that constitutional principles and public morality of liberal democracies—under conditions of reasonable pluralism—should be as freestanding as possible with regard to competing secular and religious foundations; and second, that they cannot be fully antiperfectionist (see also Tomasi 2001). Priority for democracy replaces 'second-order secularism' in order to

exclude cultural practices incompatible with liberal democracy minimally understood (versus all religious and secularist fundamentalisms) (Bader 1999, 609-19). (2) *Relational neutrality* takes into account that 'strict' or 'formal' neutrality, in the real world of inequalities, neglects structural majority bias and hides this from view. In regard to socioeconomic, legal, and political chances, neutrality is an important principle if understood gradationally and in an inequality-sensitive, relational way (Bader 1998, 436 ff; 2002b) prohibiting moral particularism and precluding injustice: sex, gender, 'race', 'ethnicity', state-membership, and religion should not matter when it comes to the distribution of resources and rewards.[1] Second, in regard to cultural and religious diversity and inequality, neutrality is not only impossible (there can be no completely neutral state) but also undesirable. Fairness cannot be achieved by a 'hands-off' approach that, in the end, would literally strip people and institutions of all cultural particularities, histories, religious traditions, and practices. The laudable moral intuition of neutrality and fairness has to be reconceptualized as *fairness as evenhandedness* (Carens 2000; Bader forthcoming). "The elimination of all ideological and religious references would not neutralize the existing ideological tensions and conflicts" (German Supreme Court 1975, 41 BVerfGE 29).

> Instead of trying to abstract from particularity, we should embrace it, but in a way that is fair to all different particularities. Now being fair does not mean that every cultural claim . . . will be given equal weight, but rather that each will be given appropriate weight under the circumstances and given a commitment to equal respect for all. History matters, numbers matter, the relative importance of the claim to those who present it matters, and so do many other considerations. (Carens 1997, 818)

We provide a moral evaluation of two models: 'nonestablishment and private pluralism' and 'nonconstitutional pluralism'. We attempt to make a case for the latter as the most promising option of democratic institutional pluralism (an option very much neglected not only in the United States but also in the English debates) (sections II and III). In the conclusion, we try to refute some realist objections to democratic institutional pluralism (section IV). Our overriding intent is to bring to the fore and stimulate debates about 'nonconstitutional pluralism', because we are convinced that this model enables us to achieve higher degrees of relational neutrality while remaining fully compatible with priority for liberal democracy. It recognizes religious diversity both individually and organizationally, it stimulates religious diversity, and it prevents a hidden majority bias. Moreover, it provides modes of representation of organized religions in the political process, enabling preliminary answers to the institutional requirements of public debate and democratic decision making under nonideal conditions. Of course, our claim is

not that organized religions should as such be represented in the legislative, executive, and adjudicative powers of the state. What we argue for is that organized religions may claim a legitimate role in regard to being informed, heard, and consulted in contested issues. This role should be a crucial component of democratic participation. What we advocate is a form of *associative democracy* in which the strengths of both individual and associational freedoms are combined and in which religious associations, among others, play a more crucial societal and institutionalized political role. This also might help prevent the development of religious fundamentalism.

I. A TYPOLOGY OF INSTITUTIONAL AND POLICY ARRANGEMENTS

What political philosophers minimally should learn from a critical sociology of religion is the following: (1) Most modern societies are normally understood to be *'secular'*, but contrary to predominant mythology, we cannot detect any inevitable decline of religious beliefs and practices, nor any inevitable privatization of religion in modern societies; and the institutional differentiation of 'Western' state-societies into relatively autonomous subsystems should not be misconceived as strict or 'complete separation of church and state'. Instead of one 'necessary' or 'optimal' American pattern in the relationship between churches, state, and nations, we find the coexistence and competition of different patterns that can be inductively generalized into many empirical types (see Martin 1978, 59). Church-state relationships are institutionally highly diverse. (2) This diversity is also characteristic of the variety of contradictory constitutional, legal, administrative, and cultural arrangements and policies in states that all share the same principles of liberal democracy. Different states, or states in different epochs, or different branches and levels (central, provincial, local) of contemporary states *grant or forbid legal or administrative privileges* to religions like tax exemptions, gathering tithes, exemptions from compulsory military service (with or without alternative compulsory civil service), exemptions from certain generally applicable laws or directives (antidiscrimination in employment, Sunday-closing, working hours, educational standards, prohibition of drugs and alcohol, zoning and building requirements, parking requirements, etc). They allow or forbid *subsidies* to religious organizations for education, charitable, and welfare activities. They interpret and apply religious *freedoms* differently, and *they balance competing rights* of individual and collective religious autonomy, or of free exercise versus antidiscrimination, in different ways.[2]

This huge complexity of actual institutional arrangements and policies has to be reduced—for the sake of practical evaluation—into a set of relevant options. Our construction of institutional and policy models is not based on inductive generalizations but rather on normative considerations (how institutions and policies ought to look), which, together with moral and constitutional/legal principles, inform—implicitly or explicitly—actual policies and invite thinking about alternative designs. Even as normative models, they are ideal types: no actually predominant policy model in any country fits completely (because there are always rival or competing normative models at work), let alone any actual institutional setting or policy (see also Monsma and Soper 1997, 10). However, predominant models tend to approximate specific ideal types, and our empirical references are meant to indicate these approximations.

The typology is constructed around two axes: 'establishment' (subdivided into constitutional, legal, administrative, political, and cultural) and institutionalized monism or pluralism (see Table 1).[3]

1. *'Strong establishment'* of one monopolistic church is per definition constitutional and/or legal establishment. It always implies administrative and political monism aimed at religio-national cultural monism, though obviously, de facto establishment can be achieved only to a certain degree and may even have completely counterproductive, unintended outcomes. Recent models approximating versions of strong establishment are Greece, Serbia, and Israel. Such establishment is clearly incompatible with minimally required institutional differentiation and with the most minimalist interpretations of religious freedoms and equal treatment. It is thus at odds with principles of relational neutrality, fairness in all versions, and priority for democracy. 'Strong establishment' has been the point of historical departure for 'dis-establishment', 'plural establishment', and 'nonestablishment'.
2. *'Weak establishment'* means constitutional or legal establishment of one state-church that has to be compatible with de jure and de facto religious freedoms and religious pluralism. It may be compatible with some administrative recognition of religious pluralism and different degrees of de facto institutionalization of other religions, and it may also recognize a certain religious pluralization of the cultural nation. Recent European models approximating this ideal type are England, Scotland, and the Scandinavian states. 'Weak establishment' is compatible with, but does not fully express, priority for democracy; it can be guided by principles of relational neutrality and fairness as evenhandedness though such arrangements may differ widely and be empirically contested.
3. *'Constitutional pluralism'* or *'plural establishment'* exists only in Finland, a nondenominational state with two state churches (the large Lutheran Church of Finland and the small Orthodox Church of Finland) (Ahonen 2000). It requires the constitutional and/or legal recognition of more than one organized religion. It aims at administrative and political pluralism with the intention of pluralizing the religio-cultural nation. It was discussed as an option in some American states in the late eighteenth and early nineteenth century.[4] Recently in England, there have been proposals to end the "unique rela-

Table 1:
Typical Institutional and Policy Models

	Constitutional	*Legal*	*Administrative*	*Political*	*Cultural*
Monism	Strong establishment (SE)	Legal monism	Administrative monism	Political monism	Religiously monistic nation
Institutional pluralism	Weak establishment (WE)	Legal monism	Some administrative pluralism	Restricted political pluralism	Hesitant religious pluralization of nation
	Plural establishment (PE)	Legal pluralism	Administrative pluralism	Political pluralism	Recognized religious pluralism
	Nonconstitutional pluralism (NCP)	Restricted legal pluralism	Administrative pluralism	Political pluralism	Recognized religious pluralism
Strict separationism	Nonestablishment and private pluralism (NEPP)	Strict legal separation	Strict administrative separation (intended)	Strict political separation (intended)	None of the states' business

tionship between the Church of England and the British state so as to create a plural religion-state-link" (Modood 1996, 3) by requiring the *new* constitutional establishment of organized minority religions. It would be compatible with, although not fully expressive of, priority for democracy. It may be explicitly guided by principles of relational neutrality and fairness as evenhandedness.

