The State of the Law 2004:

Partnerships Between Government and Faith-Based Organizations

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EXECUTIVE SUMMARY

This is our third Annual Report on the law touching upon the Bush Administration's Faith-Based and Community Initiative. We completed our work in writing the Report fewer than ten days after Election Day, and we therefore wrote the bulk of the Report without knowing who would be in the White House for the next four years. We of course expected that a John Kerry Presidency would likely produce some changes in the conduct of the Executive Branch with respect to the policies of the Initiative, and that a George W. Bush Presidency would likely produce significant continuity of policy. Without foreknowledge of the election's outcome, however, we tried to prepare a Report that would be objective and useful to those involved with the Initiative, regardless of their political affiliations.

The 2002 Report emphasized the legal and constitutional milieu within which the Initiative had to develop. The 2003 Report emphasized the activities of the Executive Branch under President Bush in pushing the Initiative forward, and in crystallizing a set of policies that would govern across many agencies of government. This year's Report returns in its central emphasis to the work of the courts. We discuss several important judicial decisions, including the Supreme Court's ruling and opinion in *Locke v. Davey*. We also highlight a series of cases now being litigated, all of which promise to be of considerable significance to the future of the Initiative. In addition, we report on a variety of Executive Branch programs and policies, some of which extend established principles to entirely new settings. And we conclude with a note on developments in state constitutional law. It is, of course, in the interaction among judicial rulings, Executive Branch actions, federal legislation, state governmental behavior, and

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the activities of faith-based organizations in response to all of these stimuli that the life of the Faith-Based and Community Initiative is shaped.

I. DEVELOPMENTS IN THE JUDICIAL BRANCH

A. Significant Judicial Decisions

1. Locke v. Davey. In *Locke*, the U.S. Supreme Court upheld the authority of states to maintain their own policies of church-state separation, even though the state's policies of separation exclude religious causes from state-financed benefits. In so ruling, the Court rejected an argument that equal treatment of religion and nonreligion is always required by the federal Constitution, and in so doing revitalized –at least in some measure – the policies reflected in so-called Blaine Amendments found in the constitutions of many states.

2. American Jewish Congress v. Corporation for National Community Service. This decision, by the U.S. District Court for the District of Columbia, held unconstitutional various aspects of the AmeriCorps Education Award Program, which places teachers in elementary and secondary schools. In particular, the court found constitutional flaws in the Program's grants to institutions in which some award recipients are trained, because those institutions included religious training as part of their program. The court also found constitutionally unacceptable the Program's failure to monitor the award recipients' involvement in religious instruction in the schools in which they had been placed. The decision, which is on an expedited appeal in the U.S. Court of Appeals for the District of Columbia Circuit, raises important questions about the distinction between direct and indirect financing of faith-based organizations, and about the concept of government-financed personnel in such organizations being involved in religious teaching "on their own time."

3. Catholic Charities v. Superior Court. In the Catholic Charities decision, the California Supreme Court rejected both federal and state constitutional attacks on a state legislative decision to require most employers (including Catholic Charities) to include contraceptive drugs in any insurance coverage for prescription drugs provided for employees. The state legislation had created a very narrow exception, for which Catholic Charities did not qualify, for certain types of religious organizations. The decision demonstrates the extent to which organizations that accept government funds may be exposed to conditions on receipt of those funds, even though such conditions conflict with the organization's religious commitments. The U.S. Supreme Court has declined to review the decision.

4. Freedom From Religion Foundation, Inc. v. Montana Office of Rural Health (and others). In this very recent decision, a U.S. district court in Montana ruled unconstitutional a government-financed, faith-based health

program being run by the Montana Office of Rural Health (MORH). In particular, the court focused on the state subsidy of a joint venture among the MORH director, his agency, and a group limited to faith-intensive health providers; the significant preference built into the program for providers that integrated religious experience with health care; and, most of all, a noncompetitive grant to the Parish Nurse Center at Carroll College, which trains parish nurses to provide health care that includes a strong religious component. The federal government, acting through the Department of Justice, did not defend the particulars of the Montana program, which involved a rather extreme commingling of faith and health service in a program directly financed by both state and federal funds. Nevertheless, the case may illustrate the uncertainty among state officials about the permissible scope of religious activity in programs directly financed with state or federal funds.

5. Freedom From Religion Foundation, Inc. (and others) v. Jim Towey, Director of the White House Office of Faith-Based and Community Initiatives (and others). This lawsuit, filed in mid-2004 by an organization devoted to Separationist principles and the leaders of the organization, is a challenge to the core of the Faith-Based and Community Initiative. The complaint alleges that a variety of federal officers, including the head of the WHOFBCI, have violated the Establishment Clause by using government resources to promote religion, to favor religious organizations over their secular counterparts, and to religiously indoctrinate social service recipients. In mid-November, 2004, the federal district court dismissed all of the Initiative-wide claims on the ground that the plaintiffs lacked standing to pursue them. All that remains are claims against two particular grants, made by the Department of Health and Human Services. After the district court disposes of those claims, the plaintiffs may appeal the dismissal of the broad claims against the Initiative as a whole.

B. Cases Awaiting Decision

1. Lown (and others) v. The Salvation Army. Inc.; Commissioner, New York City Administration for Children's Services (and others). This lawsuit, awaiting decision in the U.S. District Court for the Southern District of New York, raises vital questions about the extent to which the civil rights laws or the Constitution may preclude government financing of faith-based organizations that prefer co-religionists in their employment practices. Current and former employees of the Salvation Army brought the suit against the Army, and officials of state and local government agencies that finance social services provided by the Army. The suit alleges that the Army has begun re-emphasizing Christian commitments among its service employees, and that such an emphasis with respect to publicly-supported employees violates state civil rights laws, the New York Constitution, and the Establishment Clause of the federal constitution. The defendants have asked

the court to dismiss the complaint as legally insufficient. The case has been fully briefed, and a decision is expected at any time.

2. Americans United for Separation of Church & State v. Warden Terry Mapes, Prison Fellowship Ministries (and others). This lawsuit, filed in the U.S. District Court for the Southern District of Iowa, challenges the constitutionality of government involvement with an evangelical Christian program, which uses religious means to prepare prisoners to return to society as productive and law abiding citizens. The program claims to have been quite successful in Iowa, Texas, and elsewhere. The allegations of the complaint, however, paint a picture of a program in which the state financially supports religious training, allows significant privileges to participants as compared to other inmates, and generally enmeshes itself in the religious training of inmates. Both sides have moved for summary judgment in the case, and a decision by the district court is expected at any time.

II. DEVELOPMENTS IN THE EXECUTIVE BRANCH

On June 1, 2004, President Bush issued executive order 13342, which created centers for the Faith-Based and Community Initiative in the Departments of Commerce and Veterans Affairs and the Small Business Administration. During 2004, the Administration promulgated new rules governing the participation of faith-based providers (FBOs) in federally funded social welfare programs. These new rules cover programs in the Departments of Agriculture, Education, Health & Human Services, Housing & Urban Development, Labor, and Veterans Affairs, along with the Agency for International Development and the Corporation for National and Community Service.

A. Core Components of the Faith-Based and Community Initiative

The new rules, like those promulgated in 2003, implement eight core elements of the Faith-Based Initiative:

- Equal opportunity for FBOs to participate in federally funded social welfare programs;
- Protections for the religious character of participating FBOs;
- Preservation of FBOs' exemption under Title VII of the Civil Rights Act of 1964, which permits such entities to prefer co-religionists in hiring decisions without violating federal anti-discrimination law;
- Limitations on the direct financing of "inherently religious activities;"
- Limitations on the use of government funds to acquire, construct, or rehabilitate structures "to the extent that those structures are used for inherently religious activities";

- Prohibition on requirements that FBOs provide special assurances of non-religious use of government funds;
- Permission to intertwine religious and secular activities in programs using methods of indirect financing, such as vouchers, in which beneficiaries have control over the disposition of payment for services; and
- Protections for the religious liberty of service beneficiaries.

B. New Components Introduced in 2004

Rules promulgated in 2004 introduce two new elements to the core features of the Faith-Based and Community Initiative.

- In rules that apply the elements of the Initiative across all programs of their respective agencies, the Departments of Health & Human Services, Housing & Urban Development, and Labor each assert that the principle of neutrality between religious and non-religious social welfare providers does not prohibit "those administering Department-funded programs from accommodating religious organizations in a manner consistent with the Establishment Clause."
- New rules promulgated by the Department of Labor and the Agency for International Development provide that the general prohibition on the use of direct government funds for "inherently religious activity" may not apply to situations in which the government exercises a significant degree of control over the lives of program beneficiaries, such as where individuals are incarcerated or placed in remote Job Corps settings.

C. Analysis

The substance of these new rules governing FBOs is largely unchanged from that of the rules promulgated in 2003, and the concerns we raised in last year's State of the Law Report apply with equal force to the new rules. In the 2003 Report, we identified three areas of particular concern:

- The new rules, and especially the agencies' responses to comments on proposed rules, are insufficiently clear about the right of FBOs to prefer co-religionists in hiring decisions. While the rules operate only to preserve FBOs' exemption from federal anti-discrimination law, the wording of the rules, and agency explanations of them, seem to suggest that the rules preempt inconsistent state and local law, which may not exempt FBOs from religion-based employment discrimination. That suggestion is legally incorrect.
- The Administration's instruction that direct government funds may not be used for "inherently religious activities" is too narrow. As we stated in

last year's report: "the Constitution does prohibit direct financing of 'inherently religious activities,' but also prohibits direct financing of activities with intensely religious content, even if those activities are not 'inherently religious.'"

- The Administration claims that government funds may not be used to acquire, construct, or rehabilitate structures "to the extent that those structures are used for inherently religious activities," but that the government may pay for structures used for both religious and program activities, if the funding does not exceed "the portion attributable to eligible activities." This rule of apportionment between religious and non-religious activities is not supported under the current law of the Constitution's Establishment Clause.

This report reiterates our concerns about those elements of the Faith-Based and Community Initiative, and also raises questions about one of the new components of the Initiative introduced in 2004, which focuses on services provided to individuals who are under significant governmental control. Although the government may be obligated or permitted to facilitate the free exercise of religion of those whose lives are under significant control, the Establishment Clause's limitations on government spending nevertheless remain significant in such contexts.

D. Specific New Rules by Agency

New rules issued by the Department of Education and that of Housing and Urban Development apply the core elements of the Faith-Based and Community Initiative across all programs in those agencies. Rules issued in 2004 by the Department of Veterans Affairs (VA) and the Corporation for National and Community Service (CNCS) apply these same core elements to selected programs: to the VA's Homeless Providers Grant and Per Diem Program and to Senior Companions, Foster Grandparents, and the Senior Volunteer Programs administered by CNCS.

Distinctive elements were also present in a number of new agency rules:

- **Department of Agriculture (USDA).** The new rules from USDA apply the core elements of the Faith-Based and Community Initiative to all programs that receive USDA assistance. The rules make only one notable departure from the core elements: the rules permit religious schools that receive assistance under the School Lunch Act or the Child Nutrition Act to require all students, including beneficiaries under those nutrition programs, to participate in religious worship and instruction.
- **Department of Health & Human Services (HHS).** The new rules apply to all HHS programs except those governed by Charitable Choice regulations – that is, except those programs falling under the Community

Services Block Grant (CSBG), Temporary Aid to Needy Families (TANF), and substance abuse treatment programs funded by the Substance Abuse and Mental Health Services Administration (SAMHSA). Rules governing TANF and SAMHSA programs confer on beneficiaries a right to receive services from non-religious providers, and impose on providers a duty to inform beneficiaries of that right. The new HHS rules neither provide such a right to beneficiaries nor impose such a duty on participating FBOs.

- **Department of Labor (DOL).** During 2004, DOL issued final rules covering three facets of its programs. The first applies the core elements of the Initiative to all programs funded by DOL. The second clarifies that Individual Training Accounts (ITAs) created under the Workforce Investment Act (WIA) should be treated as indirect financing, thus permitting beneficiaries to engage in a wider range of training activities, including those that are specifically religious. The third set revises prior regulations under WIA, which had prohibited beneficiaries from receiving program funds while being employed or trained in "the construction, operation, or maintenance" of a religious facility. The new rules – following closely the WIA statutory language – permit employment or training in maintenance of structures used for religious purposes, but only "to the extent that the facility is not primarily or inherently devoted to religious instruction or religious worship."
- **Agency for International Development (USAID).** The new rules apply the core elements of the Initiative to all USAID programs. The USAID rules deserve special attention because they provide that "the Secretary of State may waive the requirements" of the rules, if "the Secretary determines that such waiver is necessary to further the national security or foreign policy interests of the United States." This waiver provision raises the question of whether the restrictions imposed by the Constitution's Establishment Clause apply to expenditures of government funds outside the United States.

III. STATE CONSTITUTIONAL LAW

The U.S. Supreme Court's decision in *Locke v. Davey* has left room for institutions of state government, including state courts, to rely on their own constitutional prohibitions to exclude religious organizations from various sources of state support. A decision of an intermediate appellate court in Florida, invalidating that state's school voucher program on the grounds that all aid (direct or indirect) violated Florida's Blaine Amendment, is the best recent evidence of the continued vitality of the Blaine Amendments, found in many states. The Florida decision (*Bush v. Holmes*) has now been certified for appeal to the Florida Supreme Court.

INTRODUCTION

For the past several years, we have prepared annual reports on the state of the law concerning partnerships, for delivery of social services, between government and faith-based organizations. The principal focus of our initial Report, published in 2002, was the evolution of legal norms that formed the backdrop for the Faith-Based and Community Initiative.[2] That document, which touched on state as well as federal law, discussed the constitutional and statutory framework within which we expected the Initiative to unfold. Our second Report,[3] published in late 2003, concentrated on the blossoming of the Initiative, especially within the Executive Branch. That Report documented a variety of recent legal developments in the field, including Executive Orders of the President, a set of path-breaking rulings and policies from a variety of federal agencies, and several highly significant judicial cases and decisions.

This year, the courts have returned to center stage and have taken up the central question at the heart of the relationship between church and state: whether religious groups should be awarded government support on the same basis as other social service providers, or should be treated as constitutionally distinctive.

This year, the courts have returned to center stage. Led by the Supreme Court's decision in *Locke v. Davey*, the courts have rendered, or have been invited by litigants to render, a series of decisions which will powerfully shape the field. As we appraise the situation, the central motif in this year's decisions is one that has long been at the heart of the conversation about the relationship between religion and state. Put most simply and directly, the question raised again and again by the Faith-Based and Community Initiative is that of religious distinctiveness. The President's Initiative rests on a strong premise of nondistinctiveness – that is, that faith-based organizations are entitled to compete for and win government grants and contracts on the same basis and terms as comparable secular organizations. The principal constitutional arguments against the Initiative rest on a contrary premise – that is, that faith-based organizations are constitutionally unique, and that such organizations must therefore be disqualified in their competition for grants and contracts to perform government service, or limited in the faith-based activities in which they can engage if they are operating with government financial support. In the cases of importance this year, canvassed in Part I below, these competing visions are recurrently present.

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[2] Ira C. Lupu & Robert W. Tuttle, Government Partnerships with Faith-Based Service Providers: The State of the Law, December, 2002 (hereafter cited as "2002 Report") (Roundtable on Religion and Social Welfare Policy, Nelson A. Rockefeller Institute of Government).

[3] Ira C. Lupu & Robert W. Tuttle, The State of the Law 2003: Developments in the Law Concerning Government Partnerships with Government Organizations) (hereafter cited as "2003 Report") (Roundtable on Religion and Social Welfare Policy, Nelson A. Rockefeller Institute of Government).

Developments in the Faith-Based and Community Initiative have not been limited to the courts. The Executive Branch, under the coordination of the White House Office of Faith-Based and Community Initiatives ("WHOFBCI"), has continued the project begun in 2001, and implemented energetically in 2003, of revising federal agency regulations to reflect the Initiative's policy concerns. Accordingly, we analyze in Part II below a variety of the regulatory efforts that came to fruition in 2004. Some of these efforts represent nothing more than repetition of pre-existing regulatory formulations in new agency contexts, but others – most notably the regulations promulgated by the U.S. Agency for International Development – involve issues that the WHOFBCI has not heretofore confronted.

Finally, in Part III, we update prior developments in state constitutional law, with particular emphasis on the Florida school voucher case (*Bush v. Holmes*).

I. DEVELOPMENTS IN THE JUDICIAL BRANCH

A. Significant Judicial Decisions

1. Locke v. Davey[4]

In a decision whose timing and contents came as a surprise to many observers, the Supreme Court ruled on February 25, 2004 in *Locke v. Davey* that Washington State did not violate the federal constitution by excluding students majoring in theology from a state-financed scholarship program. The 7-2 decision, authored by the Chief Justice, rejected Mr. Davey's argument that the Free Exercise Clause of the First Amendment required states to treat students pursuing religious studies as equally entitled to the state's financial support as those engaged in secular courses of study. Had the Court accepted Mr. Davey's contention, as the Court of Appeals had in deciding his case, the consequences would have been dramatic – states would have been barred from excluding religious providers from all government-financed services in which the state utilized private secular providers.

The Supreme Court in *Locke v. Davey* affirmed authority of the states to separate themselves from religious activity more than the federal constitution's Establishment Clause requires.

Instead, the Court affirmed the authority of the states to separate themselves from religious activity more than the federal constitution's Establishment Clause requires. The large questions remaining in the wake of *Locke v. Davey* concern the precise scope of that authority. In the answers to those questions reside significant implications for the school voucher movement and the President's Faith-Based and Community Initiative.

a. Description

Locke v. Davey arose out of a decision by Washington State to exclude students majoring in theology from the benefits of its Promise Scholarship Program. (The Program did not generally exclude students enrolled at religiously affiliated schools.) The Program paid tuition benefits for two years of higher education to low- and middle-income residents of Washington who attended accredited schools in the state. The State justified its exclusion of theology majors by reference to Article I, section 11 of Washington's constitution, which provides in part that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."

[4] 540 U.S. 712, 124 S. Ct. 1307 (2004).

Joshua Davey attended Northwest College, a school affiliated with the Assemblies of God, where he had declared a double major in Business Administration and Pastoral Ministries. Northwest treated the degree in Pastoral Ministries as a theology degree, and declared Davey ineligible for the Promise Scholarship.

Davey argued that the exclusion of theology majors from the Scholarship Program violated the Free Exercise Clause and the Free Speech Clause of the First Amendment. Washington State's defense was based on its own Constitution; that compliance with the State's constitutional policy of financial separation from religious activity was justification for the state's policy.

Davey brought suit against Washington State officials in federal court, arguing that the exclusion of theology majors from the Scholarship Program violated the Free Exercise Clause and the Free Speech Clause of the First Amendment.[5] The U.S. District Court rejected his claim, but the U.S. Court of Appeals for the 9th Circuit ruled in Mr. Davey's favor. The Court of Appeals held that because the program excluded only theology majors at religious schools, the program discriminated against the study of religion, and therefore burdened students' federal right to freely exercise religion. The court rejected Washington State's defense based on its own Constitution; the court reasoned that compliance with the State's own constitutional policy of financial separation from religious activity was an insufficient justification for the state's policy.

The State successfully petitioned the Supreme Court to hear the case. It was argued on December 2, 2003, and on February 25, the Supreme Court reversed the Circuit Court of Appeals and ruled in favor of Washington State. The Chief Justice's opinion, in which all but Justices Scalia and Thomas joined, invoked broad themes yet reached a seemingly narrow conclusion in the State's favor. The opinion first analyzes the magnitude of Mr. Davey's constitutional interest in obtaining state funds for pursuing a degree in pastoral ministries. The Court compares Mr. Davey's complaint of discrimination to other, prior cases in which the Court had upheld claims under the Free Exercise Clause, and concludes that his claim is far weaker than those which had prevailed in the past. As the Court characterizes it, Mr. Davey's claim is that "[t]he State has merely chosen not to fund a distinct category of instruction."

