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The Faith-Based Initiative and the Constitution

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THE FAITH-BASED INITIATIVE AND THE CONSTITUTION

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TABLE OF CONTENTS

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I. INTRODUCTION

Nine days after George W. Bush assumed the Presidency, his first Executive Orders brought the Faith-Based and Community Initiative (FBCI) to life.[2] The Initiative, which involves partnerships between religious entities and agencies of government in the provision of social

2. Exec. Order No. 13,198, 3 C.F.R. 750 (2002), *reprinted in* 5 U.S.C.A. § 601 (1996 & Supp. 2005) (creating seven agency centers for Faith-Based and Community Initiatives); Exec. Order No. 13,199, 3 C.F.R. 752 (2002) *reprinted in* 5 U.S.C.A. § 601 (1996 & Supp. 2005) (declaring the policy in favor of inclusion of faith organizations in social service efforts, and creating the White

services, represents a provocative challenge to our constitutional tradition concerning the relationship between the state and religious institutions. The President's ambitious enterprise has forced Congress, federal agencies, state and local government, and the courts to look afresh upon a set of questions as old as the Republic.

The Initiative has arrived at a moment in which the relationship between religion and state in America is in deep flux. The flashpoints of the change are reflected in a series of well-known rulings by the Supreme Court. These include:

- the Court's willingness to uphold the use of government-financed vouchers, and other forms of state aid, at religiously affiliated schools;[3]
- the Court's repeated insistence that government may not exclude private religious voices from public fora for speech;[4]
- the Court's embrace of the general proposition that government may not itself endorse a religious position;[5]
- the Court's repudiation in *Employment Division v. Smith*[6] of a religion-friendly standard to govern disputes under the Free Exercise Clause;
- the Court's recognition that the First Amendment marks out zones of permissive accommodation and anti-accommodation, within which the state may respectively prefer or disfavor religion more than the First Amendment requires.[7]

Taken together, these and related developments have challenged the Court, and those who comment on its work, to articulate a new vision of the relationship between religion and government. Simplistic metaphors about church-state separation, and glib assertions about neutrality, accommodation, or judicial activism cannot capture the roiling social passions and conflicting jurisprudential visions that lie beneath the law's dynamism.

House Office of Faith-Based and Community Initiatives to develop, lead, and coordinate efforts to implement that policy).

3. Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Mitchell v. Helms, 530 U.S. 793 (2000); Agostini v. Felton, 521 U.S. 203 (1997).

4. *See e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Rosenberger v. Rector & Visitors, 515 U.S. 819 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981).

5. County of Allegheny v. ACLU, 492 U.S. 573 (1989). The Supreme Court recently added an important new chapter to this story in this Term's decisions regarding government displays of the Ten Commandments. *See* Van Orden v. Perry, No. 03-1500, 2005 U.S. LEXIS 5215 (June 27, 2005); McCreary County v. ACLU, No. 03-1693, 2005 U.S. LEXIS 5211 (June 27, 2005).

6. 494 U.S. 872 (1990).

7. Locke v. Davey, 540 U.S. 712 (2004) (recognizing a zone within which states may exclude religious causes from otherwise generally available benefits); Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (recognizing a zone of permissive accommodation of religious institutions).

The Faith-Based and Community Initiative would have been constitutionally unthinkable thirty years ago. Changes in the law of the religion clauses have rendered it constitutionally plausible, but hardly unassailable. This paper is designed to confront the constitutional challenges presented by the Initiative. To do so requires three steps. In Part II, we lay out the Initiative's institutional and substantive components, as they have developed since 2001, and we identify as crisply as we can the constitutional questions that have been put into play.[8]

In Part III, we back away from the particulars of the FBCI and frame the emerging law of the religion clauses in terms that best capture its character and trajectory.[9] In particular, we describe that emerging law as refracted by the prism that we believe to be the best source of insight in this field—the prism of religious distinctiveness. In some circumstances, religion is constitutionally distinctive from all other human enterprise, and its distinctiveness requires special constitutional treatment. In other circumstances, religion is entirely analogous for constitutional purposes to its secular counterparts, and its nondistinctiveness requires constitutional treatment as a precise equal to those counterparts. In a third and widening category with unsettled boundaries, government retains discretion to treat religion as either like, or unlike, its secular analogues. The entirety of the law of the religion clauses can be conceptualized around those themes: when must government treat religion differently, when must government treat religion identically to other social phenomena, and to what extent does government have discretion to choose whether to treat religion as similar or different from its analogues?

With the field so framed, we return in Part IV to the questions that animate this paper.[10] Under what conditions and governing norms may government engage in partnership with religious organizations in the delivery of social services? When will the Constitution require, forbid, or permit distinctive treatment of religious entities engaged in such ventures? Included in this discussion will be, among other matters, considerations of:

(1) the distinction between organizational character and organizational activity;
(2) the differences between direct and indirect financing;
(3) the respective role of federal regulatory guidance and judicial decisions the in specifying the Initiative's parameters;
(4) the role of state as well as federal policy on separation between religion and government; and

8. *See infra* notes 11–57 and accompanying text. **R**
9. *See infra* notes 58–172 and accompanying text. **R**
10. *See infra* note 173–474 and accompanying text. **R**

(5) the explosive issue of the government's authority to finance social service by organizations that favor members of their own faith in employment to perform that service.

We conclude that the Initiative is likely to provoke a clarification and redefinition of some aspects of the constitutional landscape, though not always in ways that the Administration desires. The Initiative will push the Constitution, but the Constitution will push back.

II. THE FAITH-BASED AND COMMUNITY INITIATIVE

Partnerships between government and religiously affiliated entities have deep roots in the United States. Since their inceptions, systems of state-financed health insurance, such as Medicaid and Medicare, have covered services at religiously affiliated hospitals.[11] And for many decades, state and local governments have found it useful to contract for social services with organizations like Catholic Charities, Lutheran Social Services, and Jewish Family Services.[12] These organizations have religious identities, but they do not engage in practices of worship or religious training, and they have been able to deliver secularized, professional service under government contract in ways that have long remained well beneath the constitutional radar.

Nevertheless, the Supreme Court's decisions about aid to religious schools have for many years cast a shadow on financial relationships between government and religious enterprise—in particular, houses of worship and schools with a strongly religious character.[13] As a result, federal regulations for many years had systematically excluded such entities from federally financed grants and contracts.[14]

11. For discussion of this point, see Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 375, 375 (1999).

12. *See* STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY (1996); ROBERT WUTHNOW, SAVING AMERICA? FAITH BASED SERVICES AND THE FUTURE OF CIVIL SOCIETY (2004); *see also* David Saperstein, *Public Accountability and Faith-Based Organizations: A Problem Best Avoided*, 116 HARV. L. REV. 1353, 1358–59 (2003).

13. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971) (invalidating program of aid to private elementary and secondary schools, most of which had a religious character). The Court has viewed aid to colleges and universities more generously on the ground that older students are less impressionable than younger students and, therefore, less likely to be indoctrinated by government-aided teaching that may show religious influence. *See* Tilton v. Richardson, 403 U.S. 672, 686 (1971).

14. Because so many of the Supreme Court's leading decisions were about aid to education, this tendency was especially pronounced in the regulations promulgated by the U.S. Department of Education (DOE) to govern federal programs that made expenditures for elementary and secondary education. *See, e.g.*, 't.Gaining Early Awareness and Readiness for Undergraduate Programs, 34 C.F.R. § 694.9 (1999) (excluding "pervasively sectarian" institutions of higher education from certain federally funded partnerships); *see also* Fordham Univ. v. Brown, 856 F. Supp. 684, 700–01 (D.D.C. 1994) (upholding Department of Commerce policy excluding a col-

The first major impetus for change in this pattern came from the Adolescent Family Life Act,[15] a federal spending program which required local grantees to include faith-based organizations (FBOs) in their plans for delivery of services aimed at preventing teen pregnancy. In 1988, the Supreme Court upheld the Act against a facial attack,[16] albeit with a remand ordering the lower court to focus on whether grants were being made to "pervasively sectarian" organizations or for "specifically religious activit[ies]."[17] The movement to include a wide swath of FBOs in federally funded social services took a giant step forward with the inclusion of the so-called Charitable Choice provisions of the welfare reform statute enacted by Congress in 1996.[18] This scheme, which eliminated the statutory entitlement to cash assistance for low-income families, contained a set of provisions requiring the states to include FBOs among the organizations with which the state contracted for vocational training and other, welfare-related services.[19] The Charitable Choice provisions, included in the 1996 legislation at the initiation of then-Senator John Ashcroft,[20] form the substantive predicate for most of what has ripened into the government-wide Initiative sponsored by President Bush. The basic policies of the Charitable Choice movement, as pioneered in the 1996 legislation, include:

- Nondiscriminatory funding: If a state includes nongovernmental entities as providers of welfare-related services, the state may not exclude religious organizations from participating simply because of their religious character.[21]

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lege radio station from a federal grant because the station broadcast a religious service each week).

15. Pub. L. No. 97-35, 95 Stat. 578 (1981).

16. Bowen v. Kendrick, 487 U.S. 589 (1988).

17. *Id*. at 620–21. *See infra* Parts III, IV for further discussion of "pervasively sectarian organizations."

18. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in various sections of Title 42 of the U.S. Code, including 42 U.S.C. § 604a).

19. 42 U.S.C. § 604a (1996). *See* AMY E. BLACK, ET AL., OF LITTLE FAITH: THE POLITICS OF GEORGE W. BUSH'S FAITH-BASED INITIATIVES 51–52 (2004).

20. Professor Carl Esbeck deserves great credit for his roles as scholar and advisor to then Senator Ashcroft for the pioneering concepts in the Charitable Choice movement. *See, e.g.*, Statement of Carl H. Esbeck, Senior Counsel to the Deputy Attorney General, in *The Constitutional Role of Faith-Based Organizations in Competitions for Federal Social Service Funds*, *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong. 6 (2001), (concerning Section 1994A (Charitable Choice) of H.R. 7, The Community Solutions Act), *available at* http://judiciary.house.gov/legacy/esbeck_060701.htm; Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1 (1997).

21. 42 U.S.C. § 604a(c).

- Preservation of overall identity of religious organizations: FBOs that participate in state-funded services cannot be required to remove religious icons or symbols from their premises, to secularize their names, or to alter their structure of governance.[22]
- Respect for the religious liberty of beneficiaries: FBOs may not insist that beneficiaries comply with religious norms or engage in religious practices in exchange for services.[23]
- Limited audits: Government audits of FBOs will be limited to an audit of the accounts through which the government funds have passed, and will not spill over into FBOs privately funded accounts.[24]
- Religious activities proscribed: Government funds may not be used for "sectarian worship, instruction, or proselytization."[25]
- Maintenance of exemption from Title VII : FBOs that receive government funding do not thereby forfeit their exemption from Title VII's prohibition on religious discrimination in employment.[26]

In Parts III and IV, below, we will have considerably more to say about these basic policies and the ways in which they intersect with constitutional norms. In the flurry over welfare reform in 1996, however, Congress and outside observers were surprisingly quiet about the constitutional questions raised by the newly legislated philosophy of equal inclusion of FBOs in government-financed social service.[27]

George W. Bush, as Governor of Texas, led a substantial state-wide initiative in support of inclusion of FBOs in service partnerships with government.[28] When he assumed the Presidency in January 2001, Bush made this subject his very first domestic priority. Within days of his inauguration, the President issued a pair of Executive Orders

22. *Id*. § 604a(d).

23. *Id*. § 604a(g).

24. *Id*. § 604a(h)(2).

25. *Id*. § 604a(j).

26. *Id*. § 604a(f).

27. In addition to the work of Professor Esbeck, *see supra* note 20, and some early commentary from us, *see* Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37 (2002), *see* John J. DiIulio, Jr., *Government by Proxy: A Faithful Overview*, 116 HARV. L. REV. 1271 (2003); Susanna Dokupil, *A Sunny Dome With Caves of Ice: The Illusion of Charitable Choice*, 5 TEX. REV. L. & POL. 149 (2000); Jonathan Friedman, *Charitable Choice and the Establishment Clause*, 5 GEO. J. ON FIGHTING POVERTY 103 (1997); Elbert Lin, et al., *Faith in the Courts? The Legal and Political Future of Federally-Funded Faith-Based Initiatives*, 20 YALE L. & POL'Y REV. 183 (2002); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003); Saperstein, *supra* note 12; Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397 (2003). . R R

28. Lupu & Tuttle, *supra* note 27, at 46 n.42. R

which brought into being the formal apparatus of the Faith-Based and Community Initiative.[29]

The orders have both substantive and institutional dimensions. As a matter of substance, the orders focus on the elimination of barriers to equal participation of faith groups in federally funded social welfare programs. The orders do not leave implementation of these concerns to the pre-existing federal bureaucracy within the agencies that are responsible for the distribution of federal funds devoted to social service. Instead, one order creates the White House Office of Faith-Based and Community Initiatives (WHOFBCI), and assigns to it the job of implementing and coordinating the Administration's agenda.[30] The companion order creates FBCI Centers within those federal departments with primary budgetary responsibility over federal social service funds.[31] This order charges each of these agency-specific centers with the responsibility to survey the administrative climate for participation by FBOs in government-funded social services; to take steps to eliminate obstacles to such participation; and to disseminate information to state and local governments, and to private organizations, about the new philosophy of inclusion of FBOs as eligible for participation in such programs.

As the WHOFBCI and the agency centers created by the 2001 orders began their work, the Administration commenced its efforts to broaden the legislatively authorized scope of the Charitable Choice movement. The Administration sought congressional authority to expand the policy of FBO inclusion beyond the provision of public welfare and work-related services, as prescribed by the 1996 welfare reform enactment, to a wide variety of social welfare programs in education, community development, criminal justice, family services, substance abuse, and other areas of social welfare.[32] Over the course of

29. Exec. Order No. 13,198, 3 C.F.R. 750 (2002), *reprinted in* 5 U.S.C.A. § 601 (1996 & Supp. 2005) (creating seven agency centers on Faith-Based and Community Initiative); Exec. Order No. 13,199, 3 C.F.R. 752 (2002), *reprinted in* 5 U.S.C.A. § 601 (1996 & Supp. 2005) (declaring the policy in favor of inclusion of faith organizations in social service efforts, and creating the White House Office of Faith-Based and Community Initiatives to develop, lead, and coordinate efforts to implement that policy).

30. Exec. Order No. 13,199, 3 C.F.R. 752 (2002), *reprinted in* 5 U.S.C.A. § 601 (1996 & Supp. 2005).

31. The 2001 Order included the Departments of Justice (DOJ), Education (DOE), Labor (DOL), Health & Human Services (HHS), and Housing and Urban Development (HUD). 3 C.F.R. 750. Subsequent Executive Orders created similar FBCI Centers in additional agencies of the federal government. *See* Exec. Order No. 13,342, 3 C.F.R. 180 (2005), *reprinted in* 5 U.S.C.A. § 601 (1996 & Supp. 2005); Exec. Order No. 13,280, 3 C.F.R. 262 (2003) *reprinted in* 5 U.S.C.A. § 601 (1996 & Supp. 2005).

32. For a highly detailed account of the executive and legislative politics of the Initiative, see BLACK, ET AL. *supra* note 19, at 107–83. **R**

President Bush's first term of office, however, these legislative efforts, one after the other, met with failure.[33]

The major legislative obstacle to expanding the scope of Charitable Choice turned out to be an issue that had not taken center stage in 1996. Beginning in 2001, a number of Democrats seized on the question of whether FBOs receiving government funds should retain the exemption in Title VII from federal policies of religious nondiscrimination in hiring. Acting on the mantra of "no government financing of employment discrimination," this group put the issue of hiring autonomy at the center of legislative debate on every FBCI-related proposal.[34] The question of "hiring rights" (as the friends of the Initiative call it), or "government-funded religious discrimination" (the term preferred by its foes), though not necessarily at the heart of the policy represented by the FBCI, has become the obstacle to any and all major legislative efforts in the field. Although members of Congress and critics of the FBCI also cited other church-state concerns in their opposition to the proposed legislation,[35] this particular one led to a near permanent stall in the campaign to expand the FBCI in Congress.

In the face of these difficulties, the White House made several, key strategic decisions. First, it showed absolutely no sign of compromise on the contested issue of hiring rights. Instead, in a major policy pronouncement, the WHOFBCI committed itself and the President to a thoroughly unyielding defense of the preservation of the religious hiring autonomy of FBOs that receive government funds.[36] Second, on a

33. *Id.* For a discussion of Executive Branch activities in the early days of the FBCI, see Kathryn Dunn Tenpas, *Can an Office Change a Country? The White House Office of Faith-Based and Community Initiatives, A Year in Review*, Pew Forum on Religion and Public Life (July 2002), *available at* http://pewforum.org/events/022002/tenpas.pdf. For a review and analysis of the efforts made to create and promote the FBCI during the entire first term of President Bush, see Anne Farris et al., *The Expanding Administrative Presidency: George W. Bush and the Faith-Based Initiative,* Roundtable (Aug. 2004), *available at* www.religionandsocialpolicy.org/docs/policy/FB_Administrative_Presidency_Report_10_08_04.pdf. *See also* SANCTIONING RELIGION? POLITICS, LAW, AND FAITH-BASED PUBLIC SERVICES (David K. Ryden and Jeffrey Poleet eds., 2005).

34. *See* BLACK ET AL., *supra* note 19, at 128–29. *See also* Melissa Rogers, *Federal Funding and Religion-Based Employment Decisions*, *in* SANCTIONING RELIGION?, supra note 32, at 105–24. R

35. *See, e.g.*, *The Constitutional Role of Faith-Based Organizations in Competitions for Federal Social Service Funds: Hearing Before the Subcomm. on the Constitution of the House Comm. on Judiciary*, 107 Cong. 26 (2001), *available at* http://judiciary.house.gov/legacy/saperstein_060701.htm (statement of Rabbi David Saperstein, Director, Religious Action of Reform Judaism)[hereinafter Saperstein statement]

36. *Executive Summary: Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must be Preserved*, The White House Office of Faith-Based and Community Initiatives, *available at* http://www.whitehouse.gov/government/fbci/booklet.pdf (last visited July 9, 2005) [hereinafter *Religious Hiring Rights*]. For a rigorous de-

much broader front, the President, in December of 2002, issued a new Executive Order which dramatically expanded the substantive scope of the Initiative. This order, entitled "Equal Protection of the Laws for Faith-Based and Community Organizations,"[37] extended the substantive policies of the FBCI to all social service programs "administered by the Federal Government, or by a State or local government using Federal financial assistance."[38] With but a few subtle differences, these policies resonated fully with those of the 1996 Charitable Choice legislation. For example, the executive order, like the 1996 statute, emphasized the right of equal participation of FBOs in government-financed social service; the right of participating FBOs to preserve their religious character, including hiring preference for those who share their religious mission; a prohibition on using government funds for certain specified religious activities; and respect for the religious liberty of beneficiaries.[39]

In one particularly important gloss on the principles in the 1996 statute, the executive order repeated the proscription on government-funded "worship, religious instruction, and proselytization," but folded this list into a generic formula for prohibited activities.[40] The order, foreshadowing a series of regulations which now appear repeatedly across the service-funding agencies of the United States, precludes the use of government funds for "inherently religious activities, such as worship, religious instruction, or proselytization."[41] FBOs who wish to engage in such activities in connection with delivery of social services must be sure to segregate those activities and pay for them with private funds only.

This executive order arrived as a considerable surprise to members of Congress, faith-based organizations, state and local administrators of human services, and other observers of the Initiative. The President and his advisors had effectively decided to ignore Congress to the extent legally possible, and to proceed on their own to expand the

fense of this position, see Carl H. Esbeck et al., *The Freedom of Faith-Based Organizations to Staff on a Religious Basis* (2004), *available at* http://www.lo.redjupiter.com/gems/cpj/religious staffing.pdf.

37. Exec. Order No. 13,279, 3 C.F.R. 258 (2003), *reprinted in* 5 U.S.C.A. § 601 (1996 & Supp. 2005).

38. *Id.* The order defined social service programs as those which provide "services directed at reducing poverty, improving opportunities for low-income children, revitalizing low-income communities, empowering low-income families and low-income individuals to become self-sufficient, or otherwise helping people in need." *Id.*

39. *Id.*

40. *Id*.

41. See *infra* Part IV.C. for further discussion of the problems of ambiguity and underinclusion associated with this particular formulation.

Initiative beyond the scope of the work and welfare services that fall under the umbrella of the 1996 welfare reform.

Did the President have legal authority to expand the Initiative in this way? Putting aside for the moment the constitutional questions raised by the Initiative with or without congressional approval, we think the President indeed had such authority. First, as a formal matter, the order's own terms state that its scope is "to the extent permitted by law."[42] Thus, the order is by its terms inoperable with respect to any matter on which there is valid law to the contrary. Second, as a substantive matter, no federal statute of which we are aware has ever explicitly barred FBOs from participating in federally-funded social services. The prior exclusion of FBOs, sometimes reflected in explicit federal regulations,[43] rested on constitutional understandings fed by Supreme Court rulings about state aid to religious schools. Those rulings had announced and reaffirmed the proposition that "pervasively sectarian" entities were constitutionally ineligible for government assistance.[44] In turn, these rulings led government agencies, by rule or customary practice, to exclude houses of worship, and religious elementary and secondary schools from government financial support.[45] As we explain in Part III below, the Court has been sharply backing away from this doctrine, leaving room for government to enter financial relationships with such entities. Because the prior exclusion was the product of judicial decisions and regulatory reactions, and had not been codified in legislative determinations, the turnaround in the Supreme Court left room for the President to order the inclusion of FBOs as eligible participants without awaiting congressional approval.[46]

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42. 3 C.F.R. 258. This language is commonplace in executive orders. *See, e.g.*, 3 C.F.R. 127 (1982) (requiring a regulatory impact analysis by federal agencies "to the extent permitted by law").

43. *See supra* note 14.

44. The terminology "pervasively sectarian" first appeared in *Hunt v. McNair*, 413 U.S. 734, 743 (1973), to explain the difference between the elementary and secondary schools aided by the scheme struck down in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and the colleges and universities aided in the scheme upheld in *Tilton v. Richardson*, 403 U.S. 672 (1971).

45. As Rabbi Saperstein explains, most religiously affiliated charities created separate 501(c)(3) organizations, disconnected from houses of worship, in order to accomplish their social service aims. Saperstein, *supra* note 12, at 1358–59. Many religiously affiliated charities, of course, pre-date the Supreme Court's no-aid cases. *See* BLACK, ET AL., *supra* note 19, at 35–37. R R

46. The Executive Order entitled "Equal Protection of the Laws for Faith-Based and Community Organizations," *see supra* note 37, thus might be compared to President Truman's orders to racially integrate the U.S. Armed Forces. *See* Exec. Order No. 9,981, 3 C.F.R. 722 (1943–1948). Congress had never required by law the practice of racial segregation in the Armed Forces. Truman (like Bush) put an end to a longstanding set of practices within the Executive Branch. Unlike Bush's order, however, Truman's order ended a practice that the then-controlling consti- R

In the final two years of President Bush's first term in office, the WHOFBCI carefully orchestrated the promulgation of a set of FBCI regulations in every major, federal funding agency.[47] These regulations carefully tracked the principles of the December, 2002 Executive Order. In particular, they persistently reaffirmed that government funds could not be used to finance "inherently religious activities," though the relevant agencies with equal persistence refused to clarify the ambiguities of that formulation.[48] The regulations also reaffirmed the Administration's policy of defending the hiring autonomy of FBOs, except where explicitly limited by federal statute.[49]

Moreover, the regulations added an additional element of constitutional provocation. Following the lead suggested by a pair of aggressive opinions prepared by the Office of Legal Counsel of the Department of Justice (OLC),[50] several federal agencies announced that they would henceforth be willing to finance the construction, re-

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tutional law seemed to tolerate, *see e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896), rather than a practice that constitutional law had appeared to mandate. For a recent discussion of Truman's order, see Jennifer Gerarda Brown & Ian Ayres, *The Inclusive Command: Voluntary Integration of Sexual Minorities into the U.S. Military*, 103 MICH. L. REV. 150, 165–70 (2004).

47. *See, e.g.*, 69 Fed. Reg. 42,586 (July 16, 2004), *available at* http://www.hhs.gov/fbci/waisgate21.pdf (providing rules on Participation in Department of Health & Human Services Programs by Religious Organizations). For comparable rules from all federal agencies and many state agencies as well, see http://www.religionandsocialpolicy.org/links/index.cfm?LinkCat=governmentLinks.

48. *See* Ira C. Lupu & Robert W. Tuttle, *The State of the Law 2003: Developments in the Law Concerning Government Partnerships with Religious Organizations*, at 8–12 (2003) (hereinafter 2003 Report) (discussing and criticizing such a refusal to clarify ambiguities in this formulation). We develop the crucial importance of this point in Part IV.C.3., *infra*.

49. *See* Lupu & Tuttle, *2003 Report*, *supra* note 48, at 22–28. For details, see sources in note 36 *supra*. R R

50. Memorandum Opinion from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to the General Counsel, Federal Emergency Management Agency, *Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy* (Sept. 25, 2002), *available at* http://www.usdoj.gov/olc/FEMAAssistance.htm [hereinafter *Authority of FEMA*]; Memorandum Opinion from M. Edward Whelan, III, Acting Assistant Attorney General, Office of Legal Counsel, to the Solicitor, Department of the Interior, *Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church* (Apr. 30, 2003), *available at* http://www.usdoj.gov/olc/OldNorthChurch.htm [hereinafter *Authority of the Department of the Interior*]. The second of these opinions explicitly repudiated a prior opinion, prepared in 1995, by the same Office of Legal Counsel. *See* Memorandum Opinion from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to the Solicitor of the U.S. Department of Interior, *Constitutionality of Awarding Historic Preservation Grants to Religious Properties* (Oct. 31, 1995), *available at* http://www.usdoj.gov/olc/doi.24.htm. The 1995 Memorandum asserted that the policy against historic preservation grants to houses of worship originated in 1981 during the Reagan Administration. For a different view of the constitutionality of historic preservation grants to houses of worship, written before the 2003 OLC Opinions, see Ira C. Lupu & Robert W. Tuttle, *Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism*, 43 B.C. L. REV. 1139 (2002). For a more recent discussion of these developments, see Christian Sproule, *Federal Funding for the Preservation of Relig-*

habilitation, and maintenance of real property devoted to both secular and religious ends.[51] This new policy is in considerable tension with several Supreme Court decisions from the early 1970s.[52]

Despite some adverse publicity about the Administration's lack of financial commitment to serve the poor through the FBCI,[53] the Initiative may be having real, redistributional consequences. Data concerning the number and dollar amounts of federal grants to FBOs are difficult to find because the FBCI is decentralized, involving state and local government as well as federal agencies, and because the Initiative has no formal definition of a faith-based organization.[54] Even if the total amounts distributed in federal service grants have remained somewhat stagnant, these figures may reflect increased distributions to FBOs and decreased grant activity with respect to secular grantees and the secular affiliates of mainstream religious traditions. The FBCI is thus, in part, a fight over scarce resources between the relatively more secular and the relatively more faith-based segments of the private, nonprofit sector. And, though a number of studies of comparative effectiveness of secular and faith-based entities are underway, to date there has been no definitive demonstration that FBOs are better, worse, or the same as secular nonprofits in the efficient delivery of service to those in need or in the social outcomes of such services.[55]

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ious Historic Places: Old North Church and the New Establishment Clause, 3 GEO. J. L. & PUB. POL'Y 151 (2005).

51. These announcements came from the U.S. Department of Housing & Urban Development, the Federal Emergency Management Administration, and the National Trust for Historic Preservation in the U.S. Department of the Interior (National Trust). *See* Lupu & Tuttle, *2003 Annual Report*, *supra* note 48, at 32–36 (HUD), 44–53 (FEMA and National Trust) (discussing these developments).

52. Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Tilton v. Richardson, 403 U.S. 672 (1971). Congress has followed the lead of the Bush Administration by enacting the California Missions Preservation Act, Pub. L. No. 108-420, 118 Stat. 2372 (2004). A group of anonymous plaintiffs, represented by the Americans United for Separation of Church and State, has filed suit against the Secretary of the Interior and seeks an injunction against implementation of the California Missions Preservation Act. *See* Doe v. Norton, No. 1:04CV02089 RJL (D.D.C. filed Mar. 28, 2005) (on file with authors and the DePaul Law Review).

53. David Kuo, who had been an assistant to Jim Towey at the WHOFBCI, has recently made this charge. David Kuo, *Please, Keep Faith*, Beliefnet, *at* http://www.beliefnet.com/story/160/story_16092_1.html (last visited July 9, 2005).

54. For a good discussion of the funding and policy environment surrounding government partnerships with faith-based organizations, see Courtney Burke et al., *Funding Faith-Based Services in a Time of Fiscal Pressures* (Oct. 2004), *available at* http://www.religionandsocialpolicy.org/docs/general/10-26-02_Funding_FB_SS-Fiscal%20Pressures.pdf; Lisa M. Montiel, *The Use of Public Funds for Delivery of Faith-Based Human Services: Second Edition* (June 2003), *available at* http://www.religionandsocialpolicy.org/docs/bibliographies/9-24-2002_use_of_public_funds.pdf.

55. Some limited studies of effectiveness are available. *See* Partha Deb & Dana Jones, *Does Faith Work? A Preliminary Comparison of Labor Market Outcomes of Job Training Programs*, *in*

The FBCI, effectively launched by Congress in 1996 and continued energetically by President Bush, has thus reconstituted the landscape of religion-state relationships and dialogue over the past ten years. Although congressional and executive branch action will shape the milieu in which constitutional questions will arise and be resolved, these branches cannot resolve on their own the profound constitutional questions their actions have put into play. The Supreme Court has, in the past several years, decided several cases involving government financing of education, and all have deep and abiding consequences for the Initiative.[56] In light of these decisions and their predecessors in the church-state field, interest groups have been litigating, and lower courts have been deciding, a series of cases touching directly upon the Initiative.[57]

In Part IV below, we discuss and appraise the issues presented in these cases, some on the verge of decision as we write this paper. Before we do so, however, we map the emerging law of the religion clauses in terms that we hope will capture its essential features, distill issues of religious distinctiveness, and ultimately facilitate appraisal of the Initiative's most controversial aspects.

III. The Scope and Relevance of the Constitutional Distinctiveness of Religion

For thousands of years, religion has been recognized as a distinctive human enterprise. Although it would be the height of law professor imperialism to claim that religion's distinctiveness is primarily a concern of governance, the Constitution's text and history thoroughly support the assertion that religion is indeed a matter of distinctive constitutional import. It is only "religious Test[s]" that Article VI for-

Charitable Choice: First Results from Three States 57–64 (Sheila Suess Kennedy & Wolfgang Bielefield eds. 2003); Mark Ragan, *Faith-Based vs. Secular: Using Administrative Data to Compare the Performance of Faith-Affiliated and Other Social Service Providers* (Dec. 2004), *available at* http://www.religionandsocialpolicy.org/docs/research/Benchmarking_report_12-23-04.pdf; *see also* John Bartkowski et al., *Comparative Case Studies of Faith-Based and Secular Service Agencies*, Roundtable, *available at* http://www.religionandsocialpolicy.org/docs/events/2003_annual_conference/11-17-2003_comparative_case_ppt.pdf (last visited Aug. 14, 2005).

56. *See, e.g.*, Locke v. Davey, 540 U.S. 712 (2004); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Mitchell v. Helms, 530 U.S. 793 (2000). *See also infra* Part III.C. for further discussion of these cases.

57. *See infra* Part IV. For more discussion of these decisions, as well as other cases that have been settled, see Roundtable, *at* www.religionandsocialpolicy.org. Most of the decisions have been made at the district court level. For reasons that we explain in Part IV.C.3., local, state, and federal governments have thus far refused to appeal adverse decisions rendered by the district courts.

bids as a condition of federal office;[58] the government may insist on fealty to its civil norms, but not to any particular view of, or belief in, a deity as a prerequisite of eligibility for federal office.[59] It is "an establishment of religion" that the First Amendment precludes federal laws from touching, and it is "religion" whose "free exercise" may not be prohibited. These constitutional references to religion are designed to preserve space for religious freedom, in part by prohibiting regulation of worship and in part by removing government from the enterprise of worship. Government must respect the ultimate and sacred commitments of others, and must not make ultimate and sacred commitments of its own.[60]

Religion is thus in some respects constitutionally distinctive, representing institutional arrangements and human commitments that government must both respect and not assume as its own undertaking. In other respects, however, religion is fully analogous to other human motivations and institutional arrangements, representing aspects of both expression and other behaviors that invite government's attention to precisely the same extent as its secular counterparts. Thus, the question of which aspects of religious faith are distinctive for constitutional purposes, and which are not, is crucial to the entire field of the law of the religion clauses. Once the inquiry into distinctiveness is recognized as the key to the subject, all of its subunits can be mapped onto three questions:

(1) When does the Constitution mandate distinctive treatment—with respect to disqualification from benefits, or entitlement to privileges—for religion or religious institutions?
(2) When does the Constitution forbid distinctive treatment for religion or religious institutions—that is, with regard to both benefits and burdens, when must such enterprises be treated identically to their secular counterparts?
(3) When, and to what extent, does the Constitution confer discretion upon government to choose between distinctive and equal treatment for religion? The answer to this third question, which

58. U.S. CONST. art. VI, cl. 3. *See generally* Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine that Has Gone of Itself*, 37 CASE W. RES. L. REV. 674 (1986–1987).

59. Torcaso v. Watkins, 367 U.S. 488 (1961) (prohibiting a state from requiring holders of public office to declare belief in God). *But cf.* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2316–21 (2004) (Rehnquist, C.J., concurring) (asserting that the government may sponsor Pledge of Allegiance, including the words "under God," in public schools); *id*. at 2321–27 (O'Connor, J., concurring) (arguing for the same conclusion on narrower grounds).