4. *'Nonconstitutional pluralism'* (NCP) combines constitutional dis-establishment or nonestablishment with restricted legal pluralism (e.g., in family law), administrative institutional pluralism (de jure and de facto institutionalization of several organized religions), institutionalized political pluralism,[5] and the religio-cultural pluralization of the nation. NCP is a variety of democratic institutional pluralism defined by two core aspects of power-sharing systems: (1) the existing plurality of organized religions must not just be—more or less formally—recognized, it must also be integrated in the political processes of problem-definition, deliberation, presentation of decision alternatives, and decision making. NCP requires specific information rights for organized religions and corresponding information duties by state agencies regarding contested issues, participation in public fora and hearings, inclusion in advisory councils, and corresponding consultation rights and duties to listen, and so on. (2) This recognition and integration has to be combined with a fair amount of actual decentralization and de facto autonomy to decide on specific issues. On the nation-state level, the models of the Netherlands after the constitutional reforms of 1983, Belgium, India, Australia, and Germany approximate this ideal type, though, obviously, this is not an uncontested policy model in these countries.[6] With regard to specific fields like education, health care, and other welfare services, organized religions (among other 'secular' nonstate service providers) play an important, officially recognized and subsidized role in most countries (see Monsma and Soper 1997; see also note 3). NCP expresses the principle of priority for democracy more fully than the other models of religious institutional pluralism, and it is explicitly guided by principles of relational neutrality and fairness as evenhandedness.
5. *Nonestablishment and private pluralism* (NEPP) declares strict legal separation of the state from all religions as well as strict administrative and political separation. It is opposed to legal, administrative, and political institutionalization of religions. Religious pluralism is allowed only in 'civil', not political, society or the state. It cannot, however, prevent de facto administrative, political, and cultural pluralism. It may or may not contest existing religio-national establishments or aim at religious pluralization of the nation. The model of the United States approximates this type, though we must stress the inevitable distance between 'model and muddle'. Any 'complete separation of state', let alone of politics or culture, from religion in the United States would be a radical liberal or libertarian utopia, not an accurate description of the existing state of affairs. NEPP clearly expresses priority for democracy, but it is predominantly guided by principles of difference-blind neutrality and a 'hands-off' conception of fairness (Carens 2000). The crucial difference with NCP is that institutional pluralism is strictly relegated to the so-called private sphere of civil society and is not allowed to spill over into political society or the state, particularly not into decision making.

The second, third, and fourth model represent different forms of democratic institutional pluralism; the fourth and fifth option represent two forms of constitutional nonestablishment. For the purpose of practical evaluation, the most important dividing line runs between the three versions of democratic institutional pluralism, on one hand, and NEPP on the other hand, both

because constitutional aspects may not be as important as legal theorists think and because the administrative, political, and cultural aspects of these three varieties of democratic institutional pluralism show important overlap and cannot be neatly distinguished from each other.

If one compares the English and American debates (Bader 1999, 597 f) with this set of institutional models, it is remarkable that in the *English* debate, NCP is lacking. As a consequence, proponents of institutional pluralism are forced to choose between either weak establishment or plural establishment. Or they have to accept 'secular constitutional reform' inspired by the American model, giving little or no room to institutionalize religious pluralism at all. This unduly limits institutional imagination and neglects interesting options preferable for normative reasons. Institutional pluralism does not require 'formal', 'official' constitutional recognition. In the *American debate*, NCP is also largely neglected. The aversion of predominant liberal and republican theories against, and the limited practical experience of American democracy with, forms of institutional pluralism helps to explain this fact. The effect has been that NCP, the other important variety of nonestablishment compatible with the First Amendment, has never been seriously discussed.

Our claim that NCP is preferable is, as already mentioned, based on three general arguments. First, recognizing that 'strict' religious neutrality of the state is not only an unachievable but an undesirable utopia, and taking into account the actual religious bias of existing states as well as the unequal chances of organized religions (see Bader 1999; Eisenach 2000), the most important issue is, How to achieve higher degrees of relational neutrality and more evenhandedness with regard to existing majority and minority religions? We hope to show that the principles of religious freedom and of fair and evenhanded treatment of religions can be better implemented by an institutional option combining constitutional nonestablishment with different forms of legal, administrative, political, and cultural pluralism. Second, institutional pluralism with regard to organized religions has two main virtues. It recognizes religious diversity both individually and organizationally. The cause of diversity, of course, is in much better shape once it is backed by institutions.[7] NCP also strengthens religious minorities in their opposition against enforced assimilation (Walzer 1997, 69 ff; Spinner-Halev 2000, 7, 20, 44). By providing resources and opportunities for religious minorities to organize and mobilize, it directly helps to redress serious inequalities among religions. Third, contrary to liberal and republican fears, NCP may also help to prevent the development of religious fundamentalism in politics.

Practical evaluations here are complex and difficult. Practical reason itself is complex, containing moral, ethical, prudential, and realist arguments often pointing in divergent directions and requiring difficult arts of balancing and hard trade-offs. We focus on moral evaluation only (sections II and III). To reduce the complexity further, we restrict our evaluation to a rough comparison of NCP and NEPP. A final difficulty rises from the complexity of contexts. For the institutionalization of religious pluralism, much depends on whether it takes place in states with deeply rooted liberal democratic traditions or in deeply divided societies, in situations of crisis or in normal situations. Constitutional, legal, and political histories, the variety and size of (organized) religions, and particularly, the *power-relations between religious majorities and minorities* have an obvious impact (Bader 2002c).

Such overwhelming complexity spells disaster for theories of contextualized morality and practical evaluation. If contexts clearly make such a difference, no workable productive middle ground for theorizing seems to be left between the scylla of abstract, universalist moral principles as in traditional liberal moral philosophy and the charybdis of generalized statements like 'it all depends', 'it is all politics', 'adhocery'. If we clearly recognize that not all institutional options are feasible in all contexts and that no 'optimal' or 'best' institutional model can exist fitting all contexts, situations, and requirements, no space seems left for discussing the advantages and disadvantages of these models. The result would be a disappointing reproduction of the traditional divide between universalism and particularism or between moral philosophy and the social sciences. Our strategy to tackle this dilemma is twofold. First, as social scientists, we should never be content with statements like 'it all depends'. Instead, we have to spell out, 'depends upon what'? This requires some inductive generalizations and some stronger explanatory theoretical statements. Second, as political theorists, we should attempt to close this gap by demonstrating how our interpretations of universal principles are informed by our institutional models and by discussing how these models respond to the same general requirements: how they balance competing moral and legal principles, how they respond to minimal requirements of social cohesion and political unity, and so on. In such a way, the advantages and disadvantages of institutional and policy options can be clarified, and the choice of a contextually adequate institutional and policy mix can be made in a more reflexive way.

In our moral evaluation of NCP and NEPP we focus primarily on religious freedoms (liberal tradition) (section II) but also provide some insight on

democracy, political citizenship (democratic tradition) and substantive equality (section III).

II. RELIGIOUS FREEDOMS

Moral and legal principles, like religious freedom, do not exist in a vacuum. They have to be balanced with other principles, like nondiscrimination or equal opportunity *(moral pluralism)*. And religious freedom itself turns out to be a complex, *underdetermined* concept implying many freedoms, and their contested understanding, interpretation, and application is influenced by divergent understandings of the positive, negative, or neutral relationship between religions and liberal democracy (McConnell 2000, 91-100). The inevitable balance between competing principles also depends on historical facts and societal contexts leading to a range of morally permissible paths *(contextualized morality)*. Yet not anything goes. Interpretations and institutional options have to be compatible with the core of religious freedom, however contested this core may be (see below).

One of the most broadly recognized, carefully phrased, and balanced articulations of such a core is article 9 of the International Covenant of Civil and Political Rights.[8]

> (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion of belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

It is plain that "freedom of religion is not an un-differentiated or unidimensional concept, but is a constellation of overlapping and sometimes conflicting claims for specific freedoms" (Galanter 1966, 217 ff). Together, these claims spell an enormous complexity. Two questions, however, enable some complexity reduction. They are the traditional and intertwined questions about freedom from (negative) and freedom to (positive freedom)?; and about whose freedom is involved (individual, parental/familial, associational).