By contrast, the Court majority found that the State had a substantial interest in refraining from the use of taxpayer funds to support the education designed to prepare students for the clergy. The Court cited venerable episodes in American church-state history, including the famous and successful fight by James Madison against a proposed state tax assessment to pay the salaries of Christian teachers. Beginning in the late 18th century, many states have placed in their own constitutions provisions outlawing the use of tax revenues

[5] He also argued that the exclusion violated the Equal Protection Clause and the Establishment Clause of the federal constitution, but those claims played no real part in the disposition of his case.

for support of religious ministries and places of worship. In light of that history, the Court concluded that Washington State remained free to choose not to support programs of religious instruction. Such an exclusion represents longstanding nonestablishment values, not animosity towards religion.

b. Analysis

(1) The Free Exercise of Religion and Nondiscrimination

Davey will prove significant for what it refused to hold. Mr. Davey's claim based on free exercise of religion was closely akin to that advanced by the supporters of the Faith-Based and Community Initiative – that religion is entitled to a "level playing field," on which religious providers and activities are constitutionally entitled to the identical opportunities to share in government-financed programs as their secular counterparts. That is, Mr. Davey argued that the state should not be free to treat theology majors as distinctive under state law. Moreover, for the past twenty years, the law of the First Amendment's Establishment Clause has been moving in the direction of this level playing field. The Supreme Court's decision in *Zelman*, the Cleveland school voucher case (2002), upheld a program of school choice that included religious schools offering religious instruction as part of their curriculum. Years before, in *Witters v. Washington Dept. of Social Services* (1986), the Court had ruled unanimously that Washington State would not violate the federal constitution's Establishment Clause if the State included, within a different program, a blind student who wished to use a state tuition grant to study for a career in religious ministry. There was thus absolutely no question under *federal* constitutional law about Washington's authority to include theology majors in the Promise Scholarship Program.

Davey's claim was closely akin to that advanced by the supporters of the Faith-Based and Community Initiative – that religious providers and activities are constitutionally entitled to the identical opportunities to share in government-financed programs as their secular counterparts.

Mr. Davey was thus asking the Supreme Court to turn the permissive rulings in *Zelman* and *Witters* into a mandate, based on the Free Exercise Clause. This mandate would have required states to include religious instruction along with secular instruction in voucher-financed programs.[6] Had he prevailed,

[6] As the Establishment Clause of the First Amendment is currently construed, religious instruction is constitutionally impermissible in programs financed through grants or contracts running directly from government to religious entities.

every state and federal program that relied on secular, private service providers would have been constitutionally obligated to be open to religious providers. Such a ruling would have forced a significant change in the benefit-distribution philosophy of many states, and the Court refused to interpret the Free Exercise Clause to impose such a mandate on the facts of this case. (Whether, in a different case, the federal constitution might lead to such a mandate is a question that we explore in point 4, below.)

(2) Freedom of Speech and Nondiscrimination

The Court's opinion similarly rejected Mr. Davey's argument that the Scholarship Program was a "public forum" for speech, and that the exclusion of students majoring in theology from the Program therefore constituted unlawful discrimination against speech based on its religious viewpoint. If the Scholarship Program had been deemed such a forum, Mr. Davey's argument might have succeeded. In a series of prior rulings going back to the early 1980's, the Court had held time and again that the state may not exclude speech from such a forum on the ground of its religious content or perspective. Most of those earlier decisions had involved the state provision of meeting space, but at least one of them had involved the provision of money – in particular, the payment of printing costs for student journals at the University of Virginia, which the Court ruled could not exclude from a general program of subsidies a journal written from a religious perspective. (*Rosenberger v. University of Virginia*, 1995) Ever since the Court's *Zelman* decision, supporters of voucher programs had been arguing that such programs were "public fora," and that the *Rosenberger* principle applied to such programs in full force. If this were correct, it would constitute a separate ground for a judicial holding that religious providers could not be excluded from a program designed to use private entities to deliver state services.

The Court rejected Davey's argument that the Scholarship was a "public forum" for speech, and that the exclusion of students majoring in theology therefore constituted unlawful discrimination against speech based on its religious viewpoint.

The opinion in *Locke v. Davey* explicitly repudiates the notion that voucher financing of education constitutes a public forum. In a crucial footnote, the Court cursorily dismisses the application of this theory to the Promise Scholarship Program:

> *Davey, relying on Rosenberger . . ., contends that the Promise Scholarship Program is an unconstitutional viewpoint restriction on speech. But the Promise Scholarship Program is not a forum for speech. The purpose of the . . . Program is to assist students from low- and middle-income families with the cost of post-secondary education, not to 'encourage a diversity of views from private speakers.' [citation*

omitted] Our cases dealing with speech forums are simply inapplicable [citation omitted].[7]

In so repudiating the applicability to voucher programs of the Court's decisions on the right of religious speakers to obtain equal access to public forums for speech, *Locke v. Davey* rejects a constitutional argument that supporters of the school voucher movement and the Faith-Based and Community Initiative have been advancing aggressively over the past several years. Had that argument succeeded in this case, the Court's repudiation of Mr. Davey's argument based on the Free Exercise Clause would have been irrelevant, although questions would have remained in the future as to whether any particular voucher-financed program should be deemed a public forum. Mr. Davey's case, which involved a choice of educational programs rather than more conventional social services like job training, was probably the strongest possible test case for the theory of the public forum that he unsuccessfully advanced. If the Scholarship Program is not such a forum, it is unimaginable that a court would hold that a program for job training or substance abuse constitutes such a forum. After *Davey*, the argument that the Free Speech Clause of the First Amendment requires equal access for faith-based providers to state financed service programs is effectively dead.

After *Davey*, the argument that the Free Speech Clause of the First Amendment requires equal access for faith-based providers to state financed service programs is effectively dead.

(3) The Blaine Amendments

Locke v. Davey had been billed – erroneously, as it turned out – as a case about the constitutionality of Blaine Amendments, a species of state constitutional provision that appeared in the late 19th century.[8] Blaine Amendments take a variety of forms, typically requiring the state to have public schools that are free of sectarian control, or to refrain from assisting private schools that are controlled by religious denominations. Washington State's Blaine Amendment is found in Art. IX, section 4 of its Constitution, and reads as follows: "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control." Several groups had filed "friend of the Court" briefs on Davey's behalf, arguing that Washington's Blaine Amendment was tainted by anti-Catholic prejudice and that the state's nonestablishment principles should therefore be constitutionally repudiated.

[7] *Locke v. Davey*, 124 S. Ct. 1307, 1312.

[8] For more on the origins of Blaine Amendments, and the ongoing debate about whether they have an anti-Catholic character, see our prior write-up on *Locke v. Davey*, 2003 Report at 53-65.

The dispute in *Davey*, however, had nothing whatsoever to do with Article IX, section 4 of the Washington Constitution. Rather, as noted above, the State defended the exclusion from the scholarship program of students majoring in theology by reference to Article I, section 11, which prohibits state financial support of "religious worship, exercise, or instruction." Article I, section 11 is entitled "Religious Freedom," and includes a guarantee of '[a]bsolute freedom of conscience in all matters of religious sentiment, belief, and worship."[9]

As the Court saw the matter, "the Blaine Amendment's history is simply not before us." The issues attached to Blaine Amendments, therefore, remain open for resolution in other cases.

As the Court saw the matter, neither Davey nor those who filed "friend of the Court" briefs on his behalf had "established a credible connection between the Blaine Amendment [Art. IX, sec. 4] and Article I, section 11, the relevant constitutional provision. Accordingly, the Blaine Amendment's history is simply not before us."[10]

The issues attached to Blaine Amendments, therefore, remain open for resolution in other cases. For now, the best candidate on the horizon for such a resolution may be the ongoing dispute in the state courts of Florida about the constitutionality of that state's school voucher program. As we discuss in part IV below, in August of this year an intermediate state Court of Appeal in Florida affirmed a lower court ruling that the state's Blaine Amendment prohibited implementation of Florida's school voucher plan.[11] If the Florida Supreme Court affirms these lower court rulings, we can imagine a petition to the U.S. Supreme Court by disappointed parents or religious schools, in which it is asserted that the Florida constitutional provision originated from anti-Catholic animus and is therefore invalid. Be that as it may, the issue of the Blaine Amendments, and the relevance of their history to their present-day constitutionality, remains to be fought out another day.

(4) The Scope of State Authority to Maintain Independent Church-State Policy

Despite the Court's wholesale rejection of Davey's Free Speech argument, and its fact-specific rejection of his Free Exercise Clause argument, 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. This indeed remains the hope of those who supported Mr. Davey, and who now assert that the opinion should be confined to the narrow

[9] Between 20-25 states have constitutional provisions akin to Washington's prohibition on public support for worship. Between 30-35 states have provisions with the character of Blaine Amendments, focused on public support of religious schools. These provisions are collected in Appendix A to our 2002 Report.
[10] *Locke v. Davey*, slip op. at 10, n.7.
[11] *Bush v. Holmes*, 2004 Fla. App. LEXIS 12479 (Court of Appeal of Florida, First District, Aug. 16, 2004).

and historically unique context of training for the ministry. The crucial question in the wake of *Davey* is whether its principle of state discretion over church-state policy extends beyond that core nonestablishment concern. 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? More broadly still, may a state exclude faith-based organizations from state-funded programs even if those organizations are offering secular services only in their publicly funded programs?

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, whether voucher-financed or directly financed.

These questions remain to be litigated in the future, but 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, whether voucher-financed or directly financed. The Court's emphasis 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 principles in the early state constitutions is broader than that. Those principles readily extend to state support for places of worship and the profession of religious creeds, as well as to financial support for religious ministries. Given the breadth of that history and the scope of the relevant constitutional texts, we expect that courts will uphold state discretion to exclude educational or social service programs that involve worship or religious teaching.[12] If we are right about this, *Locke v. Davey* will have legitimated, rather than eliminated, that discretion. To that extent, the

[12] For an important commentary on *Locke v. Davey*, see Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev 155 (2004). For a very recent decision that is consistent with our prediction about the impact of *Locke v. Davey*, see Eulitt v. State of Maine, decided on October 22, 2004 by the U.S. Court of Appeals for the First Circuit. In Eulitt, the First Circuit considered Maine's system of paying for students to attend non-public schools. State law permits school districts to pay private nonsectarian schools to educate children enrolled in the public school system, but specifically prohibits such districts to make such tuition payments to private sectarian schools. Parents of students who attend religious schools sought tuition payments for their children, and when the payments were denied, the parents filed suit in federal court, claiming that the policy violated their right to equal protection. Citing *Davey*, the First Circuit upheld Maine's policy of excluding payments to religious schools; the court found such a policy to be within the state's prerogative to establish more restrictive rules of church-state separation. (The opinion can be found at: http://www.ca1.uscourts.gov/pdf.opinions/04-1496-01A.pdf)

decision represents both a lost opportunity and a tangible setback to the Faith-Based and Community Initiative and the school voucher movement.

We also think that an exclusion of all organizations with a 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. Here, we would distinguish between a state policy that precluded houses of worship from participating in state-financed social services, and a broader policy of excluding all organizations with a religious character of any kind. The former might be justified as a matter of state constitutional law by the state's concern about policing the boundary between secular and religious activity within a house of worship. Such an anti-entanglement policy is consistent with historic church-state norms, even if it is no longer required by the First Amendment.

We suggest a distinction between exclusion from state programs of all entities with a religious character, which we believe to be constitutionally questionable, and exclusion of entities which engage in religious worship or instruction, which we believe to be constitutionally valid. After *Locke v. Davey*, such exclusions of faith-intensive providers are significantly more likely than before to survive federal constitutional challenge.

We expect that courts would draw the line, however, at a policy of exclusion that extended to separate affiliates, created to provide social service, of houses of worship. The state could only justify such a broad exclusion by asserting that it feared that such entities would engage deceitfully in forbidden religious activity with state money, or by relying on a broader constitutional barrier, like those in the Blaine Amendments. Courts might well find a policy borne solely of mistrust of religious entities to be constitutionally unreasonable, and, for reasons described above, the Blaine Amendments remain open to constitutional doubts.

We are thus suggesting a distinction between exclusion from state programs of all entities with a religious character, which we believe to be constitutionally questionable, and exclusion of entities which engage in religious worship or instruction, which we believe to be constitutionally valid. Under the current law, this distinction matters most in programs of indirect financing, in which religious teaching is allowed. In programs financed directly by the state, the First Amendment already prohibits such teaching. The significance of *Locke v. Davey*, at least for now, is primarily attached to programs financed through beneficiary choice. These include school voucher programs, as well as the President's plan to provide money to the states to support voucher-financed treatment for substance abuse. Some states will permit faith-intensive providers to participate in such programs, but others, citing their own constitutions, will not. After *Locke v. Davey*, such exclusions of faith-intensive providers are significantly more likely than before to survive federal constitutional challenge.

2. American Jewish Congress v. Corporation for National and Community Service[13]

On July 2, 2004, Judge Gladys Kessler of the United States District Court for the District of Columbia ruled that the AmeriCorps Education Award Program (EAP), administered by the Corporation for National and Community Service (CNCS) violated the Establishment Clause in two distinct ways – by providing education awards to teachers who serve in religious schools, and by making grants to the religious organizations that oversee such teachers. The American Jewish Congress, which brought the constitutional challenge, alleged that the CNCS allowed the teachers to teach both secular and religious subjects, which too closely linked the government with the school's religious mission. Moreover, the AJC alleged that the CNCS did not require the religious organizations responsible for selecting and training the teachers to segregate CNCS funds from the organizations' other funds; at least part of this mixed pool of funds was used for religious instruction and worship.

The United States District Court for the District of Columbia ruled that the AmeriCorps Education Award Program violated the Establishment Clause by providing education awards to teachers who serve in religious schools, and by making grants to the religious organizations that oversee such teachers.

The case raises two constitutional questions of great importance for the Faith-Based and Community Initiative. First, under what conditions will a method of public finance be deemed "indirect," and thus permit the organization receiving the funds to intermingle religious and secular services? Second, when may an individual whose position is financed by the government, and who performs secular services in that position, also perform religious functions in a role closely connected to the government-funded position? Judge Kessler answered these two questions in ways that impose much greater restrictions on public financing of religious organizations than those found in current federal policies. Judge Kessler's orders in the case have been stayed, pending the resolution of an expedited appeal to the U.S. Court of Appeals for the District of Columbia Circuit. The appeal will be argued on January 14, 2005.

a. Description

Under the AmeriCorps EAP, individuals who perform 1700 hours of service in a qualified AmeriCorps program receive an award of $4725, which may be

[13] 323 F. Supp, 2d 44 (D.D.C. 2004), 2004 U.S. Dist. LEXIS 12400.

used to pay the participant's student loans or the cost of future education.[14] The EAP is administered by the Corporation for National and Community Service (CNCS), which selects a wide range of entities – state and local governments, colleges and universities, along with secular and religious non-profits – to recruit, train, place, and supervise the individual AmeriCorps participants. Such entities (the "grantees") receive grants from CNCS of $400 for each participant for whom they are responsible.

The case raises two constitutional questions of great importance: under what conditions will a method of public finance be deemed "indirect," and thus permit the organization receiving the funds to intermingle religious and secular services? When may an individual whose position is financed by the government, and who performs secular services in that position, also perform religious functions in a role closely connected to the government-funded position?

In this lawsuit, the American Jewish Congress (AJC) raised constitutional challenges to the terms under which some EAP participants have performed their AmeriCorps service as teachers in religious primary and secondary schools. The AJC also challenged the CNCS's payments to and supervision of the grantees that were responsible for placing those EAP participants in religious schools.[15]

The EAP's applicable statute and regulations provide a number of restrictions that are relevant to the issues raised by the AJC lawsuit.[16] The statute and regulations prohibit the use of CNCS grant funds "to provide religious instruction, conduct worship services, or engage in any form of proselytization."[17] The statute contains a strict prohibition on religion-based discrimination, which applies to all EAP grantees. That prohibition reads as follows:

> *[A]n individual with responsibility for the operation of a project that receives assistance under this subchapter shall not discriminate on the basis of religion against a participant in such project or a member of the staff of such project who is paid with funds received under this subchapter.*[18]

Thus, under the terms of the statute, a grantee could select neither its employees nor its EAP participants on the basis of religion.[19]

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[14] The hours are counted within a nine- to twelve-month period. Participants may use their award to repay educational loans or for future college or vocational training, and may earn no more than two awards.

[15] One of these EAP grantees, the University of Notre Dame's Alliance for Catholic Education, joined the CNCS as a defendant in this lawsuit.

[16] The EAP is authorized under the National and Community Service Act; the material provisions can be found at 42 U.S.C. §§ 12571-12604, 12631-12644.

[17] 42 U.S.C. § 12634(a).

[18] Id at § 12645(c)(1). This provision does create an exception for employees who were already employed by the grantee at the time of the grant. Id. at § 12645(c)(2).

[19] The record in the lawsuit shows that at least some of the EAP grantees selected participants for their program based on religious beliefs or membership in a religious community. Such selectivity would appear to violate the statute.

The statute also specifies that certain types of service by EAP participants cannot be counted toward the 1700 hours required to earn the education award. According to the statute, EAP grantees must ensure that:

> *[A]ny approved national service position provided to an applicant will not be used to perform service that provides a direct benefit to any--*
>
> .....
>
> *(4) organization engaged in religious activities, unless such service does not involve the use of . . . participants--*
> *(A) to give religious instruction;*
> *(B) to conduct worship services;*
> *(C) to provide instruction as part of a program that includes mandatory religious education or worship;*
> *(D) to construct or operate facilities devoted to religious instruction or worship or to maintain facilities primarily or inherently devoted to religious instruction or worship; or*
> *(E) to engage in any form of proselytization;*[20]

The prohibition found in (4)(C), above, bars AmeriCorps EAP participants from earning qualifying hours by teaching in any school that has "mandatory religious education or worship," even if the participant teaches purely secular subjects. Given that this lawsuit involves allegations of constitutional violations arising out of EAP participants' teaching in religious schools, one might reasonably assume that this statutory prohibition would be important to the suit's disposition. For reasons that remain unclear, however, neither the AJC, the CNCS, nor the court addressed this provision.

The government has appealed (on an expedited basis) Judge Kessler's decision, and she has stayed her orders pending the outcome of that appeal. The appellate court (U.S. Court of Appeals for the District of Columbia) might conclude that at least some of the practices challenged on constitutional grounds are violations of the statute. Such a conclusion would allow the appellate court to determine that the district court did not need to decide the constitutional questions raised by the case, and would thus limit any broader impact that decision might have on other government programs, including those related to the Faith-Based and Community Initiative.

The appellate court might conclude that the district court did not need to decide the constitutional questions raised by the case, and would thus limit any broader impact that decision might have on other government programs, including those related to the Faith-Based and Community Initiative.

[20] Id. at § 12584.

Much of the AJC's challenge involves changes to the EAP regulations made by CNCS in 2002. Prior to the 2002 changes, AmeriCorps had fairly broad standards for determining the set of activities in which EAP participants may not engage:

A 2002 rule change by CNCS made possible a practice at the heart of this controversy: EAP participants serving in religious schools are now permitted to lead students in prayer and to teach religious education classes, so long as the participants do not count toward their award the time spent leading worship or teaching religion. The suit claims that CNCS and its grantees have failed to develop adequate systems of oversight necessary to avoid implicating the government in unconstitutional support for religious indoctrination, and that CNCS is implicitly endorsing the religious messages conveyed by the participants.

§ 2520.30 -- Are there any activities that are prohibited?
Yes. Some activities are prohibited altogether. Although all prohibited activities may be performed voluntarily by participants on their own time, they may not be performed by participants in the course of their duties, at the request of program staff, or in a manner that would associate the activities with the AmeriCorps program or the Corporation. These activities include:
.....
(f) Engaging in religious instruction, conducting worship services, providing instruction as part of a program that includes mandatory religious instruction or worship, constructing or operating facilities devoted to religious instruction or worship, maintaining facilities primarily or inherently devoted to religious instruction or worship, or engaging in any form of religious proselytization;...[21]

In 2002, CNCS revised that regulation to read as follows:

§ 2520.30 What activities are prohibited in AmeriCorps subtitle C programs?
(a) While charging time to the AmeriCorps program, accumulating service or training hours, or otherwise performing activities supported by the AmeriCorps program or the Corporation, staff and members may not engage in the following activities:
.....
(7) Engaging in religious instruction, conducting worship services, providing instruction as part of a program that includes mandatory religious instruction or worship, constructing or operating facilities devoted to religious instruction or worship, maintaining facilities primarily or inherently devoted to religious instruction or worship, or engaging in any form of religious proselytization;[22]

Contrast the italicized portion of the pre-2002 regulation with the present version. Both versions recognize that the EAP's limitations should not apply to participants' use of their time outside of work. The current version

[21] 45 CFR § 2520.30 (before amendment in 2002), found at 57 Fed. Reg. 13794 (1994) (emphasis added).
[22] 45 CFR § 2520.30 (present version).

eliminates the earlier rule's concern with more ambiguous situations, in which the AmeriCorps participant is not "charging time" to the EAP, yet her activities nonetheless might be reasonably attributed to the program. The current version applies the statute's restrictions only to those contexts in which the EAP participant is, in fact, counting hours toward her education award.