60. For elaboration of this proposition, see Lupu & Tuttle, *supra* note 27, at 52–55, 83–84, 87–88. R

> represents the "play in the joints"[61] between the religion clauses in the First Amendment, is becoming increasingly significant, and holds the key to understanding much of the constitutional future of the FBCI.

Lest this approach to the subject appear to be mere ipse dixit, we undertake in what follows to show succinctly how these questions define the entirety of the relevant inquiry in virtually every area of religion clause law. For analytic purposes, we break that law into four major areas:

(1) access of private religious speakers to public resources;
(2) government speech on matters of religion;
(3) government funding of religious entities; and
(4) government regulation of religious entities.

These four areas blanket the entire field of religion clause jurisprudence. Within each, questions arise that map neatly onto the following concepts: (a) differences between religion and its counterparts that government must recognize, (b) differences between religion and its counterparts that government is forbidden to embody in law, and (c) differences that permit but do not require discretionary judgments about separate treatment—sometimes materially better and sometimes worse—between religion and its counterparts.

A. Public Resources and Private Religious Speech

The decisions that fall into this category are perhaps the easiest to categorize along the continuum of distinctiveness. Over the past twenty-five years, the Supreme Court has repeatedly confronted the question of whether private speech that manifests a religious perspective is constitutionally entitled to the same treatment as speech offered from a secular perspective.[62] This line of cases arose as an outgrowth of the Court's decisions on state-sponsored worship in public schools.[63] In what now seems like a massive constitutional misunderstanding, many local authorities and school officials wrongly perceived those decisions to bar private religious speech on public school property as well.[64] Accordingly, these officials at times barred

61. For reference to this idea of "play," see Locke v. Davey, 540 U.S. 712, 718–19 (2004) (citing Walz v. Tax Comm'n, 397 U.S. 664 (1970)); *see also* Cutter v. Wilkinson, 125 S. Ct. 2113, 2121–22 (2005) (quoting *Walz* and *Locke*).

62. Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Rosenberger v. Rector & Visitors, 515 U.S. 819 (1995); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981). *See also* Bd. of Educ. v. Mergens, 496 U.S. 226 (1990).

63. Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

64. For discussion of this phenomenon, see Bd. of Educ. v. Mergens, 496 U.S. 226 (1990).

students from using state-provided resources and spaces for the students' own, private religious expression and association.

In a series of decisions spanning the past twenty years, the Supreme Court has invalidated all of these restrictions.[65] The holdings have rested not on the religion clauses, but rather on the freedom of speech and attendant doctrines of equal access to state-created public fora.[66] In most of the cases in this line, the Establishment Clause has been put forward as a shield rather than a sword; that is, the government has relied unsuccessfully on the Establishment Clause as a justification for the exclusion of private religious speech from the public forum. Because private speech in a public forum is never attributable to the state, the Court has reasoned, the Establishment Clause neither requires nor permits the state to exclude such speech, on grounds of the expression's religious character, from the fora it creates. For the state to do so would systematically lead to a secular bias in the expression available in public fora.

This category of problem is thus the simplest to classify on the scale of distinctive versus equal treatment. In the public forum, religious speech is constitutionally entitled to treatment identical with that afforded its secular counterparts. The state is under no constitutional obligation to exclude such speech on grounds of its religious character. To the contrary, the state has no discretion to exclude such speech on those grounds.[67]

The most controversial of this line of cases is *Rosenberger v. University of Virginia*,[68] because it involved money rather than physical space as the government resource from which private religious speakers had been excluded. Ordinarily, public forum cases involve access to government-controlled physical space rather than pure financial subsidy. The primary explanation for this phenomenon is that the government rarely provides funds to subsidize speech from all perspectives; the state rarely has reason to do so and would frequently invite political opposition if it used taxpayer support to subsidize highly unpopular or

65. *See supra* note 62. R

66. All the decisions cited in note 62, *supra*, fit this description. R

67. Beginning in the Clinton Administration, the U.S. Department of Education began to publish a set of privately-initiated guidelines for student-initiated religious speech in public schools. *See* Ira C. Lupu, *Threading Between the Religion Clauses*, 63 LAW & CONTEMP. PROBS. 439, 447 (2000). The most recent version of these guidelines, revised by the Bush Administration, is Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, 69 Fed. Reg. 42,586 (July 16, 2004), *available at* http://www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html.

68. 515 U.S. 819 (1995) (holding that First Amendment requires that a state university include a journal written from a religious perspective in a general program of subsidies for student-run journals).

controversial speech. *Rosenberger*, because it involves a printing subsidy for student journals at a state university, provides a rare exception to that reticence. The state has education-related incentives to finance a multiplicity of diverse journals within a university, and it has reason for some confidence that the students receiving such subsidies will not transgress the highly permissive social norms operating in the campus world where publication takes place.

But *Rosenberger*, which seems unique to us, inspired considerable hope on the part of some commentators[69] and proponents of the FBCI[70] that the principle of "mandatory equal access" for religious entities was very broad. To these proponents of school voucher schemes and the FBCI, the concept of equal access extended logically to claims for equal participation in a variety of public spending programs that only faintly (if at all) resembled "public fora." On this view, the Establishment Clause did not trump the equal access principle, nor did the policies of the clause license government discretion to overcome such a principle of equality.

As we develop in Section C, below, these hopes thus far have proved mistaken. Programs of government funding for educational or other services do not create a public forum within which the principle of equal access—mandatory nondistinctiveness, in our terminology—applies. And, as we further explicate in Part IV, the absence of such a constitutional mandate has crucial consequences for the FBCI.

B. Government-Sponsored Religious Messages

Like the category of equal access for private religious speakers to public fora, the cases in this category also seem to be an outgrowth of the Court's decisions about state-sponsored worship in schools. Prior to the early 1980s, all of the Court's decisions about state-sponsored

69. Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persectuion*, 72 FORDHAM L. REV. 493 (2003); Note, *The School Voucher Debate after* Zelman*: Can States Be Compelled to Fund Sectarian Schools under the Federal Constitution?*, 44 B.C. L. REV. 1397 (2003). *But see* Colleen Carlton Smith, Note, Zelman's *Evolving Legacy: Selective Funding of Secular Private Schools in State School Choice Programs*, 89 VA. L. REV. 1953 (2003). *See also* John P. Scully, Comment, *Unifying the First Amendment: Free Exercise, The Provision of Subsidies, and a Public Forum Equivalent*, 54 DEPAUL L. REV. 157 (2004). *Rosenberger* has now been limited by both *United States v. American Library Association*, 539 U.S. 194, 206 (2003) (plurality opinion), and *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004).

70. The 2003 OLC opinion, *supra* note 50, relied significantly on this sort of argument. *See also A Guide to Charitable Choice, An Overview of Section 104,* Center for Public Justice, *available at* http://www.cpjustice.org/charitablechoice/guide/principles (last visited July 10, 2005) (arguing, as part of a discussion of even-handed funding of religious and secular social service providers, that "the First Amendment secures the right of religious expression, which may not be subjected to discriminatory treatment by government."). R

religious messages had been rendered in the context of the public schools.[71] Beginning in 1983 with *Marsh v. Chambers*,[72] which upheld on historical grounds the practice of beginning state legislative sessions with a prayer, the Court has confronted a series of comparable controversies, outside of schools, concerning government sponsorship of messages that include religious content.[73] To date, all of them, except for a stand-alone Christmas nativity scene on the courthouse steps in Allegheny County, Pennsylvania[74] and a Ten Commandments display in a Kentucky courthouse,[75] have survived Establishment Clause scrutiny.

Outcomes notwithstanding, this series of decisions has produced the widely recognized standard of "no endorsement," which forbids government endorsement of religious belief.[76] This standard forbids government from sponsoring religious messages that are designed to, or have the effect of (when viewed by the hypothetical reasonable observer) creating classes of political "insiders" and "outsiders" defined by religious belief. This Term's pair of cases about government displays of the Ten Commandments[77] called increased attention to the importance and controversial character of this principle.

Despite the obvious differences that appear among the Justices in the cases about the Decalogue or other religious communications by the state, the "no endorsement" principle readily maps onto the continuum of religious distinctiveness. Indeed, the "no endorsement" principle is one of the most powerful examples in support of a concept of distinctiveness. Outside the field of religious belief, government is entirely free in its own messages to endorse or condemn virtually anything. Government may take a firm position for the environment, against smoking, in favor of sexual abstinence by unmarried minors, against abortion, in favor of gun control, and so on.[78] Any of these messages may deeply offend some citizens, and may create within

71. *See* Ira C. Lupu, *Government Messages and Government Money:* Santa Fe, Mitchell v. Helms *and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771 (2001) (discussing the evolution of law governing state-sponsored religious messages).

72. 463 U.S. 783 (1983).

73. County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984).

74. *County of Allegheny*, 492 U.S. 573.

75. McCreary County v. ACLU, No. 03-1693, 2005 U.S. LEXIS 5211 (June 27, 2005).

76. *County of Allegheny*, 492 U.S. at 594–97; *id*. at 623–32 (O'Connor, J., concurring); *Lynch*, 465 U.S. at 687–91 (O'Connor, J., concurring). *See also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Lee v. Weisman, 505 U.S. 577 (1992).

77. *McCreary County*, 2005 U.S. LEXIS 5211; Van Orden v. Perry, No. 03-1500, 2005 U.S. LEXIS 5215 (June 27, 2005).

78. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991); Bowen v. Kendrick, 487 U.S. 589 (1988).

such persons feelings of alienation or "outsider" status. Nothing in our constitutional tradition, however, limits the government's authority to send messages with such consequences; indeed, it would be unthinkable that, after so many years of practice to the contrary, the Constitution was suddenly read to inhibit the government's use of the bully pulpit in this way.

Religious messages are different. Whether the theory that explains the prohibition on government endorsement of religious beliefs is Justice O'Connor's concern for alienation of citizens[79] or the authors' own normative account of the required secularity of the state,[80] the "no endorsement" principle rests entirely on the premise that some religious communications by government are distinctively unacceptable. The opinions applying that principle leave room for government to communicate some religious sentiment, typically characterized by the inexact phrase of "ceremonial deism."[81] Outside the uncertain boundaries of that category, current standards under the Establishment Clause render unacceptable any official promulgation designed to promote pointedly sectarian sentiment.[82]

To sum up, state-sponsored messages that effectively adopt a particular religious belief are constitutionally distinctive, and the Establishment Clause frequently bars them. All other government messages, with or without religious content, remain within the discretion of government as speaker.

Decisions about religious speech, both private and public, play powerfully into the rhetoric both for and against the FBCI. Advocates of the FBCI like to portray it as being about "equal access" of FBOs to government support and largesse; these advocates rely on the "private religious speech" cases to the fullest extent possible.[83] Foes of the FBCI have the opposite impulse. They are eager to label the FBCI as a giant program of government "endorsement" of the desira-

79. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring); *County of Allegheny*, 492 U.S. at 623–32 (O'Connor, J., concurring).

80. Lupu & Tuttle, *supra* note 27, at 53–55. **R**

81. *See* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2322–23 (2004) (O'Connor, J., concurring); *Lynch*, 465 U.S. at 715–16 (Brennan, J., dissenting) (quoting Arthur E. Sutherland, *Book Review*, 40 IND. L.J. 83, 86 (1964) (reviewing WILBER G. KATZ, RELIGION AND AMERICAN CONSTITUTION (1963)).

82. *See, e.g.*, McCreary County v. ACLU, No. 03-1693, 2005 U.S. LEXIS 5211 (June 27, 2005); Ams. United for Separation of Church & State v. City of Grand Rapids, 784 F. Supp. 403, 411–12 (W.D. Mich. 1990) (affirming preliminary injunction against placement of twenty foot-high menorah in public plaza during Chanukah); Harris v. City of Zion, 729 F. Supp. 1242, 1249–50 (N.D. Ill. 1990) (finding that city seal containing Latin cross and other Christian symbols, with nothing to neutralize their sectarian meaning, violates the Establishment Clause).

83. *See supra* notes 65–68. **R**

bility of faith.[84] If the constitutional law of the FBCI had to be derived entirely from the law about religious speech, private and governmental, it would inevitably and directly confront these competing characterizations of the expressive qualities associated with the FBCI. An older, lengthier, and more apt body of decisional law about government funding of religious entities, however, is more directly relevant to the FBCI, and it is to that corpus that we now turn as our third location on the religion clause map.

C. Government Funding of Religious Entities and Activities

1. Direct Financing.

At the height of Separationism—sometime in the 1970s—the notion of constitutional distinctiveness of religious entities was in its fullest flower. In a series of cases arising from state attempts to assist religiously affiliated elementary and secondary schools, the Court developed and repeated a doctrine that appeared to exclude from eligibility for direct government aid all "pervasively sectarian" organizations.[85] As the Court then saw the problem, aid to such organizations either inevitably aided their religious function, or required "excessive entanglement" between faith institutions and government officials to ensure that the aid was restricted to secular use.[86] Either way, such arrangements violated the First Amendment.

As a result of this doctrine, religious organizations that sought government grants and contracts had powerful incentives to create separate charitable affiliates in which they substantially played down their religious identity. If funding agencies and courts were going to make determinations about the "pervasively sectarian" character of an entity based upon its structure of governance, its declaration of mission, and its physical appearance, such entities inevitably would have to dilute their religious character or abandon the chase for government

84. *See, e.g.*, David Cole, *Faith and Funding: Toward An Expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559, 564–65 (2002); Sullivan, *supra* note 27, at 1405–09. The initial complaint in *Freedom From Religion Foundation v. Towey*, No. 04–C–381–S, (W.D. Wisc., 2004), discussed *infra* Part IV.A.1. and in Ira C. Lupu & Robert W. Tuttle, *Freedom from Religion Foundation, Inc. (and others) v. Jim Towey, Director of White House Office of Faith Based and Community Initiatives (and others)* (June 28, 2004), *at* http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=28, was based on such a theory of endorsement. R

85. Wolman v. Walter, 433 U.S. 229 (1977), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000); Roemer v. Maryland Pub. Works Bd., 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973). Aid that runs through student beneficiaries and their families, (as opposed to going directly to the schools) has always been on sounder constitutional footing. *See* Bd. of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Bd. of Educ., 330 U.S. 1 (1947); *but see* Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973).

86. Lemon v. Kurtzman, 403 U.S. 602 (1971).

resources. More than any other doctrine in the Court's engagement with the constitutional distinctiveness of religious organizations, this one invited complaints of judicial hostility and constitutionally inappropriate incentives for FBOs to secularize.[87]

Bowen v. Kendrick,[88] decided in 1988, represents a turning point in the law of government financial support for religious organizations. *Bowen* upheld the constitutionality of the Adolescent Family Life Act,[89] which authorized federal expenditures for programs of information on teenage sexuality and reproduction.[90] The Act required prospective state and local grantees to describe their plans to include religious organizations in the mix of community groups to be involved in the program.[91] The Court reversed the lower courts' invalidation of the Act on its face, and remanded the case for consideration on whether the Act might be unconstitutional "as applied."[92]

Bowen is the source of a variety of lessons that would later inform the FBCI and the litigation surrounding it. First, *Bowen* confirmed an intuition, suggested by earlier decisions, that federal programs would be more difficult to challenge on their face than comparable state programs.[93] The primary reason for this is the broader religious demography of nation wide programs; unlike a school aid program from New York or Pennsylvania or Rhode Island, where Catholic schools predominated among the beneficiaries, a federal program tends to serve a religiously pluralistic array of institutions.[94] Second, *Bowen* articulated, for the first time, a distinction between facial and as-applied challenges to broad programs on Establishment Clause grounds.[95] Requiring interest group plaintiffs to litigate grant by grant, rather than against a nationwide program as a whole, complicates considerably the task of plaintiffs in allocating their litigation resources efficiently. Although the remand in *Bowen* signaled adher-

87. *See* Columbia Union Coll. v. Clark, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 527 U.S. 1013 (1999).

88. 487 U.S. 589 (1988).

89. 42 U.S.C. § 300z (1982 ed. and Supp. IV 1986), cited in *Bowen*, 487 U.S. 593.

90. *Bowen*, 487 U.S. at 593.

91. *Id*. at 603.

92. *Id.* at 618–21.

93. For an earlier, similar result in a challenge to a federal program for spending on higher education, see *Tilton v. Richardson*, 403 U.S. 672 (1971).

94. In *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973),and *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court emphasized the predominantly Roman Catholic character of the beneficiary schools. *Nyquist*, 413 U.S. at 768 n.22, n.23; *Lemon*, 403 U.S. at 610. In *Bowen*, the Court said nothing about demographics, because a nationwide program would inevitably involve a broader range of religious communities.

95. *Bowen*, 487 U.S. at 600–18.

ence to the doctrine that "pervasively sectarian" entities (as well as "specifically religious activities" in a secular setting) remain constitutionally ineligible for direct government aid,[96] a separate opinion by Justices Scalia and Kennedy mounted a broadside attack on the idea that "pervasively sectarian" entities should be categorically excluded from aid.[97]

In *Agostini v. Felton*,[98] decided in 1997, a Court majority threw into question the doctrine that called for the exclusion of "pervasively sectarian" entities into question in *Agostini*, which expressly overruled the Court's prior decision in *Aguilar v. Felton*,[99] upheld a program that called for public employees to teach remedial subjects to students at underperforming schools in low-income areas. The program included schools that were private and religious, private and secular, or public.

Agostini's refusal to hold that the Constitution required the exclusion of sectarian schools from the scheme was thoroughly explicable on the ground that public employees were doing the teaching under the program, and the Court quite reasonably assumed that such employees would not be influenced in their teaching by the school's overall religious character.[100] Whatever doubt remained, however, about the scope of the Court's turn away from the doctrine of "pervasively sectarian" organizations, was erased in 2000 by the plurality and concurring opinions in *Mitchell v. Helms*.[101] *Mitchell* involved a program of federal financial support for loans of educational materials by state and local governments to schools in low-income areas—books, films, projectors, VCRs, computers, and educational software.[102] Private schools aided under the program were permitted to make only "secular, nonideological use" of these materials, which were placed under the control of teachers and other personnel in the borrower school.[103]

Among the challengers' arguments was the contention that some of the aided schools were "pervasively sectarian," and therefore were

96. *Id*. at 620–21.

97. *Id*. at 624–25 (Kennedy, J., joined by Scalia, J., concurring in the judgment). No Justice dissented, however, from the decision to remand the case for determination of whether particular grants had been used for "specifically religious activities."

98. 521 U.S. 203 (1997). In *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), the Court had earlier upheld the publicly financed provision of a hearing interpreter to a hearing-impaired student enrolled in a religious secondary school, but that decision involved beneficiary choice, rather than direct financial assistance to the school.

99. 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

100. *Agostini*, 521 U.S. at 222–20.

101. 530 U.S. 793 (2000).

102. *Id*. at 803 (plurality opinion).

103. *Id.* at 802 (plurality opinion).

constitutionally ineligible for such assistance.[104] This argument ran into the buzzsaw of Justice Thomas's plurality opinion, which Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy joined. The doctrine requiring exclusion from aid of "pervasively sectarian" entities, Justice Thomas wrote, was the product of an anti-Catholic animus that had influenced legal norms for over a century, and should be permanently abandoned.[105] A concurring opinion by Justice O'Connor, joined by Justice Breyer, made no mention of the plurality's attack on the doctrine, but made no effort to rehabilitate it, and agreed that the challenged program was within the boundaries of the Establishment Clause despite the fact that some intensively religious schools were among its beneficiaries.[106]

Despite its repudiation of the doctrine providing for categorical exclusion of "pervasively sectarian" organizations from direct government support, *Mitchell*'s plurality and concurring opinions alike restate several of the Court's additional criteria for the permissibility of aid to entities with a religious character. The program must have a secular purpose,[107] and it must be "offered to a broad range of groups or persons without regard to their religion."[108] After *Mitchell*, requirements of secular purpose and formal neutrality, rather than a categorical exclusion of "pervasively sectarian" organizations, are the determinants of permissible inclusion of organizations with religious character. *Mitchell* does not address the question of whether government must include religious entities in programs of aid to the private sector—the decision does not raise the question of government discretion to exclude such entities from some forms of assistance. *Mitchell*'s unmistakable legacy, however, is the abandonment of organizational character as a conclusive determinant of eligibility for government support. In this respect, the scope of constitutional distinctiveness in the field of direct government financing has shrunk.

Even as the realm of constitutional distinctiveness of religious entities has shrunk, five votes remain—the *Mitchell* concurring and dissenting Justices—for the constitutional distinctiveness of religious activities. The three dissenters would have invalidated the program because the aid was readily divertible to such activity, whether or not the evidence revealed diversion in fact.[109] The two concurring Justices

104. *Id.* at 804 (plurality opinion).

105. *Id.* at 826–29 (plurality opinion).

106. *Id.* at 836–64 (O'Connor, J., joined by Breyer, J., concurring).

107. *Mitchell,* 530 U.S. at 809–10 (plurality opinion); *id.* at 844–46 (O'Connor J., joined by Breyer, J., concurring).

108. *Id.* at 809 (plurality opinion).

109. *Id.* at 867–913 (Souter, J., joined by Ginsburg, J., and Stevens, J., dissenting).

insisted on evidence of actual diversion, and demanded that the government demonstrate the availability of systematic procedural safeguards against such diversion.[110] Finding sufficient evidence of the latter and only minor evidence of the former, the concurring Justices voted to sustain the program. The lineup of votes in *Mitchell*, however, revealed five Justices who believe that the government is forbidden to engage in conduct which will render it responsible for religious indoctrination, and that direct financing of religiously based instruction transgresses that line.[111] Although these five disagreed in *Mitchell* on the way in which to enforce this norm,[112] this is indeed a question about the constitutional distinctiveness of religion-based education. Government may be, and often is, the instrument of indoctrination into a variety of ideological positions—racial equality, or the virtues of democracy, for example. The *Mitchell* concurrence's continued devotion to a prohibition on government action that renders the state responsible for the distinctive experience of religious indoctrination has very serious implications, which we address in Part IV below,[113] for the permissibility of government financing of religion-based social services.

2. Indirect Financing

Does the method of financing that the government selects influence the relevant constitutional norms of constitutional distinctiveness? Before the Supreme Court's landmark decision in *Zelman v. Simmons-Harris*,[114] the Court's decisions left room for constitutional lawyers to argue about this. The Court's holdings in *Everson v. Board of Education*,[115] *Board of Education v. Allen*,[116] *Witters v. Washington Department of Services for the Blind,*[117] *Mueller v. Allen*,[118] and

110. *Id*. at 860–64 (O'Connor, J., joined by Breyer, J., concurring).

111. Justice O'Connor's recent retirement, once it becomes effective, will mean that only four Justices support this position, while four others oppose it.

112. The *Mitchell* dissent favored prophylactic methods, such as complete exclusion of all pervasively sectarian organizations from direct aid, *id.* at 886–87 (Souter, J., joined by Ginsburg, J., and Stevens, J., dissenting), while the *Mitchell* concurrence was content with procedural safeguards against actual diversion of the aid to religious uses. *Mitchell*, 530 U.S. at 860–64 (O'Connor, J., joined by Breyer, J., concurring). Even the concurring opinion, however, raised questions about the permissibility of direct money payments, which *Mitchell* did not involve, as compared to in-kind aid, which is more readily insulated from diversion. *Id.*

113. *See infra* Part IV.C.3.

114. 536 U.S. 639 (2002).

115. 330 U.S. 1 (1947).

116. 392 U.S. 236 (1968).

117. 474 U.S. 481 (1986) (upholding the use at a Bible college of a tuition grant from the state under a program designed to aid the blind).

Zobrest v. Catalina Foothills School District,[119] strongly suggested that the intervening choice of aid beneficiaries to direct their state-created benefit to a religious entity cleansed the outcome of any constitutional taint. On the other hand, the earlier decision in *Committee for Public Education and Religious Liberty v. Nyquist*,[120] which invalidated a state program of tax credits and tuition grants to families with children in private elementary and secondary schools, suggested that a challenged program's magnitude, religion-specific targeting, and degree of benefit to religious schools might constitutionally overwhelm its beneficiary choice feature.

In upholding Ohio's scheme for tuition vouchers in the Cleveland school system, the *Zelman* Court definitively answered the question about the significance of beneficiary choice. The majority opinion, authored by the Chief Justice, held that the intervening choice of schools by families of schoolchildren absolved the state of constitutional responsibility for whatever religious indoctrination occurred in participating voucher schools. The Constitution's only requirements for a program of this character are (1) independent choice by beneficiaries among religious and secular educational options, and (2) formal neutrality between religious and secular schools seeking to participate in the program. Despite the predominance of religious schools among those participating in the voucher scheme, the Court found that the program's entry criteria for participating schools did not favor religious providers, and that families had a wide array of choices among voucher schools and various public school options offered by Cleveland. On these facts, the religious character of many of the participating voucher schools was constitutionally irrelevant.[121]

Zelman unambiguously answers several questions. First, in a program of true, private choice, the government is free to include religious providers so long as secular providers are afforded access to the arrangement on formally equal terms.[122] To the extent that *Nyquist* or other prior cases had suggested that the quantity of government assistance that made its way to religious providers had any bearing on the

118. 463 U.S. 388 (1983) (upholding, on grounds of intervening beneficiary choice, state tax deduction for private school tuition paid to religiously affiliated school).

119. 509 U.S. 1 (1993).

120. 413 U.S. 756 (1973).

121. For a fuller exposition of the various opinions in *Zelman*, see Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151 (2003); Ira C. Lupu & Robert W. Tuttle, Zelman's *Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 918 (2003) (hereafter cited as *Zelman's Future*); Mark Tushnet, *Vouchers After* Zelman, 2002 SUP. CT. REV. 1; Charles Fried, Comment, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163 (2002).

122. 536 U.S. at 650–52.

scheme's constitutionality, *Zelman* pushes such a notion completely aside. It is the program's qualitative arrangement, not quantitative consequences, that determine its legality.

Second, unlike recipients of direct public grants, which may not be used to support religious activity, providers in programs of beneficiary choice may indeed include religious activity as part of the enterprise.[123] Many of the participating religious schools in Cleveland included worship services and religious instruction as a mandatory part of the educational program,[124] and the First Amendment, as construed in *Zelman*, presents no bar to inclusion of such material.

Zelman does not address, however, a series of questions central to the debate over the FBCI. First, is the constitutional benefit of indirect financing limited to programs in which the voucher or other benefit actually passes through the hands of beneficiaries, or do such benefits extend equally to schemes involving per capita payments to providers?[125] Second, what are the essential criteria of "true, private choice"?[126] Is the mere existence, or potential existence, of secular providers within the program enough to satisfy that standard, or must there be some measure of parity between secular and religious options?[127] Third, to what extent do circumstances of duress, or limited capacity to choose on the part of beneficiaries, affect the constitutional permissibility of the scheme?[128]

Finally, to what extent, if any, is *Zelman*'s permission to the states to include religious providers in voucher schemes a mandate to do so? That is, once the state elects to provide a service through private providers, may it limit the class of relevant providers to those with a secular character? To put this question in the terms we have been emphasizing, is equal participation of religious entities in voucher schemes mandatory (akin to private religious speech in the public forum), or a matter of political discretion?

123. *Id*. at 652 (stating that in a system of private choice, the "incidental advancement of a religious mission . . ." is not attributable to the government).

124. The Milwaukee school voucher program required participating schools to provide voucher students with an opt-out from religious instruction and worship. *See* Jackson v. Benson, 578 N.W. 2d 602, 609 (Wis. 1998). For further discussion on the significance of mandatory opt-outs, see Ira C. Lupu & Robert W. Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, 18 J.L. & POL. 539 (2002).

125. *See infra* Part IV.

126. *Zelman*, 536 U.S. at 653.

127. For consideration of this question, see Zelman v. Simmons-Harris, 536 U.S. 639, 670–76 (2002) (O'Connor, J., concurring); *id*. at 698–707 (Souter, J., dissenting); Lupu & Tuttle, *supra* note 124 at 594–601(2002); *see also* Lupu & Tuttle, *supra* note 121, at 946–47. R

128. *See infra* Part IV.C.1; *see also* Lupu & Tuttle, *supra* note 121 at 982–92. R

3. Discretionary Exclusions of Religious Entities and Activities

Less than two years after *Zelman*, the Supreme Court in *Locke v. Davey*[129] provided the first clue as to whether the state may exclude religiously oriented service from state subsidy. *Locke* involved the Washington State Promise Scholarship Program, available to low and middle income state residents who attended college within the state. The state made Promise Scholarships available for use at all accredited schools, with one limitation—Promise Scholars could not major in devotional theology or any other major course of study designed to prepare students for a career in religious ministry. The program excluded Joshua Davey on this basis, and he claimed that the exclusion violated the Free Exercise Clause of the First Amendment. Davey argued that the Constitution requires the state to treat religious studies as nondistinctive, and thus mandates identical treatment to that afforded to nonreligious studies.[130]

The Ninth Circuit ruled in Davey's favor,[131] but the Supreme Court reversed.[132] It noted at the outset that the state was indeed free to include students with such majors in the scheme. Because the beneficiary chose the school at which the scholarship would be applied, the Establishment Clause did not require distinctive and exclusionary treatment of students majoring in devotional theology.[133] Nevertheless, the Court gave short shrift to Mr. Davey's argument that the exclusion of students majoring in devotional theology violated either the Equal Protection Clause, or, by analogy to *Rosenberger v. University of Virginia*,[134] the Free Speech Clause. A scholarship program, the Court reasoned, does not constitute a "public forum" to which the state, by virtue of free speech principles, must admit all points of

129. 540 U.S. 712 (2004). For a defense of *Locke*, see Steven K. Green, Locke v. Davey *and the Limits to Neutrality Theory*, 77 TEMP. L. REV. 913 (2004). For criticism of *Locke*, see Thomas C. Berg & Douglas Laycock, *The Mistakes in* Locke v. Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 TULSA L. REV. 155 (2004); Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155 (2004).

130. Davey v. Locke, 299 F.3d 748, 753 (9th Cir. 2003) (stating that "Davey submits that [Washington's] policy fails *Lukumi's* neutrality test because the policy discriminates on its face by treating those who choose a religious major unequally.").

131. *Id.* at 760, *rev'd*, Locke v. Davey, 540 U.S. 712 (2004).

132. 540 U.S. at 725.

133. This issue was settled in *Witters v. Washington Department of Services For the Blind*, 474 U.S. 481 (1986) (holding that the Establishment Clause does not bar use of tuition aid afforded to blind student at Bible college). After the U.S. Supreme Court's remand to the Washington State Supreme Court in *Witters*, the state high court ruled that the Washington constitution barred the aid even though the federal constitution did not. *Witters*, 771 P.2d 1119 (Wash. 1989).

134. 515 U.S. 819 (1995).

view.[135] Moreover, the Equal Protection Clause requires no more than rationality review, a standard satisfied by the state's legitimate concern to keep its distance from devotional studies.[136]

To the argument that the Ninth Circuit had accepted—that the Free Exercise Clause forbade discrimination between those majoring in devotional theology and those majoring in all other subjects— the Court explicitly emphasized the state's prerogative in distinctive treatment of religious matters. Between the limits of the Establishment Clause and the rights protected by the Free Exercise Clause, the Court explained, there is room for "play in the joints"[137] in the way the state chooses to define its policy toward subsidy of religious studies.[138] In assessing the relevant space for such play in this case, the Court emphasized the constitutionally delicate nature of training for a career in ministry.[139] The state may not regulate the faith-prescribed content of such training, and the history of state involvement with religious matters going all the way back to the founding reveals constitutional concern with state support for religious ministry.[140] Thus, the Court concluded, the state retained discretion to include or exclude ministry-oriented studies in the Promise Scholarship Program.

Without question, the scope of discretion legitimated in *Locke* is subject to serious debate. Scholars have been quick to criticize it,[141] while several courts have seized upon it as a source of federal constitutional permission to exclude religious schools— not just religious studies—from schemes of indirect state financing.[142] Whatever its ultimate scope, the Court's opinion in *Locke* represents powerful evi-

135. *Locke*, 540 U.S. at 720 n.3.

136. *Id.*

137. *Id.* at 718–19 (quoting Walz v. Tax Comm'n & City of New York, 397 U.S. 669 (1970)).

138. *Id*. at 729.

139. *Id*. at 721.

140. *Id.* at 722–23. Constitutional concern over state payment of the salaries of clergy goes back to the Virginia fight over the proposed Bill for Religious Assessments and Madison's successful Memorial & Remonstrance against the Bill. Everson v. Bd. of Educ., 330 U.S. 1, 9–13 (1947) (detailing this history); *id.* at 28–42 (Rutledge, J., dissenting) (detailing this history). A number of the earliest state constitutions contain express prohibitions against using public money to support the clergy. *See, e.g.*, DEL. CONST., art. I, § 1; N.J. CONST., art. I, par. 3; W.VA. CONST., art. III, § 15; VA. CONST. art. I, § 16; VT. CONST., ch. 1 art. 3.

141. For trenchant criticism of *Locke*, see Berg & Laycock, *supra* note 129; Laycock *supra* note 129. *See also* Frank Ravitch, *The Funding of Religious Institutions in Light of* Locke v. Davey*:* Locke v. Davey *and the Lose Lose Scenario: What* Davey *Could Have Said but Didn't*, 40 TULSA L. REV. 255 (2004).