The freedom *to* believe—or the freedom of individual conscience and the freedom to practice religion in worship, ritual, teaching, observance (whether collectively or individually, in 'private' or in 'public' spaces)—and the freedom of religions *from* illegitimate state control often conflict. *Positive* freedom is compatible with and may even call for aid (see section IV),

whereas *negative* freedom from illegitimate state control seems to require 'no aid' or 'no interference' (Galanter 1966, 288 ff; *Harvard Law Review* Note 1987, 1632 ff). As with all other negative freedoms, however, the freedom of individual believers and of religious practices from persecution requires some state involvement for two reasons. First, it is not only directed against state interference, but also against all forms of illegitimate interference by other religions as well as by "secular" groups and organizations (Shue 1995, 13). The state has the obligation to protect all religions from such interference. Second, religious freedom protects not only individual freedom of consciousness and religious practice but also collective practices of organized religions. These associational or collective freedoms often contradict individual religious freedoms, particularly in cases of deeply illiberal, antidemocratic, fundamentalist, or totalistic religions. Such conflicts have for long been the subject of legal debates about *church autonomy versus public prerogatives, scrutiny or interference*.

The *cases* range from conflicts about church property, internal decision-making processes and authority, appropriate forms and degrees of public accountability and scrutiny in cases of tax exemption and public subsidies, to cases in which the *nomos* of religious groups, that is, their normative universes, laws, and customs, conflicts with state-enforced private personal law (particularly marriage and divorce law) or with criminal law (Glendon and Yanes 1991; McConnell 1992). Theoretical positions and politico-legal strategies include (1) complete deference or "full autonomy" (Swaine 2001, 320 ff) to the *nomos* ('ecclesiastical law' and customs), decision making and authority of religions as defended by radical libertarians (on the assumptions of voluntariness or free, informed consent by adults: free entry, free exit) and by traditionalist communitarians (on the completely opposite assumption of protecting given communities and their culture); (2) internally highly differentiated ways of balancing associational freedoms or collective autonomy with individual religious freedoms and other human rights; (3) radical policies of 'liberal-democratic congruency' (insensitive, universalist liberal individualism or insensitive democratic universalism). Both 'absolutist' associational autonomy or 'absolutist free exercise' and 'absolutist individual freedoms' or unrestricted liberal-democratic congruency are counterproductive (Robbins 1987, 148; Rosenblum 1998, 79; 2000a, 166). The absolutism of the first position reduces the moral and legal constraints of human rights and 'priority for liberal democracy' practically to zero. The absolutism of the second position tries to impose thick notions of liberal autonomy and democracy in a self-contradictory way on all associations. If, in contrast to these absolute positions, one recognizes the need to balance individual and asso-

ciational autonomy (Selznick 1992, 288; Etzioni 1996, 191), one cannot expect easy answers or one universal formula applicable to all cases.

The U.S. Supreme Court has been very reluctant to interfere with church autonomy, guided by a mixture of libertarian assumptions, free exercise, and suspicion of all state intervention in the 'private' sphere. In cases of *property disputes*, this has resulted in unconditional deference to ecclesiastical law, decision procedures and practices as interpreted by church authority. This rule has not been upheld in cases of *tax exemptions and subsidies* for churches and related charitable and service institutions not living up to antidiscrimination rules in labor and employment, to minimal educational, health, and social service standards, or to rules of financial accountability. "Certain social values such as equal opportunity and racial non-discrimination are now viewed as partly enforceable by the state on institutions linked to churches" (Robbins 1987, 141, 148). The enforcement is based on the assumption of the public trust theory that accepting public money gives the state a special mandate to investigate, and a greater regulatory mandate. Even so, the extent, degree, and type of regulation and interference are clearly contested.[9]

In such matters, four arguments have to be taken seriously: (1) Some distinction between 'religious' issues and 'economic' issues is needed to prevent an imperialistic use of the Free Exercise Clause to cover "all manner of enterprises [e.g., of the Unification Church, Scientology] with the shield of the First Amendment, thereby equating with freedom of worship the right to pursue profitable activities without public accountability" (Robbins 1987, 148). All these distinctions, however, are contested. (2) We clearly have to distinguish between activities and decisions central to faith (like rules, decisions and control over membership of religious associations), and other, more peripheral or nonrelated, 'secular' ones (like work and employment in church-linked institutions). Yet this distinction is not easy to draw.[10] (3) One of the explicit aims of tax exemptions is

> encouraging diverse, indeed often sharply conflicting, activities and viewpoints. . . . Far from representing an effort to reinforce any perceived "common community conscience", the provision of tax exemptions to nonprofit groups is one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life. (Justice Powell, quoted in Kelley 1987, 121)

The paramount danger of public scrutiny and interference is the imposition of conformity to standards that are actually secularist but presented as 'public', 'neutral', or 'purely professional'. This danger is particularly great if norms and standards are set and interpreted by state agencies like the Internal Revenue Service. (4) New religious minorities depend upon such exemptions and

subsidies, and they are particularly vulnerable to interference (Robbins 1987, 145).

The fairly strong argument in the tax exemption and subsidy cases that accepting public money legitimizes public scrutiny and some degree of interference is absent in the harder cases in which the *nomos* of religions, which do not accept public money allegedly conflicts with rights of their members guaranteed by *civil* and *criminal lex fori*. The American Supreme Court has not only allowed racist and sexist exclusion from membership but also a fairly high amount of illiberal and antidemocratic treatment of members of religious associations.[11] Radical libertarians and traditionalist communitarians come to the same conclusion here. For radically individualist liberal universalists (feminists among them) and for moderate libertarians, liberal democrats, and liberal communitarians, religious freedoms are constrained by the equal religious freedoms of other believers and by all other civil, political, and social rights, not only of others, but also of their own members. A liberal-democratic state has the duty to protect individual believers against their 'own' religious group, associations, and leaders. Religiously legitimized practices of caste, bondage, and slavery are surely incompatible with the most minimalist interpretation of modern freedom and equality, and radical libertarian and contractarian 'consent to slavery' arguments are almost universally regarded as null and void. Women's (and gays' and lesbians') individual human rights apparently conflict with freedom of traditional religious practices as interpreted by religious organizations and leaders, as well as absolutist Free Exercise lawyers. Practices of *sati* (immolation of widows following their husband's death), domestic violence, stranger rape, marital rape, sexual abuse, genital mutilation (Nussbaum 1997), as well as enforced collective suicide conflict with minimalist interpretations of a universal human right to life and to bodily integrity as well as of modern *criminal* law, even if this interpretation is the result of a very late, still incomplete moral learning process. Here, criminal law should step in: priority for liberal democracy must be strong enough to legitimize public scrutiny and interference to sanction these practices effectively.

Does the same hold for cases in which conflicts with modern *civil* law are the issue, for example, religiously legitimated practices of discrimination against women in 'religious private, personal law', particularly in marriage and divorce law? (see Nussbaum 1997, 115 ff; Rudolph and Rudolph 2000; Reitman 1998, Oliveira 1995). Unreconstructed radical liberal individualists try to avoid the "apparent dilemma for the modern liberal regime" (Nussbaum 1997, 98):

> If the government defers to the wishes of the religious group, a vulnerable group of individuals will lose basic rights; if the government commits itself to respecting equal human rights of all individuals, it will stand accused of indifference to the liberty of conscience, (Nussbaum 2000, 14, 168, 187)

or of neglect of associational religious freedoms. Many feminists insist on a rigorously individualistic, secularist interpretation of human rights, particularly religious freedom. They fiercely attack all 'group rights', particularly any associational or collective autonomy for religions, and they proscribe all separate codes or systems of religious law, while insisting on a "uniform civil code".[12] This strategy 'solves' the problem by denying it. The upshot of such a strategy is, of course, that it will work in favor of majorities and majority religions. Religious freedom, sadly enough, does not fall from heaven. It has to be achieved, and its importance can be weighed against the background of the elementary observation that religious organizations are an important resource for minorities in their struggle for a fair place in the space of rights, individual rights included. Some form and degree of associational religious freedom and communal autonomy is required in particular for religious minorities if only to protect them from "intrusive interference" by states and majority religions. How does one achieve a more sensible balance between protection of vulnerable individuals and groups (minorities within religious minorities) and outside protection of vulnerable religious minorities? How does one avoid the "perils of multicultural accommodation" in family and divorce law (Shachar 1998, 2000)?

Drawing on the distinctions between 'religious' and 'economic' activities in tax exemption and subsidy cases, Shachar (1998) distinguishes between "demarcating functions" of family law (crucial for the internal reproduction of the *"nomos"* of groups, particularly control of membership and the role of women in it) and its "distributive functions."[13] In her "intersectionist joint governance approach," she proposes to delegate jurisdiction about the demarcating functions to 'inside' courts of religious groups and reserves jurisdiction about property matters to state courts, explicitly permitting inputs "from two legal systems—a group's essential traditions and the state's laws—to resolve a single dispute" (p. 299).