The AJC and the CNCS agree that the rule change made possible a practice at the heart of this controversy: EAP participants serving in religious schools are now permitted to lead students in prayer and to teach religious education classes, so long as the participants do not count toward their award the time spent leading worship or teaching religion. The AJC and the CNCS differ, however, in their interpretation of that practice. The AJC alleges that the practice violates the Establishment Clause in two ways. First, the AJC claims that the CNCS and its grantees have failed to develop adequate systems of oversight to ensure that participants count only secular teaching hours, and such systems are necessary in order to avoid implicating the government in unconstitutional support for religious indoctrination. Second, the AJC claims that by allowing EAP participants to teach religion in the same schools in which the participants serve as publicly-identified representatives of AmeriCorps, the CNCS is implicitly endorsing the religious messages conveyed by the participants. In contrast, the CNCS claims that the 2002 revisions recognize and protect participants' constitutional rights – under the Free Speech and Free Exercise Clauses – to engage in religious activity on their "free time," defined as any time that the participants are not counting toward their award.

b. Analysis

Our analysis of the case and Judge Kessler's decision focuses separately on the two funding streams at issue, because each raises distinct constitutional questions. We turn first to the administrative allocation of $400 paid to grantees for each of that grantee's participants, and then to the education award paid to the individual participants. After discussing the two funding streams, we briefly examine the government's claim that its policies were driven, at least in part, by a concern about protecting the religious liberty of EAP participants.

CNCS argued that its administrative support for EAP grantees should be treated as indirect funding. Thus, grantees would have no obligation to segregate the secular portions of their programs from the religious parts, or to ensure that public funds are spent only for the secular portions.

(1) The EAP Grantees

The CNCS provides EAP grantees up to $400 for each of that grantee's participants, "to assist with program management costs." CNCS "does not require grantees to account for the uses of these funds, . . . [because] the legitimate needs of administering the program, at the grantee level and below, are expected to exceed the amount of the $400 grants."[23] The court found that several of the EAP grantees, including Notre Dame's Alliance for Catholic Education (ACE), train their participants using programs in which secular and religious elements are intertwined. Participants in these programs are required to participate in religious activities; in at least one of the programs, that requirement continues through the entire term of the participant's service in the EAP.

The CNCS offered two defenses to its grants for administrative costs. First, the CNCS argued that the administrative grants should be seen as indirect funding for purposes of analysis under the Establishment Clause. The Supreme Court's decision in *Zelman v. Simmons-Harris* sharply distinguishes between programs of indirect and direct funding.[24] Although the Supreme Court's interpretation of the Establishment Clause now permits a wide range of direct public support for religious *institutions*, the Court's most recent decisions nevertheless reiterate that the Establishment Clause prohibits the government from providing direct financial support for specifically religious *activity*, whether the activity is worship or a religiously intensive drug treatment.[25] If, however, the government provides only indirect financial support for religious activity, such as a program that allows students to redeem education vouchers at religious schools, the expenditure will not violate the Establishment Clause. In *Zelman*, the Court held that indirect funding mechanisms operate to distance the government from the student's religious education. As long as the student enjoys "genuine and independent choice" among a range of schools, the government is not responsible for the student's choice of one that is religious.

> The court held that the "grants are 'direct aid' rather than the result of 'private choice' because the grants are paid directly to the faith-based grantees rather than through an intermediary."

Relying on *Zelman*, the CNCS argued that its administrative support for EAP grantees should be treated as indirect funding because the support that each grantee receives depends entirely on EAP participants' decision to enroll with that particular grantee. Thus, the CNCS grantees would have no obligation to segregate the secular portions of their programs from the religious parts, or to ensure that public funds are spent only for the secular portions. Judge Kessler rejected this argument, and held that the "grants are

[23] 323 F. Supp. 2d at 55 (quoting from the testimony of Hank Oltmann, the official responsible for administering the EAP).
[24] 536 U.S. 639 (2002).
[25] See our analysis of *FFRP v. McCallum* (*Faithworks II*) in the 2003 Report at 65-67.

'direct aid' rather than the result of 'private choice' because the grants are paid directly to the faith-based grantees rather than through an intermediary."[26] Judge Kessler cites the concurrence of Justice O'Connor in *Mitchell v. Helms*, a decision in which Justice O'Connor's represents the controlling position in the Court.[27] In *Mitchell*, Justice O'Connor distinguished voucher-financing mechanisms from those that provide aid on a per capita basis. Under a per capita aid program, the beneficiary decides where the money will be spent; once the beneficiary chooses a particular provider, the government sends the funds directly to that provider. A voucher program, Justice O'Connor reasoned, is one in which the beneficiary decides both where and if the voucher will be redeemed. For true "private choice," the beneficiary must be free to reject the government's aid.[28] Because CNCS's administrative grants do not "pass through the hands" of the EAP participants, Justice O'Connor would not deem the grants to be programs of indirect support.

CNCS does have some jurisprudential support for its claim that the administrative grants should be treated as indirect financing. In *Freedom From Religion Foundation v. McCallum*,[29] Judge Richard Posner, writing for the U.S. Court of Appeals for the Seventh Circuit, held that a per capita aid program for substance abuse treatment is functionally – and legally – indistinguishable from voucher financing. Judge Posner wrote:

> *The state in effect gives eligible offenders "vouchers" that they can use to purchase a place in a halfway house, whether the halfway house is "parochial" or secular. We have put "vouchers" in scare quotes because the state has dispensed with the intermediate step by which the recipient of the publicly funded private service hands his voucher to the service provider. But so far as the policy of the establishment clause is concerned, there is no difference between giving the voucher recipient a piece of paper that directs the public agency to pay the service provider and the agency's asking the recipient to indicate his preference and paying the provider whose service he prefers.*[30]

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[26] 323 F. Supp. 2d at 64, n.19.

[27] The *Mitchell* decision, which concerned a variety of forms of federal aid that reached parochial schools, involved a sharply divided Court. Four justices voted to uphold the aid because it treated non-religious and religious schools on equal terms; three justices voted to strike down the aid program because of its support for religious education. Justice O'Connor (writing on behalf of Justice Breyer and herself) concurred in the decision to uphold the aid program, but added an additional requirement to the four justices' principle of neutrality. For Justice O'Connor, a valid program of direct financing must also have reasonable safeguards to protect against diversion of government funds to religious uses. Because Justice O'Connor's opinion rests on the narrower (i.e., more restrictive) ground for upholding the aid program, her opinion represents the governing standard in that decision.

[28] See *Mitchell v. Helms*, 530 U.S. 793, 842-3 (O'Connor, J., concurring in the judgment) (distinguishing per capita and voucher financing mechanisms).

[29] 324 F.3d 880 (7th Cir. 2003). A more detailed discussion of this decision may be found in our 2003 Report, at pp. 65-68.

[30] 324 F.3d at 882.

Judge Posner neither discusses nor cites Justice O'Connor's distinction between per capita and voucher aid programs. The implication of his argument, however, is clear: Judge Posner does not believe that the Establishment Clause analysis turns on the beneficiary's ability to refuse the government's payment to her chosen service provider.[31]

Whether the Establishment Clause analysis turns on the beneficiary's ability to refuse the government's payment to her chosen service provider has practical significance for any program of government funding of faith-based social services.

The difference between Justice O'Connor's and Judge Posner's definitions of indirect financing has practical significance for any program of government funding of faith-based social services. At the very least, a per capita aid program will involve less – and perhaps a great deal less – administrative effort in ensuring that beneficiaries, or those empowered to act on their behalf, follow the necessary steps to claim and redeem their vouchers for services.

The AJC offered, and Judge Kessler accepted, an additional reason for distinguishing CNCS's administrative grants from the voucher financing mechanism sustained in *Zelman*. In *Zelman*, the Court determined that the Cleveland voucher program used a religion-neutral method for deciding which providers are eligible to enroll voucher students. Judge Kessler found, however, that CNCS "uses highly discretionary criteria – as opposed to fixed, objective, measurable criteria – to pick and choose among potentially qualifying AmeriCorps EAP grantees."[32]

On this point, Judge Kessler appeared to misunderstand the analogy to the Cleveland program, because she compared the EAP grantees to the families that received school vouchers.[33] But the EAP grantees are not program beneficiaries. The EAP participants – those who are eligible to receive the education awards – are properly designated as beneficiaries; the EAP grantees should be treated as the service providers, analogous to the non-public schools under the Cleveland voucher program. The court should have compared the CNCS criteria for grantees with the Cleveland program's rules for determining which non-public schools are eligible to receive vouchers. Seen in that light, the CNCS standards for selecting grantees might not be materially different from accreditation standards for schools – or the accreditation standards for the substance abuse treatment providers in *Freedom From Religion Foundation v. McCallum*.

[31] Judge Posner's opinion in *Freedom From Religion Foundation* has become the basis for several federal agencies' decisions to treat what is essentially per capita aid as voucher financing. See, e.g., the Department of Education's notice of final rulemaking, 69 FR 31708, 31713 (quoting Judge Posner on the definition of indirect aid).
[32] 323 F. Supp. 2d at 60.
[33] Id. ("In direct contrast [to CNCS's process for selecting grantees], the government aid program upheld by the Supreme Court in *Zelman* distributed benefits to every family below a stated income level. . .").

Recognizing that the court might not accept its claim that the administrative grants should be treated as indirect financing, the CNCS offered an alternative argument for sustaining the constitutionality of the grants. The CNCS reasoned that grantees inevitably spend far more than the $400 grant on secular administrative costs, so there is no chance that those funds will support religious parts of the grantees' program. As Judge Kessler found, CNCS's alternative argument has virtually no support in the Supreme Court's Establishment Clause jurisprudence. The Court has never sustained a program of direct cash grants to religious entities, under which the government would pay the estimated secular portion of an activity. Indeed, any such program would lack the one feature that Justice O'Connor, in *Mitchell*, deemed constitutionally necessary: reasonably adequate safeguards against diversion of government aid to religious uses.[34]

The Court has never sustained a program of direct cash grants to religious entities, under which the government would pay the estimated secular portion of an activity. If the grants are analyzed under the rules for direct financing of religious entities, then CNCS must require more specific accounting of the grantees' actual use of government funds.

For this reason, the district court in *Freedom From Religion Foundation v. McCallum* rejected the state's claim that religious substance abuse counselors were paid only for the secular portion of their counseling. Estimates of the secular portion of such counseling are virtually impossible to define or monitor. The same would hold true of CNCS's estimate of the secular, administrative, aspects of the EAP grantees' programs. If the grants are analyzed under the rules for direct financing of religious entities, then CNCS must require more specific accounting of the grantees' actual use of government funds.

(2) The EAP Participants

Legal analysis of the AmeriCorps education awards is somewhat more complicated than analysis of the EAP administrative grants. Judge Kessler treated the EAP awards as a program of direct financing, and found that CNCS lacked reasonable safeguards to prevent participants from counting time spent teaching religion as part of their required service for the award. Moreover, Judge Kessler found that CNCS's rule change in 2002, under which participants are now permitted to teach religion or lead worship at their AmeriCorps school site, results in "a total blurring of religious and non-

[34] *Mitchell*, 530 U.S. at 861-864 (O'Connor, J., concurring in the judgment).

religious activities," such that the government can reasonably be held responsible for the participants' involvement in religious instruction.[35]

Compared to the EAP grantees' funding, however, the participants' education awards are harder to distinguish from the voucher programs upheld in *Zelman* or its predecessors, *Witters v. Washington Department of Services for the Blind*, *Mueller v. Allen*, and *Zobrest v. Catalina Foothills School District*. The participants choose from a wide variety of AmeriCorps EAP programs and sites, only some of which are religious.[36] The funding mechanism for participants' education awards conforms to the requirements Justice O'Connor set forth in *Mitchell*. No funds ever "reach the coffers" of the religious schools in which the participants teach; instead, each participant must personally and specifically direct how her award will be used, whether to repay existing student loans or to finance future education.

If the EAP education awards are properly understood as indirect aid, then the court is wrong in its holding that the Establishment Clause requires EAP participants to bifurcate the secular and religious aspects of their work.

If the EAP education awards are properly understood as indirect aid, then the court is wrong in its holding that the Establishment Clause requires EAP participants to bifurcate the secular and religious aspects of their work. In *Zelman*, the Court imposed no such limitations on the use of voucher funds at religious schools. Nor were such limits imposed in *Witters*, *Mueller*, or *Zobrest*. Indeed, if one follows this logic, the Establishment Clause would impose no barrier to an EAP participant performing all of her required hours of service as a teacher of religion. The EAP statute and regulations, of course, forbid participants to count religious teaching toward their service requirement. If, however, the education award constitutes indirect aid, then the EAP's restrictions go beyond the requirements of the Establishment Clause.

Judge Kessler distinguishes the EAP award from *Zelman* by identifying three attributes of the award program – the religious selectivity of several grantees; participants' relative lack of choice among programs and sites; and the religious content of the program.[37] We examine each of these attributes in turn.

[35] 323 F. Supp. 2d at 62.

[36] According to the CNCS's figures for fiscal year 2001, "there were 3200 participants in the Education Awards Program serving as teachers, 565 of whom were teaching in private schools. . . . Of the approximately 1608 elementary and secondary schools in which the participants were teaching, about 328 were religious schools." CNCS Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment, at 7 (Jan. 29, 2004).

[37] *Zelman* requires only an examination of the first two attributes (program neutrality and extent of beneficiary choice); in adding the third requirement, Judge Kessler appears to have collapsed the analysis in *Mitchell*, used to assess programs of direct financing, with *Zelman*'s test for voucher programs.

(a) Religion-Neutral Selection of Beneficiaries

In examining the threshold requirement of neutrality, which applies to both direct and indirect funding mechanisms, Judge Kessler concluded that "[i]t is clear from the record in the instant case that the [CNCS] does not offer aid 'to a broad range of groups or persons without regard to their religion' and therefore does not determine eligibility for government aid neutrally."[38] The court's conclusion seems to reflect a fundamental misunderstanding both of the structure of the EAP, and of the relevant constitutional jurisprudence. As noted above, the court treats the program grantees as beneficiaries, rather than as service providers, which means that the court examines the CNCS's standards for selecting aid providers when it should be examining the relevant standards for selecting AmeriCorps EAP participants. There is nothing in the record to suggest that the AmeriCorps EAP, when taken as a whole, limits its benefits to those having a particular (or any) religious identity. Thus, the EAP should satisfy the threshold requirement of neutrality in distribution of benefits.

The AmeriCorps EAP should satisfy the threshold requirement of neutrality in distribution of benefits. The court did, however, raise a potentially significant question about neutrality when it examined the enrollment practices of specific grantees.

The court did, however, raise a potentially significant question about neutrality when it examined the enrollment practices of specific grantees. The court found, and the CNCS apparently conceded, that some grantees have required participants to hold specific religious beliefs or to engage in specific religious practices as a condition of enrolling in those grantees' AmeriCorps programs.[39] Does the Establishment Clause permit providers of services financed by government vouchers to select beneficiaries of their services on the basis of religious beliefs, or require beneficiaries to participate in religious activities as a condition of receiving the service? In *Zelman*, the Court implicitly answered "yes" to the latter part of that question. Neither the voucher program at issue, nor the Court in its ruling, imposed on participating religious schools a requirement to allow voucher-financed students to "opt out" of religious worship or education. The first part of the question, focusing on discriminatory criteria for receiving the service, has no clear answer because the Cleveland program prohibited religious discrimination in school admissions, and the Supreme Court did not say whether or not the constitution requires such a prohibition.[40]

[38] 323 F. Supp. 2d at 59-60.
[39] As noted above, such discrimination is prohibited by the EAP statute and regulations.
[40] The Department of Labor's recent notice of final rulemaking has brought to the forefront the question of limits the constitution might impose on religion-based discrimination by a service provider under a system of indirect aid. 69

(b) Participants' Choice Among Program Grantees and Sites

Judge Kessler also distinguished the AmeriCorps EAP from the Cleveland voucher program by examining the range of choices available to EAP participants. The court found that "[a]s a matter of Corporation policy, AmeriCorps participants may enroll only in programs that the Corporation has pre-approved. Thus, participants are not free to choose the program for which they will receive government funding."[41] With this definition of choice, however, not one of the programs upheld by the Supreme Court in *Zelman*, *Zobrest*, *Mueller*, or *Witters* would have survived constitutional scrutiny.

If we consider the EAP's neutrality and the extent to which it permits beneficiaries to choose their sites of service, the AmeriCorps EAP undoubtedly meets the Establishment Clause's requirements set forth in *Zelman*.

Every program of voucher financing will have some set of criteria by which service providers are selected.[42] The Cleveland schoolchildren in *Zelman* certainly faced limited options. They could not use their voucher for out-of-state schools, or even, as a practical matter, public schools outside their school district; nor could parents use the vouchers at unaccredited schools within Cleveland. The constitution, then, requires a more limited inquiry: Does the range of choices presented to program beneficiaries provide them with sufficient variety to permit a court to assume that any who chose a religious provider did so not because the government steered them to that experience, but rather because the beneficiary wanted – or was at least willing to accept – the religious experience?

In assessing the extent of beneficiary choice, as with the requirement of neutrality discussed above, the court distinguishes the EAP award from the voucher plan in *Zelman* only by a serious misreading of the Supreme Court's decisions in the indirect aid cases. If we consider only the EAP's neutrality and the extent to which it permits beneficiaries to choose their sites of service, the AmeriCorps EAP undoubtedly meets the Establishment Clause's requirements set forth in *Zelman*.

FR 41882, 41886 (July 12, 2004) (specifying that non-discrimination protections for beneficiaries do not apply to providers of voucher-financed services).

[41] 323 F.Supp. 2d at 61. The court is simply wrong when it restricts the Supreme Court's jurisprudence of indirect financing to cases in which "the private individual had the statutory right to apply the government funding to *any school program of his or her liking*...." Id. at 38 (emphasis added). None of the Court's prior cases imposed such a restrictive definition of beneficiary choice, nor could any of the programs upheld in those cases have survived such a definition.

[42] See generally Lupu and Tuttle, Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers, 18 Journal of Law & Politics 537 (2002).

(c) The Religious Content of Participants' Service

For reasons that are not at all clear, the court adds a third criterion to its analysis, one that belongs not to the indirect aid cases, but to *Mitchell* and other decisions about direct financing of religious entities.[43] Under this third criterion, the court examines the extent to which EAP participants separated their secular from their religious teaching, and the extent to which the CNCS and EAP grantees monitored such a separation. If the EAP awards qualify as indirect aid, however, the demands of separation – and its attendant monitoring – are misplaced. Indirect aid programs are constitutionally distinctive precisely because they do not require separation of secular from religious aspects of a provider's service. CNCS and its grantees may have failed to meet their statutory or regulatory obligations to monitor the separation of secular from religious teaching, but those failures would not be matters of constitutional significance.[44]

In assessing the EAP, the primary concern should be with the participant's religious indoctrination of others, not with her own religious experiences in the program.

We believe that the court's confusion at this point is both understandable and a potential source of considerable insight. The EAP awards for teaching are not perfectly assimilable to the voucher programs upheld by the Supreme Court in *Zelman*, *Zobrest*, *Mueller,* or *Witters*, or even the drug treatment program upheld by the Seventh Circuit in *Freedom From Religion Foundation v. McCallum*. Indeed, the EAP awards have one salient difference: they are a subsidy given to teachers, rather than one provided to students.