142. Eulitt v. Maine Dept. of Educ., 386 F.3d 344 (1st Cir. 2004) (relying on *Locke* to conclude that the state's program involving payment for secular private schools, but not religious private schools, does not violate the Free Exercise Clause); Bush v. Holmes, 886 So. 2d 340 (Fla. Dist. Ct. App. 2004) (holding that state voucher program was in violation of state constitution and relying on *Locke* for the proposition that states may favor secular over religious entities).

dence that our "in-between" category of distinctiveness—discretionary with, rather than mandatory upon, the state—is vibrant.[143]

To sum up the complex law of government funding of religious entities and causes:

(1) Within a formally religion-neutral program, government may directly assist religious organizations, regardless of their character, but may not directly aid religious activity;
(2) Within a formally religion-neutral program, government may indirectly fund religious organizations, and providers within such a program are not constitutionally barred from including religious activities;
(3) Within boundaries not yet fully specified, government retains discretion to include or exclude religious activities, and perhaps organizations defined by their religious character, from programs of direct or indirect state financing.

This constellation of concepts that shape the funding rules are of course vital to the emerging regime of the FBCI. We return to them all in Part IV below.

D. Government Regulation of Religious Organizations and Religiously Motivated Private Conduct

Like government funding, this category is complex, and involves a series of interlocking rules. This category bears less on the FBCI than the category of government funding, but at least some of the controversy about the FBCI involves government-imposed conditions on the receipt of funds. Such conditions involve a form of regulation of grantees, and the architects of such conditions must be mindful of the relevant constitutional limits.

1. Religious Exemptions from Religion-Neutral Rules

The law of the Free Exercise Clause, which is the primary but not exclusive protector of rights against government regulation of religious activity, has also changed dramatically in recent years. Prior to the Supreme Court's surprising and dramatic decision in 1990 in *Employment Division v. Smith*,[144] the Court had proclaimed a policy of religious distinctiveness in free exercise cases. With respect to those claimants who demonstrated that government policy substantially burdened the exercise of their religious freedom, the governing law required courts to apply a standard highly solicitous to religion. Such

143. In Part IV below, we return to *Locke* and explore in depth its significance for the FBCI.
144. 494 U.S. 872 (1990).

claimants were constitutionally entitled to an exemption from the general policy unless the government could demonstrate that denying the exemption was necessary to accomplish very important governmental interests.[145] This standard, frequently described as the "compelling interest" test, revealed a constitutionally distinctive character to claims of religious liberty; no other constitutional guarantees, in the First Amendment or otherwise, authorized courts to create exemptions from general laws.[146]

The Supreme Court's decision in *Smith*, which involved unemployment compensation claims by drug counselors who had been fired as a result of ingesting peyote as a sacramental observance in the Native American Church, ended that distinctive treatment of Free Exercise claims. For reasons sounding primarily in issues of institutional competence, the *Smith* opinion repudiated the compelling interest test in cases involving claims of exemption from religion-neutral and generally applicable rules.[147] Under *Smith*, such claims are to be tested under the relevant constitutional standard applicable to the challenged policy as a whole, rather than tested as distinctive claims to exemption from the policy.

The *Smith* decision produced a substantial outcry,[148] followed by fifteen years of political and constitutional dispute, through and including the Supreme Court's recent decision upholding the constitutionality of § 3 of the Religious Land Use and Institutionalized Persons Act.[149] In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,*[150] decided several years after *Smith*, the Court sharpened and clarified the constitutional status of free exercise claims. The *Lukumi* decision involved a series of local ordinances, all of which were aimed at stamping out the practice of animal sacrifice in the

145. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). This test was subject to a variety of exceptions, dilutions, and evasions. Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 176–85 (1995).

146. The Supreme Court's opinion in *United .States. v. O'Brien*, 391 U.S. 367 (1968), suggests free speech exceptions to general laws not aimed at communication, but the Court has applied the approach in *O'Brien* very weakly and has rarely been willing to find such an exception. *See* Barnes v. Glen Theater, Inc., 501 U.S. 560 (1991) (finding no First Amendment exemption from laws against public nudity). *But see* Bartnicki v. Vopper, 532 U.S. 514 (2001) (recognizing narrow First Amendment exception to laws regulating disclosure of unlawful wiretaps).

147. *Smith*, 494 U.S. at 886–87.

148. The widespread criticism of and concern about *Smith* in the civil liberties and many religious communities eventually led to the passage of the Religious Freedom Restoration Act, which the Supreme Court held unconstitutional as applied to the states in *City of Boerne v. Archbishop Flores*, 521 U.S. 507 (1997).

149. Cutter v. Wilkinson, 125 S. Ct. 2113 (2005).

150. 508 U.S. 520 (1993).

Santerian religion.[151] The Court recognized that the City had rigged the ordinances so as to single out only ritual sacrifice, and virtually no other form of animal killing, for disapproval.[152] In light of this discriminatory treatment of the Santerian faith and its practices, the Court ruled that the ordinances were not entitled to the deference of the rule in *Smith*.[153] Instead, this singling out of a particular faith and its practices rendered the ordinances non-neutral and not generally applicable, and resulted in the Court's application of the compelling interest test.[154] The rules failed that test, because the City's purported aims of preventing animal cruelty and unhygienic disposal of animal remains were undercut by the City's failure to apply its prohibitions to the killing of animals for other, nonreligious, purposes.[155]

Smith and *Lukumi*, taken together, thus moved the law of free exercise from a position of mandatory religious distinctiveness to a position of mandatory religious neutrality with respect to the imposition of burdens on religious practice. So long as the government treats religiously motivated practice similarly with its secular analogues—as Oregon had done with peyote use—burdens on religion invite no constitutionally distinctive treatment. If, however, government singles out religious practice for disfavored treatment, the Free Exercise Clause is immediately triggered. As other commentators have noticed,[156] *Smith* and *Lukumi* thus shift Free Exercise norms away from a focus on distinctive rights and towards a focus on equality of treatment. As such, free exercise norms are headed for convergence with norms of equal access to public fora for religious speech—religiously motivated behavior may not be singled out for regulatory burdens from which analogous secular conduct remains free, but religiously motivated behavior (like religious speech, a subset of that behavior) is

151. *Id*. at 526–27.

152. *Id*. at 543.

153. *Id*. at 546.

154. *Id*.

155. *Id*. at 546–47.

156. *Smith* has supporters in the academic community. *See, e.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555 (1998); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991). *Smith* also has drawn withering criticism. *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990). Friends and foes of *Smith* alike, however, seem to agree on the proposition in the text.

not entitled to a general constitutional privilege when compared with its secular counterpart.[157]

2. Disputes about Matters "Internal" to Religious Communities

The *Smith-Lukumi* sequence resolves, at least for now, the judicial approach to free exercise questions raised by individuals who seek religion-grounded exemptions from general policies. The law of the religion clauses, however, still includes a body of decisions which affords constitutionally distinctive status to regulatory questions involving religious organizations. These decisions involve conflicts within religious entities over matters of property and personnel.[158]

Of late, the most frequently invoked doctrine in the field is that reflected in the "ministerial exception" to laws regulating the employment relation. Courts routinely refuse to entertain claims of unlawful discrimination by clergy or other religious leaders against religious entities.[159] We cannot in this space do justice to this entire field,[160] but several aspects of it deserve attention here. First, these decisions are unmistakably about religious distinctiveness. No other type of organization gets the benefit of rules of deference and nonintervention that these decisions routinely apply. Second, religion-neutrality is a relevant theme here, but in ways that reflect a different import from the use of that concept elsewhere. For purposes of the decisions concerning internal disputes, religion-neutrality does not refer to equal treatment of FBOs and secular entities. Instead, religion-neutrality refers to the adjudicator's ability to resolve disputes without regard to religious considerations. This line of decisions has survived *Smith* in part

157. The funding cases are different from the cases about coercive burdens on free exercise because the neutrality rules in the funding decisions are asymmetrical. If religious entities are included in funding decisions, so must secular entities. The reverse, however, is not necessarily true. Under *Locke v. Davey*, 540 U.S. 712 (2004), the state may be free to exclude religious entities from funding streams. *See infra* Part IV for elaboration.

158. *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969). For analysis of the church property cases, see Kent Greenawalt, *Hands Off! Civil court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843 (1998).

159. *See, e.g.*, EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996) (holding the church-controlled university constitutionally and statutorily immune from suit for sex discrimination for refusing to grant tenure to female professor of canon law).

160. For discussion of the ministerial exception in some detail, see Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1809–16; Lupu & Tuttle, *supra* note 27, at 41–42, 90–92. *See also* Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514 (1979); Kathleen Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 BYU L. REV. 1633, 1649–63; Douglas Laycock, *Towards A General Theory of the Establishment Clause: The Case of the Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981). R

because the law concerning internal religious disputes rests on considerations of judicial competence highly akin to those on which *Smith* rests.[161] *Smith* rejects the compelling interest test because that standard requires judicial evaluation of the weight and import of religious considerations, as compared to secular state interests involved in denying the sought-after exemption. By comparison, the judicial decisions refusing to intervene in internal religious disputes similarly renounce jurisdiction over theological matters.[162] Thus, perceived constitutional limitations on the authority of civil courts to weigh religious considerations, or resolve disputes waged in religious terms, animate both *Smith* and the line of decisions about judicial deference to the internal deliberations of faith-based entities.[163]

3. Discretionary Accommodation of Religion

Finally, under some circumstances, political bodies are free to treat religion as distinctive by singling out religious practices or organizations for relief from general rules that in their application conflict with religious freedom. Such relief, typically described as religious "accommodation," is thus permissive or discretionary rather than constitutionally mandatory.[164] Legislative and executive power to so accommodate, however, remains bounded by the Constitution. Case law on the scope of permissive accommodation permits the government to relieve its own imposition of substantial burdens on religious exercise, but constrains legislative power to provide comparable relief from privately-imposed burdens,[165] or from government-imposed obligations that do not seriously burden or deter the exercise of religion.[166]

161. *See* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 461–63, 467 (D.C. Cir. 1996) (containing an explicit analysis of the reasons that the "ministerial exception" survives *Smith*).

162. Because the limitations here, born of both Establishment and Free Exercise considerations, go to subject matter jurisdiction of the civil courts, judges can and do raise them *sua sponte*. *Id.* at 459, 465–66 (describing, discussing, and approving of the district court's refusal to proceed with adjudication of civil rights claim against Catholic University, despite the parties' willingness to proceed on the merits).

163. Brady, *supra* note 160 at 1672–1681. **R**

164. For competing views on accommodation, compare Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992), with Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992). *See also* Jonathan E. Neuchterlein, Note, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127 (1990).

165. *See, e.g.*, Estate of Thornton v. Caldor, 472 U.S. 703 (1985). *See also* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

166. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 17–18 (1989) (plurality opinion).

The Supreme Court's most favorable pro-accommodation decision is *Corporation of Presiding Bishop v. Amos*.[167] In *Amos*, the Court unanimously upheld the exemption for religious organizations from the federal prohibition on religious discrimination in employment.[168] When Congress enacted the federal law forbidding discrimination in employment in 1964, Congress recognized that such a law would interfere with the freedom of religious organizations to select members of their own faith communities for positions of religious significance.[169] Accordingly, Congress exempted such organizations from the statutory prohibition on religious discrimination with respect to the carrying on of their "religious activities." But even that exemption proved hard to administer, and led to litigation over which positions involved "religious activities." For example, the *Amos* case itself involved a building engineer at the Deseret Gymnasium, a fitness facility operated by the Mormon Church.[170] To spare religious entities the burden of legal uncertainty, government inquiry, and possible litigation, Congress expanded the exemption in 1972 to cover hiring for all activities, rather than just "religious activities," of religious organizations.

In light of this history, the Court in *Amos* recognized that any regulation of the use of religious criteria in hiring by religious entities might threaten their religious freedom, and that Congress should be given room to make reasonable policies designed to relieve government-imposed burdens on that freedom. Relieving those burdens, the Court asserted, permits religious entities to advance religion; such relief does not involve the government itself in the constitutionally impermissible enterprise of advancing religion. Thus, the Court concluded that the legislative exemption fell in a zone of permission between what the Free Exercise Clause might require, and what the Establishment Clause would forbid. Within that zone, legislators are free to specially accommodate religion. *Amos* is thus a mirror image

167. 483 U.S. 327 (1987). For an older and highly questionable pro-accommodation decision, see *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding program of "released time" for public school students to go off-site for religious instruction during the public school day). It is highly doubtful that the current Supreme Court would decide *Zorach* in the same way if the case were to arise as an original matter, because compulsory education laws today do not burden religious freedom and because "released time" programs imposed costs on the children left behind in a public school classroom. For discussion of *Zorach* from the perspective of one who was subjected to the costs of a released time program, see Lupu, *supra* note 164, at 743–44. R

168. *Amos*, 483 U.S. at 338–40. The exemption is in § 702 of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-1 (2000).

169. The Constitution itself protects some measure of this freedom. For example, religious organizations have the constitutional right to employ only people of their own faith to teach or proclaim their religious messages. *See supra* notes 158–163, and accompanying text (discussing the ministerial exception from anti-discrimination norms). R

170. *Amos*, 483 U.S. at 330.

of *Locke v. Davey*; the former creates a zone of permissive relief from regulation for religious causes, while the latter creates an analogous zone of permissive exclusion of religious causes from state largesse.[171]

To summarize the norms governing state power to regulate religious entities: with respect to government regulation of religious practice, individuals are entitled to no religion-specific relief from general rules that may limit that practice. Government is presumptively forbidden from singling out religion for disfavored treatment in the distribution of burdens (though it may do so in the distribution of benefits). Religious organizations may be entitled to distinctive, judicial nonintervention in certain classes of disputes, but only when resolution of such disputes demands judicial resolution of questions, such as the qualifications of a leader or spokesperson uniquely entrusted to the internal deliberations of religious entities.[172] And the political branches may choose to relieve religious entities or individuals from conflicts that arise between legal obligations and religious concerns.

IV. Distinctiveness Norms and the Faith-Based and Community Initiative

The images painted in Part III—part kaleidoscope and part jurisprudential map—blend into a powerful heuristic through which to view the FBCI. All across the terrain of the religion clauses, we discover recognizable and interrelated conceptions of (1) religious distinctiveness, requiring constitutionally specialized exclusion from benefits or immunity from regulation; (2) mandatory neutrality between religious and secular targets of aid or regulation, requiring identity of treatment; and (3) political discretion to include or exclude religious entities from benefits or regulations. In what follows, we trace the many ways in which these conceptions bear upon, and help resolve, the key issues raised by the FBCI.

171. The Supreme Court's decision in *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005), powerfully reinforces the concept that discretionary accommodations, like those upheld in *Amos*, are closely related to discretionary acts of separatism, like those upheld in *Locke v. Davey*. The unanimous opinion in *Cutter* upheld the constitutionality of § 3 of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000bb-1(a)(1)–(2) (2000). Section 3 requires government to accommodate the religious needs of prison inmates, among others, unless the government can demonstrate a compelling interest in not doing so. The Court's opinion twice refers to *Locke* for support of the ideas that there is "play in the joints" between the Religion Clauses, 125 S. Ct. at 2117, 2121, and that states have discretion to act within that zone of play.

172. Whether regulatory conditions on government funding require the same or any degree of similar deference to the internal decision making of religious entities presents a significant and open question. *See infra* Part IV.B., for further discussion.

A. Equal Participation by Faith Groups in Government Spending Programs for Delivery of Social Welfare Services

We begin with the very basic question of inclusion of FBOs in social service programs. This is at the core of the FBCI, and it rests on striking and oft-repeated rhetoric about creating level playing fields, establishing neutrality between religious and secular groups, and ending discrimination against FBOs.[173] The regulatory changes accompanying the FBCI across the government explicitly eliminate exclusions of entities with a strong faith identity, and protect their right to seek government support while still displaying religious icons, retaining religious organizational names, adhering to faith-specific structures of governance, and otherwise maintaining their religious character.[174] The FBCI-initiated regulations promulgated by the U.S. Department of Education go so far as to explicitly permit participation in department-funded programs at schools (or academic departments) of theology or divinity, so long as such schools observe the pertinent restrictions on use of the funds.[175]

Where does the question of inclusion lie on the continuum that runs from mandatory distinctiveness to constitutionally required even-handedness? Thirty years ago, the answer would have seemed simple. Government agencies widely viewed houses of worship and other, equally "sectarian" entities as outside the constitutional boundaries of eligibility for government grants and contracts.[176] Consequently, religious entities had powerful incentives to form separate, highly secularized affiliates, in which most signs of religious character had been scrubbed away.

As noted in Part III.C., above, the exclusion of pervasively sectarian entities from participation in government funded programs has been eroding since at least 1997, when the Supreme Court decided *Agostini v. Felton*, and the process of erosion quickened dramatically, three years later, in *Mitchell v. Helms*. But even *Mitchell*'s willingness to

173. See *supra* Part II for further discussion of Executive Orders related to the FBCI.

174. See *supra* Part II for further discussion of Charitable Choice principles in legislation, the Executive Order on Equal Protection of the Laws for Faith-Based and Community Organizations, and agency rules related to the FBCI.

175. Participation in Education Department Programs by Religious Organizations; Providing for Equal Treatment of All Education Program Participants, 69 Fed. Reg. 31,708, 31,709 (June 4, 2004) (to be codified at 34 C.F.R. pts. 74–76, 80). *See also* Ira C. Lupu & Robert W. Tuttle, *The State of the Law, 2004: Partnerships Between Government and Faith-Based Organizations*, at 64 [hereinafter *2004 Report*], Roundtable (Dec. 2004), *available at* http://www.religionandsocialpolicy.org/docs/legal/reports/12-09-2004_state_of_the_law.pdf (discussing the changes resulting from the new regulations).

176. *See supra* Part III for further discussion.

explicitly jettison that doctrine represents only a plurality opinion. The concurring opinion does so *sub silentio*, and goes so far as to raise the question of whether cash grants, as distinguished from in-kind transfers, are permissible to entities of a strongly religious character.[177]

Law tends to move glacially, and bureaucratic response to legal change typically moves more slowly still. Without both a clear majority in the Supreme Court and an energetic shove from the Chief Executive, it might well have taken a generation or more before funding agencies within state and local governments picked up the *Agostini-Mitchell* threads and stitched them into a rule of eligibility, mandatory or permissible, allowing organizations with a strong religious character to qualify for government financial support.

We firmly believe that we are correctly interpreting the significance of *Agostini* and *Mitchell*.[178] If we are accurate in that assessment, the architects of the FBCI deserve a tremendous amount of credit for dramatically reducing the normal lag between legal change and administrative response. By ending the focus on the religious character of an organization (as distinguished from the activities for which funding is sought) as constitutionally relevant to its eligibility for government support, the FBCI is serving a number of worthy goals. First, the Initiative is correcting the manifest injustice of excluding potentially capable and worthy organizations from seeking grants from or contracts with the government. Second, the FBCI is ameliorating the harm to those potential service beneficiaries who would seek social services only from entities with a religious character. Third, the initiative is increasing the competition for such grants and contracts. If awards are being made on the merits, rather than on the basis of political favoritism or past experience in doing business with government, the increased competition should produce more efficient behavior by prospective grantors and more efficient service delivery by competitively successful grantees.[179]

The policy of equality, or even-handedness, between secular and faith-based groups is not only the basic philosophy of the FBCI. Such a policy, unless it is barred by what now seem outmoded rules of constitutional distinctiveness, should be the default rule under the Consti-

177. Mitchell v. Helms, 530 U.S. 793, 843–44 (2000) (O'Connor, J., concurring).

178. *Contra* Saperstein *supra* note 12, at 1379–80 (suggesting that our interpretation is inaccurate). **R**

179. The designers of the FBCI may deserve special credit for expanding the universe of potential grantees even if they (and we) are interpreting the case law incorrectly. The policy of inclusion of such grantees invites constitutional attack and may thereby speed up the process by which the law on the point will be clarified.

tution as well. That is, unless the government has sufficient reason to manifest a preference for or against FBOs, funding agencies should not exhibit a priori distributional preferences for or against such organizations.

The question of permissible departures from such a policy of equality has already led to significant litigation, and raises a series of interlocking questions about the FBCI. May the government, through its funding agencies, ever consciously prefer faith organizations to secular entities, or vice versa, in the distribution of government funds?

1. Favoring Religious Entities

The Supreme Court's decisions about both direct and indirect funding of FBOs suggests strongly that government preference for religious entities is impermissible. When government chooses to include FBOs in programs of either direct or indirect funding, even those Justices who are most sympathetic to the inclusion insist that the program be formally neutral with respect to the character of participating organizations.[180]

Does the FBCI involve unlawful favoring of FBOs over religion? As an initial matter, it seems fair to ask whether the Administration's emphasis on bringing faith organizations into the mix of government-sponsored providers, and the outreach to such organizations by the WHOFBCI in regional conferences and otherwise, involves unlawful preference for religious over secular entities. This was one of the claims advanced in *Freedom from Religion Foundation v. Towey*,[181] a broad litigation attack on the Initiative launched in 2004 by a separationist organization that has been the Initiative's most persistent opponent.[182] U.S. District Judge John Shabazz dismissed this portion of the complaint on the ground that the plaintiffs, who sued as taxpayers, lacked standing to assert Establishment Clause claims against action

180. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002); *Mitchell*, 530 U.S. at 809–10 (plurality opinion).

181. Freedom From Religion Found. v. Towey, No. 04-C-381-S (W.D. Wis. Jan. 11, 2005) (on file with the authors and DePaul Law Review).

182. *See id.*; Freedom From Religion Found. v. McCallum, 179 F. Supp. 2d 950 (W.D. Wisc. 2002) [hereinafter *McCallum I*]; Freedom From Religion Found. v. McCallum, 324 F.3d 880 (7th Cir. 2003) [hereinafter *McCallum III*]; *Towey*, No. 04-C-381-S (W.D. Wis. 2004) *supra* note 84; Freedom From Religion Found. v. Montana Office for Rural Health, No. CV 03–30BU–RWA, (D. Mont. 2004) (on file with the authors and DePaul Law Review); Freedom From Religion Found. v. Bruininks, No. 0:05-cv-00638-JNE-SRN (D. Minn. filed March 25, 2005) (on file with the DePaul Law Review). R

taken by the Executive Branch without explicit authorization by Congress.[183]

Had the district court reached the merits, we think it unlikely that the plaintiffs would have prevailed. To be sure, the court would have found abundant evidence that the WHOFBCI, accompanied by the various federal agency centers on the FBCI, had been concentrating its outreach efforts on the very class of organizations that they believed had been systematically excluded in the past. This sort of effort seems to us to be a classic case of affirmative action, designed to reach a group that had been left out of the relevant government enterprise in the past. When Congress by legislation, and President Johnson by Executive Order, took aggressive steps to end racial discrimination in employment, companies vulnerable to private or public enforcement actions against their discriminatory conduct inevitably made race-specific efforts to reach out to African-Americans and other racial minorities. Companies with an all-white workforce did not need to make an effort to find additional white workers; instead, they needed to identify a labor pool composed of minorities and convince them that their applications and prospects for employment would be taken seriously.

The analogy between race-based outreach in employment, government-financed or otherwise, and FBCI outreach to religious entities, is of course imperfect. Prior racial exclusion of job applicants had clearly been unconstitutional with respect to government employment, and was in any event morally indefensible. By contrast, the government's prior exclusion from eligibility for contracts of those entities with a sharply defined religious character was arguably required by the Supreme Court's interpretations of the First Amendment. Nevertheless, once the Court's decisions began to change in ways that cast doubt on the required character of the exclusion, many agencies of the government were effectively maintaining an exclusionary policy that no longer was rooted in legal compulsion. It partakes of no constitutional harm that an agency so operating would make special and focused efforts to bring into the fold those organizations that it had

183. *Towey*, No. 04-C-381-S (W.D. Wis. 2004). See Lupu & Tuttle, *supra* note 84, in which we suggest that the judge's decision in *Towey* on standing is open to question but that his decision to dismiss may have properly rested on a discretionary determination that the plaintiffs: (1) were merely fishing for evidence of explicit discrimination against secular organizations, and (2) were unlikely to prevail on the merits. The FFRF has appealed the dismissal of these claims to the Seventh Circuit. Press Release, FFRF Appeals to 7th Circuit over Right to Challenge Creation of White House "Faith-Based" Office (March 16, 2005), *available at* http://ffrf.org/news/2005/faithappeal.php. R

excluded—albeit with prior constitutional warrant—for so many years.[184]

Even if we are correct in our assessment of the broad-based outreach efforts of the FBCI at the federal level,[185] the initiative invites more subtle questions of preference for religious entities, and the litigation thus far has only scratched the surface of these issues. For example, may a government grantor require that the class of grantees or subgrantees under a particular program include a mix of faith-based and secular entities? The Adolescent Family Life Act, upheld in *Bowen v. Kendrick*,[186] included a mandate that prospective grantees include religious and community organizations as prospective subgrantees, and federal agencies are now likely to have comparable policies in favor of such a mix.[187]

At first glance, such a "mix" requirement may seem analogous to race-based affirmative action policies that have been constitutionally controversial for years.[188] And it may well be that a policy designed to yield a preset, quantifiable representation of FBOs in a group of providers would raise similar constitutional concerns. But more flexible policies, involving goals of both secular and religious participation, seem to be on much safer ground. Among other things, there is some reason to believe that FBOs may serve different target populations than secular groups offering analogous services.[189] To the extent this is so, a policy requirement of mixed participation is not simply a device for spreading the largesse in the system to politically favored clients, or to an identified category of victims of prior exclusion; instead, such a requirement is a rational response to the government's concern

184. The secularized professional arms of large religious organizations have for many years been grantees of government. Those excluded by past constitutional law and administrative practice were houses of worship and more intensely religious FBOs. *See supra* Part II for discussion.

185. Some states have similar outreach programs. See *State/Local Activity on Faith-Based Social Services*, Roundtable, *at* http://www.religionandsocialpolicy.org/resources/state_resources.cfm (last visited Aug. 3, 2005) for a summary of pertinent information on state policies and FBCI offices.

186. 487 U.S. 589 (1988).

187. *See*, *e.g.*, Department of Housing and Urban Development, Notice of Funding Availability for the Operation Lead Elimination Action Program Fiscal Year 2002, 67 Fed. Reg. 50766 (Aug. 5, 2002) (informing prospective grantees that, if selected for funding, they must enter into contracts or other arrangements with faith-based and other community organizations). We thank Professor Mark Chavez, of the University of Arizona, for bringing this example to our attention.

188. *See* Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). These cases distinguish numerical set-asides from softer means of achieving diversity objectives. We know of no FBCI policies that require a hard number regarding FBO inclusion in the mix of available social service providers.

189. *See* Wuthnow, *supra* note 12, at 202–6. **R**

about reaching the widest possible array of service beneficiaries. Thus, in the absence of evidence that a policy of mandatory faith-secular mix is systematically preferring weak faith-based service providers over strong secular providers, we expect that courts will be highly tolerant of policies requiring compulsory mix.

Of course, some cases present the starker question of whether particular grant makers have explicitly set out to make all decisions in favor of FBOs and against their secular counterparts, regardless of the latter's quality. The two principal decisions in the lower courts on this point reveal both the possibilities and the difficulties of this line of constitutional attack on implementation of the FBCI.

In one of the two cases, *Freedom From Religion Foundation v. Montana Office of Rural Health* (*MORH*),[190] a federal magistrate in the U.S. District Court for the District of Montana ruled in October 2004, that the Director of the Montana Office of Rural Health (MORH) had unconstitutionally administered a Compassion Capital Fund (CCF) grant from the U.S. Department of Health & Human Services. The Director's implementation of the grant revealed several vices. First, he made direct subgrants to programs of parish nursing, which integrated faith activities with health care in constitutionally impermissible ways.[191] Second, he exhibited a very strong preference for programs of parish nursing over all other forms of health care ventures which might have fit the grant criteria, and he approved a noncompetitive grant to the Parish Nursing Center at Carroll College. These actions, the magistrate concluded, revealed a strenuous and unconstitutional preference for a narrow and sect-specific form of enterprise that linked faith and health.

This successful claim of unconstitutional preference for religious providers in *MORH* is instructively compared with an unsuccessful claim of a similar character in *Freedom From Religion Foundation v. Towey*.[192] In *Towey*, which involved the remnants of the broad attack on the FBCI discussed above,[193] Freedom From Religion Foundation challenged the implementation of a CCF grant to the Interfaith Health Program at Rollins School of Public Health, a unit of Emory

190. Freedom From Religion Found. v. Montana Office for Rural Health, No. CV 03-30-BU-RWA (D. Mont. 2004).

191. *Id.* at 3–4, 21–25. The Supreme Court's only decision on state financing of the provision of social services by FBOs assumed without questioning that subgrants to FBOs must follow the same constitutional rules as the initial grants themselves. *See* Bowen v. Kendrick, 487 U.S. 589, 620 n.16 (1988).

192. Freedom From Religion Found. v. Towey, No. CV 04-C-381-S (W.D. Wisc. Jan. 11, 2005) (on file with the authors and the DePaul Law Review).

193. *See supra* notes 181–183 and accompanying text. **R**

University. Emory used the grant to fund a project it called the "Strong Partners Initiative," which in turn involved a partnership between Emory and eight or nine "Strong Partner Foundations." The foundations with which Emory partnered all were formed when religiously affiliated, non-profit health institutions were sold to for-profit buyers. The sellers frequently used the proceeds from such sales to create foundations that continued the mission of the religious sponsor by focusing on community health care needs.[194] As Emory and the partner foundations administered the CCF grant, the foundations "provide[d] technical assistance and sub-awards to small [faith-based and community organizations] with limited resources."[195] All of the Foundation partners were religiously affiliated, and they made the bulk of the sub-awards to faith-based organizations.[196] In the grant's first year, partners made nineteen of twenty-three sub-awards to faith-based organizations; in the second year, twenty-six of thirty-one awards went to faith-based organizations.[197] The plaintiffs alleged that, on these undisputed facts, administration of this grant revealed Emory's preference for foundation partners that have a religious character, and the foundation partners' preferences for community organizations that have a religious character.

The district court found that Emory had articulated and applied a set of secular criteria in choosing partner foundations,[198] and therefore had not engaged in any unconstitutional preference in favor of religious entities. The court further concluded that Emory instructed the partner foundations to use religion-neutral criteria in the selection of community organizations to receive CCF funds.[199] Each foundation had its own competitive grant-making process in which these criteria were employed.

194. *Towey*, No. CV 04-C-381-S at 2.

195. *Id*.

196. *Id*. at 8. Emory acknowledged in its communications with CCF that some of the Foundation partners, in making grants with *private* funds, preferred entities that reflected the partner's religious heritage, although none of the partners excluded other faiths or non-faith groups from private fund sources. *Id.* at 3–9.

197. *Id*. at 4.

198. These considerations included: (1) prior grant-making experience with local community organizations, (2) strategic location and (3) the ability to contribute private matching funds to the public funds in the CCF grant. *Id.* at 8.

199. *Id.* at 2, 9. These criteria included whether: the community organization (1) had an independent financial base, (2) had developed to the point that the Foundation partner grant would significantly build the community organization's capacity, and (3) had shown ability to collaborate with other community organizations. *Id.* at 9–10. Emory also urged Foundation partners to choose community organizations that served the poor, reflected ethnic and religious diversity, and attempted "to engage body/mind/spirit." *Id.* at 9.

The dispositive element in this case, as will frequently be true in cases involving allegations of unconstitutional discrimination in the implementation of the FBCI, is the placement and weight of the burden of proof. In cases involving allegations of covert unconstitutional discrimination, the operative legal presumption is that government programs which are nondiscriminatory on their face are being administered in a constitutionally permissible manner.[200] The burden of proof therefore fell squarely on the plaintiffs to present facts tending to show that either Emory or its partner foundations had made selections based upon religion rather than the specified secular criteria. At both of the challenged levels of administration, the court in *Towey* concluded that the plaintiffs had failed to demonstrate facts that would show discrimination in favor of religious entities. The sheer numerical distribution—all of Emory's partners had a religious affiliation, as did approximately eighty percent of the recipient FBOs—was, in the absence of other, stronger evidence of religious discrimination, insufficient to satisfy the plaintiffs' burden.

The Emory case, decided on a motion for summary judgment by the government, could have gone the other way, inviting a trial on the allegations of religious preference in the administration of the grant. Emory apparently made the original application for the grant with what effectively constituted a precommitment to its foundation partners, all of which had some sort of religious affiliation. Although each partner may well have satisfied Emory's religion-neutral criteria, there was no evidence that Emory utilized an openly competitive process to choose foundation partners. If Emory had done so, it might have discovered secular foundation partners that were equally or better equipped to serve as intermediaries with FBOs. Moreover, having chosen religiously affiliated partners, Emory had every reason to believe that faith-based organizations would have a leg up in the subaward process. When the behavior of private intermediaries, rather than government agencies, is under review, it may well be appropriate for courts to look more closely at whether intermediary behavior satisfies constitutional concerns of religious neutrality.

On the other hand, the plaintiffs had the opportunity to engage in the discovery process, and were unable to present the district court with any powerful and persuasive evidence that religion had trumped secular considerations in the allocation of these grant funds. *Towey* reveals, unsurprisingly, that the distributional pattern of grant awards will typically not be enough to satisfy the challengers' burden of proof

200. *See* Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252 (1977).

in this sort of case. Instead, plaintiffs will have to present evidence that government grantors, or government-financed intermediaries, have in fact rejected secular grant-seekers in favor of less-qualified religious applicants.[201] Moreover, it will be perpetually difficult for plaintiffs to satisfy this burden of proof, because the award of social service grants can rarely be so objective a process as to permit hard conclusions about departures from announced criteria.[202] This difficulty is likely to be buttressed when demographic considerations render it unlikely that qualified secular grantees are widely available, as may be the case in portions of inner cities in which minority churches tend to be among the all too few sources of social stability in a deteriorating civic culture.[203]

2. *Favoring Secular Entities—Discretionary Separationism and the Importance of* Locke v. Davey

As demonstrated above, government favoring of FBOs is unconstitutional, but difficult to prove. What about departures from evenhandedness in the other direction? Is the rule of formal evenhandedness symmetrical, protecting FBOs and secular nonprofits with equal force? Or does the constitutional legacy of exclusion or separation, now substantially reduced in the mandates of the First Amendment, leave government agencies free to intentionally exclude some or all entities with a religious character from eligibility in funding programs? In Part III, above, we discussed *Locke v. Davey*, and its strong implication that the policy of evenhandedness between religion and secularity is—when operating in this direction—permissive and not mandatory. *Locke* gave short shrift to the equal protection argument against excluding devotional religious studies from the major subjects eligible for Promise Scholarships, rejected summarily the idea that the scholarship program constituted a First Amendment forum, and refused to apply a strict standard under the Free Exercise Clause to the state's exclusionary policy.[204]

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201. Perhaps the burden of proof should be somewhat easier to satisfy if a disappointed applicant, rather than a watchdog group, is the plaintiff, but we know of no decisions on this point. Ordinarily, taxpayers do not have standing to challenge an allegedly unconstitutional preference for one prospective grantor over another.