Such balanced, limited forms of legal pluralism presuppose (1) notions of differentiated, delegated, and limited autonomy or 'sovereignty' elaborated first and most clearly in the tradition of *institutional pluralism*;[14] (2) a criticism of the individualist social ontology of traditional liberalism—"the individual-state-market framework" (Glendon and Yanes 1991, 546 f); and (3) a full-fledged moral and legal recognition of the importance of associational autonomy in general, of associational freedoms of religion, in particular. This has

also been most clearly spelled out by institutional pluralists (Figgis 1914, 67 ff, 87 f; also Hirst 2000; Glendon and Yanes 1991, 534 ff; McConnell 1992, 724 f; Miller 1985, 272 ff, 349 ff; Skillen 1994, 249 f; Swaine 2001, 305, 320). Yet institutional pluralism was originally illiberal and antidemocratic—the most vivid defense of church autonomy can be found in the Catholic tradition—and even liberal and democratic institutional pluralism is often thought to be incompatible with voluntarism and 'separationism' minimally understood (Rosenblum 1998, 2000b). We claim that a *moderately libertarian version of democratic institutional pluralism* provides excellent opportunities to combine the strengths of both traditions. We refer to this alternative as *associative democracy*.[15]

How consonant is associative democracy with voluntarism and minimal separationism? First, how to understand *voluntarism?* Radical libertarians proceed on the assumption of free and informed consent by adults to enter religious associations, on the one hand, and free exit, on the other. *Moderate libertarians* can avoid these fictions of voluntariness and still rescue the attractive features of a libertarian approach.[16] *Entering* and remaining in religious associations are only rarely 'free' and voluntary. Most people are either born into or raised in religious communities[17]—and this "involuntary" membership may be constitutive for their cultural practices and self-definitions (Eisenberg 1995)—and they remain members because they are used to it. Membership becomes 'nonvoluntary' only if exit is legally proscribed or socially impossible or harsh. Still, entry and stay are matters of degree, and it is plausible that the absence of strong establishment, together with high degrees of religious diversity, results in higher degrees of voluntarism (Handy 1976; Miller 1985; Moore 1994; Eisenach 2000; Rosenblum 1998, 4, 84). Most people also agree that guaranteeing full *exit rights* is a necessary but not sufficient condition for providing actual *exit options*. Exit from religious associations may be extremely difficult (see generally Warren 2001, 99), particularly in cases of encompassing religions (social ostracism), and it may even be legitimate for certain minorities to make it very costly (see Spinner-Halev 2000, 77 ff). Finally, there may be some trade-off between exit and *voice*, and moderate libertarians stress high degrees of free entry and exit, minimizing 'democratic congruency' (requirements of some internal associational democracy).[18]

Second, there is the issue of how to conceptualize *separationism minimally understood*. Like most American political theorists, Nancy Rosenblum thinks that we have to chose between "structural pluralism" and "civil libertarian liberalism." Her central charges against all varieties of institutional pluralism are not only that they trespass across the voluntarist concern with individual free exercise (2000a, 182 f) but that they also reject key elements

of separationism (p. 180): they inevitably pass the threshold for impermissible establishment of religion and are accused of "one way protection" (protection of churches from the state) and "absolutist Free Exercise" (neglecting or trumping "Establishment" issues). Her understanding of separationism is "that religions must go without official recognition and imprimatur in the form of guaranteed representation or access to government power, legal jurisdiction over members or authority over their civil status" (1998, 10). Though clearly recognizing that things are different in other democracies, Rosenblum does not distinguish different modes of public or official recognition of religions and meshes claims to some form of guaranteed representation with more or less full-fledged establishment. We claim that recognized cultural pluralism, political pluralism, administrative pluralism, and even restricted legal pluralism can go together with nonestablishment, and that official recognition and group representation in the political process can be very flexible. It ranges from some representation and some (e.g., information) rights in the phases of deliberation and preparation of alternatives for decision making (e.g., of the major religions in religious councils regarding specific issues and fields) to guaranteed representation in decision making and to some representation in executive administration and the judiciary. Discussions of flexible and contextually legitimate forms of democratic institutional pluralism are blocked if all are accused trying to give "religion a controlling place in public arenas and public law."[19]

Associative democracy as the most open and flexible variety of democratic institutional pluralism allows us to make use of three considerable advantages of institutional pluralism: (1) Actual religious freedoms for minorities have to be continuously fought for. Their guarantee should not be left to law and Supreme Courts, let alone to political majoritarianism (McConnell 1992, 693, 721 f, 728, 734). Public and political pressure by religions helps remind 'benevolent' religious majorities (including judges) of discriminatory practices; and some form of political or formal recognition of religions provides them with additional political and legal resources. (2) Institutionalization of religions enlarges the possibilities and means of minimal, legitimate state supervision and control to guarantee essential human rights of dissenters and of minorities within minorities. It is much more difficult to minimally supervise highly individualized religious practices and loosely organized 'invisible' sects compared with more organized sects like Bhagwan, Hare Krishna, and Scientology or with churches. (3) If religions do not choose an isolationist strategy, but rather accept public money and other privileges and want to participate in public deliberation, decision making, and implementation, associative democracy combines two policy options. Public scrutiny and accountability is more legitimate—even from a libertar-

ian view—and more practicable. Minimal standards of associational law like financial accountability as well as minimal liberal moral and legal requirements like nondiscrimination have to be applied. Also, minimal standards of internal democracy are more legitimate.

Such a minimalist policy of liberal-democratic congruency should be differentiated according to different types of areas and activities. For example, imposing female or gay priesthood on Catholic churches (overruling internal decision rules and authority) is clearly less legitimate than asking for a critical scrutiny of discriminatory selection criteria for teachers (or for students or for janitors) in publicly subsidized religious schools, or for living up to minimally required educational standards and teaching practices, or forbidding discriminatory selection practices in church-linked services or other economic enterprises.[20] Associative democracy provides a more important role for religions in discussing and even deciding about such criteria and standards as well as in their implementation (Hirst 1994, 56 ff). It helps to make them more relationally neutral by challenging secularist or religious majority bias masked as 'neutral' 'public rules' or 'modern professional' requirements (priority for democracy versus secularism). It not only makes them subject to minimalist and differentiated policies of liberal-democratic congruency, it also enlarges their opportunities to influence these policies.

Religions, obviously, have to be free to accept or reject options of greater or lesser official recognition and institutionalization. Even if they follow (like the Amish, Hutterites, Mennonites, Chassidim) fairly isolationist strategies, social, legal, political, and cultural changes are sure to have an impact on them. Isolationist strategies cannot result in full-scale isolation, even where separationism is the official creed. Clearly, processes of unintended cultural change have to be distinguished from policies of liberal-democratic congruence. Moreover, wanting to be left alone inevitably means asking for many legal exemptions and privileges: making use of a modern legal system has an inevitable impact on conservative religions (Rosenblum 1998, 103 ff; Swaine 2001, 318; Tomasi 2001, 43 ff). The stark choice between isolationism and the exertion of influence (including the possible unintended consequence of learning the rules and virtues of the democratic game) cannot be evaded.[21] Also, the choice of whether to apply for and accept public money may prove to be a vexing one, as the latter entails monitoring and thus accountability and organization. This explains the resistance of many religious associations to formal institutionalization and the necessity for states, administrations, and majority religions to prevent an all-or-nothing dilemma.[22]

Flexible arrangements are clearly the most conducive for achieving religious freedoms and, at the same time, a modicum of legal, cultural, political,

and administrative pluralism. In this perspective, NCP is preferable to NEPP as it combines the advantages of institutional pluralism with a moderate libertarian understanding of voluntarism.

III. DEMOCRACY, CITIZENSHIP, EQUALITY

Political citizenship in the modern understanding is equal for all citizens irrespective of their 'race', sex, gender, ethnicity, class, and religion. Democratic principles and the corresponding political rights seem to preclude not only strong establishment and religious second-class citizenship, but also all group rights and all forms of institutional political representation of organized religions, notably of illiberal and antidemocratic religions. In the latter case, the tensions between the "demands of faith" and the "obligations of citizenship" are strong and the idea of "protection of the State from the Church" seems to be particularly appealing, precluding not only strong establishment, but also weak establishment, plural establishment, and NCP.[23] Only the complete, and completely unrealistic, separation of state and civil society by NEPP seems compatible with modern democracy.