As such, the awards bring to mind those programs, involving aid to teachers in religious schools, that the Supreme Court has held unconstitutional. In *Lemon v. Kurtzmann*, the Court struck down a law that paid a salary supplement of 15 percent to "teachers of secular subjects in non-public elementary schools."[45] In *School District of Grand Rapids v. Ball*, the Court held unconstitutional the school district's Community Education program, under which the district employed teachers in non-public schools to teach certain secular courses after their ordinary school day. These teachers became part-time public school employees for purposes of the after school classes, even though the classes were held in the same non-public schools in which they taught full-time, and

[43] 323 F. Supp. 2d at 61-63.

[44] And thus, presumably, the AJC would not have legal standing to challenge the statutory or regulatory shortcomings. Now that the district court has decided the case on constitutional grounds, however, we think that an appellate court would be free to consider statutory or regulatory questions as well.

[45] 403 U.S. 602, 607-08 (1971) (the statute limited such grants to teachers in non-public schools that had per-pupil expenditures below that of public schools, at least partly to show that the additional funds were designed to further the secular educational component of the non-public schools, virtually all of which were religious schools).

the students enrolled in the classes were predominantly students from that same non-public school.[46] Although the Supreme Court's Establishment Clause jurisprudence has shifted dramatically over the past two decades, these aspects of *Lemon* and *Ball* remain good law.

Close attention to *Lemon* and *Ball* helps to identify the reasons that the EAP awards do not fit comfortably into the *Zelman* pattern of voucher financing. Under *Zelman*, the relevant constitutional question is whether the government reasonably should be held responsible for any religious experience that a program beneficiary receives, when such a beneficiary has specifically chosen to receive that service from that provider. In assessing the EAP, however, the primary concern should be with the participant's religious indoctrination of others, not with her own religious experiences in the program. As with *Lemon* and *Ball*, the relevant constitutional question must involve the extent to which the government may reasonably be deemed responsible for the religious instruction and leadership that the EAP participant provides to her students.

We need to look closely at the relationships among CNCS, the EAP participant, the school that employs the participant, and the participant's students.

In order to answer that question, we need to look closely at the relationships among CNCS (and its EAP grantee), the EAP participant, the school that employs the participant, and the participant's students. The participant's relationships with the other three "constituents" are fairly simple. To the participant, the school functions as a normal employer, paying her salary just as it does the salaries of the other teacher-employees, monitoring and evaluating her performance just as it does for the other teachers. Likewise, the participant encounters the CNCS (and its grantee) in a manner not materially different than scores of other AmeriCorps participants, who provide a remarkably diverse array of community services, from health care and teaching to working in a food bank or fighting forest fires. The CNCS (through its grantee) approves the participant's site of work, and certifies that she has completed the requisite hours of service to receive the award. Lastly, the participant has a standard relationship with her students, teaching (and evaluating) them just like her non-AmeriCorps colleagues.

The specific differences arise out of the CNCS's relationship with the religious school and its students. Through the EAP grantees, the CNCS interacts with the religious school in two ways. First, the CNCS (directly or through its grantees) is responsible for establishing the conditions under which the EAP participant can earn an education award in that setting. The award provides the teacher with additional compensation, which in turn helps the

[46] 473 U.S. 373 (1985). The Court in *Ball* struck down an additional program offered by the Grand Rapids school district, the Shared Time program, which brought full-time employees of the school district into non-public schools to provide certain specialized services. In *Agostini v. Felton*, the Supreme Court overruled the part of *Ball* that dealt with the Shared Time program, but it did not reverse the part of *Ball* that dealt with the Community Education program. *Agostini v. Felton*, 521 U.S. 203 (1997).

school to afford the teacher (if one assumes that the school would need to pay a higher salary to attract that person to fill the same teaching position without the EAP award). Under the EAP statute and regulations, the CNCS places conditions on the participant's qualifying service, conditions that might have a direct effect on the religious school's mission. As noted above, the statute prohibits participants from charging toward the award any instructional time that is part of a program in which students are required to participate in religious instruction or worship. At least on their face – and even after the 2002 rule changes – these restrictions have the cumulative effect of distancing the participant from full engagement in the religious mission of the school.

CNCS effectively erased any distinction between the conduct of the participant and that of her fellow teachers. All can be fully involved in the religious life and mission of the school.

At the same time, however, the CNCS requires sites of participants' service to advertise the fact of the participant's involvement in AmeriCorps and the CNCS's involvement in the school and its community. Judge Kessler found that such publicity is an integral part of the EAP. "'AmeriCorps Identity,' i.e., 'the extent to which the provision of AmeriCorps funding is outwardly evident at the site,' is one of the specific items that Corporation personnel look for when they conduct site visits at religious schools."[47]

Taken together, these two aspects of the relationship between the CNCS and the religious school also affect the students of the religious school. The visibility of AmeriCorps images could mark the teacher as distinctive, and a strict interpretation of the EAP statute could highlight this distinctiveness by specifically distancing the participant from the religious mission of the school. The CNCS's relaxation of its rules in 2002, however, suggests the possibility of an impression with quite the opposite significance. By treating any time not charged to the EAP as the participant's "free time" – even if that time comprises a significant portion of her work day at the school – the CNCS effectively erased any distinction between the conduct of the participant and that of her fellow teachers. All can be fully involved in the religious life and mission of the school.

Were we considering a traditional program of voucher financing, the elimination of distinctions between "paying customers" of a religious school and those financed by government vouchers is a feature without constitutional significance. The EAP, however, differs from such a program because the voucher-financed person is the students' teacher, not one among many students, and the program through which the teacher receives her voucher

[47] 323 F.Supp. 2d at 50.

requires that the school publicize the teacher's participation in that government program.

When the government places its official imprimatur on a particular teacher, and then permits that teacher to be fully engaged in the religious mission of the school, one might reasonably believe the government to be endorsing or responsible for the religious messages the teacher conveys.

Given that analysis of the EAP award, as applied to teachers in religious schools, Judge Kessler was correct in rejecting the CNCS's claim that the award program should be treated – and upheld – as a program of indirect aid. Instead, proper scrutiny must return to the question of whether the government, acting through the CNCS, may reasonably be held responsible for participants' teaching and leadership in religious matters. *Lemon* and *Ball* provide relevant precedents for such an analysis, with their focus on the direct involvement of government-supported teachers in the school's full religious mission, and the difficulty of parsing out the religious from the secular aspects of those teachers' roles. Such an analysis also finds a close parallel in Justice O'Connor's concern with the "reasonable observer's" perceptions that the government has endorsed specific religious messages.[48] When the government places its official imprimatur on a particular teacher, and then permits that teacher to be fully engaged in the religious mission of the school, one might reasonably believe the government to be endorsing or responsible for the religious messages the teacher conveys.

(d) Religious Liberty of EAP Participants

In its pleadings, the CNCS asserted that the 2002 rule change, along with the Corporation's practice of requiring participants to account only for time teaching secular subjects, were both motivated by a desire to eliminate constraints imposed by the program on beneficiaries' "free time." The CNCS described this intention as follows:

> *This practice ensures that federal funds do not pay for religious instruction, while respecting the First Amendment rights of individuals who serve in AmeriCorps to engage in protected activities outside the scope of their AmeriCorps hours. Policing non-AmeriCorps service hours could involve potential First Amendment violations of AmeriCorps participants.*[49]

If the restrictions on EAP participants' non-AmeriCorps service hours were substantial, significantly limiting the participants' ability to practice their

[48] See, e.g., *Mitchell v. Helms*, 530 U.S. at 842-843 (O'Connor, J., concurring in the judgment). We have been skeptical of attempts to apply the "endorsement" test to questions of public spending – rather than its familiar home in cases of government-sponsored religious displays – but the required visibility of the participant's AmeriCorps affiliation makes the analysis especially appropriate in this context.

[49] CNCS Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment, 15 (Jan. 29, 2004).

faith, the restrictions might violate the participants' constitutional rights. For example, a rule that barred participants from attending worship services during their year of AmeriCorps service would clearly violate the constitution; its restrictions would be far too broad to serve any plausible public purpose.

The restriction at issue in this case, however, is much narrower. It involves only whether an EAP participant may teach religion classes and lead students in worship in the same school site in which she teaches secular classes toward her AmeriCorps award. Does such a narrow provision, like the pre-2002 rule, unconstitutionally limit the participants' free exercise of religion? Courts have reached varying conclusions about restrictions placed on the religious practices of public school teachers, where the restrictions are arguably related to the school's concerns about avoiding Establishment Clause violations. In *Wigg v. Sioux Falls School District 49-5*,[50] for example, a U.S. Court of Appeals recently struck down a public school district's rule that prohibited teachers from participating in after school religious programs held at the teacher's own school or any other public school in the district, in contexts in which she would not be identified as a public school teacher.[51] The U.S. Supreme Court's recent decision in *Locke v. Davey*, however, which upheld a restriction on a theology student's eligibility for a state scholarship, suggests that courts will give the government significant latitude in placing conditions on government grant programs.[52] We do not think that the CNCS's policy of allowing EAP participants to teach religion during regular school hours at their AmeriCorps schools – a situation in which there is a substantial possibility that a reasonable observer would perceive the AmeriCorps sponsor as standing behind the teacher's religious instruction – can fairly be characterized as a constitutionally mandated accommodation of the teacher's rights to free speech or free exercise of religion.

If the restrictions on EAP participants' non-AmeriCorps service hours were substantial, significantly limiting the participants' ability to practice their faith, the restrictions might violate the participants' constitutional rights.

(e) Conclusion

Judge Kessler's decision in *AJC v. CNCS* focuses on the two central constitutional issues that will be present whenever religious institutions

[50] 2004 U.S. App. LEXIS 18628 (8th Cir. 2004).
[51] The district court in *Wigg* had upheld the rule as applied to the school, in which the teacher was employed. *Wigg v. Sioux Falls School District 49-5*, (D.S.D. 2004). Compare with *Wigg* the results in *United States v. Board of Education*, 911 F.2d 882 (3rd Cir. 1990) (school district may restrict Muslim teacher's wearing of religious attire during school day); and *Rosario v. John Does 1-10*, 2002 U.S. App. LEXIS 11127 (2nd Cir. 2002) (school district permitted to terminate teacher who discussed her religious beliefs with her students).
[52] See our discussion of *Locke v. Davey* elsewhere in this Report.

participate in publicly funded programs. First, what is the appropriate line demarcating permissible public expenditures from those that violate the Establishment Clause? In this case, that question is made more complicated by the difficulty of distinguishing between direct and indirect financing. The court has precedent for its decision to treat the CNCS's payments to grantees as direct financing, and thus subject to more stringent regulation. That decision, however, rests on a very thin conceptual basis, and we can readily imagine the Supreme Court someday opting for Judge Posner's definition of indirect spending instead of Justice O'Connor's definition. With respect to the EAP participants, the court looked beyond the indirect character of their financing to the overall effect of the participants' presence, as AmeriCorps members, within the religious schools. Because of the participants' visible representation of AmeriCorps, the court held, their religious teaching could reasonably be imputed to the government.

Allowing EAP participants to teach religion during regular school hours at their AmeriCorps schools is a situation in which there is a substantial possibility that a reasonable observer would perceive the AmeriCorps sponsor as standing behind the teacher's religious instruction.

Second, what administrative steps are required to monitor the line between permissible and impermissible expenditures? The court found that the CNCS required no accounting for the funds paid to EAP grantees, and if the funds are treated as direct financing, the Establishment Clause clearly demands such an accounting to ensure that public funds are not used for religious activities. The court's analysis of the EAP participants also turned on the CNCS's failure to monitor the line between religious and secular uses of funds; by allowing EAP participants to teach religion classes in the same schools at which they served, the CNCS made it very difficult for the court to conclude that the government was supporting only permissible activities.

The parties, including the University of Notre Dame, have been briefing the appeal to the U.S. Court of Appeals for the District of Columbia, and the case will be argued on January 14, 2005. The court of appeals can avoid the difficult constitutional questions in the case by resolving the dispute on a statutory basis, and we anticipate that the appellate court will be tempted to do exactly that.

3. Catholic Charities v. Superior Court

In 2004, two major judicial decisions have clarified the constitutional rights of religious individuals or organizations that receive government funding. In *Locke v. Davey*, the Supreme Court of the United States held that the State of Washington did not violate the federal constitution when it barred students majoring in devotional theology from receiving state-funded scholarships. As we discussed above, the *Davey* decision has important implications for faith-based social services. Based on *Davey*'s reasoning, a state would be free to bar faith-intensive service providers – such as substance abuse treatment

programs – from participating in government supported programs, even though the federal constitution's Establishment Clause would permit such participation. *Davey* makes clear that the federal constitution's free exercise clause does not require the government "to include religious service providers in any government-financed service in which the state uses private secular providers."

The California Supreme Court's decision in *Catholic Charities* has important implications for faith-based social welfare services.

The California Supreme Court's decision in *Catholic Charities*[53] has less obvious, but no less important, implications for faith-based social welfare services. The case arose out of Roman Catholic organizations' challenge to a state statute that requires most employer-provided health insurance programs to cover prescription contraceptives. The statute does not require employers' health plans to cover prescription drugs, but those that do must include contraceptives as part of the coverage. Catholic Charities argued that its religious beliefs prohibit the agency from financing contraception, a practice forbidden by church teaching. The statute exempted certain religious employers from the requirement, but Catholic Charities was denied the exemption because it does not meet the statute's definition of "religious employer" – in part, because of the significant proportion of its activities that are funded by the government.

Catholic Charities brought suit to block enforcement of the statute, and asked the court to hold unconstitutional the legislation's failure to extend the exemption to Catholic social welfare agencies and hospitals. Catholic Charities claimed that, by denying the exemption to these Catholic organizations, the statute unduly burdened the organizations' right to the free exercise of religion and interfered excessively with the organizations' ecclesiastical autonomy. For reasons we discuss below, the California Supreme Court rejected the claims of Catholic Charities, holding that the law did not impose undue burdens on the organizations' religious exercise or autonomy, and that Catholic Charities could alleviate any such burden simply by ending all coverage of prescription drugs. In October 2004, the U.S. Supreme Court denied a petition by Catholic Charities to review the case further.

The *Catholic Charities* decision has two significant implications for faith-based social service providers. First, the decision upholds the government's power to define what is and is not "religious" when the definition is needed for legal purposes. Second, the *Catholic Charities* decision reflects and reaffirms the wide latitude courts typically give the government to place conditions on grants. A religious organization that enters into partnership

[53] 32 Cal. 4th 527 (2004). On October 4, 2004, the U.S. Supreme Court denied Catholic Charities' petition for review of the decision by the California Supreme Court.

with government may lose some of the constitutional protections for its religious liberty that the organization would otherwise enjoy.

A religious organization that enters into partnership with government may lose some of the constitutional protections for its religious liberty that the organization would otherwise enjoy.

a. Background on the California Statute

In 1999, the California legislature enacted the Women's Contraception Equity Act (WCEA),[54] which requires employer-provided health insurance plans to include coverage for prescription contraceptives if the plan covers prescription drugs. If, however, the employer's health plan does not cover prescription drugs, then the employer is under no obligation to pay for prescription contraceptives. The WCEA was designed to "eliminate gender discrimination in health care benefits," based on the legislature's finding that "women during their reproductive years spent as much as 68 percent more than men in out-of-pocket health care costs, due in large part to the cost of prescription contraceptives and the various costs of unintended pregnancies."[55] More than twenty states have adopted similar rules, and, over the past decade, several members of Congress have introduced federal legislation that would apply such a rule nationwide.[56]

Like most statutes that mandate coverage of prescription contraceptives, the WCEA includes a "conscience clause," an exemption that allows certain religious employers to exclude from coverage in their prescription insurance plans "contraceptive methods that are contrary to the religious employer's religious tenets." The statute defines "religious employer" as

> *"an entity for which each of the following is true:*
> *(A) The inculcation of religious values is the purpose of the entity.*
> *(B) The entity primarily employs persons who share the religious tenets of the entity.*
> *(C) The entity serves primarily persons who share the religious tenets of the entity.*
> *(D) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)(i) or (iii), of the Internal Revenue Code of 1986, as amended."*[57]

To qualify as a religious employer, the organization must meet all of the criteria.

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[54] The statute is codified at California Health & Safety Code, § 1367.25; California Insurance Code § 10123.196.
[55] *Catholic Charities v. Superior Ct.*, 32 Cal. 4th 527, 537-38.
[56] For a list of states that require coverage of prescription contraceptives, and recent developments in this area, see www.covermypills.org.
[57] California Health & Safety Code § 1367.25 subdiv. (b); California Insurance Code § 10123.196 subdiv. (d). New York has adopted identical criteria for the religious employer exemption under its statute mandating coverage of prescription contraceptives. NY Insurance Code § 3221(l)(16)(A)(1).

While the first three requirements are fairly clear, the fourth merits some elaboration. Section 6033(a)(2)(A) identifies those tax-exempt organizations that are also exempt from the requirement to file annual returns with the IRS. In order to qualify for this exemption from IRS filing requirements, an organization must show that it is: (1) a tax exempt organization as defined in sections 501(c)(3) or 509(a) of the Internal Revenue Code; (2) "affiliated with a church or a convention or association of churches"; and (3) "internally supported."[58] An organization meeting these three requirements is considered an "integrated auxiliary" of a religious organization.

To qualify as a religious employer, the organization must show that it is "internally supported."

The "internal support" requirement for integrated auxiliaries replaces the original rule adopted by the IRS, which required that the "principal activity" of an organization must be "exclusively religious" in order to qualify for the filing exemption. After several successful legal challenges to the requirement that integrated auxiliaries must have "exclusively religious" activities,[59] the IRS replaced the "exclusively religious" requirement with one focused on the sources of funding for the entity at issue. The current rule provides that integrated auxiliaries of religious organizations must be "internally supported"; an organization meeting the first two requirements is deemed to be "internally supported" unless it "offers admissions, goods, services or facilities for sale, other than on an incidental basis, to the general public . . . ; and . . . normally receives more than 50 percent of its support from a combination of governmental sources, public solicitation of contributions, and receipts from the sale of admissions, goods, performance of services . . . ."

The rule is quite significant for government-financed social service providers. If the religious entity accepts fees for its services (such as payments for substance abuse treatment), offers those services to the general public, and the services are primarily funded by government grants, fees for services, or donations from those outside the religious community, then the entity will not be considered an "integrated auxiliary" of a religious body. For religious social welfare providers, the IRS's definition has only a modest immediate impact; the organization retains its tax exemption, but must submit an informational return. The greater impact can be seen in California's WCEA

[58] 26 CFR 1.6033-2(h)(1).

[59] *Lutheran Social Service of Minnesota v. United States*, 583 F. Supp. 1298 (D. Minn. 1984), *rev'd* 758 F.2d 1283 (8th Cir. 1985), and *Tennessee Baptist Children's Homes, Inc. v. United States,* 604 F. Supp. 210 (M.D. Tenn. 1984) *aff'd*, 790 F.2d 534 (6th Cir. 1986). These challenges had two grounds: the religious entities argued that any determination of the "exclusively religious" quality of the entity in question would require the IRS to make determinations from which it was constitutionally barred; the entities also argued that the "exclusively religious" requirement was inconsistent with the terms of the statute. In changing its rule, the IRS acknowledged the significance of both arguments. See 60 FR 65550-65552 (1995).

and similar acts, which use the IRS definition of integrated auxiliaries to determine the meaning of religious entities under a state law that is wholly unrelated to the question of tax returns. Under the WCEA, any organization that is primarily funded by government sources, fees, or donations from outside the religious community, will fall outside the statutory definition of "religious employer."

Under the WCEA, any organization that is primarily funded by government sources, fees, or donations from outside the religious community, will fall outside the statutory definition of "religious employer."