202. The United States Court of Appeals for the District of Columbia recently rejected the argument that systems of discretionary government benefits that may go to religious entities pose a per se unreasonable risk of unconstitutional religious discrimination. Am. Jewish Cong. v. Corp. for Nat'l & Cmty. Serv., 399 F.3d 351 (D.C. Cir. 2005).

203. *See generally* WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (Knopf 1996); WUTHNOW, *supra* note 12, at 184–85. R

204. Professor Laycock has argued strenuously that *Locke* was wrongly decided. Laycock, *supra* note 141, at 162–218. *See also* Berg & Laycock, *supra* note 141; Scully, *supra* note 69. R

Despite the Court's somewhat dismissive rejection of all of Mr. Davey's constitutional arguments, it is conceivable that a plea for a constitutional principle of nondiscrimination against religion in the distribution of state benefits might be successful in other contexts. The crucial question in the wake of *Locke* is whether its principle of state discretion over church-state policy extends beyond the core nonestablishment concern of state separation from training for the ministry. Does the Court's decision permit states to exclude religious providers from state-financed programs for education or social service, at least in those situations in which the provider's activities include worship or religious instruction? For example, would a state now be free to exclude faith-intensive drug treatment programs from a state-financed voucher arrangement for substance abuse treatment?[205] More broadly still, may a state exclude faith-based organizations from state-funded programs even if those organizations are offering only secular services in their publicly funded programs?

We think that the substance and tenor of the Court's opinion in *Locke v. Davey* is likely to provide substantial ammunition to states that wish to exclude programs with explicitly religious content from state-financed service, even if voucher-financed.[206] It may well be, of course, that Washington and a very few other states are outliers, reflecting an unusual combination of independent, state constitutional principle and separationist political will necessary to maintain these sorts of exclusionary policies. Nevertheless, the Court's emphasis in *Locke* on state authority to maintain longstanding principles of church-state separation cannot easily be confined to preparation for a position in the clergy. The language and history of nonestablishment

Locke left open the question of whether certain state constitutional provisions requiring the exclusion of FBOs from state financial support may have been the product of unconstitutional animus. *Locke*, 540 U.S. at 723 n.7. For discussion of the constitutional issues raised by the so-called "baby Blaine" Amendments as well as citations to further literature regarding the "baby Blaine" Amendments, see Lupu & Tuttle, *supra* note 121, at 957–72. **R**

205. For a judicial validation of a comparable exclusion in a system of state payment for high school students attending school out of district, see Bagley v. Raymond Sch. Dist., 728 A.2d 127 (Me. 1999), *cert. denied*, 120 S. Ct. 364 (1999). The principle of *Bagley* has been reaffirmed in a post-*Zelman* case, in which the argument that the state is compelled by the First Amendment to so exclude religious schools has been entirely erased. Eulitt v. Maine. Dep't. of Educ., 386 F.3d 344 (1st Cir. 2004) (relying on *Locke* to conclude that state's program involving payment for secular private schools, but not religious private schools, does not violate the Free Exercise Clause).

206. *Locke* has already influenced a state court opinion involving the validity, under state constitutional norms, of state programs that aid FBOs in the delivery of education or social service. *See* Bush v. Holmes, 886 So. 2d 340 (Fla. Dist. Ct. App. 1st Dist., 2004) (holding state voucher program in violation of state constitution and relying on *Locke* for proposition that states may favor secular over religious entities).

principles, as reflected in a wide variety of state constitutions, are considerably broader in their separationist underpinnings than a narrow focus on training for the ministry.[207] Those principles readily extend to state support for places of worship, the profession of religious creeds, and financial support for religious ministries. Given the breadth of that history and the scope of the relevant constitutional texts, courts may well read *Locke* to uphold state discretion to exclude from public funding educational or social service programs that involve worship or religious teaching. The litigant and lawyers in *Locke v. Davey* set out to eliminate precisely that discretion, but the Court's opinion instead legitimates it. For that reason, *Locke* represents a significant setback to the FBCI, albeit one that leaves its residue on state discretion of a sort that the federal government will make its best efforts to influence.

A state decision to exclude all organizations with a heavily religious character from state-financed opportunities, even if the organizations are using government money to offer secular services only, presents a more difficult question. In such circumstances, the state would not be involved in supporting religious activities, such as worship or religious teaching. Nevertheless, the Free Exercise Clause, as construed in *Locke*, requires no more than a rational policy of church-state relationships. Whatever the outer boundaries of such a policy might be, it is difficult to argue that a policy that resembles what only a few decades ago was the content of federal constitutional law,[208] and that as many as four current Justices still accept,[209] fails such a test of rationality. It may be, of course, that the repudiation in First Amendment law of the categorical exclusion of "pervasively sectarian" organizations carries with it a Free Exercise mandate to include such organizations in any state program that involves the private sector. From the current views in the Supreme Court, however, we would not expect such an outcome, and principles of federalism are in considerable tension with it. State freedom to remain resolutely separationist with respect to thickly religious entities might continue to be justified as a matter of state constitutional law, as an outgrowth of the state's con-

207. See discussion of the range of state constitutional provisions in Lupu & Tuttle, *supra* note 121, at 957–61. We collect the relevant state constitutional provisions in Ira C. Lupu & Robert W. Tuttle, *Government Partnerships with Faith-Based Service Providers*: *The State of the Law*, app. A, Roundtable (Dec. 2002) [hereinafter *2002 Report*], *available at* www.religionandsocialpolicy.org/docs/legal/reports/12-4-2002_state_of_the_law.pdf. R

208. *See*, *e.g.*, Meek v. Pittenger, 421 U.S. 349 (1975), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

209. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 686–717 (2002) (Souter J., joined by Stevens, J., Ginsburg, J., and Breyer, J., dissenting).

cern about policing the boundary between secular and religious activity within such organizations. Such an anti-entanglement policy is a prophylactic device designed to insulate state money from the support of religious activities, and is consistent with historic church-state norms, even if it is no longer required by the First Amendment.[210]

Even if states remain free to exclude such religious entities from all public financial support, would a state be free to go one large step further, and exclude from such support all organizations with a religious character of any kind? No state is likely to go nearly this far, and virtually every state currently contracts with separate charitable affiliates of FBOs. The states are not at all likely to suddenly reverse that course. Moreover, courts might draw the constitutional line at a policy of exclusion that extended this far. The state could only justify such a broad exclusion by asserting that it feared that entities with a religious identity, no matter how thin, would engage deceitfully in forbidden religious activity with state money. Courts might conceivably find a policy borne solely of mistrust of religious entities to reflect unconstitutional animus toward religion.

We are thus suggesting a distinction between exclusion from state programs of all entities with a religious identity, which we believe to be constitutionally questionable, and exclusion of entities which engage in religious worship or instruction, which we believe is likely to remain constitutionally valid. Under the current law, this distinction matters most in programs providing indirect financing, in which worship and religious teaching are allowed.[211] The significance of *Locke v. Davey*, at least for now, is thus primarily attached to programs financed through beneficiary choice.[212]

Whatever the ultimate breadth of state discretion to disfavor or exclude FBOs in programs of state-funded social service, the asymmetrical force of the oft-invoked principle of government evenhandedness between religious and secular entities is striking. For the architects of the FBCI, one obvious solution to the problem of asymmetry created by state discretion to exclude FBOs from full and equal participation in social service programs resides in the law of the spending power, rather than in norms of equality derived from the Constitution. That

210. For this reason, we think that a federal policy of excluding houses of worship from participation in federal grant or contract programs would also be constitutional in light of *Locke*. We do not, of course, expect to see such a policy from the federal government anytime soon.

211. In programs financed directly by the state, the First Amendment already prohibits such teaching. *See supra* notes 109–112 and accompanying text; *infra* Part IV.C.3. **R**

212. If the *Mitchell* plurality, which would permit religious activity in a directly financed program, 530 U.S. at 809–14, becomes the law, the practical significance of *Locke* will extend to directly financed programs as well.

is, Congress could make the right of FBOs to be full and equal participants an explicit condition of every federal funding stream on which the states depend for social service. The state's power to withdraw from such expenditure programs, coupled with the lengthy and successful history of conditioning federal funds on state compliance with federal civil rights norms, suggest that this strategy is completely within the Constitution.[213]

Nevertheless, such a political solution faces two considerable impediments. First, the history of Charitable Choice legislation, as reflected in the relevant provisions of the 1996 welfare reform, reveals that in the past, Congress has been solicitous of state constitutional commitments to separate financially state government from religious entities. The 1996 law included an explicit provision that preserved the right of the states to follow their own constitutional policies with respect to funding streams that are entirely state-financed.[214] Congress would have to be persuaded to undo that provision and impose a contrary rule, requiring states to ignore their own state constitutions and to effectuate a statutory mandate of fully equal treatment of FBOs and secular entities.

Moreover, under current political conditions, the President has been able to get very little legislation promoting the FBCI through Congress. As described in Part II above, much of the FBCI has been put into place by executive order and regulation. The President, however, may not have unilateral authority to insist that the states waive their own constitutional restrictions on aid to FBOs as a condition of receipt of federal funds.[215] Ordinarily, federal agencies are deemed to lack power to preempt state law in the absence of explicit Congressional authorization. When the relevant state law is derived from state constitutions, moreover, the concern for explicit congressional authority in support of agency preemption may be at its strongest. Thus, the President may well lack authority to impose unilaterally a condition on federal funds that requires an undoing of state constitu-

213. *See* Lau v. Nichols, 414 U.S. 563 (1974); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947). In this Term's decision in *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005), the Court did not reach the state's argument that Establishment Clause limits on the Spending Power preclude Congress from imposing on states a federal policy on religion that falls within the constitutionally discretionary zone.

214. 42 U.S.C. § 604a(k) (1996).

215. *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) (holding that Congress must clearly specify the conditions on receipt of federal funds). Even when Congress specifies conditions in general terms, there remain questions about the obligation of states to comply with executive branch interpretations of those conditions. *See* Peter J. Smith, *Pennhurst, Chevron, and the Spending Power*, 110 YALE L.J. 1187 (2001).

tional commitments, especially where the only prior legislative statement in the field is precisely to the contrary.

Asymmetry, therefore, is and probably will remain the character of the prevailing constitutional norm. Government may prefer secular organizations over faith-based entities in the provision of government-financed social services, but may not prefer faith-based organizations to their secular counterparts. This asymmetry can be defended only by reference to religious distinctiveness. Our long-standing constitutional traditions, challenged at the margin but enduring at the core, suggest that the state may not use faith as an explicit instrument of state policy. Excluding FBOs from some state-financed programs may manifest that constitutional prohibition; preferring them will always be in tension with that norm. In between those inequalities lies a discretionary realm of equal treatment within which the state may choose to experiment, so long as it respects the limit, discussed in Part IV.C. below, on the religious content of government financed activity.

B. The FBCI and Respect for the Religious Character of Participating Faith Institutions

The permissive character of the policy of equal treatment of FBOs compared to secular organizations has important implications for the power of government to impose conditions on the character of organizations seeking government funds. If government may choose to exclude organizations of a particular religious character entirely from eligibility for state funds, then governmental bodies may enforce that exclusion by way of conditions that define that character. Thus, the entire body of federal law—in the FBCI or otherwise, whether from statute, executive order, or agency regulation—on the subject of religious character of organizations that seek government funds is permissive rather than mandatory. If there had been a Kerry Administration beginning in 2005, and it had sought to enforce the traditional ACLU-Americans United position on participation of FBOs in government-funded programs,[216] the Administration would have straightforwardly set out to repeal the orders and regulations about preservation of the religious character of fund-seeking entities. However wise or unwise such a step may be, constitutional norms do not preclude it.[217]

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216. This position advocates that religious organizations that seek to participate in government-financed social services should create separate, professional, charitable arms through which to do so. *See* Saperstein, *supra* note 12, at 1358–59. **R**

217. Of course, funding conditions that require surrender of some aspects of religious character will have incentive effects on FBOs and will lead some of them to wander away from elements of religious character in pursuit of government support. Under Professor Laycock's view

How does this assertion—that government acceptance of the marks of religious character is permissive and not mandatory with respect to fund-seeking FBOs—map onto the hotly contested issue of whether government-supported FBOs should be free to prefer members of their own faith for employment? As explained in Part III above, Congress has exempted FBOs from Title VII's prohibition on religious discrimination in employment, and a unanimous Supreme Court upheld the permissibility of that exemption in *Amos*.[218] In 1996, Congress passed legislation specifically designed to preserve the Title VII exemption for FBOs that participated in federally funded welfare-to-work activities,[219] but that issue is now the central obstacle to congressional cooperation with the FBCI. The Administration remains resolutely committed to preserving the hiring autonomy of FBOs that partner with government,[220] while many of the Initiative's congressional foes are resolutely opposed to what they view as government-funded discrimination.[221]

The issues associated with the hiring autonomy of FBOs can be constructively divided into three categories. First, do FBOs have a plausible claim that the Constitution protects their right to engage in faith-based employment practices, even if the organization is receiving government funds through grant or contract? This is a claim of mandatory distinctiveness—that religious entities are different from all others in their right to insist on this sort of hiring autonomy, because faith attachments are their distinctive mode of bonding and working as a cohesive community. If this argument fails, two other positions on the question remain. The second position builds on the idea of discretionary distinctiveness—if legislatures are free to either permit or deny the exercise of such rights by government-funded FBOs, which is the better policy choice? The third position also sounds in mandatory distinctiveness, but it appears from the reverse

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that the Religion Clauses require government to be substantively neutral with respect to private religious commitments, such incentive effects would be grounds for asserting the unconstitutionality of such rules. *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990). Our own view is that this sort of "substantive neutrality" can be in severe tension with the state's concern about respecting private religious freedom and for remaining as far away as possible from adopting a religious voice as the state's own.

218. 483 U.S. 327 (1987).

219. 42 U.S.C. § 604a(f) (1996).

220. *Religiousn Hiring Rights, supra* note 365.

221. *See, e.g.*, Letter from Representatives Chet Edwards et al., to House Colleagues (June 24, 2003), *available at* http://www.religionandsocialpolicy.org/docs/general/6-27-2003_congressional_letter_hiring_discrimination.pdf; Anne Farris, *Bush Support of Religious Hiring Sparks Opposition on Capitol Hill*, (June 26, 2003), *available at* http://www.religionandsocialpolicy.org/news/article.cfm?id=705.

side of this story. That is, even if legislatures choose to recognize explicitly such hiring rights, does the Establishment Clause in any way constrain such a policy judgment? In what follows in this section, we explore the first question, and note briefly the leading sources and competing arguments with respect to the second question, concerning the wisdom of such policies. We reserve the third question, concerning Establishment Clause constraints, until Part IV.C.4. below, because our response to that question builds upon the analytic framework that we establish below in Part IV.C.3.

We start with the question of whether the Constitution protects the right of FBOs to make employment decisions based on faith, even when the employment relation is being subsidized by the state. From the perspective of some of those who defend this sort of freedom in hiring, the right of FBOs to prefer co-religionists in employment—even if state-funded—should be understood as involving strong claims of both associational freedom and equality with other ideological organizations. The proponents of this view assert that FBOs are entitled by constitutional principles of associational freedom to prefer employees who share their mission.[222] For FBOs engaged in social service, this mission may extend beyond generalized charitable concern for poor and vulnerable persons, and also encompass a religious motivation to help others, seek salvation, or otherwise pursue theological objectives. Moreover, so long as other ideological organizations retain freedom of association even as they pursue government benefits, proponents of mandatory equality argue that FBOs should be treated likewise.[223]

222. The case most frequently relied on for this argument is *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (holding that state nondiscrimination law may not be applied so as to infringe upon nonprofit group's associational freedom to exclude openly gay scout leader). For an argument in favor of expanding upon the *Dale* principle, see Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917 (2001). According to Professor Koppelman, the lower courts have been highly unsympathetic to the *Dale* principle and have refused to extend it to other contexts. Andrew Koppelman, *Should Noncommercial Associations Have An Absolute Right to Discriminate?*, 60 LAW & CONTEMP. PROBS. 27, 30–31 (2004). One would expect *Dale*-type claims to be even weaker when raised against a nondiscrimination condition attached to state funding, as distinguished from coercive regulation of the sort in *Dale*, because funding conditions can be escaped by refusing the state's support. *See* Boy Scouts of Am. v. Wyman, 213 F. Supp. 2d 159 (D. Conn. 2002); Evans v. City of Berkeley, 127 Cal. Rptr. 2d 696 (Cal. Ct. App. 2002), *petition for review granted*, 65 P.3d 402 (Cal. 2003). *But see* Forum for Academic & Institutional Rights v. Rumsfeld, 390 F.3d 219 (3rd Cir. 2004), *cert. granted,* 2005 U.S. LEXIS 3756 (May 2, 2005).

223. For a strenuous argument based on considerations of policy see CARL H. ESBECK, THE FREEDOM OF FAITH-BASED ORGANIZATIONS TO STAFF ON A RELIGIOUS BASIS (Center for Public Justice 2004). For contrary policy considerations, see Steven K. Green, *Religious Discrimination, Public Funding, and Constitutional Values*, 30 HASTINGS CONST. L.Q. 1 (2002); Rogers, *supra* note 34; Saperstein, *supra* note 12, at 1389–94. For a thorough discussion of the subject's **R**

This line of argument suffers from several, considerable flaws. First, courts have not generally extended principles of freedom of association to the employment relation.[224] The most prominent recent decisions concerning associational freedom have involved voluntary social and political groups, not employer-employee relations.[225] If the government were to subsidize a feeding program that relied upon unpaid volunteers to deliver the food, the argument that an FBO should have a constitutional right to prefer members of its own faith community for those volunteer roles would be very strong. When, however, the employment relation is at stake, government has powerful reasons, including the rights of individuals to pursue their livelihood and the efficient operation of labor markets, to forbid faith-based discrimination.[226]

Second, independent of concerns with the employment relation, courts tend to be unwilling to protect freedom of association when groups claiming such freedom seek to make use of public benefits. In the wake of *Boy Scouts of America v. Dale*,[227] which protected the right of the Scouts to exclude an openly gay Scoutmaster, a number of jurisdictions have denied the Scouts use of public facilities for their meetings so long as they maintain that policy of exclusion.[228] To date, no court has been willing to overturn such a government policy to deny the Scouts use of public resources.[229] With a statutory push, at least one court has been willing to protect a student group's choice of

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legal and constitutional parameters, see Memorandum from Randolph D. Moss, Assistant Attorney General, to William P. Marshall, Deputy Counsel to the President (Oct. 12, 2000), *available at* http://balkin.blogspot.com/olc.charitablechoice.pdf. That memorandum has been further clarified and expanded upon in Memorandum Opinion from Sheldon Bradshaw, Deputy Assistant Attorney General, Office of Legal Counsel, to the Associate White House Counsel (June 25, 2001), *available at* http://www.usdoj.gov/olc/olc4brs97.htm.

224. *See, e.g.*, State *ex rel.* McClure v. Sports & Health Club, Inc., 370 N.W.2d 844 (Minn. 1986), *appeal dismissed*, 478 U.S. 1015 (1986). As Professor Koppelman points out, extending such principles to the employment relation is in fatal tension with the policy of civil rights laws. Koppelman, *supra* note 222, at 31–37. **R**

225. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); Hurley v. Irish-American Gay, Lesbian, and Bisexual Group, 515 U.S. 557 (1995).

226. *Cf.* Runyon v. McCrary, 427 U.S. 160 (1976) (holding that policies expressed in post-Civil War civil rights statutes trump freedom of association concerns in the context of private school admissions).

227. 530 U.S. 640 (2000).

228. *See* Linda Greenhouse, *Supreme Court Backs Boy Scouts in Ban of Gays from Membership*, N.Y. TIMES, June 29, 2000, at A1 (noting that the Boy Scouts suffered materially and immediately from the publicity given its anti-gay stand in connection with *Dale). See also* Kate Zernike, *Public, Private Support for Scouts Drops Since Anti-Gay Policy Upheld*, CHI. TRIB., Aug. 29, 2000, at A6.

229. *See supra* note 222. **R**

religious criteria for leadership in a religious club in a public school,[230] but courts as yet have not so ruled based on the Constitution, nor have they required public entities to tolerate such criteria for simple membership in organizations that meet on public property. Thus, constitutional law has tended to protect political discretion to impose anti-discrimination conditions on organizations seeking access to public subsidy, even with respect to private groups whose associations may not be coercively and directly regulated.

Is there any respect in which government is not free to condition FBO participation in publicly financed programs on surrender of the right to engage in religious selectivity in employment? While the argument for full hiring autonomy, as a constitutional matter, seems to us unpersuasive, the longstanding ministerial exception in employment law suggests the possibility of a more limited right.[231] Under this religion-distinctive doctrine, government is not free to dictate the criteria to be employed by FBOs in selecting and retaining those whose positions require them to express principles of the faith. Perhaps a requirement that a religiously-affiliated entity, seeking access to public goods, must act without regard to its faith commitments in employing leaders for its mission when partnering with government would entail an unconstitutional condition on participation. Even in that context, however, the entity's argument is weakened by the existing legal disability on FBOs receiving direct government support from using that support to preach a religious message. If the FBO receiving aid may not engage in religious indoctrination, it can hardly be essential for the organization to limit its leadership to members of the faith. Thus, courts might well uphold a complete bar on religious preference in hiring in government-funded programs on the grounds that FBOs remain free to separately incorporate, and separately staff on a religious basis, in their privately funded social welfare services.[232]

230. *See* Hsu v. Roslyn Union Free Sch. Dist., 85 F.3d 839 (2d Cir. 1996) (holding that federal Equal Access Act bars public school from excluding religious club which insists that its leaders—though not all of its members—commit to a certain view of Christianity). The Center for Law & Religious Freedom of the Christian Legal Society has been aggressively litigating such cases at the college and graduate school level. *See* Christian Legal Society, http://www.Clsnet.org/clrfPages/index.phpx, (last modified Dec. 5, 2004). Several universities have now agreed to change their policies and permit faith-based discrimination by religious groups on campus. *See* Press Release, Christian Legal Society, Christian Groups and Penn State University Reach Settlement (Mar. 30, 2005), *available at* http://www.Clsnet.org/clrfPages/pr_DMvPennState2php. No court, however, has held that the Constitution, unaided by the Equal Access Act, requires such a result. For discussion of the relationship between the Constitution and the Act, see Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 27–37 (1993).

231. *See* discussion *supra* Part III.D.

232. *See* Laycock, *supra* note 141, at 174–84; Lupu & Tuttle, *supra* note 121, at 972–80. The assertion in *Locke v. Davey* that Mr. Davey could keep his scholarship continue to study devo-

If, as we suggest, government is entirely free to eliminate the right of FBOs to engage in religion-based hiring in publicly supported programs, is government equally free to permit such hiring? For reasons developed below,[233] we believe that current constitutional law favors symmetrical political discretion: government may either prohibit or permit FBOs to engage in religion-based hiring in publicly supported programs.[234] The Supreme Court in *Amos* upheld the right of Congress to create the Title VII exemption for religion-based hiring by FBOs, in part on the ground that the exemption simply keeps the government out of the way of religious enterprises, rather than promoting or encouraging their faith-based hiring practices. As other commentators have put it, government does not establish religion by deciding to leave FBOs unregulated, and therefore free to pursue their own choices and pre-existing practices.[235] On this view, government—acting on competing considerations of policy, not constitutionality—is entirely free to permit or forbid faith-based hiring by publicly supported FBOs. The policy issue involves a choice between incommensurables—equal employment opportunity without regard to faith commitments, weighed against the potential staffing efficiencies and dedication to service that may flow from protecting the integrity of a religious mission.[236] This stance on the hiring question—permissive, not mandatory, equality with other mission-based private groups—would assimilate the question of hiring with the more basic question of organizational inclusion of FBOs in the first instance. For most religious accommodationists, as well as constitutional lawyers, these

tional theology by enrolling in two schools simultaneously but major in theology only at one shows how far the current Court is willing to stretch "satisfying funding conditions" concept in requiring the pursuit of simultaneous, alternative courses of action. It is, of course, far easier for artificial persons (which can be split into two or more legally distinct identities) than for real persons to pursue this sort of dual course.

233. *See infra* Part IV.C.4.

234. We defend that political discretion and cite the cases holding that the acceptance of public funds by a faith-based organization does not constitute a waiver of that exception in Lupu & Tuttle, *supra* note 207, at 43–47, 44 n.53. The lone case invalidating, on Establishment Clause grounds, a grant of public funds to an FBO that engages in faith-based hiring is *Dodge v. Salvation Army*, No. S88-0353, 1989 WL 53857 (D. Miss. Jan. 9, 1989). In *Lown v. Salvation Army, Inc.*, No. 04-CV-05162 (S.D.N.Y. filed Sept. 23, 2004), a federal district court will consider a constitutional challenge to an FBO's use of religion-based employment practices for publicly-funded positions. *See infra* Part IV.C.4 for discussion in greater detail of *Lown*. For a thorough discussion of current law and relevant policy considerations, see ESBECK ET AL., *supra* note 223; Green, *supra* note 223; Rogers, *supra* note 34. R R R

235. The leading defender of the pro-accommodation position is Judge Michael McConnell. *See* McConnell, *supra* note 156; McConnell, *supra* note 164. R

236. For full development of these arguments in favor of faith-based hiring, see ESBECK ET AL., *supra* note 223. R

issues are a matter of government discretion, not constitutional mandate.

Public financial support of such hiring practices, however, may not simply be a matter of leaving private sector choices unencumbered. Faith-based hiring, when supported by government funding, raises questions under the Establishment Clause that are different from those raised in *Amos*. In *Amos*, the issue involved deregulation of a hiring practice. In the context of the FBCI, however, the question extends to state subsidy of such practices.

Under conventional state action doctrine, the state is not constitutionally responsible for actions taken by its private grantees and contracting partners.[237] But norms of non-Establishment law operate differently, and in some circumstances render the state responsible for conduct of a religious character in which its grantees or contracting partners engage. Because much of Part IV.C., below, discusses this special doctrine of responsibility under the Establishment Clause, we defer for the moment any further discussion of state-supported, faith-based hiring. We take up the question again in Part IV.C.4.

C. The Faith-Based Initiative and Constitutionally Mandated Distinctive Treatment of Religious Activity

With few exceptions, our constitutional analysis of the FBCI has emphasized the permissive, rather than the mandatory, distinctiveness of religion. The Constitution permits FBOs to participate on equal terms in government-funded social welfare programs, and it permits the government to impose significant conditions on FBOs' participation in such programs.[238] In one important respect, however, the FBCI confronts—and, we argue, inadequately addresses—the constitutionally mandatory distinctiveness of religion. As we discussed in Part III.C.1.,[239] the Establishment Clause prohibits "government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."[240] The Court has removed the prohibition on government funding of "pervasively sectarian" entities, but it has reaffirmed the Constitution's limit on government support for religious activities.

237. Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982). For further discussion of the relationship between conventional state action doctrine and Establishment Clause jurisprudence, see *infra* notes 260–273 and accompanying text. **R**

238. *See supra* notes 216–232 and accompanying text. **R**

239. *See supra* notes 109–113 and accompanying text. **R**

240. Agostini v. Felton, 521 U.S. 203, 219 (1997) (quoting Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985)).

In her concurring opinion in *Mitchell v. Helms*, Justice O'Connor restated the Establishment Clause analysis as an inquiry into "whether the [government] aid results in religious indoctrination."[241] Those familiar with the plethora of Establishment Clause analyses may be tempted to dismiss this inquiry as but one more of the many equally plastic and contradictory standards offered by various justices, from neutrality or endorsement, to the *Lemon* measures of purposes, effects, and entanglements.[242] Although much rests on Justice O'Connor's use of the term "results," her approach in *Agostini* and *Mitchell* is one that is both familiar to lawyers from other contexts, and ultimately quite useful for resolving cases under the Establishment Clause.

Restated in somewhat more familiar terms, Justice O'Connor's inquiry asks whether the government may reasonably be held responsible for religious indoctrination in a program supported by government funds.[243] Thus revised, the inquiry takes on the character of an analytic approach that is standard in law or moral philosophy—the question of whether an actor bears responsibility for an act that she, in some way, has caused. The idea of causation focuses on the actor's factual involvement in a chain of events leading to the outcome at issue.

Consider the following example: Anne drives Bill to the bank, which Bill then robs. In the strictly factual sense, Anne's transportation is one of a number of acts that make possible Bill's robbery. The more challenging and difficult question, of course, is whether Anne should be held legally responsible for Bill's robbery. To answer that

241. Mitchell v. Helms, 530 U.S. 793, 845 (2000) (O'Connor, J., concurring).

242. *See* Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) (repudiating a neutrality standard: "As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means."); Lynch v. Donnelly, 465 U.S. 668, 688–89 (1984) (O'Connor, J., concurring) (suggesting an endorsement test); Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (setting forth a three-part test for Establishment Clause analysis).

243. Two criticisms might be leveled at the approach offered in the text above. The first is that the term "indoctrination" is pejorative, carrying anti-religious implications. We use the term only because the Supreme Court uses it to categorize the conduct in question. Were we to write on a blank slate, we would use a more neutral phrase such as "religious formation" to describe the conduct. The second criticism is that our focus on causation and responsibility implies that religion is analogous to a wrongful act. That criticism rests on a misperception. Our analysis of causation asks only whether a particular agent should be held responsible for a particular outcome; it implies nothing about the moral or legal quality of the outcome. One might do a similar analysis to determine whether an agent deserves praise for her part in bringing about a good act. The question here is not whether religion or indoctrination is good (a matter on which we express no view in this piece) but, rather, whether such formation is a constitutionally proper activity for the state to support.

question, one must turn to a series of additional inquiries: Did Anne share Bill's intent to rob the bank? How much help did she provide? Is she a taxi driver, who must take all passengers, or a friend of Bill's? Was Bill's robbery foreseeable? Did Anne take any steps to avoid carrying potential bank robbers, or was she indifferent to that possibility? Depending on the answers to these questions, we may hold Anne responsible under a variety of different theories of culpability—criminal, civil, or moral—or exonerate her.[244]

Justice O'Connor suggests much the same approach under the Establishment Clause. When is it constitutionally reasonable to hold the government responsible for religious indoctrination conducted by a recipient of government funds? We can add rigor to this question by imagining two programs, one real and the other hypothetical, that provide funds ultimately used to support religious activity. In the first, a military veteran uses his education benefit under the G.I. Bill[245] to finance a seminary education, which prepares him for ordained ministry. In the second, a state creates and funds a program to promote biblical literacy. The program supplies bibles and study materials, and pays the salaries of teachers who lead classes in devotional reading and scriptural interpretation. The government's responsibility for religious indoctrination in the second program is obvious. The religious activity is both foreseeable and intended by both the grantor and the grantee, and any secular benefit—such as promoting literacy in general—is subordinate to the religious objective.

In the first program, however, the government's responsibility is far more attenuated. One cannot plausibly claim that the government created the G.I. Bill with the purpose of financing theological education. Nor can one reasonably claim that the program impelled, or even guided, the veteran toward ministry as a course of study or profession. The veteran chose that seminary from a wide range of educational options, both secular and religious. Nonetheless, the use of such benefits for religious education by at least a few veterans is foreseeable, and the government could have taken more affirmative steps to discourage—or even prohibit—the use of educational benefits for seminary training.[246] Given these considerations, does the government bear responsibility for the veteran's seminary education?

244. *See generally* Sanford H. Kadish, *Criminal Law: Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369 (1997); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323 (1985); Neal Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307 (2003).

245. 38 U.S.C. §§ 3451, 3698 (2000 & Supp. 2002).

246. The Washington State Promise Scholarship program, upheld by the Supreme Court in *Locke v. Davey*, includes such a prohibition. Locke v. Davey, 540 U.S. 712, 725 (2004). But the

The question of responsibility provides an especially illuminating prism through which to view and understand the divisions in Establishment Clause jurisprudence. One group of Justices, led by Chief Justice Rehnquist, would impute responsibility only when the government acts with the purpose of religious indoctrination; another set, led by Justice Souter, would find responsibility any time the government has failed to guarantee that public resources are not used for religious indoctrination. Between those two positions, and reflecting the current law of the Establishment Clause, Justice O'Connor offers a more subtle, and more fact-intensive, inquiry into the government's responsibility. We now turn to that inquiry and its application to the FBCI.