The idea, inhering in separationism and disestablishment, is that the representation of particular interests and groups should remain constricted to civil society and not spill over into the domain of the state. Of course, interest groups may form lobbies and may try to influence political parties. But such 'political pluralism' is supposed to prevent or forestall—for fear of 'mischief of faction' (see criticism by Cohen and Rogers 1995)—the political institutionalization of particular interests, not to recognize or formalize it. All existing liberal-democratic political systems, however, actually recognize the existence and role of groups and organizations at least to some degree (e.g., in drawing the boundaries of constituencies, equal representation of small states in federal senates, guarantee of some minority rights), and many explicitly supplement territorial group representation with forms of social or functional (e.g., 'neocorporatist') group representation (Lijphart 1984). Also, these forms of representation have been extended to include representation of ascriptive minorities (e.g., women, ethno-national minorities; see Williams 1998; Kymlicka 1995) and organized religions (Lehmbruch 1996). Especially in regard to the correction of inequalities and disadvantages, NCP presents a more promising avenue than NEPP, which, like all difference- and inequality-blind systems, tends to perpetuate the existing state of affairs. NCP, then, tends to tackle the actual political and cultural hegemony of entrenched religious majorities and of aggressive secularism. In doing so, it contributes to a viable religious diversity in civil and in political society.

Finally, it tends to contribute to a relationally neutral state by adding important political resources and opportunities for religious minorities. Differences and inequalities are, thus, "brought onto the political stage" (Phillips 1996, 26) more effectively. Associative democracy has the advantage of keeping the *type, scope, degree, and mode of political institutionalization and representation* more flexible, open, and revisable, more in line with moderate voluntarism (Bader 2002c). Not the least of its strengths is the space it allows for a thorough discussion of substantive equality.

The positive freedom to believe and practice, emphasized by an accommodationist reading of the Free Exercise Clause (McConnell 1992; *Sherber v. Verner* 1963), asks for more than the minimally required liberal democratic scrutiny for the sake of safeguarding individual freedoms. It asks for some *materially* 'equal treatment of religions', either bent on correcting inequalities (invoking justice-based arguments, as we do) or on providing assistance and aid to promote the flourishing of varieties of religious life (invoking state-perfectionist arguments about the good religious life; Glendon and Yanes 1991; Parekh 2000). Libertarians and radical individualistic liberals deny any such duty: equal treatment of religions means equality before the law, and the absolute priority of negative individual freedom discounts any more substantive notion of equality. Aid to religions is none of the state's business. Only the strict, formal neutrality (*Lemon vs. Kurtzman*) and the strong separationism of NEPP is compatible with equality, because all other options are said to be inherently unfair either to other religions, or to nonbelievers. In all cases, however, where constitutional dis-establishment has been fairly recent and has been antedated by a long history of strong establishment and actual predominance of one or more Christian churches, a policy of formally strict equal treatment of religions is, according to libertarian conceptions of justice, both unfair and harsh. Such a policy neglects all legal, administrative, political, and material advantages such churches have built up and continue to use to preserve their predominance. Libertarian justice, surely, demands some restitution or redress.

Furthermore, state policies in modern welfare states affect the diversity of believers and nonbelievers in many direct and indirect ways (Lugo 2001). These policies cannot be strictly neutral, either in the justificatory sense of a 'secular purpose', or with regard to their 'direct and indirect effects'. This is obvious in religion as well as other fields like health (abortion, euthanasia) and education (curricula, pedagogy, financing, prayer in public schools). What, then, would an absolute libertarian hands-off policy of nonregulation and nonsubsidy prescribe for the long and strenuous 'meantime' between now and the realization of its radical utopia? When guided by more substantive notions of equality (Bader 1998, 447 ff) and of equal freedoms for reli-

gions, justice-based arguments have to balance liberties *from* and liberties *to* (Robbins 1987, 135; McConnell 1992, 692 ff). They thus have to take inequalities into account and find ways to combine 'involvement' and 'relational neutrality'. The requirements of the latter cannot of course be deduced in a general way. Such generality is actually precluded by an essential constraint. We refer here to the circumstance that all policies addressing serious, state-induced or state-guaranteed inequalities amongst religions have both to be evaluated in terms of effectiveness and democratic legitimacy, and in terms of avoidable violations of equality before the law (Bader 1998, 462 ff).

Religious equality does not as such require disestablishment, if only because constitutional law has its limits and because all institutionally pluralist options may deliver on the promise of substantive religious equality. All the same, the nonestablishment options express evenhandedness more clearly. In comparison with NEPP, again, NCP shares the advantages of flexible and democratic institutional pluralism. It gives minority associations more resources, based on official recognition and opportunities for participation in the realms of information, public deliberation, decision making, and implementation. It helps to detect hidden secularist or religious majority bias in the distribution of material benefits and, especially, in the cultural and symbolic impregnation of state ceremonies, rituals, and practices. Finally, it makes the ideal of fair and evenhanded judgment a practical necessity.

IV. CONCLUSION: REFUTING SOME REALIST OBJECTIONS AGAINST NCP

Religious institutional pluralism must be compatible with the minimal requirements of liberal-democratic constitutions; in short, it must supplement, not replace representative democracy. Still, such pluralism opens up a vast array of tricky problems (see Bader 2002c), and it may have unintended consequences that can prove inseparable from the institutionalization of pluralism as such. Will NEPP not be preferable to NCP, then, if only by default? We think not for three reasons.

First, states cannot institutionalize religions in the abstract. Which associations, for example, can rightly claim recognition as religions? And once recognized, which are deserving of public monies? Which are pivotal enough to be deserving of representation in the political process? These are hard questions, without generally applicable answers. For one, a purely subjective 'self-definition' will not do, as it will invite the strategic use of religious identities for other reasons. For another, the state cannot grant institutional representation to all religions, regardless of size and coverage. Thresholds are

needed, yet thresholds are not neutral, and they may have to be adjusted upwards merely to keep a system of representation workable. And finally, the mode of institutional representation itself has to be chosen, with the choice having effects on the possibilities of being and getting represented. Which religious organizations should be represented—constitutionally, legally, or de facto?—on which level of governance, in which fields, concerning which issues and decisions?

We claim that NCP allows for open and context-specific answers to these issues instead of resolving the matter by denying it. NCP allows for flexible strategies, for example, by distinguishing between the levels of thresholds of representation and of financing. NCP, since it does not require constitutional and sometimes not even legal status, enables the comparatively easy adaptation of arrangements and practices of institutional representation and is thus better suited to accommodate changes in the religious and societal landscape. Such flexibility is particularly important because religious associations and membership—compared with ascriptive categories like 'race' or sex—can show much higher degrees of voluntarism and actual exit options and, consequently, may be much more fluid.

Second, recognition has a price. Institutionalized systems of representation are inherently characterized by conservative tendencies and exclusionary effects. Recognized religions will defend their privileges by holding newcomers at bay, thereby adding to the negative effects of thresholds on new religious minorities and their organizations. As a consequence, the gap between institutionalized religions and the actual religious state of affairs is widening (a fact well known in the aftermath of the Dutch history of pillarization from the 1950s onward). For obvious reasons, administrations also experience difficulties in recognizing such changes and adapting their policies accordingly, thereby contributing at least unwittingly to institutional inertia and longer time lags. Again, NCP does not discard this problem but, once again relying on the mechanisms of an associative democracy and its positive premium on associative participation, it provides better opportunities to check the relative strengths of religious memberships and affiliations. Also, it provides mechanisms to scrutinize the democratic legitimacy of representations and to make appropriate revisions if needed.

Third, there is the danger of divisive effects. Boundaries around cultures, identities, and loyalties may be hardened, in particular if religious education and religious political parties receive institutional backing. Again, however, context and experience matter. The demand for separate religious schools, for example, is more often than not a response to either a fairly complete monopolization of the public educational system by majority religions (the United States in the nineteenth century, the United Kingdom), or to an

aggressive liberal purification of the school system (the Netherlands, Belgium, Germany in the nineteenth century).