In its pleadings, Catholic Charities admitted that it meets none of the WCEA's four criteria for exemption as a religious employer. Its purpose is the provision of social welfare services; it employs people of many religious faiths; it serves people of all faiths; and it does not satisfy the requirement of "internal support" to qualify as an integrated auxiliary under § 6033 of the Internal Revenue Code.

b. Constitutional Arguments in the Catholic Charities Case

Catholic Charities raised a broad range of federal and state constitutional objections to the WCEA's requirement that the entity must provide coverage for prescription contraceptives under its health insurance plan. These objections can be grouped into two general claims. First, the WCEA requires the state to distinguish between the secular and religious characteristics of an employer, and Catholic Charities argued that the state is constitutionally prohibited from making such distinctions. Second, in requiring Catholic Charities to provide insurance coverage for its employees' prescription contraceptives, Catholic Charities asserted that the WCEA imposes an unconstitutional burden on the organization's religious exercise and autonomy. We discuss each of these assertions, and the court's analysis of them, in turn.

(1) The Religious/Secular Distinction

Catholic Charities challenged the constitutionality of the WCEA's exemption for "religious employers" by arguing that the exemption depends on a line between the religious and the secular that the state is forbidden to draw. This argument has two distinct aspects. The first, a claim that the WCEA's exemption involves "excessive entanglement" between government and religious entities, focuses on the process through which the state would administer the exemption for religious employers. Catholic Charities contended that the WCEA's exemption requires government officials to investigate the religious quality of an entity's activities, and the religious beliefs of the entity's employees and beneficiaries. The court agreed that the state's need to verify the religious quality of beliefs or activities could "invite

official trolling through a person's or institution's religious beliefs."[60] Such an inquiry might represent excessive entanglement between government and religion, but the court found the concern to be purely speculative in the case at hand, because Catholic Charities conceded that it satisfied none of the conditions for the religious employer exemption. Moreover, the risk of entanglement seems far less significant with the fourth criterion for exemption – whether the entity meets the IRS definition of an integrated auxiliary – than with the first three criteria. The distinction drawn by the fourth criterion involves only a quantitative assessment of the sources of the entity's revenue, rather than a qualitative judgment about religious beliefs or activities.

Second, Catholic Charities argued that the exemption requires government officials not only to investigate religious beliefs, but to decide which beliefs and activities count as religious. Official decisions about religious beliefs, Catholic Charities claimed, operate to "establish" certain beliefs in violation of the First Amendment. The court dismissed this claim, holding that "legislative accommodations [of religious beliefs and practices] would be impossible as a practical matter if the government were, as Catholic Charities argues, forbidden to distinguish between the religious entities and activities that are entitled to accommodation and the secular entities and activities that are not."[61]

The court held that "legislative accommodations [of religious beliefs and practices] would be impossible as a practical matter if the government were, as Catholic Charities argues, forbidden to distinguish between the religious entities and activities that are entitled to accommodation and the secular entities and activities that are not."

Public laws frequently distinguish between the religious and the secular. Tax codes, zoning ordinances, and a host of other regulatory regimes – including the Promise Scholarship program at issue in *Locke v Davey* – require government officials to define "religion" for legal purposes. And yet confusion abounds with respect to the use of religion as a legal category. Religious communities and individuals object when a government official decides that their practice or land use does not count as "religious." Understandably, they believe that the official's decision reflects a normative theological judgment, made by the state, about the value of the activity in question. Those who object would be quite correct if such theological judgments were implicit in the official's decision; the state cannot decide the relative religious worthiness of particular activities. Typically, however, the official's judgment is far more mundane, in the true sense of that word. "Religious" in a statute or regulation has a purely functional meaning, one

[60] *Catholic Charities*, 32 Cal. 4th at 546-47.
[61] Id. at 545.

given by the language, context, and purpose of that rule, and designed to do nothing more than determine the scope of the rule's application. An activity deemed non-religious by a rule – such as a zoning ordinance that excludes home shelters from "religious uses" of property – does not cease to have religious significance for believers. The religious community may, and indeed, should continue to believe that sheltering the homeless is among the highest religious obligations, even if the ordinance holds that such a use of land is not "religious."

Thus, a statute or ordinance is not unconstitutional simply because the rule requires a government official to distinguish between the religious and the secular. The way in which that distinction is drawn, however, is subject to constitutional scrutiny. As we noted above, the court agreed that an investigation to verify the religious beliefs of employees or beneficiaries might result in "excessive entanglement" of government in religious matters. In addition, a rule's distinction between the religious and the secular might be drafted in a way that confers a benefit only on favored religious groups, or imposes a burden only on disfavored religious groups. Such a "religious gerrymander," discussed under the next heading, would likely be held unconstitutional under the establishment clause (for the special benefit conferred on the favored group) or the free exercise clause (for the unequal burden imposed on the disfavored group). Neither the concerns with administrative entanglements or religious gerrymanders, however, render suspect the common legal act of distinguishing, for governmental rather than theological purposes, between the religious and the secular.

A statute or ordinance is not unconstitutional simply because the rule requires a government official to distinguish between the religious and the secular. The way in which that distinction is drawn, however, is subject to constitutional scrutiny.

(2) Burden on Religious Exercise and Autonomy

Catholic Charities claimed that the WCEA, by requiring coverage of employees' prescription contraceptives, violated the organization's religious liberty in two ways. First, Catholic Charities argued that the WCEA unconstitutionally interfered with the entity's ecclesiastical autonomy, by intruding on "matters of internal church governance and by rejecting the Catholic Church's decision that prescription contraceptives are sinful."[62] The court rejected Catholic Charities' characterization of the dispute as one internal to the church. The dispute involves Catholic Charities' relationship with its employees – many of whom are not church members – and the U.S. Supreme Court has treated such disputes as ones in which general employment laws prevail.[63]

[62] Id. at 542.

[63] The court cites *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 US 290 (1985) (religious organization is not exempt from minimum wage laws); and *United States v. Lee*, 455 US 252 (1982) (religious employer must pay employees' Social Security and unemployment insurance taxes).

The court acknowledged that a religious organization's constitutional right of ecclesiastical autonomy might require an exemption broader than the one provided in the WCEA, but only insofar as the act covered the entity's relationship with "ministerial employees." For the past three decades, courts have regularly held that "the First Amendment bars courts from reviewing employment decisions by religious organizations affecting employees with the religious duties of ministers."[64] Following the logic of the ministerial exception, the court reasoned, an employer might well be relieved of its obligation to cover the prescription contraceptives of any employees that "have the religious duties of ministers." This broader exemption, however, offered no help to Catholic Charities; it conceded that none of the employees in question had ministerial duties.

Catholic Charities claimed that the WCEA requires it to take actions that are prohibited by its religious beliefs. The court analyzed this claim under the rule announced by the U.S. Supreme Court in *Employment Division v. Smith*, which denied that the free exercise clause requires special protections for the religious, and held that the government has no obligation to accommodate religious practices that conflict with "valid and neutral law[s] of general applicability."

Second, in perhaps its most basic argument, Catholic Charities claimed that the WCEA requires it to take actions that are prohibited by its religious beliefs. The court analyzed this claim under the rule announced by the U.S. Supreme Court in *Employment Division v. Smith*.[65] Prior to 1990, a number of U.S. Supreme Court decisions had afforded special protection to religious institutions and individuals when their religious beliefs conflicted with public law. These decisions appeared to require the government to accommodate religious practices, or at least to justify why such accommodations could not be made without threatening the welfare of the broader community. In *Employment Division v. Smith*, however, the U.S. Supreme Court denied that the free exercise clause requires such special protections for the religious, and held that the government has no obligation to accommodate religious practices that conflict with "valid and neutral law[s] of general applicability."

Catholic Charities argued that the WCEA should not be treated as a "neutral law of general applicability," because it singles out for mistreatment those religious organizations that provide social welfare services to people of all

[64] *Catholic Charities*, 32 Cal. 4th at 543.
[65] 494 US 872 (1990).

faiths, in contrast to religious organizations that provide only religious services to people of their own faith. In this argument, Catholic Charities relied on the U.S. Supreme Court's decision in *Larson v. Valente*,[66] in which the Court held unconstitutional a law that generally regulated charitable solicitations, but exempted religious organizations that received more than half of their donations from those inside the religious community. The defect in that law, the Court found, was that the rule was specifically designed to regulate disfavored religious groups such as the Unification Church, while imposing no burdens on more mainstream faiths.

The California Supreme Court distinguished the statute at issue in *Larson* from the WCEA, finding that the former was designed to impose disfavored treatment on a specific religious community, while the latter provides only a narrowly crafted exemption, and applies its burden to a broad range of employers, both religious and nonreligious.[67] Nor did Catholic Charities prove that the WCEA (or, more precisely, the narrow scope of the act's religious exemption) was motivated by anti-Catholic animus. Instead, the court found, the legislature accorded preferred status to some Catholic entities. "The law treats some Catholic organizations more favorably than all other employers by exempting them; nonexempt Catholic organizations are treated the same as all other employers."[68]

Finally, Catholic Charities argued that the free exercise clause of California's state constitution should be construed in a way that reflects the U.S. Supreme Court's decisions before *Employment Division v. Smith*. That is, the California free exercise clause should require the government to accommodate religious beliefs and practices that conflict with public laws, even when the law is "general" and of "neutral applicability." The court said that it was unnecessary to decide whether to adopt such an interpretation of the California constitution, at least in this case, because Catholic Charities would not prevail even if the court applied the pre-*Smith* rule. Under such a standard, the court reasoned, Catholic Charities may be able to show that the WCEA imposes a substantial burden on its religious beliefs, but the government may overcome that showing and prove that elimination of gender discrimination is a governmental interest of the highest order, one that cannot be achieved if the exemption is broadened to include Catholic Charities and similar organizations. The state's interest in denying an accommodation, the court held, is especially strong when the costs of such an accommodation will be borne not by society as a whole – as in, for example, a rule that exempts religious property from

The court found "the law treats some Catholic organizations more favorably than all other employers by exempting them; nonexempt Catholic organizations are treated the same as all other employers."

[66] 456 US 228 (1982).
[67] 32 Cal. 4th at 553-54.
[68] Id. at 556.

taxation – but rather by a narrow set of individuals, such as the employees of Catholic Charities.

Although not discussed in great detail, an additional factor seemed to weigh heavily in the court's decision to deny Catholic Charities' free exercise claim. The burden imposed by the WCEA on Catholic Charities could be avoided simply by eliminating prescription drug coverage from employees' health insurance. Although such a change would impose greater costs on employees, Catholic Charities could reimburse employees for some portion or all of that expense. Reimbursement of employees' prescription drug costs might be more expensive for Catholic Charities than equivalent health insurance coverage of prescriptions, but courts have consistently held that regulations that increase the costs of religious activities are not for that reason unconstitutional burdens on religious liberty.

(3) Broader Implications for Faith-Based Social Services

At first glance, the *Catholic Charities* decision seems remote from the constitutional issues faced by many faith-based social welfare providers. The organization did not claim a right to hire only its co-religionists, nor did the organization seek to use government funds for faith-intensive social services. Instead, Catholic Charities employs a religiously diverse staff that provides generally secular services. That diversity, however, at least partly causes Catholic Charities' predicament. Through its engagement with the broader community, Catholic Charities – like many private for-profit and non-profit entities – has lost its unfettered ability to define the obligations and rights of employees.

The *Catholic Charities* decision provides faith-based service providers with a cautionary tale.

The *Catholic Charities* decision, then, provides faith-based service providers with a cautionary tale. The WCEA's definition of "religious employer" is one that few, if any, social welfare providers can meet if they enter service partnerships with government. Although the agency might retain its right to prefer co-religionists in hiring, and might even receive the majority of its funding from "internal sources," many laws and regulations prohibit government grantees from discriminating against service beneficiaries on the basis of religion.[69] Under the WCEA, a religious entity that does not primarily serve members of its own faith falls outside the statutory definition of "religious employer," and thus becomes subject to the general regulation. As the *Catholic Charities* court found, the government may adopt reasonable definitions of "religion," even if the definition excludes from its reach institutions that consider themselves to be religious.

[69] See 2002 Report at pp. 131-169.

This cautionary tale does not imply that faith-based service providers should limit or avoid their partnerships with the government. Providers may have very good reasons – indeed, the deepest religious reasons – to form those relationships. Before entering any such partnership, however, the faith-based organization must decide the extent to which it is willing to permit the government to control the character of its relationships with staff and beneficiaries and the content of its services. If the organization is unwilling to permit significant government control over its services, then the organization must consider carefully the specific obligations imposed by any given service partnership with government, along with generic obligations – such as the WCEA – that may flow simply from the fact of partnership with government.

Religious organizations will have little legal support if they agree to enter partnerships with government, and then object to the controls accompanying such partnerships. The U.S. Constitution's religion clauses permit the state great latitude to impose obligations on those who provide services in the public realm.

Many organizations will decide that ceding some aspect of control over their services is consistent with their religious commitments, and will enter a wide range of partnerships. Others may reject that control, and will strictly limit their service relationships with government. The *Catholic Charities* decision provides a clear backdrop against which such decisions must be made: religious organizations will have little legal support if they agree to enter partnerships with government, and then object to the controls accompanying such partnerships. As the California Supreme Court found in *Catholic Charities*, the U.S. Constitution's religion clauses permit the state great latitude to impose obligations on those who provide services in the public realm.

4. Freedom From Religion Foundation, Inc, (and others) v. Montana Office of Rural Health (and others)

On October 26, 2004, a federal magistrate judge in Butte, Montana ruled unconstitutional a government-financed, faith-based health program being run by the Montana Office of Rural Health. The program, which involves a partnership between government agencies and faith-based health care providers, is supported in part by a Compassion Capital Fund (CCF) grant from the U.S. Department of Health & Human Services. The court did not find that the CCF grant itself violated the Constitution, but it held unconstitutional a number of aspects of the state's implementation of the grant. In particular, the court based its ruling against the state on the overt religiosity of the state's program director in his administration of the program; the state subsidy of a joint venture among the director, his agency, and a group of faith-intensive health providers; the significant preference built into the program for providers that integrate religious experience with health care; and, most of all, the program's noncompetitive grant to the Parish Nurse Center at Carroll College, which trains parish nurses to provide health care that includes a strong religious component.

The facts of the case reveal a rather extreme commingling of faith and health service in a program directly financed by state and federal funds. Despite the full and obvious integration of religious communication and experience into state-financed training of parish nurses, Montana argued that the financed activities were constitutionally acceptable. The failure of that argument is no surprise. The case may nevertheless serve as an object lesson of the consequences of ambiguity in the Bush Administration's oft-repeated guidance to program administrators that government funds may not be used for "inherently religious activities." Montana has 60 days within which to appeal to the U.S. Court of Appeals for the 9th Circuit.

a. Description

The Montana Office of Rural Health (hereafter "MORH") operates out of Montana State University (Bozeman). The mission of MORH is to improve health care for Montanans through "health promotion, disease prevention, and reduction of the impact of illness, disease, and disability." David Young is an employee of Montana State and the Executive Director of MORH. MORH co-founded the Montana Faith-Based Health Cooperative ("MFHC"), a partnership among faith-based health organizations and government organizations. The MFHC's mission is "to foster and promote faith-health partnerships across Montana designed to improve the holistic health and well-being of Montanans and their communities." The physical site of MFHC is within the offices of MORH, where David Young's office is also located.

The Montana Office of Rural Health applied for and received a grant from the U.S. Department of Health and Human Services to fund the Montana Faith-Health Demonstration Project, which in turn made subgrants to Montana organizations – in particular, the Parish Nurse Center at Carroll College, which fully integrates religious elements with health care.

In 2002, MORH applied for and received a grant, under the Compassion Capital Fund ("CCF") Demonstration Project, from the U.S. Department of Health and Human Services. The grant is for three years, and paid over $600,000 in each of the first two years to fund the Montana Faith-Health Demonstration Project, which in turn made subgrants to Montana organizations. Young is primarily responsible for administration of the grant, and a Committee of MFHC reviews subgrant applications from Montana health organizations and recommends subgrantees to Young.

MORH gives preference in awarding subgrants to "parish nursing programs." One particular program, the Parish Nurse Center at Carroll College, received

uniquely preferential treatment through a subgrant for which Carroll did not have to compete with other grant applicants. This subgrant funds continuing education for nurses seeking to become parish nurses, and the parish nurse program fully integrates religious elements with lessons in physical health care.

Freedom From Religion Foundation, Inc., an organization devoted to church-state separation, along with several Montana taxpayers, challenged the administration of state and federal funds by MORH as a violation of the First Amendment's Establishment Clause. In particular, the plaintiffs challenged 1) MORH's administration of the CCF grant to provide direct funding for parish nursing; 2) the line-item subgrant to the Carroll College Parish Nurse Center; and 3) the interrelationship among David Young, the MORH, and the MFHC. The plaintiffs did not challenge the CCF grant program or the decision by HHS to award such a grant to Montana State University.

The federal magistrate judge, ruling in favor of a motion for summary judgment filed by Freedom From Religion Foundation,[70] made the following findings and conclusions:

- Young is a deeply religious man who had shown himself in his writing and communications to be a committed believer in the idea that religious beliefs and practices are positively correlated with good health outcomes. Young's actions in administering the grant were motivated not by the general and secular purpose of improving health care in Montana, but by the "more specific" (and constitutionally forbidden) purpose of "advancing and endorsing religion as a substantial component of the health care to be provided."
- By awarding subgrants to fund parish nursing, Young operated to further his own belief in the application of Judeo-Christian principles in the provision of health care, and thereby violated the Establishment Clause.
- Without regard to Young's personal beliefs and commitments, the administration of this grant had the constitutionally impermissible effect of making the government responsible for religious indoctrination.
- This indoctrination is evident from (among other things) Young's description of parish nursing as "intentional integration of the practice of faith with the practice of nursing." This integration may include "therapeutic use of prayer and scripture."
- The parish nursing curriculum at Carroll College, which received an MORH subgrant to train parish nurses, is "replete with religious

[70] Both sides filed motions for summary judgment. A court may give summary judgment (that is, judgment without a trial) to a party who shows that, on the basis of undisputed facts, it is entitled to judgment as a matter of law.

training and indoctrination," including specific instruction in the use of prayer and worship as therapeutic practices central to the nursing enterprise.

- The subgrant process administered by MORH favored parish nursing in general and Carroll College in particular. This preferential treatment of parish nursing as a health care method violates the government's responsibility to allocate aid based on secular, neutral criteria that neither favor nor disfavor religious entities, and adds to the government's responsibility for the indoctrination that its funds are supporting.
- Independent of the administration of the CCF grant, the elaborate organizational intertwining of Young, a state officer; MORH, a state agency; and MFHC, a partnership of faith-based groups (including the Montana Association of Churches) and government devoted to promoting the link between faith commitments and good health, has the constitutionally impermissible purpose and effect of involving the government in the endorsement of faith over non-faith, and thereby violates the Establishment Clause.

The court ordered Young, in his capacity as a state officer, to a) "cease and withdraw"[71] state funding of inherently and pervasively religious parish nursing programs, especially the program at Carroll College; b) cease providing housing or other support for the MFHC.; c) no longer remain involved in the leadership or organizational affairs of MFHC; d) no longer engage in any activities that could reasonably be construed to constitute government endorsement of the MFHC.

b. Analysis

On the undisputed facts as determined by the federal district court, the outcome in *FFRF v. MORH* is completely unsurprising. The state agency was aggressively and preferentially promoting the value of religious faith as an element of health, rather than merely including faith-affiliated health-care providers among government-financed deliverers of secular care. The Constitution does not impede the inclusion of, for example, hospitals affiliated with a faith community from participating in programs of government support. The Montana Faith-Health Demonstration Project, however, appears to have gone well beyond the inclusion of secular health care as provided by a religiously affiliated entity. By concentrating its resources on the particular practice of "parish nursing," which appears to include worship and prayer as

[71] The order to withdraw existing funding suggests that the programs that have received commitments of funds, and have made expenditures based on those commitments, will not receive the committed funds to reimburse those expenditures. It is not clear whether the order to withdraw funds requires any repayment of government monies received and spent. For further discussion of this remedial question, see our analysis of *American Jewish Congress v. Bost*, in the 2002 Report, at pp. 31-34.

integrated, non-optional components, the Demonstration Project crossed the constitutional line which forbids direct government financing of religious experience. And Mr. Young's complete immersion in the direction, control, and administration of a partnership between government and faith-based health organizations, actively promoting this sort of full integration of religiosity and health, weakened whatever constitutional defenses the state might have advanced.[72]

The Montana Faith-Health Demonstration Project appears to have gone well beyond the inclusion of secular health care as provided by a religiously affiliated entity and to have crossed the constitutional line which forbids direct government financing of religious experience.