1. Secularity

All of the current members of the Supreme Court agree that the government offends the Establishment Clause if it acts without a secular purpose. This requirement reflects an important aspect of religion's constitutionally mandated distinctiveness. Government can act to achieve an enormously wide variety of objectives, so long as its goal is secular. The hypothetical program to improve biblical literacy would likely fail to meet the requirement of secularity, although in prior cases the Chief Justice has accepted the state's asserted secular purposes for a range of acts with significant religious components, including posting of the Ten Commandments in public school classrooms[247] and moments of silence for meditation or prayer in public school.[248] Social welfare programs under the FBCI will always have a secular objective. Even programs that focus on personal transformation, achieved through religious experience and commitment, cite as their primary objective the secular benefits, such as release from addiction, success at work, or improved interpersonal relationships, all achieved through profound personal growth.[249]

The Court's assessment of a program's secularity extends beyond analysis of legislative purposes. The majority opinions in *Agostini* and *Zelman*, and the plurality opinion in *Mitchell*, also inquired into the criteria used to determine whether service providers or service beneficiaries were eligible to participate in the government funded programs

Establishment Clause does not require the state to refrain from funding theological education in a program of beneficiary-designated financing. Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 489 (1986). *See supra* notes 114–128 and accompanying text. R

247. Stone v. Graham, 449 U.S. 39, 43–47 (1980) (Rehnquist, J., dissenting).

248. Wallace v. Jaffree, 472 U.S. 38, 113–14 (1985) (Rehnquist, J., dissenting).

249. *See, e.g.*, Freedom from Religion Found. v. McCallum, 179 F. Supp. 2d 950, 966–67 (W.D. Wis. 2002) (concluding that faith-intensive drug treatment program has secular purpose of treating substance abuse addition).

at issue in the cases.[250] Evidence of religious selectivity, in criteria for either providers or beneficiaries, would suggest that a program is not, in fact, motivated by secular objectives but has a hidden religious purpose.[251]

Although programs funded thus far under the FBCI have not violated the secular purpose mandate, the same cannot be said with respect to the requirement that government-funded programs must use secular criteria in selecting providers and beneficiaries. For example, in *MORH*,[252] a federal district court held that MORH had unconstitutionally administered a federal grant program because its process of awarding subgrants systematically preferred religious providers. Evidence that a program supports more religious than secular providers does not, however, necessarily lead to a conclusion that the program violates the secular criteria requirement.[253] In *Towey*,[254] a federal district court rejected plaintiff's establishment clause challenge, and found that a grantor used religion-neutral standards to select subgrantees under a federal program, even though a significant majority of the subawards went to FBOs.

It is no coincidence that *MORH* and *Towey* arose from the same funding program, the Compassion Capital Fund (CCF), administered by the Department of Health and Human Services (HHS)[255] and the only new source of federal funding directed toward the FBCI. The

250. Zelman v. Simmons-Harris, 536 U.S. 639, 653–54 (2002); Mitchell v. Helms, 530 U.S. 793, 809–14 (2000) (plurality opinion); Agostini v. Felton, 521 U.S. 203, 231 (1997);. With one exception, the Justices concurring and dissenting in *Agostini*, *Mitchell* and *Zelman* also regarded religion-neutral criteria for eligibility as a mandate of the Establishment Clause. *Zelman*, 536 U.S. at 669–71 (O'Connor, J., concurring); *Zelman*, 536 U.S. at 696–98 (Souter, J., dissenting) (recognizing significance of neutrality, but rejecting majority's construction of neutrality); *Mitchell*, 530 U.S. at 838–39 (O'Connor, J., concurring in the judgement); *Mitchell*, 530 U.S. at 877–84 (Souter, J., dissenting); *Agostini*, 521 U.S. at 253 (Souter, J., dissenting). . Justice Thomas represents the sole exception. In *Zelman*, he questioned the incorporation of the Establishment Clause into the Fourteenth Amendment, and he therefore doubted the Court's authority to scrutinize the details of the state's program. *Zelman*, 536 U.S. at 678–80 (Thomas, J., concurring).

251. In his opinion for the plurality in *Mitchell*, Justice Thomas suggested that religion-neutral criteria for providers and beneficiaries provide sufficient evidence, when combined with a secular purpose for the program, that the government does not bear responsibility for any religious indoctrination that a provider might undertake in carrying out the program. *Mitchell*, 530 U.S. at 809–10.

252. Freedom From Religion Found. v. Montana Office for Rural Health, No. CV 03-30-BU-RWA, (D. Mont. Oct. 26, 2004) (on file with the authors and the DePaul Law Review).

253. *See, e.g.*, *Zelman*, 536 U.S. at 656–60 (finding that large proportion of places in religious schools under voucher program does not reflect lack of secular criteria).

254. Freedom From Religion Found. v. Towey, No. 04-C-381-S (W.D. Wis. Jan. 11, 2005) (on file with the authors and the DePaul Law Review).

255. Congress created the CCF by a legislative appropriation in 2002. *See* The Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, Pub. L. No. 107–116, 115 Stat. 2177 (2002). *MORH*, No. CV 03-30-BU-RWA (on file with

CCF's primary purpose is to support a range of intermediate organizations (grantees), which in turn provide training, technical assistance, and subgrants to grassroots faith and community-based organizations.[256] HHS selects these grantees based, in part, on their existing network of relationships with faith and community-based organizations.[257] HHS might well have anticipated that grantees would use their CCF funding to benefit that network of relationships, even if the network consisted primarily—or even exclusively—of fellow religious organizations, but HHS, at least in the early years of the grant program, seems to have provided grantees with little guidance on making subawards. Because grantees must comply with the same constitutional rules in making subawards that the government must meet in making the grants to intermediaries,[258] such guidance should have included an obligation to use secular criteria in selecting subgrantees.

For the justices who joined the plurality opinion in *Mitchell v. Helms*,[259] a challenged funding program must only satisfy the secularity requirement in order to absolve the government of responsibility for any religious indoctrination that occurs in the grant program. Justice Thomas wrote:

> If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination.[260]

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the authors and the DePaul Law Review); *Towey*, No. 04-C-381-S. *See also* Administration for Children & Families, *at* www.acf.dhhs.gov/programs/ccf (last updated July 29, 2005).

256. The authority to make subgrants under the CCF has been questioned. The scant legislative history of the Fund would indicate that subgrants are not consistent with Congress's intent in creating the program as indicated by the statements of several senators. *See, e.g.,* "[T]his fund is only for the development of model best practices." 147 CONG. REC. S11,546 (daily ed. Nov. 7, 2001) (statement of Sen. Harkin). *See also* OMB Watch Comments on Compassion Capital Fund Guidelines, OMB Watch, March 29, 2002, *at* www.ombwatch.org/article/articleview/647/1/52?TopicID=1. The statutory language, however, seems broader in that it authorizes funding not only for research on best practices but also for charitable organizations to "emulate" such practices, which could suggest funding for services. For discussion of the practices under one CCF grant in Philadelphia, see Jason DeParle, *Hispanic Group Thrives on Faith and Federal Aid*, N. Y. TIMES, May 3, 2005, at A1.

257. For details about the criteria for and obligations of intermediary organizations, see www.acf.dhhs.gov/programs/ccf/about_ccf/prgm_demonstration.html (last updated July 4, 2005).

258. Bowen v. Kendrick, 487 U.S. 589, 606 (1988) (holding that aid to grantees and subgrantees should be treated as constitutionally identical).

259. Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion).

260. *Id.* at 809–10 (2000) (plurality opinion).

Justice Thomas's analysis reveals his narrow conception of the government's responsibility under the Establishment Clause. In the view of the plurality, the government is not accountable for religious indoctrination that may be financed through the grant program as long as the government does not formally prefer religious over non-religious grantees.

In articulating this narrow account of government responsibility, the *Mitchell* plurality—at least implicitly—attempted to harmonize Establishment Clause jurisprudence with the Court's "state action" doctrine, which applies to a wide range of other constitutional provisions. Seen in light of that doctrine, current Establishment Clause jurisprudence appears anomalous. As a general rule, other provisions of the federal constitution do not bind private entities that offer government-financed services.[261] Thus, a private school teacher could not invoke the Free Speech Clause to challenge her termination by the school, even though the school received virtually all of its funding from the government.[262] Nor could residents of a private nursing home invoke the Due Process Clause in demanding a hearing before discharge from the home, even though the patients' care was publicly financed.[263] In both cases, the Court held that the private provider was not a "state actor," despite the extensive public funding, and so the provider had no obligation to conform its conduct or procedures to constitutional norms.

In these and other cases, the Court has identified only a very narrow set of conditions under which private service providers may be regarded as state actors: either the government must have active and significant involvement in the challenged conduct, or the government must have extensive control over the challenged service provider.[264] Unless one or both of those conditions apply, courts will neither treat the private provider as a state actor, nor impute to the government the private provider's conduct.

The Court's state action doctrine, like its analysis of public aid to religious entities, focuses on the extent to which government may rea-

261. *See* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV 1367, 1410–21 (2003) (describing the Supreme Court's "state action" jurisprudence). *See generally*, Daniel P. Hart, Note: *God's Work, Caesar's Wallet: Solving the Constitutional Conundrum of Government Aid to Faith-based Charities*, 37 GA. L. REV. 1089 (2003) (applying the state action doctrine to the FBCI).

262. Rendell-Baker v. Kohn, 457 U.S. 832 (1982).

263. Blum v. Yaretsky, 457 U.S. 991 (1982).

264. Metzger, *supra* note 261, at 1416–7 (discussing Brentwood Acad. v. Tennessee Secondary Sch. Ass'n, 531 U.S. 288 (2001); Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999); West v. Atkins, 487 U.S. 42 (1988)). R

sonably be held responsible for acts performed by the state's private grantees. Given the conceptual similarity of these two analyses, why should the Court apply a different, and more robust, measure of public responsibility in Establishment Clause cases than it does in other constitutional contexts? If constitutional norms do not generally follow public funds into private service providers, why should Establishment Clause restrictions do so?[265]

The answer to these questions arises from a fundamental distinction between the Establishment Clause and the other constitutional provisions to which the state action doctrine applies. The Court's state action decisions involve claims that private providers of government-financed or government-authorized services have violated constitutional rights held by individuals or entities.[266] Although constitutional rights may have parallel norms in laws that apply to private actors,[267] the constitution does not ordinarily create rights and duties between private entities and individuals.[268] Courts and commentators have offered a wide array of explanations for this limitation on constitutional rights,[269] but all rest on the assumption that the Constitution protects only against injuries caused by the state.[270] Thus, state action analysis measures the extent to which the government may fairly be held responsible as the legal cause of the injury alleged by the plaintiff.[271] Causation, in this context, focuses on conduct closely proximate to that injury. Unless a state official or entity exercises legal and effective control over, or participates actively in, the challenged action,

265. *See* Carl H. Esbeck, *Church-State Relations in America: What's at Stake and What's Not*, Liberty Online, (May/June 2005), *at* http://www.libertymagazine.org/article/articleview/495/1/2/ (discussing state action doctrine in context of Establishment Clause litigation).

266. *See generally* G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333 (1997); Sheila S. Kennedy, *When is Private Public? State Action in the Era of Privatization and Public-Private Partnerships*, 11 GEO. MASON U. CIV. RTS. L.J. 203 (2001); Metzger, *supra* note 261; Peter M. Shane, *The* Rust *That Corrodes: State Action, Free Speech, and Responsibility,* 52 LA. L. REV. 1585 (1992). R

267. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C § 2000(a)(2005) (prohibiting racial and other forms of discrimination in places of public accommodation).

268. Metzger, *supra* note 261, at 1369–70. R

269. Buchanan, *supra* note 266, at 354–55 (outlining the diversity of approaches to state action determination). R

270. Constitutionalizing private conduct may dramatically impede personal freedom of action, and thereby impair both efficiency and autonomy. For example, individuals are free to refuse to enter inter-racial marriages even though the government may not forbid them. Loving v. Virginia, 388 U.S. 1 (1967).

271. Buchanan, *supra* note 266, at 355–63 (describing two general models of state action doctrine, both of which assess the extent to which the state is the legal cause of plaintiff's alleged injury). R

courts will be reluctant to conclude that the state bears responsibility for the action.[272]

The Establishment Clause, however, does not create a constitutional right enforceable by private individuals or entities. Instead, the Establishment Clause functions as a structural limitation on government, and circumscribes the state's authority to assert jurisdictional competence over religious matters.[273] In this respect, the Establishment Clause imposes a constitutionally unique restraint on the state. Government may neither act to achieve religious ends, nor select or include distinctly religious means to achieve public ends. The state thus violates the Establishment Clause when it chooses either religious ends or religious means, choices that often cause no distinct injury to any person or entity.[274] Indeed, the state violates the Establishment Clause even when it chooses religion as one among many means of achieving a public good. The constitutional harm arises from the state's assertion of control over religion, no less when religion is one among many instruments as when it is the only means or objective selected.

In order to facilitate this jurisdictional understanding of the Establishment Clause, the Court's analysis of government responsibility under the Clause differs markedly from that under the Court's broader state action doctrine. Although state action norms generally reflect a narrow conception of proximate causation—one closely related to traditional notions of criminal liability—the Establishment Clause inquiry must account for the broader, jurisdictional disability imposed by the Clause on the government. Because of the state's

272. Metzger, *supra* note 261, at 1410–21. *See also* Jackson v. Metro. Edison Co., 419 U.S. 345 (1974) (holding that state utility commission's approval of procedural practices of private utility does not render the state constitutionally responsible for the practice). The one context in addition to the Establishment Clause in which state responsibility appears to expand involves the state's duty to maintain desegregated public schools. See Norwood v. Harrison, 413 U.S. 455 (1973) (finding that Mississippi may not loan textbooks to students in private segregated schools under long-established program for book loans to private and public school students). *Norwood* may be explicable in light of the remedial duty imposed on a state that has maintained a de jure system of segregated schools. For discussion of the relationship between *Norwood* and the problem of faith-based hiring by FBOs receiving government support, see Memorandum from Randolph C. Moss, Assistant Attorney General, Office of Legal Counsel, to William P. Marshall, Deputy Counsel to the President 19 (Oct. 12, 2000), *available at* http://balkin.blogspot.com/olc.charitablechoice.pdf. **R**

273. The specialized doctrine of taxpayer standing in Establishment Clause cases, *see, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968), affirms the Clause's unique character as a structural, rather than rights-creating, provision. For discussion, *see* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998).

274. Religious coercion is not a necessary element of Establishment Clause violation, but such coercion may produce injuries cognizable under the Free Exercise Clause. *See* Lee v. Weisman, 505 U.S. 577, 621 (1992) (Souter, J., joined by O'Connor, J., and Stevens, J., concurring).

duty not to use religion as an instrument, the Establishment Clause analysis demands a more searching inquiry into the state's relationship with private providers of government-financed services than that conventionally required under state action doctrine. If the state chooses to fund religious grantees as a means of achieving public objectives, official awareness of such grantees' foreseeable use of religious means to meet those goals should lead to an attribution of governmental responsibility for the use of such means.

In contrast to the *Mitchell* plurality's implicit attempt to harmonize Establishment Clause analysis with the state action inquiry, a majority of the Supreme Court has asserted more robust standards for the Establishment Clause. These standards reflect a heightened responsibility for the government in its relationships with private service providers. For the Justices who support such norms, the government's responsibility includes an affirmative duty not to promote religious indoctrination, rather than simply an obligation not to prefer such indoctrination over its secular counterparts. These Justices differ, however, in their assessment of the affirmative steps government must take in order to avoid responsibility for religious indoctrination. In the next two sections, we explore these differing conceptions of governmental responsibility, looking first at programs that provide indirect assistance to FBOs, and then at programs that provide direct assistance.

2. Indirect Financing

A close look at our example of the G.I. Bill's tuition benefit suggests that, under the appropriate financing structure , the government is not likely to be held responsible for supporting religious indoctrination. Crystallized in the Supreme Court's *Zelman* decision, but resting on caselaw spanning five decades,[275] the category of indirect financing has long been accorded special status in Establishment Clause jurisprudence.[276] *Zelman* and its predecessors hold that when government offers service beneficiaries an array of providers from which they can choose to receive services, and pays those providers only to the extent the beneficiaries actually utilize their services, the array may include religious providers, and the service provided may be intertwined with

275. Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Washington Dep't. of Servs. for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983); Bd. of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Bd. of Educ., 330 U.S. 1 (1947).

276. *See supra* notes 114–128 and accompanying text (discussing constitutional significance of indirect financing). *See generally* Lupu & Tuttle, *supra* note 121; Lupu & Tuttle, *supra* note 124. R R

religious indoctrination. These decisions treat service beneficiaries' exercise of "genuine, independent choice" as an intervening cause that insulates the government from responsibility for any religious indoctrination that beneficiaries might receive through their chosen program.[277]

The architects of the FBCI quickly recognized the possibilities that *Zelman* opened for public financing of faith-intensive social services. Indeed, in his 2003 State of the Union Address, President Bush highlighted vouchers as a key element in his proposal for funding substance abuse treatment.[278] By financing treatment with vouchers, the President emphasized, beneficiaries may choose to receive their services from a range of providers, including those that offer faith-infused programs. Moreover, within two years of the *Zelman* decision, virtually every federal agency had promulgated a rule that identified the special constitutional status of indirect financing of social welfare services.[279] Each of these regulations provides that normal constitutional limits on public funding of religious indoctrination do not apply to programs "in which a service provider receives program funds . . . as a result of the independent and private choices of individual beneficiaries."[280]

Courts have already begun to recognize the significance of *Zelman* for government-funded social services. A month after the Supreme Court's decision in *Zelman*, a federal district court in Wisconsin upheld a state program that funded faith-intensive substance abuse treatment for individuals on probation or parole. In *McCallum II*[281] the district court found that beneficiaries in the program were free to choose secular or religious treatment providers, and providers only received government funds when chosen by a beneficiary. Applying the Supreme Court's reasoning from *Zelman*, the district court upheld

277. *Zelman*, 536 U.S. at 649–53.

278. Press release, Substance Abuse and Mental Health Services Administration, [Access to Recovery, *available at* www.samhsa.gov/news/newsreleases/030620fs_atr_rev.htm (last updated June 20, 2003) (detailing Access to Recovery program, announced in President Bush's 2003 State of the Union Address).

279. *See* 7 C.F.R. § 16.3(b) (2005) (USDA); 20 C.F.R. § 667.266(b)(1) (2005) (DOL); 24 C.F.R. § 5.109(c) (2005) (HUD) (restricting limits on inherently religious content to "direct HUD funding"); 28 C.F.R. § 38.1(h) (2004) (DOJ); 34 C.F.R. § 74.44(f)(2) (2004) (ED); 38 C.F.R. § 61.64(g) (2004) (VA); 45 C.F.R. § 87.1(j) (2004) (HHS).

280. *See, e.g.*, 28 C.F.R. § 38.1(h) (2004) (giving the DOJ provision on programs with indirect financing).

281. 214 F. Supp. 2d 905 (W.D. Wis. 2002), *aff'd*, 324 F.3d 880 (7th Cir. 2003). In McCallum I, 179 F. Supp. 2d 950 (W.D. Wisc. 2002), the same district court invalidated a direct grant from the state to a faith-based provider found acceptable in *McCallum II, Id.* at 977-78. *See* text at notes 355–361 *infra*. **R**

the program, ruling that the voucher financing insulated the state from responsibility for any religious indoctrination of the beneficiaries.[282] The plaintiffs appealed the district court's ruling in *McCallum II*, and the U.S. Court of Appeals affirmed the lower court's decision.[283]

A second case, *American Jewish Congress* (AJC) *v. Corporation for National and Community Service* (CNCS),[284] also involved voucher financing of social services, though in a somewhat more complicated context than *McCallum II*. AJC challenged the constitutionality of two forms of CNCS financing under the AmeriCorps Education Award Program (EAP). The first was CNCS's provision of EAP awards to teachers who served in religious schools; the second was CNCS's subsidy of the religious organizations, such as Notre Dame University, that selected, trained, and monitored those teachers.[285] Under the EAP, individuals who fulfill a term of service in a qualified AmeriCorps position are eligible to receive a monetary award that they may use to repay existing student loans or to finance further education. CNCS selects a range of organizations—public and private non-profit, religious and secular—to select and prepare individuals for various types of AmeriCorps positions, to monitor the individuals' performance in those positions, and finally to certify to CNCS that the individuals met the EAP requirements. CNCS provides these organizations with a small grant—$400 per enrolled participant in the relevant years—to defray the organizations' expenses in administering the program.

The AJC claimed that the EAP awards violated the Establishment Clause because the teachers who received the awards were permitted to teach religion in their schools, so long as they did not count time spent teaching religion as part of their required hours for the EAP award.[286] The AJC also claimed that CNCS grants to the organiza-

282. *McCallum II,* 214 F. Supp. 2d at 913–16. *See also Freedom from Religion Foundation, Inc. v. McCallum*, Roundtable, *at* www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=9 (Aug. 14, 2002).

283. 324 F.3d 880 (7th Cir. 2003). *See also Legal Update, Freedom From Religion Foundation, Inc. v. McCallum and Faith Works, Milwaukee, Inc.*, Roundtable, *at* www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=15 (June 3, 2002).

284. 399 F.3d 351 (D.C. Cir. 2005). *See also Legal Update, American Jewish Congress v. Corporation for National & Community Service,* Roundtable, www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=34 (Mar. 15, 2005).

285. *Am. Jewish Cong.*, 399 F.3d at 354–55. The lawsuit challenged only the grants paid to religious organizations and the awards given to teachers in religious schools, not the EAP overall. *Id.* at 354–55.

286. Am. Jewish Cong. v. Corp. for Nat'l Cmty. Serv., 323 F. Supp. 2d at 49–50 (2004), *rev'd*, 399 F.3d 351 (D.C. Cir. 2005) (discussing change in CNCS regulations of AmeriCorps participants' activities, 45 C.F.R. § 2520.30(a)(7) (2004)), *reh'g denied*, 2005 U.S. App. LEXIS 10201 (D.C. Cir. June 1, 2005).

tions violated the Establishment Clause because the grants represented direct cash subsidies to organizations that included religious indoctrination as part of their training of AmeriCorps teachers. In response, CNCS argued that both the EAP awards and the administrative grants should be seen as forms of indirect financing, and thus subject only to the requirements of secular purpose and criteria.[287] The U.S. District Court for the District of Columbia agreed with the AJC and held that the funding streams constituted direct support for religious indoctrination, in violation of the Establishment Clause.[288]

CNCS appealed the decision, and the U.S. Court of Appeals for the District of Columbia Circuit reversed. Correcting what seemed a fairly obvious error by the district court, the appellate court found that the EAP awards represented a form of indirect financing. EAP participants could choose from a very wide range of settings in which to perform their AmeriCorps service, and also could choose from a very wide range of options in redeeming their EAP awards, including payment for past or future educational expenses. Given those two considerations, CNCS could not plausibly be held responsible for the religious experiences of AmeriCorps participants.[289]

With respect to the organizational grants, however, the appellate court agreed with the district court that such grants should be seen as direct aid. The appellate court then concluded that the grants survived challenge under the Establishment Clause because they fit into a narrow exception for government-mandated record keeping.[290] For present purposes, what is most significant about this portion of the court's opinion is its unwillingness to treat the organizational grants as a form of indirect aid. The organizations only received payment after

287. *Amer. Jewish Cong.*, 323 F. Supp. 2d at 60–61.

288. *Id.* at 61. The district court assumed that the Supreme Court's Establishment Clause decisions on indirect aid do not apply when the government has "pre-approved" the set of providers eligible to receive beneficiaries' vouchers. The Court's decisions have never imposed that limit on indirect aid programs. In *Zelman*, for example, the voucher program limited beneficiaries' choice to state-accredited schools within a defined geographical area. Zelman v. Simmons-Harris, 536 U.S. 639, 645 (2002). The AmeriCorps participants at issue in *American Jewish Congress* also had a broad range of training and teaching sites from which to choose. *Am. Jewish Cong.*, 399 F.3d at 357–58.

289. The case raised the quite intriguing question of whether a voucher program might lose its constitutionally preferred status if the voucher is used to pay the teacher, as under the EAP, rather than the students' tuition, as in *Zelman*. Neither the district nor the appellate court, however, addressed this question.

290. *Id.* at 358–59 (discussing Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 657–58 (1980)). We have some doubts about the appellate court's application of the *Regan* exception, especially in this context. The *Regan* exception purports to be very narrow, involving government-mandated secular costs. It remains unclear whether the details of CNCS's organizational grants actually satisfied the *Regan* standard.

being selected by an AmeriCorps participant, and the participants could choose from a wide range of organizations eligible to provide EAP training and monitoring services. The grants seem, at first glance, to be a clear example of indirect financing. Beneficiaries choose from a wide array of service providers, and the providers only receive public funding if selected by a program beneficiary.

The D.C. Circuit's refusal to treat the organizational grants as a form of indirect aid can be traced to Justice O'Connor's concurring opinion in *Mitchell v. Helms*,[291] in which she wrote:

> I do not believe that we should treat a per-capita-aid program the same as the true private-choice programs considered in *Witters* and *Zobrest*. . . . [W]hen the government provides aid directly to the student beneficiary, that student can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education. The fact that aid flows to the religious school and is used for the advancement of religion is therefore *wholly* dependent on the student's private decision.[292]

For Justice O'Connor, indirect aid appears to have constitutional significance only when the beneficiary is empowered to choose *not* to direct government funds to her preferred service provider. That power alone, she reasoned, absolves the government of responsibility for the beneficiary's religious indoctrination.

Justice O'Connor adopted this formalist view, at least in part, because of her concern that failure to distinguish a per capita version of direct financing from voucher financing would place Establishment Clause jurisprudence on a slippery slope, potentially ending in "direct money payments to religious organizations (including churches) based on the number of persons belonging to each organization."[293] It is far from clear, however, why the physical act of placing vouchers in the hands of beneficiaries should affect the constitutionality of payments to religious organizations. Any such program would need to have a secular purpose and use secular criteria for eligibility, and those requirements are far more likely to protect the core values of the Establishment Clause than the requirement that aid pass through the hands of program beneficiaries.[294]

In his opinion for the Seventh Circuit's decision in *McCallum II*,[295] Judge Posner ignored Justice O'Connor's distinction between per-capita aid and beneficiary choice programs, and held that the Wisconsin

291. Mitchell v. Helms, 530 U.S. 793, 841–44 (2000) (O'Connor, J., concurring).
292. *Id*. at 842.
293. *Id*. at 843–44.
294. Lupu & Tuttle, *supra* note 121, at 941–44. **R**
295. Freedom from Religion Found. v. McCallum, 324 F.3d 880 (7th Cir. 2003).

program met the Supreme Court's test for "genuine, independent" choice. Judge Posner's opinion emphasized that beneficiaries were free to choose between secular and religious providers, and that the state paid providers only when, and to the extent that, beneficiaries received treatment from that provider.[296] The FBCI has enthusiastically embraced this facet of Judge Posner's opinion. In the last two years, whenever a federal regulation adopted under the FBCI has addressed the issue of indirect aid, the relevant agency has cited the Seventh Circuit's decision in *McCallum II* to justify treating per-capita aid programs as identical to beneficiary choice programs under *Zelman*.[297]

As we have argued at length elsewhere, Justice O'Connor's concern about equating per-capita aid programs with beneficiary choice programs might rest on uncertain conceptual foundations, but the concern does relate to other important aspects of her establishment clause jurisprudence. Close attention to these aspects reveals weaknesses in Judge Posner's analysis in *McCallum II*, and by extension, also raises questions about indirect funding schemes in other contexts. In marked contrast to the other members of the majority in *Zelman* (the same justices who joined the plurality in *Mitchell*), and to Judge Posner's opinion in *McCallum II*, Justice O'Connor devotes significant attention to beneficiaries' subjective experience of choice.[298] This should come as no surprise, because the *Mitchell* plurality holds that inquiry into a program's secular criteria and purpose—elements focused exclusively on the government's action—is sufficient to resolve any challenge under the Establishment Clause. For these justices, "beneficiary choice" has no independent significance; the concept simply restates the secularity requirements in other terms.

For Justice O'Connor, however, the concept of beneficiary choice fits within a more robust assessment of the government's responsibility. In sharp contrast to the *Mitchell* plurality, which focused exclusively on the government's neutrality among forms of indoctrination, O'Connor—like the *Zelman* dissenters—requires government to take affirmative steps to avoid responsibility for funding religious indoctrination, even if such funding of indoctrination is done on a neutral basis. The legal significance of indirect aid, then, rests on the mechanism's ability to distance government normatively from religious indoctrination. And this distance results from the beneficiary's

296. *Id*. at 882–84.

297. *See, e.g*., Final Rules for Participation in Education Department Programs of Religious Organizations, 69 Fed. Reg. 31,708, 31,713 (June 4, 2004) (citing *McCallum* II, 324 F.3d at 882).

298. Lupu & Tuttle, *supra* note 121, at 939–44. **R**

intervention in the chain of causes linking the government funding to the religious experience. The paradigmatic example of an intervening cause is the government worker who donates part of her paycheck to her religious community.[299] Because the worker has full ownership rights to that money, including the power to save, donate, or spend on any lawful activity, the government bears no responsibility at all for her decision to donate the funds. Thus, the constitutionality of any program of indirect aid for religious indoctrination depends on the extent to which the program approximates the model of the government worker's donation.

We do not believe that a voucher financing mechanism, compared to per-capita financing, significantly enhances the beneficiary's status as an intervening cause. Two other aspects of indirect aid programs, however, play a crucial role in distancing government from responsibility for the beneficiary's choice. First, the beneficiary must have a viable secular alternative to the religious provider. Although the services need not be of precisely equal value—there will always be subtle differences, including quality and quantity of the service offered, or distance from the beneficiary's home—the secular provider must be practically accessible to the beneficiary, and must offer services of a quality reasonably sufficient to achieve the government's purposes in supporting the program.[300]

In *McCallum II*, Judge Posner recognized that the religious program at issue in the case, Faith Works, offered a much longer (and apparently more successful) program than any of the available secular providers, but he declined to impose on government an obligation to ensure that secular providers in an indirect aid program offer services of roughly equal quality to those offered by religious providers. He suggested that any requirement of equal quality would result in a "race to the bottom," in which secular providers reduced their programs in order to disqualify superior religious treatment providers.[301] That possibility seems exceedingly remote, but even if it were not, such a risk should be no excuse for the government's failure to meet

299. In his opinion for the Court in *Witters*, Justice Marshall wrote: "[A] State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary." Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 486–87 (1986) (cited and discussed in Mitchell v. Helms, 530 U.S. 793 (2000) (O'Connor, J., concurring in the judgment)).

300. Zelman v. Simmons-Harris, 536 U.S. 639, 670–1 (O'Connor, J., concurring) (discussing the adequacy of choices available to parents of Cleveland schoolchildren). *See also* Lupu & Tuttle, *supra* note 121, at 984–92; Lupu & Tuttle, *supra* note 124, at 560–68. **R**

301. *McCallum III*, 324 F.3d at 884.

its affirmative responsibility to ensure the availability of quality secular providers. If the government fails to meet that obligation and the religious providers alone offer valuable programs for beneficiaries, one could quite plausibly say that the government has steered beneficiaries into religious indoctrination. In those circumstances, the voucher mechanism would not insulate the government from responsibility.

Second, and closely related to the first, indirect aid programs only insulate government from responsibility for religious indoctrination when beneficiaries exercise choice that is informed and voluntary. *Zelman* provides a useful example of such a choice. The parents of schoolchildren were provided information concerning eligible schools, and had the opportunity to research the benefits of various schools.[302] No public official pressured the parents to send their children to a religious school; indeed, the program gave parents significant financial incentives to send their children to a public or charter school.[303] These factors strongly suggest that the government should not bear significant responsibility for any parents' decision to send their child to a religious school.

In *McCallum II*, however, Judge Posner revealed very little interest in the beneficiaries' experience of choice, although the facts of the case raise serious questions about that experience.[304] All of the beneficiaries in *McCallum II* were under the control of the Wisconsin Department of Corrections (DOC), either as probationers or parolees. The probation or parole officers regularly recommended that offenders enroll in the Faith Works program. Moreover, some of the offenders were likely to be suffering the effects of withdrawal from addiction, which adds an additional layer of potential cognitive weakness and vulnerability.

Compared to the choice exercised by parents under the Cleveland voucher plan, the offenders' choice in *McCallum II* seems much less "genuine and independent." Offenders may not have been coerced into receiving faith-intensive substance abuse treatment, but defining "genuine and independent choice" as the absence of explicit coercion dramatically undercuts the significance of such choice as an intervening cause between government support and religious indoctrination. When DOC agents urge offenders—who might have judgment impaired by substance addiction and withdrawal—to enroll in a program that depends on religious transformation, the government should be

302. Zelman v. Simmons-Harris, 234 F.3d 945, 950 (6th Cir. 2000).
303. *Zelman*, 536 U.S. at 653–54.
304. *McCallum III*, 324 F.3d at 883–84.

held to bear some responsibility for the offenders foreseeable religious indoctrination of the offender. Official indifference to beneficiaries' religious experience does not erase the government's responsibility.

Nevertheless, Judge Posner's lack of attention to beneficiaries' experience of choice is consistent with the tone of the majority opinion in *Zelman*, which was written by Chief Justice Rehnquist. It remains an open question whether lower courts will follow the *Zelman* majority's path, or focus on Justice O'Connor's more subtle analysis, which places much greater emphasis on beneficiaries' subjective experience of choice. In one separate respect, however, Judge Posner's assessment of beneficiaries' choice follows the reasoning of both the *Zelman* majority and Justice O'Connor's concurrence. Those who bring establishment clause challenges to indirect aid programs bear the burden of showing defects in the beneficiaries' range or exercise of choice, and the *McCallum II* plaintiffs failed to meet that burden.[305]

To the extent that the FBCI rests, at least in part, on a belief that religious transformation offers a unique means of achieving personal and social well being, indirect aid represents the only constitutionally safe mechanism for financing that transformation. The FBCI, as evident from changes to federal regulations, has embraced the possibilities offered by beneficiary choice programs. At this time, however, the federal agencies have not provided details about how such programs should be structured, whether in terms of the range or quality of alternatives to religious programs, or the extent to which beneficiaries must be provided with information about the available providers.[306]

Despite the FBCI's regulatory embrace of beneficiary choice programs—and the special constitutional status of such programs, which leads to that embrace—the vast majority of social welfare funding programs, for practical reasons, will not adopt the indirect aid mechanism. Indirect financing may be a viable means of supporting some services, especially those like education and substance abuse treatment, where providers can make reasonable projections about the number of beneficiaries they are likely to serve, and adjust their ex-

305. *Zelman*, 536 U.S. at 655–56 (2002); *McCallum III*, 324 F.3d at 882. *See also* Lupu & Tuttle, *supra* note 121 at 931–32, 940–43 (discussing placement of the evidentiary burden after *Zelman* in challenges to direct aid programs). For a discussion of burdens of proof in direct aid programs, see *infra* notes 387–390 and accompanying text. R R

306. The only exceptions come in the statutory programs that contain Charitable Choice provisions. Those provisions include explicit requirements to provide beneficiaries with adequate information about, and the opportunity to select, alternative providers. 42 C.F.R. § 54.8 (2004) (SAMHSA); 45 C.F.R. § 260.34(g) (2004) (TANF).

penditures accordingly. But many social welfare services, whether supplied by the government or private entities, require the provider to maintain capacity to respond to fluctuations in the demand for services. Such capacity cannot practically be maintained if providers may only charge when they have performed services. Government will continue to use direct financing mechanisms to pay for social welfare services, and it is to the constitutional analysis of those mechanisms that we now turn.