The historical experience with separate religious schools (viz., the Catholic schools in countries like the United States [see Miller 1985, 261 ff; Handy 1976, 179 ff, 218; Eisenach 2000, 38, 87 f], the United Kingdom, and the Netherlands) shows that they regularly contribute to, instead of detract from, the integration of the respective religious communities into the common polity. The same may occur with the more recent policy of 'institutionalizing Islam' in the educational system in the Netherlands. The low threshold for the establishment of Islamic schools in the Netherlands—compared to France, Germany, or the United Kingdom—may help to prevent the development of a 'fundamentalist' Islam and its spillover into the political system. Indeed, the development of religious political parties corroborates such expectations: acting in a competitive political environment, these parties undergo the transformational pressures of liberal-democratic institutions and, eventually, contribute to integrating huge masses of believers into the democratic polity, and even to liberalize and democratize the associated national churches (Kalyvas 1996; Rosenblum forthcoming). The upshot is that once states do not apply aggressive policies of enforced assimilation but rather engage in evenhanded accommodationist policies and allow religious minorities considerable autonomy, including the freedom to voluntarily integrate into common public institutions, the chances will be minimized that minorities develop into 'isolated' groups living from cradle to grave in separate institutions. On this score too, NCP provides an interesting alternative to NEPP—even in the United States, where any serious discussion of these matters has so far been blocked by the ritual invocation of the mischief of faction. Republicans and unitary liberals really concerned with the divisive effects of pluralism should also learn from these experiences.

The price for our cautiously general plea for NCP is that we could not specify its different varieties, associative democracy amongst them. Obviously, urgent questions like which religions should be represented in which ways, in which fields, regarding which issues, cannot be answered in a general way as if there were one institutional blueprint for all states. We want to end with some food for thought and further research regarding the *modes of representation in the political process*.

(1) The focus of traditional debates about minority representation has been the political process, narrowly understood as decision making, implementation, and adjudication in the state, that is, on 'voice' (e.g., some guaranteed seats in legislative chambers for religions) and on 'muscle' (some power sharing in executive and judicial bodies). But it is obvious that in the case of religions, almost no one is claiming that minority religions should participate

in legislative, executive, and adjudicative power sharing at this level, because majority religions, as a rule, lost their rights and privileges long ago, and rightly so. Decision making, however, follows on issue definition, information, and the elaboration of decision-making alternatives. And in all these regards, organized religions may claim a legitimate role. Religions should, for example, be given specific *information rights* and corresponding *information duties* by (central, provincial, local) state agencies with regard to contested issues *('ear')*. Again, they should be given rights and opportunities to participate in *public fora* and *public hearings* (e.g., on morally contested issues like abortion, euthanasia, genetic engineering). They should be included in *advisory religious councils*, composed of the relevant organized religions, which can give their opinions on all subjects of their interest (Parekh 2000, 331), whether unanimously or in majority and minority opinions *(advisory and consultation rights and duties: 'listen to voice')*. Indeed, even reserved seats for organized religions in legislative committees with a capacity to participate (but not vote) could be discussed and explored.

(2) Associative democracy opens opportunities for organized religions to provide a wide variety of services like education, health care, and care for elderly, and it enables a wide variety of divergent service providers (religious ones amongst them) to participate in public, democratic standard setting and in critically scrutinizing service provision. Cooperation in such public-private forms of governance may contribute to trust and to a two-way redefinition of cognitive and normative frames, allowing criticism of both secularism, masked as 'neutral' and 'public', and the imposition of illiberal and antidemocratic religious particularism.

NOTES

1. See Bader (2002b) for a very short explication of the epistemological, meta-ethical, sociology, and history of knowledge aspects of this concept of relational neutrality. See Melissa Williams's ongoing research project 'reconstructing impartiality'. Her notion of 'embedded impartiality' is very close to my concept.

2. Monsma and Soper (1997) provide rich material in all these regards: (1) divergent interpretations of religious freedoms: U.S. strict separationism, particularly in primary and secondary education, stresses negative freedoms and nonintervention, whereas most other countries, constitutionally most outspoken the Netherlands (pp. 64 f, 81) and Germany (pp. 165 ff, 178), try to find more sensible balances between negative and positive freedoms. In Monsma/Soper's view, they "have a far more expansive and, we contend, approximate understanding of religious freedom" (p. 202). (2) The degree of actual guarantee of 'free exercise' by constitutional provision, legislation, and cultural attitudes and assumptions: Contrary to widespread expectations, constitutional protection does not always protect religious minorities (United States, Australia [p. 202] when popular sentiment and the elected branches of government fail to do so. But insti-

tutionally pluralist models also have difficulties in this regard (the Netherlands [p. 65 ff], Germany [p. 169 ff for Muslims: the lack of a centralized organizational structure causes difficulties to recognize them as *'Körperschaften öffentlichen Rechts'*]). (3) Degree of actual neutrality in primary and secondary education: strict separationism has a secularist bias, tending to violate state neutrality (p. 32 ff), all other models (particularly the Dutch [p. 67ff] and German [p. 178]) have recognized this; they all provide subsidies on a more or less equal footing to private schools (Australia [p. 102 ff]). (4) Degree of actual neutrality in welfare services: compared to education in the United States, one finds an "almost complete about-face, finding many forms of cooperation and support to be constitutional" (p. 36) and the same is true, in much more consistent and principled way, for the Netherlands, Germany, and, more pragmatic, Australia.

3. In their comparative study of church-state relations in five democracies, Monsma and Soper (1997) have constructed a similar model, guided by the same second-order principle of relational neutrality and the intent to defend institutional pluralism against strict separationism. They distinguish three basic types: the strict church-state separation model, the established church model, and the pluralist or structuralist model. In our view, our typology has the following advantages: (1) Our construction of the basic types is more explicitly focused on constitutional characteristics. Their 'established church model' is a hybrid combining two dimensions: formal and informal establishment (e.g., in the case of Germany) and "only one particular established church" (England) or "a system of multiple church establishment" (Germany figuring as "informal multiple establishment" (pp. 11, 189 f). (2) Our model is multidimensional and explicitly invites to discuss the relations between constitutional, legal, administrative, political and cultural aspect. (3) Our model explicitly distinguishes the three relevant types of institutional pluralism from institutionally monist types (Monsma and Soper's 'established church' model blurs the differences between strong, weak, and plural establishment) and from strict separationism. (4) We focus more explicitly on evaluation of institutional designs and policies, whereas Monsma and Soper use their model mainly "to classify the five countries in terms of these three models." Nevertheless, their comparative study allows "some general conclusions" (IX) and "to learn from each other".

The focus of Esbeck's (1994, 3 ff) six types of strategies: strict separationists, freewill separationists, institutional separationists, structural pluralists, nonpreferentialists, and restorationists is doctrinal, not institutional, and restricted to recent positions in the United States.

4. At least six states—New Hampshire (till 1817), Connecticut (till 1818), New Jersey, Georgia, North Carolina, South Carolina—and, depending on definitions, also Massachusetts (till 1833) had established churches. Plural establishment has also seriously been discussed (see Miller 1985, 18-22, 37 f, 44 f [three options for Virginia]; see also Handy 1976, 145).

5. Institutional pluralism needs no 'constitutional recognition' as the example of neocorporatism shows clearly (neocorporatism has been 'constitutionalized' only in Austria). In the Netherlands, building on the tradition of pillarization, a whole variety of institutional arrangements is used, particularly on so-called lower levels. More or less officially, but at least de facto recognized religious organizations are actual players in political contestation and institutionalized bargaining by different departments, mainly on a local level, and in different fields of policy making and implementation (for further elaboration, see Bader 2000, 2002c).

6. The 'General Assessment' Patrick Harvey Bill in Virginia (1784) proposing 'some tax aid to all religion' represents an early version of nonconstitutional pluralism (Miller 1985, 10 f, 26-31). The New South Wales Church Act of 1836 is an Australian example of attempted plural establishment (Monsma and Soper 1997, 91 f).

7. Tomasi (2001, 42, 56) also claims to present "institutional remedies" to protect cultural diversity against the unintended, indirect, and long-term spillover effects of political liberalism.

Unfortunately, this claim is not substantiated (apart from some remarks on nonstatist systems of service provision [pp. 16, 113-18], Catholic subsidiarity, and a more Tocquevillian ideal [p. 127]).

8. In our view, this article is much clearer than the First Amendment phrasing. See note 2, along with Monsma and Soper (1997), for Dutch, German, and Australian versions.

9. Cases: *EEOC v. Southwest Baptist Theol. Sem; Bob Jones University v. United States; Goldsboro Christian Schools; Amos*. See for divergent positions Pfeffer (1987), Kelley (1987), Robbins (1987), McConnell and Posner (1989), Rosenblum (1998, 79 ff), Spinner-Halev (2000, chap. 7), Cole Durham 2001, 701 ff).