The issues in *FFRF v. MORH* must be identified and analyzed separately from one another. First, the case is a reminder that government agencies involved with the Faith-Based and Community Initiative need to be very careful about maintaining a policy of evenhandedness. If MORH had assembled and worked with a group of holistic health care providers, including those with secular identities as well as those with religious connections, the basic structure of its partnership arrangements would not have been drawn into such deep question. Organizations that tilt heavily or exclusively toward faith-based providers will always arouse constitutional suspicion. In this respect, repeated emphases by the architects and promoters of the Initiative on the history of exclusion of faith groups - but not secular community groups - may lead an unwary government official into a constitutionally troubling practice of favoring religious entities in new programs.

Second, and quite aside from the question of favoring faith entities, *FFRF v. MORH* raises a question that has from the beginning been at the heart of the controversy over the Initiative. What, if any, activities with religious content may be included in privately delivered services that the government is directly financing? At one extreme, it seems obvious that the government may not pay for pure worship, even if it is demonstrated that worship promotes good health or social virtue. So government may not build houses of worship, or pay the salaries of clergy. At the other extreme, it now seems constitutionally well-settled that government may finance programs with exclusively secular content that are being operated out of houses of worship or other religious entities. The activity, not the organization that provides it, is the proper focus of constitutional concern.

Uncertainty persists, however, in the frequently recurring situation of faith-based organizations that integrate religious messages with secular activities and goals. Faith-based programs that teach sexual abstinence to unmarried

[72] Ordinarily, it would seem wrong for the court to undertake an analysis of the religious commitments of a state officer. He is, after all, completely entitled to his own religious freedom. Here, however, Young's religious philosophy seems overtly and tightly bound up with the day-to-day administration of his public office. In such circumstances, exploration of the relationship between religious belief and conduct of public office seems appropriate.

teenagers, or that help with recovery from addiction to drugs or alcohol, often present such mixtures of faith and other services. Our view, now well-supported by a series of decisions in the lower courts[73] as well as by Supreme Court decisions such as *Mitchell v. Helms*, is that the government may not directly finance any program that integrates spiritual or religious components into its efforts to educate or transform beneficiaries.[74] In *FFRF v. MORH*, the district court concluded that the state was financing precisely that sort of integrated service.

Uncertainty persists in the frequently recurring situation of faith-based organizations that integrate religious messages with secular activities and goals. Our well-supported view is that the government may not directly finance any program that integrates spiritual or religious components into its efforts to educate or transform beneficiaries.

The Department of Justice filed a friend of the court brief, in which the federal government distanced itself considerably from the Montana program. The brief points out that HHS regulations governing the grant, and Montana's grant agreement with the federal government, both explicitly prohibit Montana from spending the grant to support "inherently religious activities." The brief identifies worship and prayer as such activities, but does not assert straightforwardly that parish nursing is an "inherently religious activity." Moreover, even though the CCF grant application from Montana discloses a proposed subgrant to Carroll College, the brief for the U.S. asserts that the application described that program as "continuing education for professional nurses," and did not disclose its religious content. In short, the U.S. informed the court that HHS had not approved of the thickly religious content that MORH appeared to be supporting with its subgrants.

We have elsewhere expressed concern that the Bush Administration's regulatory guidance - expressing the policy that the government may not pay for "inherently religious activities," exemplified by worship, proselytizing, and religious instruction - has contributed to significant uncertainty for faith organizations and officials of state and local government.[75] Perhaps Mr. Young and others at MORH could not reasonably interpret that policy as permitting government support of parish nursing, given its explicit inclusion of prayer as an integral, mandatory component. But MORH's approach to its CCF grant may be symptomatic of a larger phenomenon that has emerged from the Administration's (a) encouragement of government-financed promotion of faith as a component of personal transformation; (b) insufficient guidance about where the Constitution prohibits direct government support of

[73] See the analyses of *FFRF v. McCallum* (*Faithworks I*) and *ACLU v. Foster* in our 2002 Report, at pp. 26-31.
[74] Indirect financing of such programs through a voucher-type system of beneficiary choice is constitutionally permissible, so long as beneficiaries have options among secular and faith-based providers.
[75] For more on this see our 2003 Report, at pp. 4-11.

MORH's approach to its CCF grant may be symptomatic of a larger phenomenon that has emerged from insufficient guidance about where the Constitution prohibits direct government support of such faith efforts.

such faith efforts; and (c) inadequate monitoring of the faith-content of CCF-funded activities. We remain concerned that state and local governments, along with faith-based organizations, may venture unknowingly into constitutionally questionable service activities and left to fend for themselves if litigation begins.

The state authorities now have a period of time in which to decide whether to appeal to the U.S. Court of Appeals for the Ninth Circuit. The factual record in *FFRF v. MORH* is deeply unfavorable to the state, and therefore we expect that, as in *Faithworks I*, the state will not appeal.

5. Freedom From Religion Foundation, Inc. (and others) v. Jim Towey, Director of the White House Office of Faith-Based and Community Initiatives (and others)

a. Description

On June 17, the Freedom From Religion Foundation (hereafter "FFRF") filed suit in the United States District Court for the Western District of Wisconsin against Jim Towey, the Director of the White House Office of Faith-Based and Community Initiatives (hereafter "WHOFBCI"), and other federal officials with primary responsibility for the Initiative. The complaint, which was later amended to add more detail[76] and most of which has now been dismissed, alleges that many aspects of the Initiative are being administered in an unconstitutional way. The defendants include (in addition to Jim Towey) the Attorney General; the Secretaries of Labor, Health & Human Services, and Education; the Directors of the OFBCI at each of those agencies, and at the Department of Housing and Urban Development, the Department of Agriculture, the Agency for International Development, and the Corporation for National and Community Service; and the Director of the Center for Disease Control and Prevention. The complaint, which sweeps across virtually every agency in the federal government that has a connection with the Initiative, alleged that those responsible for the Initiative have unconstitutionally: 1) endorsed religion; 2) favored religious over secular organizations in the distribution of federal funds for social services; 3) directly funded services that include religious content; and 4) funded intermediary faith-based organizations (hereafter "FBOs") that prefer religious subgrantees to secular ones. All these actions, the complaint asserts, violate the Establishment Clause of the First Amendment.

The original complaint was written in very general terms, and included virtually no identified examples of the alleged wrongdoing. In response to

[76] The complaint is available on-line at ffrf.org/legal/faithbased_complaint.html

the government's motion to dismiss, the plaintiffs alleged with more particularity (described below) some of the activities of which they complain. The government thereafter filed a motion to dismiss most of the claims, including all of the sweeping, Initiative-wide assertions, on the grounds that the plaintiffs lacked standing to bring them.

The lawsuit's massive scope make it a matter of immediate and focused concern for the architects and administrators of the Initiative. If major aspects of the suit succeed, the Faith-Based and Community Initiative could be significantly altered or compromised, and perhaps fall under long-term judicial supervision.

The Freedom From Religion Foundation complaint alleged that those responsible for the Initiative have unconstitutionally: 1) endorsed religion; 2) favored religious over secular organizations in the distribution of federal funds for social services; 3) directly funded services that include religious content; and 4) funded intermediary faith-based organizations that prefer religious subgrantees to secular ones.

Just as this Report was going to press, however, several major developments dramatically narrowed the scope of the suit. First, on November 12, 2004, the plaintiffs voluntarily dismissed eight of their ten claims focused on specific grants (as distinguished from general policies) made under the Initiative. Then, on November 16, 2004, Judge Shabaz of the U.S. District Court for the Western District of Wisconsin granted the government's motion to dismiss, on grounds of lack of standing, all of the Initiative-wide claims against Jim Towey, all of the OFBCI Directors at the various agencies, and against Education Secretary Rod Paige. The result is that the complaint has been narrowed to two particular federal grants – made by the Department of Health and Human Services – and has now been reduced to a small thorn in the Initiative's side rather than the large threat it initially appeared to be. Motions for summary judgment on the remaining parts of the complaint are due in the district court by Tuesday, November 23. In addition, after the district court disposes of these remaining parts of the case, the plaintiffs may yet appeal the dismissal of the Initiative-wide claims.

b. Summary of Allegations

The suit, filed on behalf of FFRF and its principal officers,[77] names as defendants virtually all of the federal officials, some at Cabinet rank, who are

[77] In addition to FFRF itself, the plaintiffs include Anne Nicol Gaylor, President of FFRF; Annie Laurie Gaylor, editor of FFRF's periodical "Freethought Today"; and Dan Barker, Public Relations Director of FFRF. Each of the

responsible for administering the President's Faith-Based and Community Initiative (FBCI). Many of the defendants are directors of agency-specific FBCI Offices. The complaint alleges that the Initiative is being administered in ways that endorse religion, prefer FBOs to secular entities, and directly fund religious activity, all in violation of the First Amendment's Establishment Clause. The complaint's central allegations are as follows:

- FFRF is a non-profit corporation, with more than 5000 members, "who are opposed to government endorsement of religion" in violation of the U.S. Constitution.
- The various named defendants, including Jim Towey, each have administrative responsibility for some portion of the Faith-Based Initiative.
- The defendants have used federal taxpayer appropriations to support activities that endorse religion and give FBOs preferred positions.
- The defendants at national and regional conferences have sent messages that "adherents of religious belief" are favored members of the political community, and that non-adherents of such belief are political outsiders. In particular, Education Secretary Rod Paige gave such a speech at a White House Conference on the Initiative in October 2002, and President Bush (not a defendant in the case) gave similar speeches at national and regional conferences devoted to the Initiative.
- Those defendants who direct agency Centers for FBCI oversee expenditures intended to give preferences to FBOs over other organizations, and help build capacity of FBOs. These activities are all designed to support and endorse religious service providers.
- The Departments of Labor, HHS, Education, and Justice, and the Center for Disease Control have all "directly and preferentially funded . . . . services that integrate religion as a substantive and integral component." The amended complaint lists a variety of programs that fall under this heading.[78]

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individual plaintiffs is alleged to be a federal taxpayer and "a nonbeliever who is opposed to governmental establishment of religion." (FFRF Complaint, pars.7-9). FFRF and these same individuals were the plaintiffs in the highly significant litigation surrounding government financing of substance abuse programs being operated by Faithworks, Milwaukee. See our discussions of the *Faithworks* decisions in the 2002 and 2003 Reports.

[78] The funded programs listed in the amended complaint include: the Exodus Transitional Community, a prisoner re-entry program funded by the Departments of Justice and of Labor; the Phoenix MatchPoint Mentoring Program, funded by the Department of Health and Human Services; Bridge to Hope Ministries, funded by the Department of Labor; H.O.P.E. Center of Greater Community Temple Ministries Church of God in Christ, funded by the Department of Labor; Metro Atlanta Youth for Christ, funded by the Department of Health Human Services; Metro-Atlanta Youth for Christ-Teen Moms Program, funded by the Centers for Disease Control and Prevention as part of a sexual abstinence program; Faith Partners, Colorado Springs, Colorado, funded by the Department of Labor; a Compassion Capital Fund grant by the Department of Health and Human Services to Emory University for a

- The Departments of Labor, HHS, Education, and Justice, and the Center for Disease Control have funded intermediary FBOs "that preferentially award sub-grants to other [FBOs]," without objective criteria to guide the intermediaries in making sub-awards.[79]
- These actions violate the Establishment Clause of the First Amendment, and injure the plaintiffs by compelling taxpayer support of the "establishment, endorsement and advancement of religion."

The complaint concludes with a request that the court 1) declare that the defendants have made expenditures in violation of the First Amendment; 2) order the defendants to discontinue such expenditures, and in particular order the de-funding of the various FBCI Offices; and 3) order the defendants to create policies to ensure that future appropriations are not made or used to fund providers of services that include "religion as an integral component."

The defendants are represented by the Department of Justice, in consultation with the affected federal agencies.

c. Recent Dismissal of Initiative-wide Aspects of the Lawsuit

In a ruling released to the parties on November 16, Judge Shabaz dismissed all of the claims against Jim Towey, all of the claims against the Directors of the agency centers on the Faith-Based and Community Initiative, and the claims against Secretary Paige of the Department of Education. The only claims that remained involved particular grants by various agencies, and the plaintiffs have voluntarily dismissed eight of the ten claims, listed in footnote 78 below, of that character. Thus, all that survives this pair of actions by the Judge and the plaintiffs are claims against the Department of Health & Human Services for funding the Phoenix (AZ) Matchpoint Mentoring Program, and for a Compassion Capital Fund grant to Emory University for a program called "Interfaith Health Strong Partners."

The complaint has now been reduced to a small thorn in the Initiative's side rather than the large threat it appeared to be.

program called Interfaith Health Strong Partners; and funding from the Department of Labor for Public/Private Ventures' Contract to oversee a faith-based mentoring program.

[79] Here, the complaint (paragraph 43) offers two examples: "funding for the Interfaith Health Program of Rollins School of Public Health at Emory University, under a Department of Health and Human Services' Compassion Capital Grant;" and grants from the Departments of Labor and Justice in the operation of the Ready (4) Work Program.

d. Dismissal of the Initiative-wide Aspects of the Suit

Despite the Supreme Court's recent dismissal on standing grounds of Michael Newdow's suit regarding recitals in public school of the Pledge of Allegiance, the law of standing in Establishment Clause cases tends to be very favorable to plaintiffs. Here, plaintiffs have alleged that FFRF is an organization devoted to protecting church-state separation, and that it has 5000 members devoted to that principle. In addition, the individual plaintiffs are alleged to be federal taxpayers whose tax contributions are used to support the challenged activity, including Conferences, sponsored by the WHOFBCI, at which government officials have allegedly delivered religion-endorsing messages.

In most circumstances, taxpayers lack standing to challenge the constitutionality of federal expenditures, but the one major exception to this rule has been in the context of Establishment Clause challenges. The leading decision in the Supreme Court on the subject is *Flast v. Cohen*,[80] which authorized taxpayer standing to challenge congressional action alleged to be in violation of the specific limitations in the First Amendment, including the Establishment Clause. The Court limited *Flast* in its 1982 ruling in *Valley Forge Christian College v. Americans United for Separation of Church and State*,[81] which held that taxpayers lacked standing to challenge a transfer of real property by the Executive Branch to a religious organization. A few years later, however, in *Bowen v. Kendrick*,[82] the Court permitted taxpayers to challenge expenditures of money by the Executive Branch for programs, explicitly authorized by Congress, devoted to adolescent education on sex and pregnancy.

In most circumstances, taxpayers lack standing to challenge the constitutionality of federal expenditures, but the one major exception to this rule has been in the context of Establishment Clause challenges.

In his opinion, Judge Shabaz focused on the respective roles played by Congress and the Executive Branch in the creation and promotion of the Faith-Based and Community Initiative. He accurately attributed the genesis of a government-wide Initiative to Executive Orders rather than legislation. Focusing on the fact of Executive rather than legislative origination, Judge Shabaz found that decisions to spend funds to promote the Initiative should be attributed to the Executive Branch alone, even though such funds had been appropriated generally by Congress (as indeed all Executive Branch funds must be). Accordingly, he reasoned, the general prohibition on taxpayer standing, as applied in the *Valley Forge* decision, should govern this case. From this premise, Judge Shabaz concluded that taxpayer standing was insufficient to press any of the allegations in the suit that focused upon Executive Branch

[80] 392 U.S. 83 (1968).
[81] 454 U.S. 464 (1982).
[82] 487 U.S. 589 (1988).

promotion of the Initiative (as distinguished from actual expenditure for social service delivery by religious organizations).

e. Our Analysis of the Dismissal

The dismissal of all but a small portion of the FFRF complaint is a major victory for the federal government. If the dismissal is not appealed, or is upheld on appeal, the United States will not be obliged to defend on the merits the various Initiative-promoting actions of which the plaintiffs complained. Even if the government eventually prevailed on most or all of these claims, as we predicted it would in our website comment on this complaint when originally filed,[83] defending it would consume the time and energy of the Initiative's leading administrative officials.

Our own view of the dismissal is that it involves a plausible, though not necessarily correct, application of the law of taxpayer standing. Taxpayer standing is crucial in Establishment Clause cases, because there frequently is no party other than a taxpayer who can assert the constitutionally requisite injury to challenge government promotion of religion. Moreover, the distinctions among *Flast*, *Valley Forge*, and *Bowen* seem technical and arcane. The decisional law gave Judge Shabaz room to make this decision, but did not compel this particular outcome.

The dismissal involves a plausible, though not necessarily correct, application of the law of taxpayer standing. We think that the best explanation for the ruling is that the judge believed the plaintiffs' case against government promotion of the Initiative to be weak on its merits, and not worth the court's and the government's time to litigate it to an inevitable conclusion in the government's favor.

We think that the best explanation for Judge Shabaz's ruling is that he believed the plaintiffs' case against government promotion of the Initiative to be weak on its merits, and not worth the court's and the government's time to litigate it to an inevitable conclusion in the government's favor. *Bowen v. Kendrick* holds that, with respect to federal spending programs that appear neutral between religious and secular grantees, Establishment Clause challenges can be maintained only on an as-applied basis. That is, such challenges must be focused on particular expenditures and grants, rather than on the program as a whole. It was on this very ground that the Freedom From Religion Foundation, in the same district court, had failed in a facial challenge to the Charitable Choice provisions of the 1996 law

[83] See comment on FFRF v. Towey on the Roundtable website: http://www.religionandsocialpolicy.org/legal/legal_update.cfm?id=28

reforming the federal welfare system.[84] Judge Shabaz may well have seen the complaint in *FFRF v. Towey* as an attempt to recast and relitigate the plaintiffs' same, basic assertion that the Initiative as a whole promoted and advanced religion. Recognizing that the case had that character, sensing the futility and constitutional inappropriateness of litigating something as amorphous as the content of speeches at WHOFBCI Conferences, and perceiving the absence of crucial detail from the plaintiffs' allegations of religious preferences in the administration of federal grants, Judge Shabaz exercised his discretion to terminate the suit's most intrusive and sweeping elements at an early stage. An appeal is possible, but – in light of the considerations we discuss in this paragraph – we doubt that such an appeal would succeed.

As noted above, the case has now been limited to claims of unconstitutionality of two particular grants – one from HHS to fund the Phoenix (AZ) Matchpoint Mentoring Program, and a Compassion Capital Fund grant to Emory University for a program called "Interfaith Health Strong Partners." We do not know the particulars of these grants, and we can only surmise that the plaintiffs dropped all other grant-specific claims and kept these because the plaintiffs believed that the factual record was most favorable to their side in these two instances. Motions for summary judgment, which are likely to include materials that flesh out the particulars of these two remaining claims, may be filed on November 23, a date too late for us to include them in this Report.[85] For now and the immediate future, however, what began as a sweeping constitutional attack on the administration and promotion of the Initiative has been reduced to a minor skirmish over two, highly particularized expenditures of federal money.

B. Cases Awaiting Decision

1. Lown (and others) v. The Salvation Army. Inc.; Commissioner, New York City Administration for Children's Services (and others)

a. Description

This lawsuit, filed in February, 2004 in the U.S. District Court for the Southern District of New York, alleges that the Salvation Army (hereafter "SA") has unlawfully discriminated on the basis of religion with respect to its professional employees who are working in child welfare services funded by

[84] *Freedom from Religion Foundation v. McCallum*, 179 F. Supp. 2d 950 (WD Wisconsin 2002). The court in *McCallum* upheld the Charitable Choice scheme on its face, but held unconstitutional a direct grant from the state's Department of Workforce Development to a faith-intensive, residential program for the treatment of those struggling with problems of substance abuse.

[85] Significant new developments in this and other cases following the closing date of this Report (11/22/04) will be covered in supplemental updates available on the web site of the Roundtable on Religion and Social Welfare Policy at http://www.ReligionandSocialPolicy.org.