3. Direct Aid

When the government uses private entities to deliver publicly financed social services, the financing most frequently takes the form of direct aid. For purposes of Establishment Clause analysis, "direct aid" means any public support, provided through private agencies, that does not meet the legal definition of a beneficiary choice program.[307] Direct financing of private providers may take the form of cash grants or in-kind aid, which may range from books orcomputers to real property or personnel.[308] The constitutional status of indirect aid may attract attention under the FBCI, but such aid makes up only a small percentage of government support for private social welfare providers, and that percentage is not likely to increase in the foreseeable future. Given the predominance of direct funding, we find it both remarkable and troubling that the legal standards adopted by the FBCI to govern direct aid programs mesh so poorly with the Supreme Court's Establishment Clause jurisprudence.

As we described above, Justice O'Connor's concurring opinion in *Mitchell* governs Establishment Clause analysis of direct aid programs. This analysis, like that appropriate to indirect aid, reflects the central question under the Establishment Clause: when is the government constitutionally responsible for religious indoctrination, via government-funded service providers, of program beneficiaries? The *Mitchell* plurality answered the question entirely by reference to the standard of neutrality, under which the government is responsible

307. As described in the preceding section, Justice O'Connor's restrictive definition of "indirect aid" excludes per capita financing mechanisms, but the FBCI's legal standard for indirect financing follows that formulated by Judge Posner in *McCallum III*. The constitutional analysis appropriate to direct aid programs also applies to programs of indirect assistance that are found deficient in any of their core elements, such as the extent to which the program offers beneficiaries a sufficiently broad range of service providers.

308. For an example of direct cash grants, see Bowen v. Kendrick, 487 U.S. 589 (1988). For examples of in-kind assistance, see Mitchell v. Helms, 530 U.S. 793 (2000); Agostini v. Felton, 521 U.S. 203 (1997).

only when it favors religious over other forms of indoctrination.[309] The dissenters in *Mitchell* offered a starkly different approach. In their view, the government acts unconstitutionally whenever it provides aid to a religious organization, because that aid might be diverted to advance the organization's religious mission.[310]

Justice O'Connor, joined by Justice Breyer, occupied the middle ground in *Mitchell.* As elaborated in their concurring opinion, the government is constitutionally responsible for a direct grantee's efforts at religious indoctrination of beneficiaries if (1) the aid is diverted to activities that are not secular in content,[311] or (2) the program lacks adequate safeguards against such diversion.[312] Because O'Connor's view represents the controlling position of the Court,[313] we will use those two criteria to assess the FBCI's regulation of and guidance for direct aid programs.

a. Content Restrictions

The roots of the FBCI's limit on religious use of direct aid reach back to the Charitable Choice provisions first included in the 1996 welfare reforms.[314] The centerpiece of that reform, the Personal Responsibility and Work Opportunity Reconciliation Act, included language intended to reflect the Establishment Clause's restriction on the use of public aid: "No funds provided directly to institutions or organizations to provide services and administer programs under [the Act] shall be expended for sectarian worship, instruction, or proselytization."[315] Over the next four years, the same language was included in each additional statute that contained Charitable Choice provisions.[316]

In December of 2002, President Bush issued Executive Order 13279, which sets forth the key substantive elements of the FBCI.[317] These features have since been replicated in all regulations and gui-

309. *Mitchell*, 530 U.S. at 809–10 (plurality opinion) (Thomas, J.).

310. *Id*. at 890–955 (Souter, J., dissenting).

311. *Id*. at 855–77 (O'Connor, J., concurring in the judgment).

312. *Id*. at 858–62 (O'Connor, J., concurring in the judgment).

313. *See* Freedom from Religion Found. v. McCallum, 179 F. Supp. 2d 950 (W.D. Wisc. 2002) (treating the O'Connor opinion in *Mitchell* as stating the governing Establishment Clause norm in direct aid cases).

314. *See* discussion *supra* Part II.

315. 42 U.S.C. § 604a(j) (2000).

316. The relevant Community Service Block Grant Provisions are located at 42 U.S.C. § 9920 (2000). The relevant provisions from the Federal Substance Abuse and Mental Health Program are located at 42 U.S.C. §§ 290kk, 300x-65 (2003). The original Charitable Choice provisions, enacted in 1996 also apply to the Welfare-to-Work program. Lupu & Tuttle, *supra* note 207, at 54–55. R

317. Exec. Order No. 13,279, 3 C.F.R. 258, *reprinted in* 5 U.S.C. § 601 (1996 & Supp. 2005). *Executive Order: Equal Protection of the Laws for Faith-based and Community Organizations*,

dance materials relating to the FBCI, and the FBCI's regulations now affect nearly all federal funding streams for social services.[318] All of the FBCI's regulations and guidance documents have adopted the same phrasing and interpretation of the Establishment Clause limitation on directly funded programs. This limit is best explained in "Guidance to Faith-Based and Community Organizations on Partnering with the Federal Government," issued in December 2002, by the White House Office of Faith-Based and Community Initiatives, which gives the following account:

> WHAT ARE THE RULES ON FUNDING RELIGIOUS ACTIVITY WITH FEDERAL MONEY?
> The United States Supreme Court has said that faith-based organizations may not use direct government support to support "inherently religious" activities. Don't be put off by the term "inherently religious"—it's simply a phrase that has been used by the courts in church-state cases. Basically, it means you cannot use any part of a direct Federal grant to fund religious worship, instruction, or proselytization. Instead, organizations may use government money only to support the non-religious social services that they provide. Therefore, faith-based organizationsthat receive direct governmental funds should take steps to separate, in time or location, their inherently religious activities from the government-funded services that they offer. Such organizations should also carefully account for their use of all government money.[319]

At first glance, the description seems to accurately reflect the Establishment Clause standard adopted by the Court in *Agostini*, and refined in Justice O'Connor's concurring opinion in *Mitchell*. Direct aid may be used only for "non-religious social services."

The problem, however, lies in the description's account of what constitutes religious activity. This description—and every subsequent regulation and guidance document issued under the FBCI—says that the Establishment Clause forbids the government from directly supporting "inherently religious activities," such as "worship, religious instruction, or proselytizing." This statement of the constitutional prohibition is accurate, but incomplete, and has the potential to seriously mislead grant officers and FBOs. Someone who reads these reg-

The White House, (Dec. 12, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/12/20021212-6.html.

318. Lupu & Tuttle, *supra* note 48, at 4–27. For an example of a final agency regulation that incorporates the features of the Executive Order, see Participation in HUD Programs by Faith-Based Organizations, 68 Fed. Reg. 56,396 (Sept. 30, 2003). R

319. White House Office of Faith-Based and Community Initiatives, *Partnering with the Federal Government: Some Do's and Don'ts for Faith-Based Organizations*, The White House, *available at* http://www.whitehouse.gov/government/fbci/guidance/partnering.html (last visited Aug. 8, 2005) [hereinafter *Do's and Don'ts*].

ulations and guidance documents might reasonably conclude that the Constitution prohibits the use of government funds *only* for worship, proselytizing, or exclusively religious instruction, such as a class in scripture or theology. The reader might then conclude that government funds may be used for social services that have intensely religious content. But that conclusion would be wrong.[320]

The confusion created by the FBCI's guidance and regulations arises from its consistent use of the adverb "inherently" to modify "religious activities."[321] Although "inherently" is open to a number of possible meanings, the FBCI appears to use the term to identify activities that are "exclusively" religious—activities performed only for religious purposes. The architects of the FBCI might have clarified the standard in subsequent commentary, but they have consistently failed to do so. The Department of Health & Human Services, in its response to comments on proposed rules governing substance abuse treatment programs, provides a standard illustration of the FBCI's guidance on the use of direct aid:

> This limitation on the use of the direct funds . . . is not meant to put an organization in the position of having to deny its religious perspectives on social issues, or in the position of having to reject government funds for its programs that are consistent with the purposes of the SAMHSA program. We recognize that while the government regards services like feeding the hungry or helping substance abusers return to their communities as social services or secular work, some organizations may regard these same activities as acts of mercy, spiritual service, fulfillment of religious duty, good works, or the like. Therefore, providing social services that otherwise satisfy the requirements for funding under a government program–e.g., providing food for the hungry or helping substance abusers rejoin their communities–would constitute an appropriate use of funds, as long as government funds are not used to pay for inherently religious activities such as prayer and worship.[322]

Rather than focusing on the content of the service provided—asking whether the help for substance abusers involves faith-intensive treatment—this response deflects the question of content into a concern about motivation, and erroneously suggests that the Establishment

320. As we discuss below, nearly all of the cases challenging government grants to FBOs have involved the use of public funds to deliver social services intertwined with religious indoctrination. All of the grants have been found unconstitutional. *See infra* notes 354–371 and accompanying text.

321. *See, e.g.*, *Do's and Don'ts*, *supra* note 319. A LEXIS search on June 16, 2005, of the Federal Register database produced ninety-nine examples of the phrase "inherently religious activities"; all ninety-nine had come about as a result of the FBCI. **R**

322. Charitable Choice Regulations, 68 Fed. Reg. 56,430, 56,432 (Sept. 30, 2003).

Clause inquiry is exclusively concerned with whether or not the service fulfills the secular purpose of the funding program.

The serious and pervasive constitutional flaw in this aspect of the FBCI can be traced back to its roots in the Executive Branch's description of the Supreme Court's Establishment Clause jurisprudence. Recall the FBCI guidance document's assertion: "The United States Supreme Court has said that faith-based organizations may not use direct government support to support "inherently religious" activities. Don't be put off by the term "inherently religious"– it's simply a phrase that has been used by the courts in church-state cases.[323]

The phrase "inherently religious activities" appears in several Supreme Court opinions, but the Court has never used the phrase to define the outer boundary of what government may finance under the Establishment Clause.[324] Only once has a majority opinion for the Court used the phrase "inherently religious activities," and that case did indeed involve public financing of social services.[325] In *Bowen v.*

323. *Do's and Don'ts*, *supra* note 319. **R**

324. The concept of "inherently religious activities" as the outer limit of forbidden government expenditures has been developed in the scholarly work of Professor Carl Esbeck, the first Director of the Office for Faith-Based and Community Initiatives in the U.S. Department of Justice. *See* Esbeck, *supra* note 20; Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285, 304–11 (1999) (arguing that the concept of "inherently religious" activities represents the boundary between church and state); Carl H. Esbeck, *Religion and The First Amendment: Some Causes of the Recent Confusion*, 42 WM. & MARY L. REV. 883, 914–17 (2001). The discussion in text of the use of the phrase "inherently religious activities" draws significantly upon the analysis in our *2003 Report*. Lupu & Tuttle, *supra* note 48, at 5–11. **R** **R**

325. In various non-majority opinions, the Justices have used the phrase "inherently religious activities." The opinions came in cases involving issues of government religious expression rather than government financing of services by religious organizations. The first of the three was *Wallace v. Jaffree*, 472 U.S. 38 (1985), which involved Alabama's required moment of silence for prayer or meditation at the beginning of each public school day. In a concurring opinion in *Wallace*, Justice O'Connor wrote: "A state-sponsored moment of silence in the public schools is different from state-sponsored vocal prayer or Bible reading. First, a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise." Wallace, 472 U.S. at 62 n.2. The term "inherently religious," which, in the context of *Wallace,* could only have meant "necessarily religious," "exclusively religious," or "not possibly secular," showed up again in a footnote to a concurring opinion by Justice Powell in *Edwards v. Aguillard*, 482 U.S. 578 (1987). *Edwards* involved a Louisiana statute mandating that public schools teaching evolution also teach "creation science." The footnote is appended to a discussion of the legislative history of the Louisiana law, whose proponents urged the teaching of the doctrine of "creation ex nihilo" alongside the teaching of Darwinian evolution. *See* Edwards, 482 U.S. at 600 n.2. The footnote states"Creation '*ex nihilo*' means creation 'from nothing' and has been found to be an inherently religious concept." *Id.* (Internal quotation marks and citation omitted). Here, "inherently religious" appears to mean "religious as a matter of cultural or intellectual origin" rather than "necessarily religious"; the disciplines of science or magic might conceivably include concepts of "creation from nothing."

The term "inherently religious" also appears in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), involving the permissibility of government sponsored displays of

Kendrick, the Court rejected an Establishment Clause attack on the Adolescent Family Life Act, a federal program that was the source of grants to private organizations that provided education and counseling to teenagers on matters of sexuality and reproduction.[326] In the course of that opinion, the Court used the phrase "inherently religious" several times. First, after describing the Act's "necessary services" as education and counseling, the Court asserted that "there is nothing inherently religious about these activities . . . ."[327] The Court also described the Act's goals as including the promotion of self-discipline and other "prudent approaches to the problem of adolescent premarital sexual relations," and the promotion of "adoption as an alternative," and then added, "again, that approach is not inherently religious, although it may coincide with the approach taken by certain religions."[328]

The references in *Bowen* to "inherently religious activities" appear to demarcate the set of activities that may *never* be legitimate objects of government funding, such as "worship, religious instruction, or proselytization." The rules and *Guidance* document therefore are legally correct insofar as they forbid direct government financing of these activities. The references to these activities in *Bowen*, however, do not purport to mean, and should not be taken to mean, that the Establishment Clause permits the government to finance *anything and everything except* inherently religious activities.

In *Bowen*, the phrase "inherently religious activities" is used in order to distinguish activities that are exclusively religious—paradigmatically, worship — from those that may or may not have a religious character, such as a silent moment, education, counseling, or other forms of training. All that *Bowen* teaches is the common-sense proposition that government is not automatically barred from sup-

symbols associated with various holidays. In a dissenting opinion, Justice Brennan asserted that a Chanukah menorah is a religious symbol. "Pittsburgh's secularization of an inherently religious symbol . . . recalls the effort in *Lynch* [v. Donnelly] to render the crèche a secular symbol." Allegheny, U.S. at 643. Because an object in the shape of a menorah is not unavoidably religious, here, too, the reference seems to be to a cultural understanding that a specific object, displayed in a particular way at a defined date, is connected to a story about, or belief in, the possibility of divine intervention. Finally, Justice Souter's dissenting opinion in *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) describes the message of the Ten Commandments as "inherently religious." Van Orden, 125 S. Ct. at 2892 (Souter, J., joined by Stevens J. and Ginsburg, J., dissenting) (text at note 1 of this dissent). None of these four decisions (*Wallace*, *Edwards*, *Allegheny*, or *Van Orden*) involved government financing of services, and the phrase "inherently religious" did not appear in any of the majority opinions.

326. 487 U.S. 589 (1988).

327. *Id.* at 605.

328. *Id.*

porting activities that may have either secular or religious character, depending on how they are conducted. For activities that may be conducted with either secular or religious character, it is their context and content, not any a priori categorization as "inherently religious," that controls the permissibility of government support for them.[329]

Bowen does, however, offer an important indication of how the line should be drawn between permissible and impermissible objects of direct aid. At the end of its opinion in *Bowen* —after deciding that education and counseling were not "inherently religious," and therefore not presumptively forbidden objects of government support—the Court remanded the case to the district court to consider whether government aid had been used to fund "specifically religious activities."[330] "Here," the Court asserts, "it would be relevant to determine, for example, whether the Secretary has permitted AFLA grantees to use materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith."[331] Thus, the Court's focus on forbidden expenditures is not on any concept of inherent religiosity, nor on any narrow notion of worship or religious instruction, but instead on the potential religious content of a social service with otherwise secular goals.

Justice O'Connor's opinion for the Court in *Agostini*, and her concurring opinion in *Mitchell*, reinforce the constitutional restriction on the use of direct aid for activities that have a religious component. Indeed, the plurality, concurring, and dissenting opinions in *Mitchell* all agreed that the content of the public aid must be secular.[332] The dissenters treated the secularity of the aid's content as a necessary, but certainly not sufficient condition of constitutionality.[333] The plurality's assessment of the secular content requirement is more equivocal

329. A search of lower court opinions (through June 16, 2005) has found no evidence that the concept of "inherently religious activities" has ever been used as a guidepost for measuring the constitutionality of government funding. Almost all of the cases in which a lower court has used the phrase have involved the issue of government religious expression, such as sponsorship of monuments containing the Ten Commandments. The closest any court has come to using the phrase as a guide to permissible government support is *Child Evangelism Fellowship v. Montgomery County Public Schools*, 373 F.3d 589 (4th Cir. 2004), and even here the issue was the scope of a government forum for private speech rather than government financial support for social services.

330. *Bowen*, 487 U.S. at 613 (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973) (stating that government aid may be unconstitutional "when it funds a specifically religious activity in an otherwise substantially secular setting.")).

331. *Id.* at 621.

332. Mitchell v. Helms, 530 U.S. 793, 836–37 (2000) (O'Connor, J., concurring in the judgment) (reciting the plurality's criteria for the constitutionality of direct aid to religious entities).

333. *Id.* at 868–69 (Souter, J., dissenting) (stating that secular character of aid to sectarian organizations is a condition of its constitutionality).

than Justice O'Connor acknowledged. On the one hand, the plurality twice quoted a standard drawn from *Board of Education v. Allen*,[334] that the content of government aid must not be "unsuitable for use in the public schools because of religious content."[335] The plurality also cited with approval the challenged program's requirement that the content of public aid must be "secular, neutral, and non-ideological."[336]

On the other hand, the plurality absolved the government of responsibility for grantees' religious use of the aid provided, as long as the aid itself was not religious.[337] Referring to the government-provided interpreter in *Zobrest*, the plurality wrote: "[J]ust as a government interpreter does not herself inculcate a religious message—even when she is conveying one so also a government computer or overhead projector does not itself inculcate a religious message, even when it is conveying one."[338] Because it rejected any constitutional limitation on diversion of aid to religious uses, the plurality adopted a weak form of the secular content restriction. Only aid that is itself religious, such as government-supplied vestments or Bibles, would seem to violate the plurality opinion's version of the standard.

For Justice O'Connor, however, the Establishment Clause requires that direct aid must be secular when given and secular when used.[339] Although she disagreed with the dissent's exclusive focus on the divertibility of public aid, Justice O'Connor sharply rejected the plurality's assertion that use of such aid for religious purposes is constitutionally irrelevant.[340] More precisely, she rejected the plurality's assumption that the aid can possess an intrinsic legal character – exemplified by the notion of the "secular" overhead projector – distinct from the actual use of the aid by the grantee.[341]

Justice O'Connor's analysis recurrently turns back to the core Establishment Clause inquiry: when is the government constitutionally responsible for a grantee's religious indoctrination of program beneficiaries? In *Mitchell*, she provided an unambiguous answer. The government bears responsibility when the government's aid is used by the

334. 392 U.S. 236 (1968).

335. *Id.* at 245, *quoted in Mitchell*, 530 U.S. at 820, 823.

336. *Mitchell*, 530 U.S. at 831.

337. *Id.* at 820–21.

338. *Id.* at 823.

339. *Id.* at 840–41.

340. *Id.*

341. *Id.* at 855 (stating that "[a]n educator can use virtually any instructional tool, whether it has ascertainable content or not, to teach a religious message.").

grantee to inculcate religion.[342] This inculcation may happen in settings marked off as "inherently religious," such as worship or catechism classes, or it may occur in settings that intertwine religious messages with otherwise secular activities, such as the sexual abstinence education at issue in *Bowen v. Kendrick*.[343] In either context, the government bears responsibility if direct public aid finances the religious indoctrination.

Justice O'Connor's view in *Mitchell* is not only legally controlling; iIn light of evolving and constitutionally sound norms touching on the distinctiveness of religion, it seems normatively correct. The *Mitchell* plurality view offers powerful and persuasive arguments for ridding the law of the category of "pervasively sectarian organizations,"[344] barred by their character from receiving direct government assistance. But the *Mitchell* plurality goes too far in making equal treatment of religious and secular entities a sufficient condition for direct government financial support. That move effectively erases any constitutional limitation on the government's use of religious experience as an instrument of social policy. As we have argued elsewhere, the Constitution's strategy for protecting religious liberty is to leave the domain of the sacred in private hands,[345] and to fence off the government from either regulating or financing activities in that domain. The *Mitchell* plurality represents abandonment of that strategy.

The *Mitchell* dissent, however, clings to a now discredited notion that organizations, by their religious character, should be disqualified from direct government assistance.[346] We think that the prophylactic approach represented by the dissent unreasonably excludes such organizations from public support, even in those circumstances in which the organizations are involved in completely secular pursuits. Norms of equal treatment also deserve constitutional respect, especially when those norms can be maintained without transgressing concerns about the constitutional distinctiveness of religion. The approach reflected in the *Mitchell* dissent underprotects egalitarian concerns by overprotecting separationist values.

Justice O'Connor's approach seems to us normatively optimal because it does not categorically exclude any organization from participating in public programs, while nevertheless remaining faithful to a longstanding constitutional limitation on the ambit of state authority.

342. *Mitchell*, 530 U.S. at 843.
343. *Id.* at 856–57 (citing *Bowen*, 487 U.S. at 621).
344. *Id.* at 826–30.
345. Lupu & Tuttle, *supra* note 27, at 83–84. **R**
346. *Mitchell*, 530 U.S. at 867–912 (Souter, J., dissenting).

We recognize that implementation of her approach involves complex and subtle judgments. Nevertheless, given the importance of direct aid programs, and the relative clarity of the rule that direct funds may not be used for programs that inculcate religion, those who speak for the FBCI should be able to provide significant and reliable guidance to its grantees. When asked to do so, however, representatives of the FBCI have steadfastly refused to do so. The HHS response to comments on proposed rules to govern the Temporary Aid to Needy Families Program offers a stark illustration of that refusal. In explaining why it would not provide guidance about the constitutional limit on the use of direct aid, HHS stated:

> As some of the commenters noted, it would be difficult to establish an acceptable list of all inherently religious activities. Inevitably, the definition would fail to include some inherently religious activities or include certain activities that are not inherently religious. Our approach is consistent with Supreme Court precedent, which likewise has not comprehensively defined inherently religious activities. The Court has explained, however, that prayer and worship are inherently religious, but that social services do not become inherently religious merely because they are conducted by individuals who are religiously motivated to undertake them or view the activities as a form of "ministry."[347]

The passage—and indeed every place in the final and proposed rules for the FBCI—studiously avoids any discussion of the crucial middle ground between "inherently religious activity" and secular acts motivated by a person's religious beliefs.

We have three concerns with HHS's assertion that it can give no more guidance about the constitutional limit on the use of direct aid. First, HHS's analysis itself obscures the most important question. Everyone is likely to agree that "worship, religious instruction, and proselytizing" may not be directly funded; and everyone is equally likely to agree that a person's religious motivation for performing a government-financed service with secular content is constitutionally irrelevant. The pressing, and constitutionally salient, issue falls predictably between those two poles, and involves the question whether the social service may be intertwined with the inculcation of religious beliefs.

Second, in its response, HHS offers the unhelpful assertion that its "approach is consistent with Supreme Court precedent, which likewise has not comprehensively defined inherently religious activities."[348]

347. Charitable Choice Provisions Applicable to the Temporary Assistance for Needy Families Program, 68 Fed. Reg. 56,449, 56,453 (Sept. 30, 2003).

348. *Id.*

As we have shown, the Supreme Court has never used the phrase "inherently religious activity" to mark the line between permissible and impermissible expenditures, and HHS does not point to other sources of judicial guidance on where that line is to be drawn.[349]

Third, HHS also makes the implausible claim that it cannot provide more specific instruction about the meaning of "inherently religious activity" because any such answer would inevitably be over- or under-inclusive.[350] Rules covering complex areas frequently present problems of under- or over-inclusion. These problems are typically resolved, or at least minimized, by clear articulation of the principles required to decide hard cases. Instead of identifying such principles, HHS simply restates easy cases, and makes no efforts to confront difficult ones.[351]

We can only speculate about the FBCI's reasons for not providing comprehensive and maximally transparent guidance concerning the Establishment Clause law governing direct aid to FBOs. The Initiative's policymakers certainly want to encourage more FBOs to participate in government-funded programs, and might think a more forthright description of the law would appear inhospitable. In addition, the President's commitment to expanding the role of FBOs arises, at least in part, from his belief that religious transformation

349. As a technical matter, the HHS statement is correct — the Supreme Court has not "comprehensively defined inherently religious activities" — but only because the Supreme Court has never used "inherently religious activities" to categorize the universe of impermissible objects of direct aid.

350. Charitable Choice Provisions Applicable to the Temporary Assistance for Needy Families Program, 68 Fed. Reg. at 56,453.

351. HHS's response to one question deserves mention, if only because of the extent to which it illustrates the practice of refusal to clarify in a context in which clarification is possible. Replying to comments on rules governing substance abuse treatment programs, HHS offered the following:

> *Comment:* Questions were also raised about whether 12-step programs or, specifically, AA programs, are religious programs.
>
> *Response:* With regard to the 12-step and AA meetings, we note that any inherently religious activities must be voluntary and must be offered separately in time or location from the program that receives direct SAMHSA funding.

Final Rule on Charitable Choice Regulations Applicable to States Receiving Substance Abuse Prevention and Treatment Block Grants, 68 Fed. Reg. 56,430, 56,432 (Sept. 30, 2003).

In 2001, the United States Court of Appeals for the Second Circuit provided an unambiguous answer to that question, holding that direct government support for the inculcation of the views of Alcoholics Anonymous (as developed in the record of that case) constituted government subsidy for religious indoctrination in violation of the Establishment Clause. DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397 (2d Cir. 2001). Even if HHS thought that *Destefano* was wrongly decided, or that its facts were in some way atypical of twelve-step recovery programs, the response should have acknowledged the decision's existence.

carries significant personal and social benefits.[352] The architects of the Initiative within the federal agencies may believe that by offering ambiguous statements of the law—and refusing to state an explicit prohibition on direct funding of faith-intensive social services—they can leave open the possibility that FBOs will provide such services. If, as has already happened,[353] any grantees are challenged for using public funds for faith-intensive services, the ambiguity in federal policy permits the federal government to disclaim responsibility for the diversion of government funds to activities with religious content.[354] Moreover, from the federal agencies' perspective, encouraging FBOs to test the limits of current constitutional doctrine may be attractive on policy and political grounds. Litigation over the limits on the direct financing of services with religious content may conceivably lead to change in the future.

Even if one agrees with the overall objectives of the FBCI, the strategy of ignoring opportunities to provide better guidance to FBOs comes at a cost. The FBCI's opaque message about governing law may induce FBOs to rely on the government's implicit permission to provide faith-intensive services. That reliance renders FBOs vulnerable to constitutional challenge—a challenge that could easily exhaust the resources and energies of such organizations. A strategy of transparency, in which faith-based organizations could appropriately assess their level of legal risk, would be far preferable to one resting on ambiguity.

This risk is not hypothetical, but real. Almost all of the lawsuits challenging aid to FBOs have involved faith-intensive social services, and each decision in these cases has reaffirmed the principle that direct public aid may not be used for social services with that character.[355] In *American Civil Liberties Union of Louisiana v. Foster*,[356] a court held unconstitutional a grant to faith-based organizations that provided sexual abstinence education, because the education had been conducted through intensely religious messages. In *McCallum*

352. *See* President George W. Bush, Remarks at the Annual Prayer Breakfast (Feb. 3, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/02/20050203-1.html.

353. *See infra* text accompanying notes 355–372. **R**

354. In an earlier analysis of *Freedom from Religion Foundation v. Montana Office of Rural Health*, No. CV 03-30-BU-RWA (D. Mont. filed Oct. 26, 2004), we commented on the tendency of the Department of Justice to distance itself from particular activities undertaken under the FBCI.

355. *See Legal Update*, *Roundtable*, *at* http://www.religionandsocialpolicy.org/legal/legal_updates.cfm (last visited July 5, 2005) (analyzing these decisions).

356. No. 02-1440, 2002 U.S. Dist. LEXIS 13778 (E.D. La. July 24, 2002).

I,[357] a court held unconstitutional a direct grant to a faith-intensive substance abuse treatment provider. In *Freedom from Religion Foundation v. MORH*,[358] a court held unconstitutional a direct grant to a parish nursing program, which intertwined community healthcare with spiritual formation and prayer. And in *Towey*,[359] a court held unconstitutional a direct grant for a program that provided mentors to children of prisoners, because the mentors were expected to engage their mentees in religious conversations and experience.[360] That no government defendants have yet appealed any of these decisions suggests to us that government lawyers see little prospect of prevailing on appeal under the current law. Moreover, now pending are at least three additional lawsuits, two of which involve programs for prisoners,[361] that challenge direct grants for faith-intensive social welfare services.

As with any area of Establishment Clause law, the requirement that government refrain from supporting religious indoctrination presents close and difficult cases at times. A recent lawsuit, *Freedom from Religion Foundation v. Minnesota Faith Health Consortium*,[362] appears to be a good example. The University of Minnesota's Academic Health Center operates a Center for Spirituality and Healing, which is a partner in the Minnesota Faith Health Consortium (MFHC), along with the university's teaching hospital and a Lutheran seminary.[363] The

357. 179 F. Supp. 2d 950 (W.D. Wis. 2002). *See also Am. JewishCong. v. Bost*, (*S.D. Tex. 2002*), Roundtable, *at* http://www.religionandsocialpolicy.org/legal/legal_xupdate_display.cfm?id=4 (June 14, 2002) (discussing *Bost*, which involved the expiration of a service contract with a faith-intensive job training program and the consequent mooting of the case).

358. *MORH*, No. CV 03-30-BU-RWA.

359. Freedom From Religion Found. v. Towey, No. CV 04-C-381-S (W.D. Wis. filed Jan. 11, 2005) (on file with the authors and the DePaul Law Review).

360. The court in *Towey* held unconstitutional the direct grant to organization that provided mentoring, although earlier holding that the plaintiffs lacked standing to challenge the entire structure of the FBCI. *Id.*

361. The pending cases involving prisons include *Americans United v. Mapes*, 4:03-cv-90074 (D. Iowa Feb. 12, 2003) (complaint on file with the DePaul Law Review), and *Moeller v. Bradford County*, 3:05-cv-003340-JMM-TMB (D. Pa. filed Feb. 17, 2005) (complaint on file with the DePaul Law Review) discussed in Part IV.C.4, *infra*. The third case, discussed in the following paragraph of the text, is *Freedom from Religion Foundation v. Minnesota Faith/Health Consortium*, 0:05-cv-00638-JNE-SRN (D. Minn. filed March 25, 2005) (complaint on file with the DePaul Law Review), and the fourth is *American Civil Liberties Union of Massachusetts v. Leavitt*, Civ. A. No. 05-11000 (JLT) (D. Mass. filed on May 16, 2005) (complaint on file with the DePaul Law Review), discussed in note 428, *infra*. R

362. Freedom from Religion Foundation v. Bruininks, No. 0:05-cv-00638-JNE-SRN (D. Minn. filed March 25, 2005) (on file with the DePaul Law Review). Also named as a defendant in this lawsuit is the Minnesota Faith Health Consortium, a faith-based organization. Due to the nature of this article, we style the case with reference to that entity.

363. The complaint in this lawsuit is available at the FFRF website. *See* http://www.ffrf.org/news/2005/minnesota_fhcomplaint.pdf. [hereinafter *MFHC* Complaint]. The seminary acts as the Minnesota Consortium Theological Schools's representative in the MFHC.

complaint alleges that the MFHC promotes the full integration of religion, spirituality, and physical well-being as a path to good health. The suit focuses specifically on the MFHC's Faith/Health Clinical Leadership Program; the complaint alleges that the Leadership Program "brings together health care professionals, clergy, University of Minnesota graduate students, and seminarians in a 'transformative educational process' that includes exploration of the theological perspectives of healing and provides training in Clinical Pastoral Education."[364] The complaint also alleges that the MFHC "promote[s] the integration of religious spirituality and faith as inherent components of public health delivery systems."[365]

The chief and most difficult question raised by the suit is whether such activities constitute "religious indoctrination" for purposes of Establishment Clause analysis. The contrast between the Minnesota litigation and *MORH*[366] is illuminating. The *MORH* suit challenged the use of public funds for the training of parish nurses. A district court found the training programs to be "inherently and pervasively religious, . . . steeped in concepts of Judeo-Christian theology."[367] The court concluded that the program lacked a secular purpose, and had "the impermissible effect of favoring and advancing the integration of religion into the provision of secular health care services."[368]

The MFHC's programs, however, may not involve the same kind of faith and health integration that was present in the MORH program.[369] The MFHC's activities—particularly the Faith Health Clinical Leadership Program—operate from a philosophy that every person is a spiritual as well as physical, mental, and social being, and that holistic care requires health professionals to understand, address, and integrate these varied components of human welfare.[370] If plaintiffs can prove that public funds are used to support the MFHC Clinical Leadership Program, the judge conducting the Establishment Clause inquiry must determine whether the Program merely teaches participants about the importance of spirituality in many patients' lives, or engages in forbidden religious indoctrination of participants

364. *Id.* at ¶ 44.