10. I agree with Rosenblum's strategy that different cases should be treated differently, for example, *Brown v. Dade Christian Schools* (1998, 96 ff) *Amos* (1998, 8 9ff; 2000a, 165 ff), and *Jaycees* (2000a, 174-79).

11. Defended by *Harvard Law Review* Note (1987, 1758 ff). For obvious reasons (holocaust), the *BVerfG* in Germany is much more interventionist, strikes a different balance (as in cases of free speech—more like in India [see Jacobsohn 2000]—gives more weight to 'liberal' and to 'democratic congruency').

12. See Okin (1997) and Galenkamp, Tamir, and MacKinnon, discussed by Nussbaum (2000, 174 ff). In 1997, Nussbaum defended such a strictly individualistic concept of religious freedom (1997, 125). In 2000, she criticizes this as 'secular humanist feminism' (2000, 174 ff), remains 'neutral about establishment' (2000, 208), allows some legal pluralism in personal law, but still virtually neglects associational freedoms (2000, 188 ff, 229).

13. For similar strategies to split the issues and areas, see Reitman (1998), Bader (1998), Rudolph and Rudolph (2000), and Nussbaum (2000, 217).

14. All varieties of a "joint governance approach" discussed by Shachar (2001) also share this core of the institutionalist tradition: "dividing and sharing authority" (p. 89). See also Swaine (2001, 324 ff), "semi-sovereignty."

15. Compared with Shachar's (2001, 118 ff) "transformational accommodation" approach supposed to avoid the disadvantages of the other joint governance approaches (federal, temporal, consensual, and contingent accommodation), our approach looks—prima facie—similar to the contingent accommodation model in which

> the state yields jurisdictional autonomy to *nomoi* groups in certain well-defined legal arenas, but only so long as their exercise of this autonomy meets certain minimal state-defined standards. If a group fails to meet these minimal standards, the state may intervene in the group's affairs. (P. 109)

We place this minimally required state intervention, however, within the framework of associative democracy, and this enables us to resolve the main difficulties mentioned by Shachar: (1) Who defines the minimal standards? How are they defined, interpreted and applied (p. 115 f)? Associative democracy provides for excellent ways and means to challenge majority bias hiding as 'modern' or 'neutral'. (2) Intervention "requires a complex regulatory regime" (p. 110, inspections of actual performance and compliance). Associative democracy combines self-regulation and self-scrutiny with public scrutiny and gives associations an important role not only in standard setting but also in control regimes. (3) Given the power asymmetries, "it is hard to see how this (analytically attractive) model of mutual 'mirror-image policing' can be applied in practice" (p. 112). Associative democracy exactly tries to redress these power asymmetries (and does so much more effectively than Shachar's preferred "transformational accommodation" model). (4) It "relegates individual group members to a more passive position" (whistleblowers). Associative democracy not only provides important exit options for minorities within minorities, it also enables organized voice inside religious associations. (5) The most crucial

interests of "at-risk group members" would not be "maximized." In our view, the combination of actual voluntarism, real exit options, and critical public scrutiny does a lot to protect vulnerable minorities. Shachar's transformational accommodation, vice versa, encounters difficulties to explain why traditionalist leaders should not choose to ostracize, exclude, excommunicate critical voices inside (124 f, but see 139, 143), and it shares the problem with associative democracy how to respond to the trade-off between (threat of) exit and voice pointed out by Mark Warren (2001, 96 f).

16. See Swaine (2002), Spinner-Halev (2000), Rosenblum (1998, 2000b), Hirst (1994, 2001) for different varieties. Proposals of indirect financing of competing religious and secular associations in education, health care and other social services by way of a balanced voucher system (Hirst 1994; Bader 2001, 197, 200) also increase voluntarism and free choice of clients considerably (see also Monsma and Soper 1997, 42 f, for an amendment of Senator John Ashcroft of Missouri to a welfare reform bill in 1996).

17. Parental religious freedoms to transmit and implant religious views in the next generation also have to be balanced with individual religious freedoms of kids and maturing people because both 'absolutist' parental freedoms (defended by conservative religions, see the *Mozert* (vs. 'exposure') and *Yoder* cases) and 'absolutist' state paternalism, roughshod overriding parental powers, are morally indefensible options.

18. Rosenblum (1998, 101), rightly, privileges the 'real conditions' of exit above entry. Hirst (1994, 2001) also hopes that free exit options increase the voluntarism of stay, increase chances for voice inside associations and consequently stimulates loyalty. See also Tomasi (2001), Bader (2002a).

19. Even defenders of plural and weak establishment have by now understood that such a 'controlling place' for 'churches' is really incompatible with minimalist interpretations of separationism.

20. Nussbaum's (2000) 'principle of moral constraint' (p. 190 f) in its more restricted 'political use' eventually legitimizes very strong and deep policies of liberal-democratic congruency because the 'full list of fundamental rights' is included in the 'protection of the central capabilities' (p. 202), constituting a 'compelling state interest'. Consequently, not much 'accommodationism' is left. The more expansive 'social use' of the principle of moral constraint eventually legitimizes thick perfectionist and paternalistic policies (see pp. 82 ff, 88, 92, 194 ff). Our principle of moral constraint is more minimalist and differentiated. As a first rule, the general principles of nondiscrimination have the right of way relative to possible exceptions. Principles are not averages; nor are they probabilities. A second rule allows for variety of standards and criteria. Variety may be admissible, and even called for, in terms of activities (core activities may command more autonomy than peripheral ones), in terms of profit and not for profit or status (private versus public, minorities versus majorities, small versus big), or in terms of open versus protected markets, and, of course, members versus nonmembers.

21. See McConnell (2000), Kalyvas (1996), Rosenblum (1998, 108 ff; forthcoming); and Tomasi (2001) for this 'irony of democracy'.

22. For the 'costs of institutionalization' and the inevitable 'dialectics of institutionalization', see Bader (1991, 240 ff; 2002c).

23. 'Two way protection', for Gutmann (2000), Rosenblum (2000b), and Phillips (1996), seems to demand nonestablishment and private pluralism (NEPP), but in our view, nonconstitutional pluralism (NCP) would not necessarily be ruled out by Rosenblum and Phillips, if it would be seen as a viable option.

REFERENCES

Ahonen, P. 2000. A minority state-church in a liberal democracy. Presented at ECPR Copenhagen, 14-19 April, in Copenhagen, Denmark.

Bader, V. M. 1991. *Kollektives Handeln*. Opladen, Germany: Leske & Budrich.

———. 1998. Dilemmas of ethnic affirmative action. Benign state-neutrality or relational ethnic neutrality. *Citizenship Studies* 2 (3): 435-73.

———. 1999. Religious pluralism. Secularism or priority for democracy? *Political Theory* 27:597-633.

———. 2000. How to institutionalize religious pluralism? Conference paper, May, in Bremen, Germany.

———. 2001. Associative democracy and the incorporation of ethnic and national minorities. In *Associative democracy—The real third way*, edited by P. Hirst and V. M. Bader, 187-202. London: Frank Cass.

———. 2002a. Associative democracy and minorities within minorities. Manuscript. (Forthcoming in the American Political Science Association conference, Minorities within Minorities, organized by J. Spinner and A. Eisenberg.)

———. 2002b. Defending differentiated policies of affirmative action and of multiculturalism. Paper presented at the "Ideas and Policies for Our Times" conference, 17 May, in Braga, Portugal.

———. 2002c. Democratic institutional pluralism and cultural diversity. In *Life in diversity*, edited by Danielle Juteau and Christiane Harzig. Oxford: Berghan Books.

———. Forthcoming. Ethnic and religious state neutrality: Utopia or myth? In *Politics of identity and forms of belonging*, edited by Y. Lithman and H. Sicakkan. Oxford: Berghan Books.

Carens, J. 1997. Two conceptions of fairness. *Political Theory* 25:814-20.

———. 2000. *Culture, citizenship, and community.* Oxford: Oxford University Press.

Cohen, J., and J. Rogers. 1995. Secondary associations and democratic governance. In *Associations and democracy*, edited by E. O. Wright. London: Verso.

Cole Durham, W., Jr. 2001. The right to autonomy in religious affairs. In *Church autonomy*, edited by G. Robbers. Frankfurt, Germany: Peter Lang.

Eisenach, E. J. 2000. *The next religious establishment*. Lanham, MD: Rowman & Littlefield.

Eisenberg, A. 1995. *Reconstructing political pluralism*. Albany: State University of New York Press.