New York State and New York City.[86] The complaint asserts that SA has recently and dramatically reemphasized its religious mission, and that this religious emphasis has resulted in unlawful changes in its employment practices. According to the plaintiffs, these new employment practices have produced a religiously hostile environment for many employees and led to the unlawful constructive discharge of several professional employees. The plaintiffs claim that these new practices are violations of various provisions of the federal constitution, of the anti-discrimination provisions of the New York State Constitution, and of state and city anti-discrimination laws.

The complaint in *Lown* alleges that the Salvation Army has unlawfully discriminated on the basis of religion with respect to its professional employees who are working in child welfare services funded by New York State and New York City.

Because much of the work of the SA in the New York City area involves child welfare services which are funded by the City of New York or the State of New York, the suit also targets a number of government agencies and officials. The complaint asserts that the government financing of the SA's child welfare services implicates the government defendants in violations of the state and federal constitution. The suit seeks an injunction against the SA's "discriminatory employment practices," a declaration that government financial support of those practices violates the federal and state constitutions, and damages against appropriate parties.

This lawsuit is potentially of great significance to the Faith-Based and Community Initiative. The suit's central focus is a question that has haunted the Initiative – to what extent may government-financed, faith-based providers engage in employment practices that prefer a particular religious identity or set of religious principles? Moreover, the SA is a very substantial provider of government-supported social services in New York and elsewhere. If the SA and the government defendants can prevail on the legal questions raised by this litigation, this aspect of the Initiative will become considerably safer from legal attack, though not from political controversy. If, on the other hand, the plaintiffs prevail here, faith-based organizations (hereafter "FBOs") which prefer co-religionists in hiring or insist on employee adherence to a religiously mandated set of principles may well become targets of future litigation if they enter into contracts with government. Of equal or greater concern to architects of the Initiative, a plaintiffs' victory here may induce such FBOs to refrain from applying for such contracts altogether.

[86] The complaint is available at http://www.nyclu.org/salvation_army_complaint_022404.html. The plaintiffs include Anne Lown and several other named current and former employees of the Salvation Army. The defendants include a variety of state and local social service agencies with programs for children.

On May 14, 2004 the SA and the various government defendants moved to dismiss the complaint as legally insufficient; that is, the defendants assert that even if all of the factual allegations in the complaint are true, the defendants are nevertheless entitled to legal judgment in their favor. The parties have fully briefed the court on these motions, and the U.S. Department of Justice has filed a friend of the court brief on the side of the Salvation Army and the government defendants. The federal district court is expected to rule on these motions sometime soon. In what follows, we summarize the principal allegations in the complaint, analyze the legal strength of the plaintiffs' claims and of the defenses that have been offered by the various defendants, and offer our appraisal of the likelihood of the various possible outcomes.

b. Summary of Allegations

On February 24, 2004, the New York Civil Liberties Union filed suit in the U.S. District Court for the Southern District of New York on behalf of Ann Lown, the Associate Director of the SA's New York program known as "Social Services for Children (hereafter "SSC"), and seventeen other current or former employees of SA. The complaint alleges that, in the past several months, the SA "has improperly infused religion into the workplace" of a number of SA employees who work in government-funded service programs. The result of this infusion has been the creation of a pervasively hostile environment for those professional employees who do not share the SA's reinvigorated religious mission. Because the SSC program is heavily funded by the city and the state, the complaint asserts that these employment practices violate the federal constitution, the state constitution, and various state and local anti-discrimination codes. All of the following assertions are taken from allegations in the complaint:

The suit's central focus is a question that has haunted the Faith-Based and Community Initiative: to what extent may government-financed, faith-based providers engage in employment practices that prefer a particular religious identity or set of religious principles?

- The 18 plaintiffs are all present or former SA employees, who were or are at risk of job loss because of their reluctance to disclose their religious practices to the SA or their reluctance to profess adherence to SA's religious principles
- The SA receives approximately $50 million in state and city funds annually. It sees about 2300 clients daily, nearly 90 percent of whom are in the custody of, or have been referred by, government agencies.
- Because of the amount of government financial support, and the quantity of services to children (a number of whom are in government custody), the SSC of SA functions as a government actor rather than as a private one.

- Dating back to the fall of 2003, SA has been infusing religion into the workplace. Its employment forms now ask employees for their church affiliations over the past 10 years; request employees to authorize their clergy to reveal to the SA private communications between employees and their clergy; and ask employees to pledge to support the SA's religious mission, which includes a specific commitment to preach the gospel of Jesus Christ.
- In September of 2003, the SA rescinded a policy guaranteeing "equal employment opportunity without unlawful discrimination as to . . . creed," and replaced it with a policy guaranteeing equal employment opportunity "except where inconsistent with Salvation Army principles."
- The new environment at SA is religiously hostile to many employees, who fear they will be required to breach their professional obligations to clients, especially teen-agers at risk for HIV, sexually transmitted disease, or unintended pregnancy.
- The religious hostility in the SA employment environment has led to the constructive discharge (i.e., involuntary departure) of several professional employees, including Margaret Geissman, who was Director of Human Resources for SSC.
- The service partnership between SA and the various government defendants render these policies inconsistent with the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause of the federal constitution; the antidiscrimination provisions of the New York State Constitution; and the state and city human rights laws.

c. Responses from the Salvation Army and the Government Defendants

Soon after the complaint was filed, the SA modified its employment form in several ways. The form, which was designed to elicit information about the applicant/employee's suitability for work with children, had originally asked for the employee's current church affiliation and church affiliations for the past 10 years. The form had also asked employees to authorize their current ministers to answer questions about confidential communications with the employees. Those requests now have been withdrawn.

All of the defendants have filed motions to dismiss the Lown complaint. The motions assert that, even if the factual allegations in the complaint are true, the defendants are nevertheless entitled to prevail in the litigation.

The defendants' principal arguments in support of their motion are as follows:

- The relevant statutory law, at both the state and local level,[87] permits religious organizations to give employment preference to "persons of the same religious denomination" and to "take such action as is calculated by such organizations to promote [their] religious principles . . ." The SA describes itself as a church, and it argues that all of the religious influences that it brings to bear on its employees are designed to promote the SA's religious mission. The SA therefore claims that its challenged practices are exempt from state and local prohibitions on religious selectivity in employment.
- The SA and the government defendants all argue that the actions of the SA are those of private actors, and do not constitute action by the state. (If the SA is considered an arm of the state, some of its actions would definitely violate the state and federal constitution. The state may not have a "religious mission;" it may not select employees on a religious basis, and it may not encourage them to follow "religious principles" in their work.) Therefore, the requirements of the federal and state constitutions do not govern the SA's employment relations, which are controlled only by statutory and common law.
- The government-financed programs administered by the SA are entirely secular in their content, and therefore do not involve the government in financing religious indoctrination.

d. Analysis of the Litigation

The facts alleged in this complaint comprise a narrative that is sympathetic to the plaintiffs. Nevertheless, the relevant law – and some conspicuous omissions from the pleaded facts – suggests that the plaintiffs' case is far more difficult as a legal matter than initially may appear.

It is not difficult to see how and why the facts alleged in this complaint comprise a narrative that is sympathetic to the plaintiffs. They are professional child welfare workers, trying to serve their clients. The Salvation Army appears to have recently reinvigorated its religious mission. Many observers, untutored in the relevant legal nuances, believe that a financial relationship between government agencies and SA is constitutionally troubling unless the SA operates its government-sponsored programs in an entirely secularized way. In addition, many legislators and civil rights advocates object on policy grounds to government financing of private organizations that engage in religious selectivity in employment, even if civil rights statutes permit such selectivity by FBOs in their privately financed activity. If the SA is insisting on religious commitments from its professional employees, its relationship with New York City and New York

[87] At the time of the filing of the original complaint, there remained procedural impediments to filing a lawsuit based on federal statutory law. In the fall of 2004, the plaintiffs filed an amended complaint which added a claim against the Salvation Army of religious discrimination in employment, in alleged violation of Title VII of the 1964 Civil Rights Act.

State may appear to some to be impermissibly and unacceptably tainted with religious influence.

Nevertheless, the relevant law – and some conspicuous omissions from the pleaded facts – suggests that the plaintiffs' case is far more difficult as a legal matter than initially may appear.

(1) The Statutory Issues

Federal law, the law of New York State, and the law of New York City all contain prohibitions on religiously-motivated selectivity in employment. These prohibitions apply to selectivity based on religious identity (e.g., preferring Christians to non-Christians), religious practices (e..g., preferring church attenders to non-attenders), and commitment to religious principles (e.g., preferring those who oppose abortion on religious grounds to those who do not).

The same bodies of federal, state, and local law, however, contain exemptions from these very prohibitions for religious organizations. The federal law explicitly says that it does not apply to the actions of religious organizations in selecting people of a particular faith for employment. The law of the State and the City, both of which are invoked by the Lown plaintiffs, uses the following language to describe the exemption of religious organizations:

> *"Nothing contained in this [anti-discrimination law] shall be construed to bar any religious or denominational organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment . . . to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained."*[88]

The state and local exemption is slightly narrower than the federal exemption; the latter excludes religious organizations' acts of religious selectivity entirely from the coverage of the statute, while the state law, as construed by the New York Court of Appeals, requires that the selectivity be identified and defended by the religious organization as designed to promote its religious principles.[89]

[88] This language appears in New York State's Executive Law, Art. 15, Human Rights Law, section 296, Unlawful discriminatory practices, section 11. Identical language appears in New York City Administrative Code, Section 8-107 (12).

[89] See Scheiber v. St. John's University, 84 N.Y. 2d 120, 638 N.E. 2d 977 (1994). In *Scheiber*, New York's highest court ruled that a Catholic university could not dismiss a vice-President simply because he was Jewish; the University was obliged to explain how and why its dismissal of Mr. Scheiber was in furtherance of its religious principles. The identity of language between the state's and the city's anti-discrimination laws strongly suggests that the courts would construe the city's law identically with that of the state.

The actions of the SA that the Lown complaint targets, however, seem to fit comfortably within the language of this exemption, as construed by courts. The Lown plaintiffs accuse the SA of emphasizing its religious mission, and insisting that its employees acknowledge and respect that mission. Whether or not actions consistent with that mission raise Establishment Clause questions when government is financing the SA's programs – a question that we consider below – it seems very difficult to argue that the SA's actions, apparently designed to reinvigorate its identity as a church, are not within the scope of the exemption for religious organizations found in the law of the state and the city.[90]

(2) The Constitutional Issues

There are two sets of constitutional issues in Lown, and it is easy to confuse them. The first set of issues involves SA's status as a governmental versus private entity. Both the state and federal constitutions limit government, but they do not limit private parties. If the actions, including personnel decisions, of SA are attributed to the State, then the federal and state constitutions govern such actions. Under such legal circumstances, SA would be obliged to afford its employees freedom of speech, freedom of religion, and due process of law, to the same extent as other governmental agencies. If, on the other hand, the actions of SA remain private in character despite the public funding of SA, those constitutional limitations do not apply to SA's conduct.

If the actions, including personnel decisions, of the Salvation Army are attributed to the State, then the federal and state constitutions govern such actions. If, on the other hand, the actions of SA remain private in character despite the public funding of SA, those constitutional limitations do not apply to SA's conduct.

The second set of issues is easily conflated with the first, but is nevertheless distinct. In the special constitutional context of the Establishment Clause, the mixture of a) state action in the form of government financing of privately delivered social service with b) state failure to police the religious content of those services has the potential to be constitutionally fatal.

On the facts alleged in Lown v. SA, the plaintiffs' case for deeming SA to be a "state actor" seems highly questionable. But the issue of whether the state violates the Establishment Clause when it provides financial support to an organization that emphasizes a religious mission in its personnel decisions is closer and more complex. We explore each of these issues in turn.

[90] The plaintiffs also claim that SA has retaliated against them for asserting civil rights claims. Under certain circumstances, such retaliation (if demonstrated) is actionable even if the underlying anti-discrimination claim lacks merit. We do not attempt to analyze the retaliation claim in this comment. We note, however, that it is a purely state law claim, and therefore (like any other state law claim) may be dismissed if all of the federal claims are dismissed. In those circumstances, the plaintiffs would still be free to bring their state law claims in a state court.

(a) State Action

It is commonplace among those untutored in the subject to believe that private entities that receive government funds thereby become state actors and thereby fall under the strictures of the constitution – or, to put it another way, that the state is constitutionally responsible for all that its contracting partners do when such partners act pursuant to government contracts. This belief is reinforced by a variety of statutes which indeed do impose special legal duties on private parties when they receive financial assistance from the government. The most prominent example of such duties is Title VI of the 1964 Civil Rights Act, which imposes requirements of nondiscrimination based on race or national origin (but not religion) on all beneficiaries of financial support from the federal government.

Such duties, however, are creatures of legislation and do not arise from the Constitution of its own force. In several prominent decisions, dating back over twenty years, the Supreme Court has held very explicitly that a private entity's receipt of public financing does not make the government responsible for all of that private party's actions. In *Rendell-Baker v. Kohn*,[91] several former employees of a private school for troubled high school students brought suit against the school and its directors for what the plaintiffs alleged was an unconstitutional dismissal from their jobs. The school received more than 90 percent of its funding from various sources of government funds. The employees alleged that they had been fired in violation of the First Amendment and the due process clause of the Fourteenth Amendment to the Constitution. The Supreme Court affirmed a dismissal of the suit, holding that the receipt of government funds did not convert the school into a state actor. Unless the dismissal was pursuant to a state policy, or the school was in a relationship of unusual mutual dependence with the state, the private party's personnel action could not be attributed to the government.

In several prominent decisions, dating back over twenty years, the Supreme Court has held very explicitly that a private entity's receipt of public financing does not make the government responsible for all of that private party's actions.

In *Blum v. Yaretsky*,[92] decided the same day as *Rendell-Baker v. Kohn*, the Supreme Court reached the identical conclusion in a case that presented very similar facts. *Blum* involved a challenge to decisions of private nursing homes to move patients to a lower level of care. The patients were Medicaid recipients, and they argued that their recipient status and the corresponding transfers of funds for their care from the government to the nursing homes

[91] 457 U.S. 830 (1982).
[92] 457 U.S. 991 (1982).

(combined with the degree of government regulation of nursing homes) rendered the homes "state actors" for purposes of decisions about levels of care. The government was paying the medical expenses of more than 90 percent of the patients in these facilities. Had the plaintiffs prevailed on that point, decisions about levels of care would have been subject to the procedural constraints of the due process clause. In *Blum*, similarly to *Rendell-Baker*, the Court ruled that the financial relationship between the government and the nursing homes did not make all nursing home activities attributable to the state. In the absence of government compulsion (which obviously is state action, and could be challenged directly by suit against the relevant government official), actions by the nursing home were private in character and therefore not subject to constitutional constraints.

The precedents set by the decisions in *Rendell-Baker* and *Blum* are forceful in the Salvation Army context. SA is a service contractor, delivering social services pursuant to contracts with various agencies of the City and the State of New York. The contracts by their own force do not transform SA into a state actor, nor do they result in the actions of SA being generally attributable to the state.

The Lown complaint attempts to steer around these precedents in several ways. One is by focusing on the quantity of business that the SA does with various levels of government. The decisions in both *Blum* and *Rendell-Baker*, however, dismiss such quantitative considerations as irrelevant to the question of the constitutional status of private actors. Second, and perhaps more promisingly, the Lown complaint asserts that the SA has custodial responsibility for a number of children who have been placed with SA facilities by the state. In these circumstances, the complaint asserts, the state's constitutional responsibilities toward those in its custody cannot be avoided by privatizing the custodial responsibility. The relevant analogy here is to those incarcerated for crime; with respect to the state's prisoners, delegation of authority to private parties by contract with the state does not erase the constitutional duties of the state and its delegates to abide by constitutional limitations – for example, on cruel and unusual punishments.

The contracts by their own force do not transform the Salvation Army into a state actor, nor do they result in the actions of SA being generally attributable to the state.

The SA's response to this line of argument is to assert that at most it applies to only some portions of the SA enterprise, and that in any event the "constitutional" duties of SA run only to the children in its custodial care, and not to the personnel working with them. This response has considerable force, though it of course remains to be seen how the federal district court will deal with it.

Our tentative conclusion is that the SA and the government defendants have strong legal arguments on their side on the question of whether the SA's

personnel policies and actions can be attributed legally to the state.[93] As suggested above, however, success on this point does not necessarily produce a victory for all of the defendants. The government defendants still must face the allegation that they are violating the Establishment Clause by their financing of private parties whose personnel practices are religiously selective.

(b) The Establishment Clause and State Support of FBOs that Engage in Religiously Selective Personnel Actions

Even if the personnel actions of the SA cannot be attributed to the government, First Amendment questions remain in the case. The expenditure of government funds in ways that may advance religion always presents such questions. Indeed, the Establishment Clause presents a unique context in which to evaluate the constitutional significance of government funding. The expenditure itself – without question an action of the state –triggers constitutional limitations. Even if the decision to spend such monies in a particular way is entirely within the practical discretion of the private recipient, the government may be held constitutionally responsible for expenditures on practices that have religious content. This special responsibility of the government to police the actions of its contracting partners exists in no other area of constitutional law.

Does the government's financial support for hiring selectivity have the effect of advancing religion?

Exactly what the government's substantive responsibilities are, and what impact such responsibilities may have on the status of the SA's personnel policies and practices, are matters of considerable controversy. In this regard, it is crucial to note that the Lown complaint never alleges that the SA has been engaging in government-financed religious counseling or other government-financed activities with explicitly religious content. Allegations of that sort would of course raise questions, under the Establishment Clause, about the government's duty to refrain from directly financing explicitly religious experience. Instead, the complaint's allegations are limited to the SA's expression of its religious mission in the workplace, and in its employment relations with personnel, all or part of whose salaries are paid from funds obtained through government contracts and grants.

Is direct government financing of personnel costs in such a workplace, in which religious selectivity is practiced and religious themes are emphasized, but religious content is not expressed to beneficiaries, a violation of the Establishment Clause? This question is at the heart of Lown v. Salvation

[93] It is possible that the law of what constitutes "state action" under the New York Constitution is more generous to the plaintiffs than the analogous law under the federal constitution. But we have so far seen nothing that would indicate that such is the case.

Army, and indeed at the center of the large political debate swirling around the Faith-Based and Community Initiative and the Bush Administration's support for religious selectivity in hiring by government-financed FBOs.

Three different approaches to the Establishment Clause, all of which find some support in the relevant case law, might be brought to bear on this question by the courts. First, the plaintiffs might rely on the Supreme Court's 1971 decision in *Lemon v. Kurtzman*.[94] *Lemon*, which involved public financing of religious schools, has fallen into considerable disfavor in the Supreme Court but is still widely cited in the lower courts. The three-part test for constitutionality announced by Lemon is: 1) whether the challenged action has a secular purpose; 2) whether the principal or primary effect of the challenged action neither advances nor inhibits religion; and 3) whether the action results in "excessive entanglement" between government and religious institutions. The first and third of these will play little part in Lown; the government's purpose in its contracts with SA is to deliver secular social service to children and others, and the government's nonregulation of religious selectivity in employment reduces rather than increases entanglement concerns. It is on the question of religious effects that Lown becomes more difficult. Does the government's financial support for hiring selectivity have the effect of advancing religion? That is a question with respect to which reasonable people may differ. From the SA's perspective, the government is just maintaining the legal status quo when it funds SA services without insisting on revised SA personnel practices. Viewed from the plaintiffs' perspective, government funding of religiously selective hiring by SA expands the organization's religious mission and influence, even if the relevant employees have secular responsibilities. It is possible that the plaintiffs may prevail on this argument, although such a victory may not survive on appeal.

From the Salvation Army's perspective, the government is just maintaining the legal status quo when it funds SA services without insisting on revised personnel practices. From the plaintiffs' perspective, government funding of religiously selective hiring by SA expands the organization's religious mission.