365. *Id.* at ¶ 40.

366. FFRF v. Montana Office for Rural Health, No. CV 03-30-BU-RWA (D. Mont., Oct. 26, 2004) (on file with the authors and the DePaul Law Review).

367. *Id.* at 24.

368. *Id.* at 25.

369. Information on this point is limited to what is alleged in the complaint or available on the MFHC websites. *See, e.g.*, Minnesota Faith Health Consortium, http://www.faithhealth.org (last visited July 29, 2005).

370. *See Rationale*, Minnesota Faith Health Consortium, *at* http://www.faithhealth.org/rationale.html (last visited July 5, 2005) (giving the MFHC philosophy).

(or teaches participants how to indoctrinate others). Teaching about religion—whether in a high school history course or a medical school class on alternative therapies—does not normally violate the Establishment Clause.[371] But teaching about the truth or falsity of particular religious commitments, or encouraging (or discouraging) faith in particular beliefs, crosses the constitutional line into impermissible indoctrination. Judging from the limited facts available to us, the MFHC activities seem closer to teaching about religion, and less like religious indoctrination, though the development of additional facts in the litigation might lead us to a different judgment.[372]

The presence of difficult cases at the boundary between religious and secular instruction, however, does not excuse the FBCI's failure to provide guidance about practices that are readily foreseeable and undoubtedly unconstitutional—the use of direct funds for faith-intensive social welfare programs. Moreover, courts may eventually find that the lack of federal guidance about constitutional limits on the use of direct aid is itself a violation of the Establishment Clause, because such an omission is a sign of the government's failure to provide adequate safeguards against diversion of public aid to religious indoctrination. We now turn to the analysis of such safeguards.

b. Safeguards against diversion

Justice O'Connor's two Establishment Clause criteria are intertwined. The government bears constitutional responsibility if a grantee diverts public aid to inculcate religion, and this responsibility requires the government to provide adequate safeguards against diversion.[373] In this respect, the concurring and dissenting opinion in

371. For general discussion of this proposition, see Kent Greenawalt, *Teaching About Religion in the Public Schools*, 18 J.L. & POL. 329 (2002).

372. It may be that other activities in which the Consortium is involved are constitutionally questionable. In this regard, we note that a news article on the Minnesota lawsuit reported that the "[C]onsortium serves as consultant to religious and community groups that have received grants from the Greater Minneapolis Council of Churches Compassion Capital Fund, paid for in part by the federal government," and that the Consortium "has also received a grant to fund six 'parish nurse' projects through an organization called the Congregational Nurse Project." Claire Hughes, *Minnesota Group Target of New Faith-Related Lawsuit*, Roundtable, *at* http://www.religionandsocialpolicy.org/news/article.cfm?id=2584) (Apr. 5, 2005). It is possible that either of these Consortium projects may involve the pass-through of government resources to activities involving religious indoctrination. But the burden of proof of such impermissible involvement by government in religious activity remains on FFRF. *See* Mitchell v. Helms, 530 U.S. 793, 857 (2000) (holding that "[t]o establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes."). The specifics of its complaint, when read against the backdrop of available information about the Consortium, suggest that this case may be considerably heavier sledding for FFRF than the Montana litigation.

373. *Mitchell*, 530 U.S. at 859–61 (O'Connor, J., concurring in the judgment).

Mitchell agreed,[374] but they asserted markedly different standards for measuring the adequacy of such safeguards.

In his dissenting opinion, Justice Souter argued that the government should be held responsible whenever public aid advances the religious mission of an FBO.[375] The government has an obligation not to provide aid when the context or kind of aid poses a high "risk of diversion."[376] This obligation arises from the foreseeability of diversion, and also from the likelihood that the monitoring required to avoid such diversion would result in excessive entanglement between the government monitors and the monitored grantees. Safeguards against diversion, in the dissent's view, are constitutionally appropriate only when (1) the risk of diversion is relatively low; and (2) without becoming entangled with the grantee's activities, the monitors can police that risk with confidence that the aid is not being diverted.

In her concurring opinion, Justice O'Connor provided a quite different assessment of the government's responsibility and the safeguards needed to address that responsibility. Like the dissenters, Justice O'Connor rejected the plurality's claim that a grantee's religious use of public aid is constitutionally irrelevant.[377] But she also rejected the dissenters' claim that the Establishment Clause demands distrust and "pervasive" monitoring of religious grantees.[378] The dissenters' Establishment Clause jurisprudence, she argued, failed to reflect or acknowledge the recent evolution of constitutional norms.[379] That evolution has not abandoned the core principles underlying the Court's Establishment Clause decisions—as the plurality's exclusive focus on neutrality would have it— but has changed the way in which those principles are protected.[380]

The primary revision of prior law advanced by Justice O'Connor's concurring opinion involves what at first glance seems to be only a matter of legal procedure, but ultimately has the deepest substantive significance. Under the prior rule, to which the *Mitchell* dissent continued to cling, courts presumed that religious grantees would divert public aid to religious use, and placed the burden on the government and its grantees to overcome that presumption. Because of the perceived unlikelihood that grantees could limit the use of the aid to sec-

374. The *Mitchell* plurality treated such safeguards as constitutionally irrelevant. *Id.* at 820–25.

375. *Id.* at 890–91 (Souter, J., dissenting).

376. *Id.* at 890.

377. *Id.* at 837–39 (O'Connor, J., concurring in the judgement).

378. *Id.* at 860–64.

379. *Mitchell*, 530 U.S. at 849–56.

380. *Id.* at 844–45.

ular activities, the Establishment Clause required the government to develop robust and intrusive mechanisms for monitoring the aid. Such mechanisms, however, resulted in excessive entanglement of government in religion.[381] This conundrum gave rise to the prohibition on direct aid to "pervasively sectarian institutions."[382] Citing *Agostini*, Justice O'Connor argued in *Mitchell* that the Establishment Clause does not mandate a presumption of bad faith on the part of religious grantees.[383] Such a presumption, she asserted, rested either on a premise—now abandoned—that government may provide no aid to religious entities, or some less benign "taint" that carries undertones of religious hostility.[384]

As the law has now developed, Justice O'Connor asserted, courts may presume that religious grantees will act in good faith and respect the "secular restrictions placed on the government assistance," restrictions that the grantees have formally promised to honor.[385] Because religious grantees enjoy this presumption, she wrote, "I see no constitutional need for *pervasive* monitoring" as the dissent would require.[386]

The presumption of good faith, however, is neither automatic nor irrebuttable. Justice O'Connor acknowledged the dissent's concerns about direct cash grants to religious entities, and public subsidies of salaries of teachers in religious schools.[387] *Mitchell* involved neither form of aid, so Justice O'Connor did not elaborate about those contexts, but the reason she distinguished those forms of aid is not hard to discern. In contrast to the forms of aid at issue in *Agostini*, *Mitchell*, or *Allen*, cash awards and teacher salaries cannot easily be segregated into secular and religious portions. If government is unable to segregate public aid from the grantee's religious activity, the grantee's good faith willingness to respect secular use limitations on the funds is drained of meaning.

Even if the presumption of trustworthiness is extended to cash grants, the presumption may be overcome by evidence that the

381. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971).

382. *Mitchell*, 530 U.S. at 861. The dissent stated that the plurality "proceed[s] from the premise that, so long as actual diversion presents a constitutional problem, the government must have a failsafe mechanism capable of detecting *any* instance of diversion." *Id.*

383. *Id.* at 863.

384. *Id.* at 857–58. Here O'Connor made a single overt reference to the anti-Catholic animus emphasized in the plurality opinion.

385. *Id.* at 860.

386. *Id.* at 861.

387. *Mitchell*, 530 U.S. at 856–57 (discussing cash grants); *id.* at 859–60 (discussing Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985)). The cited part of *Ball* was not overruled by *Agostini v. Felton*, 521 U.S. 203 (1997) .

grantee has diverted public aid to religious uses.[388] Plaintiffs have the burden of showing that the public aid has been misused. At this point in her analysis, Justice O'Connor—prodded by the dissent— returned to her concurring opinion in *Bowen v. Kendrick*:

> "[*A*]*ny* use of public funds to promote religious doctrines violates the Establishment Clause." That principle of course remains good law, but the next sentence in my opinion is more relevant to the case at hand: "*Extensive* violations—if they can be proved in this case— will be highly relevant in shaping an appropriate remedy that ends such abuses."[389]

Actual diversion of public aid to religious use is a violation of the Establishment Clause, but plaintiffs need to prove more than just occasional violations if they seek to enjoin the funding program altogether, and perhaps even to enjoin funding of the grantee that has diverted public funds. What that "more" might be is left unanswered because Justice O'Connor concluded that the plaintiffs in *Mitchell* had uncovered only de minimis evidence of diversion.[390]

Nonetheless, Justice O'Connor's analysis in *Mitchell* provides highly suggestive guides for measuring the adequacy of a program's safeguards.[391] Examining the program challenged in *Mitchell*, she identified safeguards provided by federal, state and local authorities. These safeguards functioned in three different ways. First, the program articulated very clearly the permitted and prohibited uses of the public aid. The materials must be used only in ways that are "secular, neutral and nonideological," and may not be used for "religious worship or instruction."[392] Second, the program formally designated the aid provided as separate from other property at the schools, and required "all nonpublic schools to submit signed assurances" that the aid would only be used for secular purposes.[393] And third, both state and local officials monitored the schools' compliance with the restrictions. Monitoring devices included random visits, inspection of records concerning use of the aid, and reviews of the content of library books requested by the schools.[394]

Justice O'Connor acknowledged that diversion was possible even with such safeguards, but she responded by returning again to the core

388. *Mitchell*, 531 U.S. at 847–48.

389. *Id.* at 865 (quoting Bowen v. Kendrick, 487 U.S. 589, 623 (1998) (O'Connor, J., concurring) (internal citations omitted).

390. *Id.* at 860–61.

391. *Id.* at 861–63.

392. *Id.* at 861 (internal quotation marks omitted).

393. *Id.* at 862–63.

394. *Mitchell*, 530 U.S. at 862–63.

of her argument. The government is obliged to establish reasonable safeguards against diversion, and will be held constitutionally responsible for failing to do so.[395] But the government is not required to treat religious grantees with deep suspicion. Nor is the government required to institute "failsafe mechanism[s] capable of detecting *any* instance of diversion."[396] Where the dissent would assign strict liability to the government for any diversion, Justice O'Connor's approach more closely resembles a standard test for negligence. Under such a test, the government bears responsibility for foreseeable misuses, unless it acts reasonably to limit the possibility of such misuse.

Applying her standards to the facts in *Mitchell*, Justice O'Connor found that the plaintiffs had not shown a systematic practice of violations, which would remove the presumption of good faith. Indeed, one of the plaintiffs' strongest factual claims of diversion actually reflected the normal and successful operation of one of the program's safeguards: official review of a school's requested library books determined that a large number of the books had religious content, and were thus ineligible for government purchase and loan to private schools under the program.[397]

Drawing from Justice O'Connor's understanding of constitutionally sufficient safeguards against diversion of public funds, we return to the FBCI and its rules governing direct aid to FBOs. We organize our analysis of the FBCI's safeguards using the same three questions identified above in Justice O'Connor's analysis of *Mitchell*. First, is the program clear in its guidance about prohibited uses of the aid? Second, what are the program's formal mechanisms for segregating secular from religious uses? Third, what are the program's provisions for monitoring compliance by the FBO?

i. Clarity of Guidance

Compared to the statements of prohibited uses in the program in *Mitchell*, the FBCI's articulation of the Establishment Clause's limits falls well short of adequate. The insistence on "inherently religious activities" as the measure of constitutional limits is defective, as we argued above. That deficiency is amplified by the failure of relevant officials to clarify the standard, despite the many opportunities for such clarification offered in the guidance documents and administrative rulemakings of the past three years.

395. *Id.* at 861–64.
396. *Id.* at 861.
397. *Id.* at 866.

By failing to give its grantees clear and accurate guidance about the Establishment Clause, the FBCI renders its programs and grantees especially vulnerable to constitutional challenge. The vulnerability is obvious on one level—those who do not have notice of the standards to which they will be held are less likely to comply with the standards than are those who do have such notice. But Justice O'Connor's analysis in *Mitchell* gives this vulnerability a deeper significance. This significance is evident in the way that she framed the presumption of constitutionality enjoyed by direct grant programs. Rejecting the dissent's claim that direct aid to FBOs should be presumed unconstitutional, Justice O'Connor wrote: "I . . . believe that a religious school teacher can abide by the secular restrictions placed on the government assistance."[398] The presumption of constitutionality attaches specifically to the grantee's expected compliance with the program's restrictions. If, however, those restrictions fail to reflect the Establishment Clause's limits on the use of direct aid, then the presumption of constitutionality is at least diminished, and perhaps forfeited altogether.

Moreover, the FBCI compounds its inadequate constitutional guidance by eliminating all requirements that FBOs make special assurances about secular use.[399] In its response to suggestions that FBOs should continue to provide such assurances, the U.S. Agency for International Development (USAID) explained:

> This rule directs the removal of those provisions of USAID's agreements, covenants, memoranda of understanding, policies, or regulations that require only USAID-funded religious organizations to provide assurances that they will not use monies or property for inherently religious activities. All organizations that participate in USAID programs, including religious ones, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of USAID-funded activities, including those prohibiting the use of direct financial assistance from USAID to engage in inherently religious activities.[400]

398. *Id.* at 860.

399. *See* Participation in Education Department Programs by Religious Organization, 69 Fed. Reg. 31,708, 31,714 (June 4, 2004) (ED); VA Homeless Providers Grants and Per Diem Programs, 69 Fed. Reg. 31,883, 31,886–887 (June 8, 2004) (VA); Equal Opportunity for Religious Organizations, 69 Fed. Reg. 41,375, 41,380–381 (July 9, 2004) (USDA); Equal Participation of Faith-Based Organizations, 69 Fed. Reg. 41,712, 41,715 (July 9, 2004) (HUD); Equal Treatment in Department of Labor Programs for Faith-Based and Community Organizations, 69 Fed. Reg. 41,882, 41,888–889 (July 12, 2004) (DOL); Participation in Department of Health and Human Services Programs by Religious Organizations, 69 Fed. Reg. 42,586, 42,590 (July 16, 2004) (HHS); Participation by Religious Organizations in USAID Programs, 69 Fed. Reg. 61,716, 61,717 (Oct. 20, 2004) (USAID).

400. Participation by Religious Organizations in USAID Programs, 69 Fed. Reg. at 61,717.

USAID appeals to the principle of neutrality to justify removal of the assurance requirement. FBOs should be treated on an equal basis with nonreligious providers, and demands for special assurances single out religious providers for a special burden. The restriction on religious use applies to all providers, religious and secular alike, so any affirmation of that limit must be imposed on all providers. Moreover, USAID claims, the restriction on religious use is only one of many restrictions on the use of public funds, and all grantees must affirm that they will abide by conditions on the use of aid. Special assurances regarding religious use are thus superfluous.

A policy of eliminating special assurances by religious entities, however, disregards the constitutionally distinctive character of religious activities and religious institutions. While the duty not to use direct government funds for religious use is indeed imposed on all grantees, not just FBOs, the government's duty to provide reasonable safeguards against diversion is not identical with respect to religious and nonreligious grantees. What may be a reasonable precaution in dealing with nonreligious grantees—where the danger of diversion to religious use is remote—may be demonstrably insufficient in the context of a grant to a house of worship, where diversion is quite foreseeable. By placing the limitation on religious use as one of a laundry list of restrictions on the use of public aid, the federal agencies make it less likely that FBOs will receive clear notice of their obligations, and render the government's grant-making practices more vulnerable to constitutional challenge.

ii. Formal Segregation of Secular Aid

A changed understanding of the line between the religious and the secular stands as the distinctive mark in the shift from a constitutional regime characterized by *Meek v. Pittenger*[401] and *Wolman v. Walter,*[402] to that of Justice O'Connor's opinions in *Agostini* and *Mitchell.* In *both Meek* and *Wolman*, the Court determined that the Establishment Clause requires segregation of the religious and the secular at the level of the institutional grantee. Religious organizations were impermissible grantees of direct public aid because the organizations were presumed to be "pervasively sectarian," and the government was forbidden—by the restriction on excessive entanglement—to engage in the intensive monitoring necessary to discern and enforce a line between the religious and the secular aspects of the organization. Gov-

401. 421 U.S. 349 (1975), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).
402. 433 U.S. 229 (1977), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

ernment thus was free to provide direct aid to secular, but not religious, organizations.

Agostini and *Mitchell* shift the religious-secular line from the inter-institutional (government and grantee) to the intra-institutional level (religious versus secular activity within the grantee). Government may fund religious entities, but only if the aid is directed to the entities' secular functions. The shift to the new regime, however, presupposes that government can identify and restrict its aid to the secular activities of religious organizations. The aid at issue in *Agostini* was easily identified and restricted. The aid consisted of public employees who entered religious schools in order to conduct remedial education, and the regulations prohibited them from engaging in religious activities or indoctrination while working in the religious schools.[403] Likewise, in *Mitchell*, the regulations required grantees to designate government-funded educational materials with special labels, and restricted the use of such materials to secular activities.[404]

As one of the FBCI's core components, all of the regulations applicable to direct aid programs require grantees to segregate religious activities from those supported by government funds. The Department of Veterans Affairs (VA) regulations for the Homeless Providers Grant and Per Diem Program provides a standard description of this requirement:

> Organizations that engage in inherently religious activities, such as worship, religious instruction, or proselytization, must offer those services separately in time or location from any programs or services funded with direct financial assistance from VA . . . .[405]

The problem with that description lies not in the requirement to segregate religious activities, but in the continued use of "inherently religious activities" as the set of practices from which the program services must be segregated. The restriction does not discuss the equally important obligation to segregate any activity with a religious content—including, for example, substance abuse treatment conducted with religious themes or methodology—from the services funded under the VA program.

The issue of segregation is especially acute with respect to the FBCI's rules governing public financing of structures owned by religious organizations. Many of the agency regulations adopted under the FBCI contain a provision that permits FBOs to use direct grant funds

403. Agostini v. Felton, 521 U.S. 203, 209–12 (1997).

404. *Mitchell*, 530 U.S. at 848–49, 861–63 (O'Connor, J., concurring in the judgment) (detailing safeguards).

405. 38 C.F.R. § 61.64(c) (2005) .

to acquire, construct, or rehabilitate structures "to the extent that those structures are used for conducting eligible activities" under that grant.[406] Such use is permitted even if the same structure will also be used for religious activities, as long as the grant payments do not exceed the portion of use attributed to the funded service activity, and the space financed by the grant is not the religious entity's "principal place of worship."[407] Thus, a religious school may receive one-half of the cost of acquiring a new building or renovating an existing building if the rooms in that structure will be used half of the time for a government-financed service program, even if the same rooms are used for religious instruction during the other half of the time.

The rules on funding religious structures share a common defect with the FBCI's other restrictions on direct aid programs—the use of the phrase "inherently religious activities" to define the relevant constitutional limitations.[408] The context of public aid for religious structures magnifies that defect, because of insuperable practical difficulties in segregating religious from secular uses of the structures. The agencies, however, deny any such difficulties. The response of the U.S. Department of Agriculture (USDA) to comments about its proposed rule on grants for religious structures exemplifies government agencies' unwillingness to grapple with the relevant concerns

> USDA disagrees with those who commented that preventing the use of direct USDA capital-improvement funds for inherently religious activities would necessarily fail or, in the process, excessively entangle the government in the affairs of recipients or subrecipients that are religious organizations. Because inherently religious activities are non-program activities, USDA need not distinguish between participants' religious and non-religious non-program activities; the same mechanism by which USDA polices the line between ineligible and eligible activities will serve to exclude inherently religious activities from funding. This system of monitoring is more than sufficient to address the commenters' concerns, and the amount of oversight of religious organizations necessary to accomplish these purposes is not greater than that involved in other publicly funded programs that the Supreme Court has sustained.[409]

Despite the USDA's assertions, *Agostini* and *Mitchell* considered very different programs. Most importantly, the programs at issue in both *Agostini* and *Mitchell* provided that the government-funded personnel

406. *See, e.g.*, Equal Participation of Religious Organizations in HUD Programs and Activities, 24 C.F.R. § 5.109(g) (2004) (explaining HUD regulations on grants for acquisition, construction, or rehabilitation of structures owned by religious entities).

407. *Id.*

408. *See supra* Part IV.C.3.a.

409. 69 Fed. Reg. 41,380 (July 9, 2004) (USDA). *See also* 69 Fed. Reg. 61,719 (Oct. 20, 2004).

or materials must be used *only* for secular activities, whereas the space financed under USDA's rule may be used for both secular and religious activities.

In *Agostini* and *Mitchell*, because any religious use of the government-provided aid was prohibited, grantees and public officials alike could easily determine whether the aid was being used properly. In sharp contrast, the FBCI's rules on religious structures permit mixed use of the same physical space. Anyone monitoring the use would need to know precisely when religious or non religious activities had started and ended in order to know if the costs were being allocated properly. Neither *Agostini* nor *Mitchell*—nor any other program of direct financing upheld by the Supreme Court or any federal appellate court—contemplates monitoring as remotely as extensive as what would be required to ensure appropriate use of government-financed structures under the FBCI's rules.

Moreover, the illustrations chosen by the Department of Housing and Urban Development (HUD) to explain the rule on religious structures reflect the general unwillingness on the part of FBCI officials to acknowledge foreseeable constitutional problems with its rules and practices.[410] Of the four examples HUD uses to illustrate the "proportional allocation" standard, three involve no proportional allocation at all, because the government-financed rooms or buildings are used exclusively for secular program purposes, and the fourth involves a room used as the FBO's principal place of worship, the funding of which is categorically prohibited under the rules.[411]

Even if the FBCI's rules provided accurate guidance about the required line between religious and secular uses, the particular regulations on public aid for religious structures would nonetheless stand in direct conflict with two decisions of the Supreme Court: *Tilton v. Richardson*[412] and *Committee for Public Education v. Nyquist*.[413] *Tilton* approved federal construction grants for structures devoted to exclu-

410. 68 Fed. Reg. 56,396, 56,397 (Sept. 30, 2003) (HUD) (providing examples of permitted and prohibited uses of structures owned by religious entities and financed by HUD grants).

411. *Id.*

412. 403 U.S. 672 (1971).

413. 413 U.S. 756 (1973). *See also* Hunt v. McNair, 413 U.S. 734 (1973) (approving a state revenue bond for financing capital improvements at a religious college, because all uses of bond-financed structures for religious worship or instruction were forbidden). More recent decisions have approved of the revenue bond device even in cases in which the buildings financed might be used for religious instruction. *See* Steele v. Indus. Dev. Bd., 301 F.3d 401(6th Cir. 2002); Virginia Coll. Bldg. Auth. v. Lynn, 538 S.E.2d 682 (Va. 2000). Revenue bonds do not involve direct state financing of the repair or preservation of religious buildings because private bondholders are the sources of the funds. In light of the Court's decision in *Zelman*, the restriction approved in *Hunt* may no longer be required by the Establishment Clause.

sively secular uses at religiously affiliated colleges, but struck down a provision under which the "secular use" restriction would expire after a period of twenty years, permitting religious uses thereafter.[414] *Nyquist* invalidated a state program of "maintenance and repair" grants to religious elementary and secondary schools on the ground that such grants would inevitably advance the teaching of religion in such schools.[415]

Although the Supreme Court has overturned a number of Establishment Clause decisions from the 1970s, the Court has never revisited the limits on financing of religious structures found in *Tilton* and *Nyquist*.[416] Indeed, in her concurring opinion in *Mitchell*, Justice O'Connor strongly suggested that she still approved of the Court's decision in *Tilton*.[417] Her affirmation of *Tilton* focused on the "secular content restriction" imposed by the Court. Government may fund structures owned by religious entities, but the use of such structures must be restricted to secular activities.[418]

The defects apparent in the FBCI's rules for proportional funding of religious structures also arise in the context of programs that pay a portion of the salaries of those who work for religious organizations. In *McCallum I*,[419] the Wisconsin Department of Workforce Development (DWD) argued that, in the substance abuse program financed by the government, eighty percent of the drug counselors' time was devoted to secular counseling, and so the grant could pay eighty percent

414. *Tilton*, 403 U.S. at 683–84.

415. *Nyquist*, 413 U.S. at 776–77.

416. In 2002 and 2003, the Department of Justice, Office of Legal Counsel (OLC) issued opinion letters that found constitutionally appropriate two programs under which the government provides funds to religious organizations for repair or renovation of structures owned and used by such organizations. *Authority of the Department of the Interior, supra* note 50; *Authority of* **R**
FEMA, supra note 50. The opinion letters assert that *Tilton* and *Nyquist* are either distinguisha- **R**
ble or no longer good law, but the latter arguments rely in part on propositions derived from Free Speech Clause decisions that require the government to treat religious expression on equal terms with analogous secular expression. The Supreme Court decisively rejected the idea of extending those propositions to government funding of services, as distinguished from expression, in *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004). For fuller discussion of these opinion letters, see Ira C. Lupu & Robert W. Tuttle, *New Federal Policies on Grants for Building Aid for Houses of Worship, Roundtable on Religion & Social Welfare Policy*, Roundtable (June 13, 2003) *available at* www.religionandsocialpolicy.org/publications/publication.cfm?id=52. *See generally* Lupu & Tuttle, *supra* note 49 (anal,yzing the Establishment Clause implications of federal and state grants for historic preservation of houses of worship).

417. *Mitchell v. Helms*, 530 U.S. 793, 856–57 (2000) (O'Connor, J., concurring in the judgment).

418. *Id.*

419. 179 F. Supp. 2d 950 (W.D. Wis. 2002). *See supra* notes 281–283 for our discussion of **R**
McCallum I related to indirect financing of a separate program administered by the state's Department of Corrections.

of the counselors' salaries. The treatment provider had raised private funds to support the other twenty percent share of those salaries.[420]

The court rejected this argument, because the FBO commingled its private and public funds, and spiritual activities were woven into all of the counselors' efforts. The court concluded that the "[d]efendants' ability to estimate how much time counselors spend on religious versus non-religious matters does not mean that it is possible to make a clear distinction between the two roles the counselors play."[421] The constitutionality of direct aid to a religious organization, the court reasoned, depends on the establishment of a "clear distinction" between religious and secular activities.[422]

The direct grant from DWD challenged in *McCallum I* exemplifies the kind of financing from which Justice O'Connor specifically withheld the presumption of constitutionality. In her concurring opinion in *Mitchell*, Justice O'Connor identified as especially problematic "direct money grants to religious institutions," and the public financing of "religious-school instructors to teach classes supplemental to those offered during the normal school day."[423] These two funding mechanisms share the same constitutional infirmity: neither readily permits reliable and transparent segregation of religious from secular uses of public aid. In the context of government aid for salaries of teachers, the confusion between the secular and religious is magnified by the close connection of the two roles played by the teachers.[424]

Identification of these defects in the FBCI rules for aid to religious structures, or in the aid represented by the Wisconsin DWD's grant at issue in *McCallum I*, does not necessarily lead to the conclusion that the funding schemes violate the Establishment Clause. Under Justice O'Connor's analysis in *Mitchell*, such grants would not automatically be held unconstitutional, but the grants would likely forfeit the presumption of constitutionality accorded to programs in which the secular and religious activities can be reliably and transparently segregated. In other words, the burden would fall on the government and its religious grantee to show: (1) that the program possessed reasonable safeguards against diversion of funds to religious use and (2) that the government effectively monitored the grantee's compliance with those safeguards, and their underlying prohibition on diversion

420. McCallum I, 179 F. Supp. 2d at 973–74.

421. *Id.* at 973.

422. *Id.*.

423. *Mitchell*, 530 U.S. at 859–60 (citing Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985)).

424. *See Ball*, 473 U.S. at 386–92. This confusion is equally significant in the combined roles of religious and secular counselor which were at issue in *McCallum I*. *McCallum I*, 179 F. Supp. 2d at 973–74.

of funds to religious use. Such a burden would be difficult, but not impossible, for the government and its grantee to meet. Grantees will be severely handicapped in doing their part to avoid diversion, however, if the governing standards are not clarified and enforced.

iii. Monitoring

The third component of effective safeguards follows logically from the first two. The government must provide grantees with clear notice of the secular content restrictions on direct aid and must ensure that the secular activities funded under the program are segregated from any religious activities engaged in by the grantee.[425] Although necessary, those two formal safeguards are not constitutionally sufficient. The government also must monitor grantees' compliance with the general restriction on religious use, and with the safeguards designed to segregate the grantees religious activities.[426]

In her concurring opinion in *Mitchell*, Justice O'Connor rejected the dissent's claim that the government must engage in robust and intrusive monitoring of religious grantees to ensure that aid is not diverted to religious use.[427] Official monitoring, she argued, may take into account the presumption of constitutionality that attaches to properly designed programs of direct aid. A court evaluating the effectiveness of a program's monitoring provisions may thus assume that the government officials and grantees are acting in good faith.

As we have already argued, however, the presumption of good faith may be rebutted. In *American Civil Liberties Union of Louisiana v. Foster*,[428] a federal district court held grants from the Governor's Program on Abstinence (GPA) to be unconstitutional to the extent such grants financed organizations that mingled religious and secular messages relating to sexual abstinence.[429] A significant part of the court's findings related to the GPA's monitoring of its grantees. The court determined that the GPA received regular reports from its grantees, and that the reports accurately reflected the intensely relig-

425. *Mitchell*, 530 U.S. at 861-62 (O'Connor, J., concurring).

426. *Id.*

427. *Id.* at 861.

428. No. 02-1440, 2002 U.S. Dist. LEXIS 13778 (E.D. La. July 24, 2002). For litigation related to *Foster*, see American Civil Liberties Union v. Leavitt, Civ. A. No. 05-11000 (JLT) (D. Mass. filed on May 16, 2005) (lawsuit challenging government funding of faith-based sexual abstinence education program, the "Silver Ring Thing"). Press release, ACLU, ACLU Challenges Misuse of Taxpayers Dollars to Fund Religion in Nationwide Abstinence-Only-Until-Marriage Program (May 16, 2005), *available at* http://www.aclu.org/ReproductiveRights/ReproductiveRights.cfm?ID=18240&c=30.

429. *Foster*, 2002 U.S. Dist. LEXIS 13778, at *1–*2.

ious content in several grantees' programs, but that the GPA's office was so understaffed that the reports were rarely, if ever, read.[430] When the relevant officials did read the reports, the office provided no documentation that it had taken any steps to remedy the violations.[431] Programs with no effective monitoring will not enjoy the presumption of constitutionality accorded by *Agostini* and *Mitchell*, but will instead be met by judges' traditional skepticism, grounded in the Establishment Clause, about direct public grants to religious entities.

It remains theoretically possible that the federal government will begin to specify and engage in such monitoring, and to require it of the states, especially if defeats for the FBCI in court continue to mount. And it is also possible that such monitoring could lead to the sort of "excessive entanglement" that the Court condemned in *Lemon*.[432] Programs run by houses of worship, or other intensely religious entities, are probably most vulnerable to this hazard, especially if the programs involve attempts at character transformation of beneficiaries. For now, however, the constitutional dangers of under-monitoring seem to far outweigh those of over-monitoring—the sort at which the doctrine of "excessive entanglement" historically has been aimed.

4. FBOs' employment practices

In our discussion above of religion-based employment practices,[433] we reserved one important question, to which we now return. Does the Establishment Clause forbid the state from providing direct funding to FBOs that engage in religion-based hiring with respect to publicly-financed positions? This question is squarely presented in an important case, *Lown v. Salvation Army*,[434] now pending before a federal district court. *Lown* involves allegations that the Salvation Army has recently imposed stringent religious requirements for employment in its offices in the New York City area, and that employees covered

430. *Id.* at *4–*5.

431. *Id.* at *14. As part of its order, the court made very specific requirements for the GPA to develop and follow effective safeguards against diversion. *Id.* at *5.

432. Lemon v. Kurtzman, 403 U.S. 602, 615–22 (1971).

433. *See supra* text at notes 218–237 *supra*. R

434. Lown v. Salvation Army, Inc., No. 04-CV-05162 (S.D.N.Y., filed Sept. 23, 2004). Both defendants (the government and the Salvation Army) have moved to dismiss the complaint for failure to state a legally sufficient claim. The case has been fully briefed (including an amicus brief submitted by the U.S. Department of Justice on behalf of the Salvation Army) and is now awaiting decision on these motions to dismiss. For a thorough discussion of the background in *Lown*, see Fred Scaglione, *The Battle of 14th Street*, New York Nonprofit Press, May 2004, *available at* http://www.nynp.biz/current/archives/nynparchives/0504_May_2004_Edition.pdf.

by these requirements are in effect compensated with funds that originate with the government.[435]

The *Lown* plaintiffs, along with several legal scholars,[436] contend that in providing support to FBOs, the government violates the Establishment Clause if it permits such organizations to engage in religion-based hiring with public funds. Relying on the Establishment Clause standard articulated in Justice O'Connor's *Mitchell* concurrence,[437] those who advance this argument assert that the government bears responsibility for any religious indoctrination directly supported by public funds.[438] It is not hard to imagine a set of facts with respect to which this argument would seem very strong.[439] As a condition of employment in publicly financed positions, an FBO could require that its employees sign a statement of religious confession, regularly attend worship services, and participate in daily religious instruction conducted by the employer.[440] Failure to meet any of those conditions

435. *Lown* also involves claims that the Salvation Army violated state and city antidiscrimination rules. The complaint asserts that the Salvation Army should be treated as a state actor and thus subject to federal and state constitutional prohibitions on religious discrimination. *See* Ira C. Lupu & Robert W. Tuttle, *Lown (and others) vs. The Salvation Army, Inc., Roundtable* (June 21, 2004), available at: http://religionandsocialpolicy.org/legal/legal_update_display.cfm?id=27.