Esbeck, C. H. 1994. A typology of church-state relations in current American thought. In *Religion, public life, and the American polity*, edited by L. E. Lugo, 3-36. Knoxville: University of Tennessee Press.

Etzioni, A. 1996. *The new Golden Rule*. New York: Basic Books.

Figgis, J. N. 1914. *Churches in the modern state*. London: Longmans, Green and Co.

Galanter, M. 1966. Religious freedoms in the United States. A turning point. *Wisconsin Law Review*, pp. 217-96.

Glendon, M. A., and R. F. Yanes. 1991. Structural free exercise. *Michigan Law Review* 90 (3): 477-550.

Greenawalt, K. 1995. *Private consciences and public reasons*. Oxford: Oxford University Press.

Gutmann, A. 2000. Religion and state in the United States: A defense of two way protection. In *Obligations of citizenship and demands of faith*, edited by N. Rosenblum, 127-64. Princeton, NJ: Princeton University Press.

Handy, R. T. 1976. *A history of the churches in the United States and Canada*. Oxford: Clarendon.

Harvard Law Review Note. 1987. Developments in the law: Religion and the state. *Harvard Law Review* 100:1606-781.

Hirst, P. 1994. *Associative democracy.* Cambridge: Polity.

———. 2000. J.N. Figgis, churches and the state. In *Religion and democracy*, edited by D. Marquand and R. Nettler, 104-20. Oxford: Blackwell.

———. 2001. Comment. Presented at the Workshop on Religious Pluralism, 29 June, in Amsterdam.

Jacobsohn, R. J. 2000. By the light of reason. In *Obligations of citizenship and demands of faith*, edited by N. Rosenblum, 294-320. Princeton, NJ: Princeton University Press.

Kalyvas, S. 1996. *The rise of Christian Democracy in Europe*. Ithaca, NY: Cornell University Press.

Kelley, D. M. 1987. The Supreme Court redefines tax exemption. In *Church-state relations*, edited by T. Robbins and R. Robertson, 115-24. New Brunswick, NJ: Transaction Books.

Kymlicka, W. 1995. *Multicultural citizenship*. Oxford: Clarendon.

Laycock, D. 1990. Formal, substantive, and disaggregated neutrality toward religion. *DePaul Law Review* 39:1001-6.

Lehmbruch, G. 1996. Der Beitrag der Korporatismusforschung zur Entwicklung der Steuerungstheorie. *Politische Vierteljahresschrift* 17 (4): 735-51.

Lijphart, A. 1984. *Democracies*. Berkeley: University of California Press.

Lugo, L. E., ed. 2001. *Religion, public life, and the American polity.* Knoxville: University of Tennessee Press.

Marquand, D., and R. Nettler, eds. 2000. *Religion and democracy.* Oxford: Blackwell.

Martin, D. 1978. *A general theory of secularization*. New York: Harper & Row.

McConnell, M. 1992. Accommodation of religion. *George Washington Law Review* 60 (3): 685-742.

———. 2000. Believers as equal citizens. In *Obligations of citizenship and demands of faith*, edited by N. Rosenblum, 90-110. Princeton, NJ: Princeton University Press.

McConnell, M., and R. A. Posner. 1989. An economic approach to issues of religious freedom. *University of Chicago Law Review* 65 (1): 1-60.

Miller, W. L. 1985. *The first liberty.* New York: Knopf.

Modood, T. 1996. Introduction. In *Church, state and religious minorities*, edited by T. Modood, 3-15. London: Policy Studies.

Moore, R. L. 1994. *Selling God*. New York: Oxford University Press.

Monsma, S. 1993. *Positive neutrality.* Westport, CT: Greenwood.

Monsma, S., and C. Soper. 1997. *The challenge of pluralism. Church and state in five democracies*. Lanham, MD: Rowman & Littlefield.

Murphy, A. 2001. *Conscience and community.* University Park: Pennsylvania State University Press.

Nussbaum, M. 1997. Religion and women's rights. In *Religion and contemporary liberalism*, edited by P. Weithman, 93-137. Notre Dame, IN: Notre Dame University Press.

———. 2000. *Women and human development*. Cambridge: Cambridge University Press.

Okin, S. 1997. Is multiculturalism bad for women? *Boston Review*, October/November, 25-28.

Oliveira, H. U. Jessurun d'. 1995. Le droit international privé Néerlandais et les relations Maroc-Pays-Bas. *Cahiers des Droits Maghrébins* 1:137-66.

Parekh, B. 2000. *Rethinking multiculturalism*. Houndsmill, UK: Macmillan.

Pfeffer, L. 1987. Religious exemptions. In *Church-state relations*, edited by T. Robbins and R. Robertson, 103-14. New Bruswick, NJ: Transaction Books.

Phillips, A. 1996. In defense of secularism. In *Church, state and religious minorities*, edited by T. Modood, 23-30. London: Policy Studies.

Reitman, O. 1998. Cultural accommodation in family law: Clarifying the relationship between multiculturalism and feminism. European Consortium on Political Research, Warwick, UK. Manuscript.

Robbers, G., ed. 2001. *State and church in the European Union*. Baden-Baden, Germany: Nomos.

Robbins, T. 1987. Church-state tensions and marginal movements. In *Church-state relations*, edited by T. Robbins and R. Robertson, 135-52. New Bruswick, NJ: Transaction Books.

Rosenblum, N. 1998. *Membership and morals*. Princeton, NJ: Princeton University Press.

———. 2000a. Amos: Religious autonomy and the moral uses of pluralism. In *Obligations of citizenship and demands of faith*, edited by N. Rosenblum, 165-95. Princeton, NJ: Princeton University Press.

———. 2000b. Introduction: Pluralism, integralism, and political theories of religious accommodation. In *Obligations of citizenship and demands of faith*, edited by N. Rosenblum, 3-31. Princeton, NJ: Princeton University Press.

———. Forthcoming. Institutionalizing religion: Religious parties and political identity in contemporary democracies. In V. Bader, ed., Religion and politics (special issue), *Ethical Theory and Moral Practice* 5, no. 1 (March).

Rudolph, S. H., and L. Rudolph. 2000. Living with difference in India. In *Religion and democracy*, edited by D. Marquand and R. Nettler, 19-37. Oxford: Blackwell.

Selznick, P. 1992. *The moral commonwealth*. Berkeley: University of California Press.

Shachar, A. 1998. Group identity and women's rights in family law: The perils of multicultural accommodation. *Journal of Political Philosophy* 6 (3): 285-305.

———. 2000. Should church and state be joined at the altar? In *Citizenship in diverse societies*, edited by W. Kymlicka and W. Norman, 199-223. Oxford: Oxford University Press.

———. 2001. *Multicultural jurisdictions*. Cambridge: Cambridge University Press.

Shah, T. S. 2000. Making the Christian world safe for liberalism: From Grotius to Rawls. In *Religion and democracy*, edited by D. Marquand and R. Nettler, 121-39. Oxford: Blackwell.

Shue, H. 1995. Thickening convergence: Human rights and cultural diversity. Amnesty Lectures, No. 6, Oxford.

Skillen, J. W. 1994. The religion puzzle. In *Religion, public life, and the American polity*, edited by L. E. Lugo, 240-52. Knoxville: University of Tennessee Press.

Smith, S. D. 1995. *Foreordained failure*. New York: Oxford University Press.

Spinner-Halev, J. 2000. *Surviving diversity.* Baltimore: Johns Hopkins University Press.

Swaine, L. 2001. How ought liberal democracies to treat theocratic communities? *Ethics* 111:302-43.

———. 2002. Religious pluralism and the liberty of conscience. In *Pluralism without relativism*, edited by J. Espada, M. Plattner, and A. Wolfson. Lexington, MA: Lexington Books.

Tomasi, J. 2001. *Liberalism beyond justice*. Princeton, NJ: Princeton University Press.

Walzer, M. 1997. *On toleration*. New Haven, CT: Yale University Press.

Warren, M. 2001. *Democracy and association*. Princeton, NJ: Princeton University Press.

Williams, M. 1998. *Voice, trust, and memory.* New Haven, CT: Yale University Press.

Veit Bader is a professor of sociology and of social and political philosophy at the University of Amsterdam. His main research areas are theories of societies, social movements, and collective action; theories of modern capitalisms; ethics of migration and incorporation; and associative democracy. His books include Inequalities *(1989);* Collective Action *(1981);* Racism, Ethnicity, Citizenship *(1995); and* Associative Democracy: The Real Third Way *(2001) (with Paul Hirst).*