436. For arguments that publicly supported, faith-based hiring violates the Establishment Clause, see Laura B. Mutterperl, *Note, Employment at (God's) Will: The Constitutionality of AntiDiscrimination Exemptions in Charitable Choice Legislation*, 37 HARV. C.R.-C.L. L. REV 389 (2002); Vikram Amar & Alan Brownstein, *"The "Charitable Choice" Bill that was Recently Passed by the House, and the Issues It Raises*, Findlaw (Apr. 29, 2005), *available at* http://writ.corporate.findlaw.com/commentary/20050429_brownstein.html [hereinafter *Charitable Choice Issues*]; Vikram Amar & Alan Brownstein, *"The "Charitable Choice" Bill that was Recently Passed by the House: Why Supreme Court Precedent Renders It Unconstitutional*, Findlaw (May 13, 2005), *available at* http://writ.corporate.findlaw.com/commentary/20050513_brownstein.html [hereinafter *Supreme Court Precedent*]. *See also* Memorandum from Randolph D. Moss, *supra* note 223, at 22–30 (raising questions about the constitutionality of public support for FBOs that practice religion-based hiring, but reaching no definite conclusion). **R**

437. *Mitchell*, 530 U.S. at 844–49; Amar & Brownstein, *Charitable Choice Issues*, *supra* note 436. **R**

438. Those who challenge the constitutionality of government support for FBOs that use religion-based employment practices do not suggest that this unconstitutionality extends also to FBOs that receive indirect financing. Such financing mechanisms significantly attenuate the government's responsibility for religious indoctrination, whether of FBO employees or of program beneficiaries. *See supra* notes 114–128 and accompanying text (discussing the Establishment Clause implications of indirect financing mechanisms). **R**

439. Because we believe, even on facts this strong, that public funding of FBOs' religion-based employment practices is not likely to violate the Establishment Clause, we do not discuss the constitutional implications of any less religiously intense employment practices of FBOs, such as a general statement that an employee will not act overtly in a manner inconsistent with the employer's faith commitments.

440. In *Lown*, the plaintiffs allege that they were required to provide the Salvation Army with the name of their clergy and to authorize their clergy to discuss with the Salvation Army the plaintiff-employees religious practices and faith commitment. *Lown*, No. 04-CV-D5162 at ¶ 16; *see also* Lupu & Tuttle, *supra* note 435. **R**

could result in termination of employment. Such employment practices certainly involve employer-sponsored religious indoctrination, and might be experienced by some employees as religious coercion.[441]

The constitutional question posed by this scenario is whether the government may reasonably be held responsible for the religious indoctrination or coercion of employees. On the one hand, the public financing might constitute a "but for" cause of the indoctrination. Without the public support, the FBO might not have hired the employees, and thus the employees would not have been exposed to the indoctrination. Moreover, because the religious confession and exercise is an express condition of employment, the employees' participation in religious exercises cannot plausibly be characterized as voluntary. On such facts, the government would certainly seem to bear some responsibility for the FBO's religious control over its employees.

On the other hand, the government has a different relationship with a service program's beneficiaries than it does with a funded provider's employees. As we described above, the concept of governmental responsibility advanced by the *Mitchell* concurrence focuses primarily on providers' foreseeable use of religion as a means of reaching public ends.[442] If a service program were to provide employment itself as an integral part of the program's benefits, then the government's responsibility for religious indoctrination of these employee-beneficiaries would be no different than the government's responsibility for the religious indoctrination of any beneficiary in a program directly supported by the government.[443] The government bears such responsibility because the indoctrination is directly linked with achievement of the public purposes of the funding program.

An FBO's religious indoctrination of its employees, however, stands in a much less direct relationship with the government's pur-

441. Government sponsorship of religious coercion is a core violation of the Establishment Clause. Lee v. Weisman, 505 U.S. 577 (1992).

442. *See supra* notes 238 and accompanying text. The concept of secularity, endorsed by all current members of the Court, forbids the government from acting for exclusively religious goals. **R**

443. When employees are intended beneficiaries, Congress is likely to explicitly bar faith-based discrimination in employment. *See, e.g.*, Workforce Investment Act, 29 U.S.C. § 2841 (2005); 29 C.F.R. § 37.10 (2005) (codifying the DOL's nondiscrimination rules for the Workforce Investment Act). *See also* Lupu & Tuttle, *supra* note 48, at 66–67 (discussing the DOL's rules). **R** A subcommittee of the House of Representatives recently approved a bill that would remove the restriction in the Workforce Investment Act on faith-based hiring by FBOs. *See* Anne Farris, *Proposed Renewal of Workforce Investment Act Clears First Hurdle in House but New Provisions for Faith-Based Groups Raise Concerns*, Roundtable (Mar. 25, 2003), *available at* http://www.religionandsocialpolicy.org/news/article.cfm?id=459.

poses in financing the service.[444] In their analysis of the constitutionality of religion-based hiring by public grantees, Professors Vikram Amar and Alan Brownstein contend that the indirect character of the government's interest in the FBO-employee relationship is constitutionally irrelevant: "But why would anyone think that this simple fact—that government and businesses do not engage in activities for the express purpose of providing jobs—somehow justifies discrimination in hiring employees, or reduces the impact and consequences of such discrimination?"[445] This question suggests that government is responsible for religious discrimination in positions that receive public funding whether or not the provision of employment is one of the purposes of the government program.

The Amar-Brownstein argument proves too much. If the government bears responsibility for religious discrimination in any way traceable to public support of an FBO, then the same argument should hold true if the government provides less direct support for the affected position. If government support supplants private funds that the religious entity was already using to support its social welfare programs, enabling the FBO to hire a new employee for work not related to the public grant, then the restriction on religion-based hiring should be applied to that position as well. The same could even be said with respect to tax exemptions enjoyed by religious organizations, which also effectively provide public support for such organizations' activities, including the positions used to carry out those activities.[446] Under the *Mitchell* standard, the government's responsibility for religious indoctrination depends on the link between that indoctrination and the benefit intended and conferred by the funding program. Unless the challenged hiring policy is intertwined with the service program's benefit, a court applying the *Mitchell* standard should not hold the government constitutionally responsible for an FBO's religion-based employment practice.

5. Protections for the religious liberty of program beneficiaries

In addition to its emphases on the equal participation of FBOs in federal grant programs and the constitutional limits on FBOs' use of

444. If the FBO bills the government for the time in which its employees are engaged in religious indoctrination—either of beneficiaries or of employees—such an expenditure would clearly violate the *Mitchell* concurrence's prohibition against diversion of funds for religious use. *See* Mitchell v. Helms, 530 U.S. 793, 844–49 (2000).

445. Amar & Brownstein, *Charitable Choice Issues*, *supra* note 436. **R**

446. The Supreme Court long ago upheld an exemption from taxation for real or personal "property used exclusively for religious, educational or charitable purposes." Walz v. Tax Comm'n, 397 U.S. 664, 666–67 (1970).

funds for religious activities, the Faith-Based Initiative has also developed a set of protections for the religious liberty of program beneficiaries.[447] All of these safeguards are consistent with the overarching principle that government should not be the knowing agent of religious indoctrination of the state's intended beneficiaries.

These new regulatory protections have taken two basic forms. The first is designed to ensure that beneficiaries will not be forced to participate in religious activities as a condition of receiving government-financed services. In programs of direct funding, service providers must separate, in either place or time, their "inherently religious activities" from the service program, and must ensure that beneficiaries' participation in such activities is voluntary. In programs of indirect financing, by contrast, protection for beneficiaries is implicit in the structure of such programs. To meet the constitutional standard set forth in *Zelman v. Simmons-Harris*, the program must offer beneficiaries a reasonable choice from among a range of service providers. The range may include intensely religious providers; under *Zelman*'s reasoning, so long as government offers adequate secular alternatives to beneficiaries, government is not responsible for the religious experience that may arise from a beneficiary's selection of a religious school or social service provider. Thus, if a program meets the relevant constitutional standards for adequate choices among providers, beneficiaries' religious liberty should be sufficiently protected.

The second protection for beneficiaries' religious liberty arises from the FBCI's regulatory prohibition on religion-based discrimination against beneficiaries in programs of direct financing. Every federal agency that has promulgated rules under the Faith-Based Initiative has included a provision that bars service organizations from discriminating "against a current or prospective program beneficiary on the basis of religion or religious belief."[448] This rule is a little-noticed yet deeply significant clarification of federal policy. Prior to the FBCI's regulatory push during the last two years, no federal government-wide standard prohibited religion-based discrimination by directly financed

447. Lupu & Tuttle, *2004 Report*, *supra* note 175 at 80–81 (discussing the religious liberty of FBCI beneficiaries); Lupu & Tuttle, *2003 Report*, *supra* note 48, at 17–19 (same); and Lupu & Tuttle, *2002 Report*, *supra* note 207, at 52–54, 63–64. Portions of the material in text above also appear in *2004 Report*. R R R

448. Responsibilities of DOL, DOL social service providers and State and local governments administering DOL support, 29 CFR § 2.33(a) (2004) (DOL). *See also* Responsibilities of participating organizations, 7 CFR §16.3(a) (2004) (USDA); Equal Participation of Religious Organizations in HUD Programs and Activities, 24 CFR §5.109(f) (2004) (HUD); Religious organizations, 38 CFR §61.64(e) (2004) (VA); Discretionary grants, 45 CFR §87.1(e) (2004) (HHS).

providers against service beneficiaries. With the rule changes announced over the past year, the Administration has now extended such provisions to cover virtually all federally financed social welfare programs.

Indeed, in light of our analysis above of the controlling constitutional norms of nonestablishment, we believe that there is a powerful case to be made that the rule forbidding religious discrimination against beneficiaries in directly financed programs is required by the Constitution. Such discrimination inevitably permits providers to use their government-enhanced leverage to induce actual or potential beneficiaries to undergo religious experience—attend worship services, accept religious instruction, refrain from sinful activities, and the like. If directly financed FBOs are free to limit their beneficiaries to members of a prescribed faith, any attempt to confine such limitations to matters of religious identity (e.g., Catholics only) as distinguished from religious practice (e.g., observant Catholics only) would founder on the shoals of religious autonomy to define membership in the faith community. Thus, religious discrimination by providers could readily develop into requirements that beneficiaries practice the faith in particular ways. If that were to occur, the policy of the first FBCI rule—that of voluntariness concerning beneficiaries' participation in privately financed religious activity—would be fatally undermined. Moreover, if government permitted directly financed FBOs to effectively induce religious experience in this way, the argument that government would be responsible for religious indoctrination of beneficiaries would be quite strong. The architects of the FBCI are thus to be commended for putting in place a regulatory policy that Congress and prior administrations have overlooked, and that the Establishment Clause arguably requires.

We recognize that the constitutional line between religious discrimination with respect to employees—at least those who themselves are not intended beneficiaries of government programs—and similar or identical selectivity with respect to service beneficiaries will not be intuitively obvious to all of our readers. Nevertheless, for reasons that we develop in Part III.C.4., above, we think such a constitutional distinction can be maintained. An FBO's choice of faith criteria in selecting a work force, even in a government-financed program, does not reflect any government policy concerning the role of religious experience or commitment in the accomplishment of state ends. The government thus may choose, as it has with respect to many service programs, to be indifferent to the role of faith in the employment relation between FBOs and their agents. In contrast, an FBO's use of

faith criteria in selecting service beneficiaries is quite likely to be an instrument of the FBO's methodology in delivering the service.

In any event, government cannot measure the extent to which these criteria are being used by an FBO as such an instrument, rather than as an extraction of religious experience in exchange for a material benefit. Because of that limitation on knowledge, we think that drawing a line between beneficiaries and employees for purposes of attributing responsibility to the government for religious indoctrination is defensible and prudent. Our judgment on this point is buttressed by customary practice of governments in the United States, which have been for many years far more likely to tolerate faith-based hiring than faith-selective service delivery by FBOs directly financed through government programs.

That said, the protections afforded beneficiaries under programs of the Faith-Based Initiative could be made even more robust by incorporating affirmative requirements of notice to beneficiaries. The Charitable Choice provisions require that beneficiaries must be notified of their right not to participate in religious activities offered by a provider, and of their right to receive services from an alternative provider if they object to receiving services from a particular FBO.[449] The federal agencies, however, have not imposed any comparable obligations on providers or government officials to inform beneficiaries of their rights, whether in programs of direct or indirect financing. Because beneficiaries are frequently vulnerable and not well informed about their legal options, the imposition of such obligations would be salutary, whether or not required by the Constitution.

6. Potential exceptions to limits on direct financing of faith-based organizations

In at least two different contexts, the constitutional limits on direct government financing of religious experience may give way. One involves individuals who are in government custody or control, such as those in the U.S. armed forces, places of incarceration, state-operated homes for children, or state institutions for involuntary confinement of the mentally ill. In such settings, the government generally is permitted, and sometimes may be obliged, to take affirmative steps to facilitate the free exercise of religion by those in its custody. The other context involves government expenditures on social programs

449. For further discussion of this point, see Lupu & Tuttle, *supra* note 207, at 52–54, 63–64; Lupu & Tuttle, *supra* note 47 at 18–19. **R**

outside the United States. In what follows, we discuss both of these areas.

a. Individuals Under Significant Government Control

For many years, government has provided religious experience, facilitated by the mechanism of chaplains, to persons under its control.[450] The conventional account of such provisions is that government is not promoting or sponsoring religion in doing so, but instead is responding to the plight of those who have been removed from their ordinary opportunity for religious experience as a result of some action the government has taken. Several of the agencies involved in the faith-based initiative have recently promulgated rules that build on this concept. For example, the U.S. Department of Labor's (DOL) rules concerning its support for work-training programs now provide:

> [T]o the extent permitted by Federal law (including constitutional requirements), direct DOL support may be used to support inherently religious activities, and such activities need not be provided separately in time or location from other DOL-supported activities, under the following circumstances:
>
> (i) Where DOL support is provided to chaplains to work with inmates in prisons, detention facilities, or community correction centers through social service programs;
>
> (ii) Where DOL support is provided to social service programs in prisons, detention facilities, or community correction centers, in which social service organizations assist chaplains in carrying out their duties; or
>
> (iii) Where DOL-supported social service programs involve such a degree of government control over the program environment that religious exercise would be significantly burdened absent affirmative steps by DOL or its social service providers.[451]

450. In *Katcoff v. Marsh*, 755 F.2d 223, 237-38 (2nd Cir. 1985), the Second Circuit rejected an Establishment Clause challenge to the institution of paid chaplains in the U.S. armed forces. Shortly before *Katcoff*, the Supreme Court in *Marsh v. Chambers*, 463 U.S. 783, 792-95 (1983), upheld the legality of legislative prayer led by a paid chaplain retained by the Nebraska legislature. The federal courts have frequently struggled with the question of whether prison chaplains are state actors, thereby rendering the state responsible for a chaplain's conduct within the prison. *Compare* Montano v. Hedgepeth, 120 F.3d 844, 848 (8th Cir. 1997) (holding that prison chaplains, on the facts of the case, are not state actors), *and* McGlothlin v. Murray, 993 F. Supp. 389, 397 (W.D. Va. 1997) (same), *with* Phelps v. Dunn, 965 F.2d 93, 101–02 (6th Cir. 1992) (holding that, on the facts of the case, prison chaplains are state actors), Paz v. Weir, 137 F. Supp. 2d 782, 801 (S.D. Tex. 2001) (same), *and* Hobbs v. Pennel, 754 F. Supp. 1040, 1041 n.6 (D. Del. 1991) (same).

451. Responsibilities of DOL, 29 C.F.R. § 2.33(b)(3) (2005). *See also* Grants and Cooperative Agreements, 22 C.F.R. § 205.1(b) (2004) (providing parallel, though less specific, provision in USAID regulation).

At a very basic level, the new rules accurately restate the principle that government may take affirmative steps to facilitate the free exercise of religion of those under significant control by the government, such as members of the military and prisoners. This principle has a necessary corollary. Accommodations that the government makes to facilitate such individuals' free exercise of religion must relieve significant government-imposed burdens on religion,[452] and therefore do not violate the Establishment Clause. Thus, paragraph three (iii) of the DOL rule is constitutionally appropriate. Where the government places an individual under state control, the government may need to provide financial or other institutional assistance to ensure that the individual can continue to practice his or her religion.[453]

The principle advanced in the DOL's rule, and the constitutional justification for it, contain the seeds of the rule's own limitation. The concern that justifies the government's positive involvement in facilitating individuals' religious exercise does not provide a blanket justification for the government to support any and all intensely religious activities, simply because the activities occur on military bases or behind the walls of a prison. Inside these institutions as well as outside them, the Establishment Clause explicitly forbids the government's direct financing of religious means in order to achieve its own objectives. In this context, any program of direct support for religious activity must derive from the goal of facilitating the religious exercise of individuals.

The case of *Americans United for Separation of Church and State v. Prison Fellowship Ministries*, currently pending in the U.S. District Court for the Southern District of Iowa, provides an instructive example of the potential limits of governmental support for religious experience in custodial settings.[454] The plaintiffs allege that the Iowa

452. *See* Cutter v. Wilkinson, 125 S. Ct. 2113 (2005); Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987). *See* discussion *supra* Part III for further analysis of *Amos* and the doctrine of permissive accommodation.

453. In addition to *Cutter*, the leading Supreme Court opinion on this principle is *Cruz v. Beto*, 405 U.S. 319 (1972), which held that prison administrators could not discriminate against a Buddhist prisoner in the provision of chaplaincy services. *Cruz*, 405 U.S. at 322.

454. *See* Lupu & Tuttle, *2003 Report*, *supra* note 48, at 68–75. *See also Americans United for Separation of Church and State et al. v. Warden Terry Mapes, Prison Fellowship Ministries, InnerChange Freedom Initiative et al.*, Roundtable (Mar. 14, 2003), *available at* http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=13. In the complaint filed in the U.S. District Court for the Eastern District of Pennsylvania in *Moeller v. Bradford County*, the ACLU and others have made similar allegations that government funds are supporting religious indoctrination in a job training program for prisoners. *See* Ira Lupu & Robert Tuttle, *Americans United For Separation of Church and State et. al. v. Warden Terry Mapes, Prison Fellowship Ministries, Freedom Initiative, et. al.*, Roundtable (Mar. 14, 2003), *available at* http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=35. R

Department of Corrections entered into an agreement with Prison Fellowship Ministries that led to the ministry assuming effective control of a wing of a prison. The wing was then used for a program of intensive education, personal and group reflection, and character transformation, all done from an evangelical Christian perspective. The State of Iowa, which financed the program, offers neither analogous secular programs nor similar programs from other religious perspectives.[455]

The primary constitutional question raised by the *Prison Fellowship Ministries* case is whether the program is designed primarily to facilitate prisoners' free exercise of religion, or whether its principal goal is one of promoting the state's interests in rehabilitation (or moral transformation) of inmates. If the former, then the state's direct expenditures on religion may be justified.[456] If the latter, the expenditures would likely violate the Establishment Clause. On the allegations in the complaint, the prison ministry program seems to go far beyond the legitimate goal of promoting inmates' free exercise of religion. All prison chaplaincy programs are likely to involve some variation in the amount of support available to different faiths, based largely on the relative size of the different religious faiths within the prison population. The program at issue in *Prison Fellowship Ministries*, however, involves differences in kind, not just in degree. Only evangelical Christians are offered the services available in that program, and government support provided only to that religious tradition's transformative ministry is inconsistent with an intention to facilitate the religious practice of all faiths in the institution.

Even in the unlikely event that such services were available to inmates of every faith tradition, the state may not pay for this sort of religious transformation as a means to achieve the state's antirecidivist ends. Such programs frequently claim a very high success rate,[457] and those claims may indeed be demonstrable. But the principles of nonestablishment, unlike the law governing most of the Bill of Rights,

455. In late April of 2005, the district court denied motions for summary judgment from both sides, and ordered the case to be set for trial as soon as feasible. *Ams. United for Separation of Church and State v. Prison Fellowship Ministries*, No. 4:03-cv-90074 (S.D. Iowa filed Apr. 29, 2005) (copy on file with the authors and the DePaul Law Review).

456. This assumes that participation in the program is voluntary. If the state facilitated coercion of prisoners to participate in religious activity, their free exercise rights would also be implicated.

457. The "InnerChange Initiative," a program operated by Prison Fellowship Ministries in a number of prisons including those in Iowa, asserts that states choosing to use the program will experience a "spectacular reduction in the rate ex-offenders are returned to prison . . . ." *See About IFI*, The InnerChange Freedom Initiative, *at* http://www.ifiprison.org/channelroot/home/aboutprogram.htm (last visited July 4, 2005).

do not invite or permit interest balancing of any kind. Establishing religion is forbidden, regardless of the social goal that any establishment may achieve.

Given our concern about government financing of programs such as that in *Prison Fellowship Ministries*, we believe that DOL needs to make clearer the limited character of the exception found in paragraphs one (i) and two (ii) of the rule.[458] The rule should more explicitly state that the exception does not constitute general permission to use government funds to sponsor and promote intensely religious programs, even within fully institutionalized settings.

b. Expenditure for programs abroad

The U.S. Agency for International Development (USAID) has recently promulgated a rule that incorporates the core elements of the Faith-Based Initiative[459] into all USAID programs in which private (i.e., nongovernmental) organizations are eligible to participate. The unique and intriguing question raised by the USAID rule is the extent to which Establishment Clause limitations on the U.S. government are altered or eliminated by the context of foreign rather than domestic expenditure. Whatever the content of the constitutional rules that govern overseas expenditures by the United States, the context of foreign expenditure—especially when supervised by private U.S. grantees—raises special concerns about enforcing both regulatory and constitutional policies.

USAID administers a number of programs in which FBOs, both domestic and foreign, may become involved.[460] Among them is the American Schools and Hospitals Abroad program, ("ASHA) which supports educational and medical institutions abroad as a way of sharing American ideas and practices in education and medicine. In the ASHA program, U.S.-based FBOs may be intermediaries, receiving USAID grants and redistributing them to overseas organizations, such as U.S. government-specified foreign schools and medical centers. Moreover, foreign recipients of ASHA grants, food grants, and grants for treatment and prevention of HIV infection, may themselves be faith-based.

In addition to the core elements of the Faith-Based Initiative, the USAID rule adds one additional element to the usual mix of rules governing the Faith-Based Initiative. Because of the potential impli-

458. *See supra* note 451. R

459. See *supra* Part II for enumeration of core elements.

460. We list a number of these programs in Lupu & Tuttle, *supra* note 175 at 85, 84–90. R

cations for U.S. foreign policy associated with USAID programs, the proposed rule permits the Secretary of State to waive all or any part of the rule in a particular case "where the Secretary determines that such waiver is necessary to further the national security or foreign policy interests of the United States."[461]

Our concerns about the USAID rule relate primarily to the foreign context in which the rule's policies will be implemented. However straightforward this set of policies of the FBCI appear to be, it is entirely possible that the physical and cultural distance between USAID and the foreign FBOs that receive this assistance will create some unusual difficulties of enforcement. Most foreign FBOs are presumably even less aware and sensitive than domestic FBOs with respect to conventional U.S. norms of government spending. In particular, we think that the requirement of nondiscrimination with respect to beneficiaries may be unusually difficult to enforce in some foreign settings. In nation-states in which religious conflict is severe, one can expect that some FBOs will be sharply inclined toward caring for their own, and perhaps unwilling to provide services to those outside their faith. In the same vein, even within their particular faith, foreign FBOs may be inclined to use the USAID-financed goods or services as leverage to induce beneficiaries to endure unwanted religious experience.

Moreover, two substantive sections of the proposed USAID role raise explicit constitutional concerns. As we discussed above, the line that federal agencies have drawn between "inherently religious activities," for which government may not directly pay, and all other activities, is constitutionally underinclusive. Moreover, the agency's rule on the public financing of physical structures also raises constitutional problems. USAID funds are not, however, generally expended within the United States. Does the foreign setting in which USAID expenditures have their operational impact alter the constitutional analysis of the agencies' policies?[462]

The question of the extent to which the Establishment Clause of the First Amendment applies to actions of the United States undertaken in foreign nations is one upon which the U.S. Supreme Court has never ruled. Decisions of the Supreme Court about the application of other provisions of the U.S. Bill of Rights to actions by our government in foreign nations, however, offer material that bears sharply on that question. Moreover, at least one prominent decision of a federal

461. Grants and Cooperative Agreements, 22 C.F.R. § 205.1(i) (2005).

462. For an earlier discussion of this question, see John H. Mansfield, *The Religion Clauses of the First Amendment and Foreign Relations*, 36 DEPAUL L. REV 1 (1986).

Court of Appeals has ruled that the Establishment Clause does apply to foreign expenditures of USAID.[463]

The Supreme Court's approach to the question of the application of provisions of the Bill of Rights abroad—a question of particular timeliness in light of allegations that members of the U.S. Armed Forces have tortured prisoners being held by the U.S. in foreign lands—has turned on several variables, including the language of the relevant provision and its function as a limitation on government. For example, the focus in the Fourth Amendment on the right of "the People" to be protected from unreasonable searches and seizures has led the Court to reject an argument that non-citizens are protected outside the U.S. against the involvement of American officials in unlawful searches.[464] By contrast, the Court has extended to American citizens—spouses of U.S. servicemen—the right to be indicted by a grand jury and to be tried by a jury, even when the offenses have been committed overseas against members of the U.S. Armed Forces.[465]

Moreover, the First Amendment—in its protection of speech, press, religious freedom, and nonestablishment—is written as a limitation on the government's jurisdiction, not as a promise of rights to "the People" or to citizens. The Supreme Court has construed the Establishment Clause as a structural limitation on government more than as a guarantee of "rights" in the conventional sense.[466] For example, in contrast to the basic rule that taxpayers ordinarily do not have standing to assert the unconstitutionality of expenditures by the federal government,[467] the Supreme Court has held that taxpayers may bring suit to complain of governmental expenditures that are alleged to violate the Establishment Clause.[468]

It was in part this focus on the structural qualities of the Establishment Clause that led the U.S. Court of Appeals for the Second Circuit to hold in *Lamont v. Woods*[469] that the clause indeed applied to USAID expenditures on overseas programs. *Lamont* involved the program for American Schools and Hospitals Abroad. A group of

463. Lamont v. Woods, 948 F.2d 825 (2d Cir. 1990).

464. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that the Fourth Amendment does not protect a Mexican citizen tried in U.S. court from an unreasonable search of his residence in Mexico).

465. Reid v. Covert, 354 U.S. 1 (1957).

466. For detailed elaboration of this theme, *see* Esbeck, *supra* note 273; Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & POL. 445 (2002). R

467. Frothingham v. Mellon, 262 U.S. 447 (1923).

468. Flast v. Cohen, 392 U.S. 83 (1968). For further discussion, see Esbeck, *supra* note 273, at 33–40. R

469. 948 F.2d 825 (2d Cir. 1991).

taxpayers challenged a set of grants to American sponsors of specific foreign schools, many of which were religious in character. The Court of Appeals rejected the government's argument that the Establishment Clause does not apply to overseas expenditures. Instead, the Court ruled that the clause protects American taxpayers from having U.S. government monies spent for the purpose of promoting religion anywhere in the world. The Court of Appeals recognized, however, that the foreign context might affect judicial evaluation of whether a particular grant actually violated the clause.[470] For example, grants to schools in countries that have no secular educational institutions will inevitably prefer religious education, and therefore violate the norm of neutrality between the secular and the religious that ordinarily prevails inside the United States In such circumstances, the Court of Appeals suggested that the crucial questions would relate to the particular purposes of the grant—a grant designed to fund study of American ideals or science would be acceptable, while a grant to promote "moderate Islam" might not.[471]

If the opinion in *Lamont* is sound, the USAID rules would be analyzed for their constitutionality in much the same way as would rules in the domestic context. The prohibition on federal government support of "inherently religious activities" would still be required by the Constitution, and our concern expressed above about social service with explicitly religious content would remain. The situation is similar with respect to funding of physical structures. If the Establishment Clause applies to overseas expenditures, the policy of proportionate support may be just as constitutionally questionable when applied overseas as when applied in the United States.

We question, however, whether the view of the *Lamont* Court would, or should, be adopted by the Supreme Court today if a USAID program were to be challenged under the Establishment Clause. Some of *Lamont*'s reasoning depends upon constitutional premises that have been thrown into doubt in the thirteen years since the case was decided. The substantive concern with respect to protecting taxpayers against "religious uses" of public funds has been eroded somewhat, in particular by the Supreme Court's decision in the Cleveland voucher case.[472]

The Supreme Court's most recent decisions regarding the Establishment Clause emphasize the secularity of the government's purpose at

470. *Id.* at 841.

471. *Id.* at 841 n.20 (citing John H. Mansfield, *The Religion Clauses of the First Amendment and Foreign Relations*, 36 DEPAUL L. REV. 1, 34 (1986)).

472. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

issue, neutrality between religion and nonreligion, and most controversially the concern that government not be responsible for religious indoctrination. The foreign policy-based and humanitarian objectives of USAID programs seem comfortably inside the boundaries of the doctrine requiring a secular purpose for government programs. The requirement of neutrality may not be met with respect to particular USAID grants, but these requirements are probably satisfied when USAID programs are viewed as a whole; religious and nonreligious entities, foreign and domestic, are all eligible for grants. The most controversial question raised by USAID programs involving foreign FBOs may therefore be whether they implicate the U.S. government in religious indoctrination. In a world in which the struggle between radical and moderate Islam affects the national security of the United States, we would not be surprised if the courts gave USAID and its grantees considerable leeway to finance instruction or humanitarian assistance that attempted to link particular versions of Islam with pro-American values.

If courts move away from the opinion in *Lamont*, the USAID may have discretion to permit religious content even beyond what the proposed rules would allow. Thus far, USAID does not seem to be seeking any such expansive authority to promote religion abroad. Except for one provision, the new USAID rule simply tracks the government-wide policies adopted for the Faith-Based Initiative. That one provision permits the Secretary of State to waive the requirements of the proposed rule when such a waiver "is necessary to further the national security or foreign policy interests of the United States."[473] The Secretary's authority to waive agency rules of course may not be extended to approve unconstitutional action. If the constitutional rights of American citizens abroad were at stake, we doubt that such a waiver would be effective.

In the context of Establishment Clause concerns, however, the waiver authority may be quite considerable. Judicial deference to the Executive Branch in matters of foreign policy, coupled with the possibility that weaker Establishment Clause norms may apply when the U.S. acts in foreign nations,[474] may coalesce into ample authority to finance religious education outside our borders. Moreover, the rule's

473. Grants and Cooperative Agreements, 22 C.F.R. § 205.1(i) (2005).

474. We think that the normative question presented by these problems is very difficult. Constitutional lawyers will inevitably grow uneasy when the President of the United States makes public pronouncements on what is or is not the "true" meaning of Islam, but we doubt that either the original intentions behind the Establishment Clause or its contemporary normative underpinnings speak to the issue of foreign relations with particular religious movements that may be friend or foe of the United States.

requirement that the Secretary personally approve any such waiver is an important check on what otherwise might be a lightly considered willingness by USAID (or, more likely, its grantees) to overlook constitutional considerations.

V. Conclusion

As the length of this paper may indicate, the Faith-Based and Community Initiative is sprawling. It involves all three branches of the federal government, and it has forced interaction on religion-state issues across the boundaries of federalism. By aggressively moving to include entities with a strong religious character within the category of permissible federal grantees, the architects of the Initiative have pushed the Constitution in constructive ways. A great deal of what lawyers once thought excluded by a mandate of constitutional distinctiveness is now a matter of government discretion, and is likely to remain so.

At least in the context of direct government financing of services provided by such entities, however, the Initiative's designers have thus far fallen short in their effort to erase entirely the constitutionally distinctive character of religious organizations. With respect to expenditure of public funds on religious activity, safeguards against such expenditure, and the shape of devices designed to enforce those safeguards, religious organizations retain a constitutionally distinctive character. As has been demonstrated by virtually all of the initial litigation against FBCI-related grants, government officers and faith-based organizations that ignore these features of the current legal landscape do so at their peril. The enlistment of faith-based entities in the provision of government-sponsored social service comes with a set of affirmative constitutional responsibilities that cannot be safely ignored. On this crucial point, the Constitution is pushing back.

The Faith-Based and Community Initiative offers the bright promise of attracting new providers, reaching new beneficiaries, and perhaps offering unprecedented levels of effective delivery of social service. We firmly believe that it can be implemented in ways that are respectful of the Constitution. We believe with equal conviction, however, that if the Initiative is administered in ways that are indifferent to or hostile to the Constitution, the efforts made on the Initiative's behalf will be engulfed in destructive litigation and the political animosities of the culture war.

As this piece goes to press, Justice O'Connor's seat on the Supreme Court is up for grabs. In light of Justice O'Connor's crucial opinions

in *Mitchell*, *Agostini*, and *Zelman*,[475] we have reason to believe that the Initiative's constitutional future may not coincide perfectly with its constitutional past and present. Whatever that future holds, it remains to be seen if the Initiative will become George W. Bush's bright domestic legacy, or, as Madison feared of a faith-based initiative in his own time and place, "an unhallowed perversion of the means of salvation."[476]

475. *See supra* Part IV.C. (discussing the centrality for current Establishment Clause jurisprudence of Justice O'Connor's opinions in *Mitchell*, *Agostini*, and *Zelman*.

476. James Madison, Memorial and Remonstrance Against Religious Assessments, *quoted in* Everson v. Bd. of Educ., 330 U.S. 1, 63 –72 (1947) (Rutledge, J., dissenting). Madison was protesting a bill that would have taxed property owners in order to raise funds for the building of churches and the payment of salaries to ministers and teaches of the gospel. Madison offered as point number five of the Remonstrance that "the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation." *Id.* at 67.