Second, the Supreme Court on a number of recent occasions has framed Establishment Clause questions in terms of whether the challenged government action has the purpose or effect of "endorsing religious belief." The underlying concern of this approach is the government's alienation of citizens. If government is purposefully endorsing a religious view, or perceived to be doing do, nonadherents of that view may be made to feel like outsiders in their own political community. But the Court has tended to utilize this approach primarily in cases about government religious speech, such as displays of religious symbols, and has tended to rely on this doctrine less in cases concerning government expenditure in support of FBOs. Moreover, the Court has insisted that the question of perception of government endorsement of religious view be appraised from the perspective

[94] 403 U.S. 602 (1971).

of a reasonable observer, one familiar with legal norms and historical practices. From that perspective, the plaintiffs in Lown have a difficult argument to make. The Court's hypothetical reasonable observer would know that FBOs have long been free under federal, state, and local law to engage in religious selectivity in employment practices. For government not to insist that FBOs relinquish their right to engage in such practices in exchange for government funds is not necessarily an endorsement of those practices. Rather, it could reasonably be seen as a policy decision to leave the relevant labor law provisions unchanged when government enters into contractual arrangements with private employers.

Finally, the Lown plaintiffs may rely on a theory of government's responsibility, under the Establishment Clause, for the religious experiences of those who receive government-financed services from FBOs. This approach, which has just recently emerged, and is displayed most prominently in the concurring opinion joined by Justice O'Connor and Justice Breyer in *Mitchell v. Helms*[95] (2000), proscribes religious indoctrination for which the government is financially responsible. Some lower courts have begun to act upon this concept,[96] which obliges the state to impose procedural safeguards to ensure that FBOs do not use public monies to engage in such indoctrination. If the court in Lown relies on this line of thought, the distinction between direct service to beneficiaries and employment practices may be constitutionally significant. *Mitchell v. Helms* involved direct aid, in the form of computers, books, and other goods, to religious schools, and raised questions about religious indoctrination of students at government expense. Religious selectivity in hiring, by contrast, typically involves an employment preference for those who already believe in and are committed to the FBO's religious mission. Permitting such selectivity, even when the government is putting up funds that contribute to payroll, does not necessarily involve the government in financing ongoing activities that are designed to inculcate religious beliefs in employees.

It may be an uphill fight for the Lown plaintiffs to convince the court that government contracts with the Salvation Army, which in turn uses the money in part to support a workforce controlled by the SA's policy of emphasizing its religious mission to its employees, implicates the government in the impermissible advancement or promotion of religion.

[95] 530 U.S. 793 (2000).

[96] See Freedom *from Religion Foundation v. McCallum*, 179 F. Supp. 2d 950 (2002). See also our discussion of this decision in the 2002 Report, at pp. 26-29.

It may thus be an uphill fight for the Lown plaintiffs to convince the court that government contracts with the SA, which in turn uses the money in part to support a workforce controlled by the SA's policy of emphasizing its religious mission to its employees, implicates the government in the impermissible advancement or promotion of religion. We believe that it is likely to be on this question, however, and not on the questions of statutory civil rights or the SA as a state actor, that the primary confrontation in Lown v. SA will occur.

e. Conclusion

For the reasons we have addressed, the plaintiffs' legal situation is precarious but not wholly implausible. A ruling for the plaintiffs on any of its federal constitutional theories would have sweeping implications for the Faith-Based and Community Initiative, both within and without the State of New York. A dismissal of all the claims against these defendants, however, would be a substantial victory for the Bush Administration's long-held legal and political stance in favor of permitting religious selectivity in employment by FBOs holding social service contracts with agencies of government on any level.

2. Americans United for Separation of Church & State v. Warden Terry Mapes, Prison Fellowship Ministries (and others)

This case, which we analyze in detail in our 2003 Annual Report at pp. 68-75, involves claims that the Iowa prison system is operating an unconstitutional program of rehabilitation in partnership with the InnerChange Freedom Initiative, an affiliate of Prison Fellowship Ministries. The plaintiffs allege that the program unconstitutionally involves the state in the financial support of religious instruction, that it favors evangelical Christianity over other faith communities, and that it creates unlawful incentives on the part of prisoners to accept evangelical Christian faith. The parties presented their competing arguments for summary judgment to the court in the U.S. District Court for the Southern District of Iowa in mid-October, 2004, and the case is now awaiting decision. The court may rule for one side or the other, or may rule that the case yet requires a trial on a variety of disputed factual issues. If and when the court rules definitively for one side or the other, we expect an appeal to the United States Court of Appeals for the Eighth Circuit.

II. DEVELOPMENTS IN THE EXECUTIVE BRANCH

On June 1, 2004, President Bush issued executive order 13342, which created centers for the Faith-Based and Community Initiatives in the Departments of Commerce and Veterans Affairs and the Small Business Administration. This brings the number of such offices to ten, including the Departments of Agriculture, Education, Health and Human Services, Housing and Urban Development, Justice, and Labor; the Agency for International Development; as well as a similar office in the Corporation for National and Community Service.

During 2004, the Administration also promulgated a series of new rules governing the participation of faith-based providers (FBOs) in federally funded social welfare programs administered by these departments. In the main, these new rules are designed to implement and advance a set of core elements of the Faith-Based and Community Initiative which we analyzed in detail in our 2003 State of the Law Report. The new rules have not materially altered the use or understanding of any of those elements, and our legal analysis of them remains unchanged from that found in last year's report. With respect to those elements, we identify minor changes or developments as appropriate in this section, but largely summarize our earlier assessments, and refer back to last year's report for fuller discussions.

During 2004, the Administration promulgated a series of new rules governing the participation of faith-based providers in federally funded social welfare programs and introduced two new core elements to the Initiative: a clarification that accommodation of the distinctive needs of religious organizations does not violate the principle of equality, and an exception to the limit on direct government funding of religious activities in contexts in which the government maintains extensive control over individuals, such as in prisons or the military.

This year, federal agencies have introduced two new core elements to the Initiative, and we provide below a full analysis of these new elements. The first introduces a clarification or exception to the principle of neutrality between religious and non-religious service organizations, and provides that accommodation of the distinctive needs of religious organizations does not violate the principle of equality. The second introduces an exception to the limit on direct government funding of religious activities, and provides that such a limit does not have the same force or scope in contexts in which the government maintains extensive control over individuals, such as in prisons or the military.

For purposes of our analysis, Executive branch actions in 2004 to further the Faith-Based and Community Initiative are grouped among three key principles:

equal participation of FBOs in federally financed social welfare programs; constitutional limits on the use of government funds for certain religious activities; and protection for the religious liberty of those who receive benefits under government social welfare programs. We discuss each of these principles, and this year's corresponding actions by the Executive, in turn.

A. Key Elements in the Faith-Based and Community Initiative

1. Equal Participation of Faith-Based Organizations in Federally Financed Social Welfare Programs

The principle of neutrality between FBOs and secular providers stands as the defining feature of the Faith-Based and Community Initiative and its predecessor, Charitable Choice. Although the Supreme Court's Establishment Clause jurisprudence once required the exclusion of "pervasively sectarian organizations" from participation in any government-financed service program, that law has changed dramatically over the past fifteen years. The law of the Establishment Clause now focuses attention on the religious content of the service financed by the government, not on the religious character of the organization providing that service. Emphasizing this legal change, the Faith-Based and Community Initiative has sought to ensure a robust opportunity for FBOs to participate in federal social welfare programs on terms equal to those imposed on or enjoyed by non-religious providers. The principle of neutrality is articulated in four of the core elements of the Initiative.

FBOs have an equal right to compete for funding under any federal social welfare program for which an analogous secular service provider would be eligible to compete. FBOs may not be excluded from participation simply because of their religious character. The Administration has made special effort to eliminate legally unnecessary obstacles to FBOs' participation, and to expressly invite FBOs to participate.

a. Equal Opportunity for FBOs

The first element is also the most basic. FBOs have an equal right to compete for funding under any federal social welfare program for which an analogous secular service provider would be eligible to compete. FBOs may not be excluded from participation simply because of their religious character. This principle is made most clear in a new rule promulgated by the Department of Education (hereafter ED). A prior rule categorically barred payment of ED grant funds to any "school or department of divinity," regardless of the character of the service provided by that institution. The new rule eliminates that restriction. A seminary or divinity school can participate in ED programs so long as it complies with restrictions on the religious use of government grant funds, even if the school also offers intensely religious instruction and training.[97]

[97] 69 FR 31708-31709 (June 4, 2004) (revising 34 CFR Parts 74, 75, 76, and 80).

In its articulation of this principle, the Administration rightly emphasizes the full inclusion of FBOs in government-financed social welfare programs. By law, regulation, or simply bureaucratic habit, agencies excluded FBOs from such programs or subjected them to burdens not imposed on analogous non-religious providers. Given this history of limitation, the Administration has appropriately made special effort to eliminate legally unnecessary obstacles to FBOs' participation, and to expressly invite FBOs to participate.

At least in principle, the Administration's efforts to include FBOs are legally permissible.[98] Such efforts, however, can be misconstrued as a preference for FBOs in the distribution of government funds. As *FFRF v. MORH*, discussed in part I.A above, vividly illustrates, the Establishment Clause prohibits the design or operation of government-funded programs that target religious organizations for special benefits. The Administration's standard articulation of the neutrality principle clearly states this constitutional limitation. "In the selection of goods and service providers, recipients shall not discriminate *for or against* a private organization on the basis of the organization's religious character or affiliation."[99]

Because such provisions are typically found under headings that focus exclusively on the rights of religious entities, the prohibition on discrimination in favor of religious organizations might be overlooked. In response to that concern, DOL's new rule highlights the full import of the neutrality requirement. Those who administer DOL programs "must not disqualify organizations from receiving DOL support or participating in DOL programs on the grounds that such organizations are motivated or influenced by religious faith to provide social services, have a religious character or affiliation, *or lack a religious component*."[100] While not legally mandatory, other agencies might want to consider adopting similar language to guard against this potential misunderstanding.

Those who administer government funds may not require providers to "secularize" their place of service or their organization's governance in order to participate. The Establishment Clause prohibits direct financing of religious content, but permits financing of providers with a religious character.

[98] See above for our discussion of *Freedom from Religion Foundation v. Towey*.
[99] 34 CFR §74.44(f)(1)(ii) (ED). See also 7 CFR §16.2(a) (USDA); 45 CFR §87.1(b) (HHS). HUD's rule, however, prohibits only discrimination against religious entities. 24 CFR §5.109(b).
[100] 20 CFR §2.32(c). See also 69 FR 41884-41885 (July 12, 2004) (DOL's explanation of change to include more explicit prohibition on discrimination against non-religious providers).

b. Protection for the Religious Character of Participating FBOs

The second element is a corollary of the first. Because the religious character of a provider is legally irrelevant for that provider's eligibility to participate in a service program, those who administer government funds may not require providers to "secularize" their place of service or their organization's governance in order to participate. Thus, participating FBOs may retain religious imagery in their buildings, may place religious conditions on those who oversee the organization, and may have governance documents that commit the organization to a religious mission.

This protection for the religious character of FBOs does not, however, grant such providers the legal right to introduce religious content into programs directly financed by government funds. The Establishment Clause prohibits direct financing of religious content, but permits financing of providers with a religious character.

c. Preservation of FBOs' Title VII Exemption

The third element also represents an extension of the central claim of the Faith-Based and Community Initiative – that FBOs participating in government service programs should be able to maintain their religious character. The second element focuses on the institutional character of participating FBOs, and this third element focuses on the character of the employees who will provide that service.

Under Title VII, religious organizations are exempt from the ban on religion-based discrimination. The Initiative affirms that FBOs retain that exemption even when they participate in government funded programs.

The Administration typically expresses this element as a broad principle: FBOs should be free to hire co-religionists, even if the position in question is funded by the government. The specific legal effects of the rules adopted to further this principle, however, are somewhat narrower, and are situated within a complicated legal landscape. This element refers to Title VII of the Civil Rights Act of 1964, which restricts (among other things) religion-based discrimination in employment decisions or practices. Under Title VII, religious organizations are exempt from the ban on religion-based discrimination. This third element of the Initiative affirms that FBOs retain that exemption even when they participate in government funded programs. As several of the new rules acknowledge, that affirmation is limited by statutes governing certain programs – affecting, most notably, some of those administered by HHS, HUD, and DOL – which explicitly prohibit all participating providers from engaging in religion-based discrimination.[101] Although these rules do not identify the specific programs in which participating FBOs would lose their

[101] 45 CFR §87.1(g) (HHS); 24 CFR §5.109(e) (HUD); 29 CFR §2.35 (DOL).

exemption under Title VII, the rules do provide sufficient guidance in directing providers to make inquiry about the specific obligations that attach to funding programs in the affected agencies.[102]

We remain concerned, however, about the new rules' treatment of an even more complicated part of the legal landscape. While the supremacy of statutory requirements over administrative rules may be clear, the relationship between the federal regulation and inconsistent state or local law is far less so. In the rules introduced over the past year, agencies have not provided sufficient guidance for FBOs wrestling with the potential conflict between the federal exemption and state or local anti-discrimination rules. This lack of clear guidance is most evident in the agencies' responses to comments on proposed rules, in which the agencies discussed the issue of "State and local diversity requirements and preemption." The VA response, for example, states:

> *Some commenters expressed concern that the proposed rule will exempt religious organizations from State and local diversity requirements or anti-discrimination laws. Further, commenters suggested that the proposed rule be modified to state that State and local laws will not be preempted by the rule.*
>
> *The requirements that govern funding under the VA Homeless Providers Grant and Per Diem Program (Program) do not address preemption of State or local laws. Federal funds, however, carry Federal requirements. No organization is required to apply for funding under these programs, but organizations that apply and are selected for funding must comply with the requirements applicable to the Program funds.*

The first paragraph implicitly restates the question of whether or not the new rules preempt state or local laws that prohibit religion-based discrimination. The first sentence of the second paragraph correctly states that the rules do not address the question of preemption. The remainder of the second paragraph, however, leaves the potential for ample confusion with potentially serious consequences for affected organizations. It is, of course, true that "federal funds... carry federal requirements," and that "organizations that ... are

[102] It is interesting to note that, in all of the new rules promulgated over the past year, the federal agencies specifically declined to address or endorse FBOs' potential rights under the Religious Freedom Restoration Act (RFRA) to be relieved of federal statutory restrictions on religion-based discrimination in employment. In its rules governing the Substance Abuse and Mental Health Services Administration (SAMHSA), promulgated in 2003, HHS provided that RFRA operates to exempt FBOs from religious hiring restrictions found in statutes specific to SAMHSA-funded programs. Agencies adopting new rules during 2004 have uniformly rejected requests that all other rules governing the Faith-Based and Community Initiative incorporate such an interpretation of RFRA. See, e.g., 69 FR 42591 (July 16, 2004) (HHS); 69 FR 41887-41888 (July 12, 2004) (DOL). For our earlier discussion of HHS's use of RFRA under SAMHSA programs, see our 2003 Report, at pp. 23-26.

selected for funding must comply with the requirements applicable to the Program funds." The problem is that these two statements do not adequately respond to the question under consideration - whether or not grantees must comply with state or local anti-discrimination rules.[103]

To one unskilled in reading legal language, these two sentences might seem to suggest that the organizations maintain their "right" to prefer co-religionists even in the face of inconsistent state or local rules. Such an interpretation of the VA response would be in tension with what the law actually requires. The Title VII exemption for religious employers is neither a right of the organization, nor a requirement of any federal funding program, that displaces inconsistent state or local rules. The Title VII exemption means only that FBOs may prefer co-religionists without being held liable for violating federal law. In many states and localities, FBOs enjoy the same exemption under state or local anti-discrimination rules. In a significant number of other jurisdictions, however, FBOs - or at least FBOs that receive government funds - are not exempt from state or local prohibitions on religion-based discrimination. Rules governing the Faith-Based and Community Initiative should clearly state that FBO-grantees would be well-advised to check with an attorney to see whether employment preferences for co-religionists are forbidden by state or local anti-discrimination rules, notwithstanding the Title VII exemption.

Title VII exemption for religious employers is neither a right of the organization, nor a requirement of any federal funding program, that displaces inconsistent state or local rules.

d. Accommodation of Religion

DOL's new rules introduce two additional elements to the Faith-Based and Community Initiative – a commitment to the accommodation of religion within social service programs, and a recognition that constitutional limitations on direct financing of religious activity may not apply in contexts in which the government exercises significant control over individuals' lives. Although we take up here only the first of these elements, and address the second below, the two are quite closely linked. Most importantly, both raise the issue of the Establishment Clause's limit on government acts that provide distinctive benefits to religion – whether by exempting the religious from general rules, or by facilitating religious activity. This issue will come before the U.S. Supreme Court early in 2005, in *Cutter v. Wilkinson*,[104] in which the Court will decide whether the Religious Land Use and Institutionalized Persons Act (RLIUPA) violates the Establishment Clause by requiring prison officials to accommodate prisoners' religious practices.

[103] This ambiguity is found in other agencies' responses to similar questions, as we discussed in our 2003 Report, at pp. 26-28.
[104] 349 F.3d 257 (6th Cir. 2003), certiorari granted, 2004 U.S. Lexis 6695.

The new DOL rules introduce the idea of accommodation in two distinct contexts, focusing on the religious practices of service providers and those of program beneficiaries.[105] In materials appended to their final rules, HHS and HUD also invoke the concept of accommodation, but do so only in the context of religious service providers.[106] The rules offer neither a definition of accommodation nor guidelines to determine when the provision should or should not be invoked. The rules state only that the requirement of neutrality between religious and non-religious providers, or of equal treatment of religious and non-religious beneficiaries, "does not preclude [DOL or those who administer its programs] from accommodating religion in a manner consistent with the Establishment Clause."[107]

Under the law of the Religion Clauses, an accommodation exempts religious conduct from a general policy that does not target religion for special burdens but has the practical effect of imposing a significant hardship on religion.

Under the law of the Religion Clauses, an accommodation exempts religious conduct from a general policy that does not target religion for special burdens but has the practical effect of imposing a significant hardship on religion. For example, a regulation that requires all men to be clean-shaven does not single out religious men for special burden; the law applies to all men. But for those whose religious beliefs require that they wear beards, the law's effect is to prohibit a significant religious practice.[108] An accommodation would permit those whose religious beliefs require beards to wear them – though subject, perhaps, to limits on length in order to address some of the concerns that motivated the general rule.

Accommodations can be either mandatory – created by courts in order to address violations of a religious individual's or organization's free exercise rights – or permissive – created by statute or regulation, and encompassing a wider range of religious practice than might be required by the Free Exercise Clause. In federal constitutional law, the distinction between mandatory and permissive accommodation has grown much wider over the past fifteen years. In *Employment Division of Oregon v. Smith*, the Supreme Court dramatically restricted the scope of mandatory accommodations, ruling that religious individuals have no constitutional right to an exemption from religion-neutral

[105] 29 CFR §2.32(a) (providers); 29 CFR §2.33(a) (beneficiaries).
[106] 69 FR 42586 (July 16, 2004) (HHS); 69 FR 41713 (July 9, 2004) (HUD).
[107] 29 CFR §2.32(a) (providers); 29 CFR §2.33(a) (beneficiaries).
[108] See, for example, FOP Newark Lodge No.12 v. City of Newark, 170 F.3d 359 (3rd Cir. 1999) (challenge to police grooming regulations).

laws that burden religious practices.[109] As long as a law does not single out religious conduct for special disfavor, the religious have no constitutional right to relief from burdens on their conduct.[110]

In response to the Court's decision in *Smith*, Congress decided to expand the scope of permissive accommodations under federal law. Congress passed the Religious Freedom Restoration Act (RFRA) in 1993, which attempts to recreate a general principle of religious exemption from neutral but distinctly burdensome regulations. The Supreme Court, in *City of Boerne v. Flores*, held RFRA unconstitutional as it applied to state governments; the Court found that the statute impermissibly intruded upon states' rights.[111] Then, in 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), which tries to answer the objections raised by the Court in *Boerne*. RLUIPA, affecting primarily zoning and prison regulations, applies the rule of permissive accommodation to a narrower set of practices than those covered under RFRA. Late in 2003, the U.S. Court of Appeals for the Sixth Circuit, in *Cutter v. Wilkinson* held that RLUIPA violates the Establishment Clause because it singles out religion for special benefit – that is, for regulatory exemptions not available to the non-religious. The Supreme Court has agreed to review the *Cutter* decision, and will hear oral argument in the case early in 2005.

The Supreme Court will hear oral argument early in 2005 on *Cutter v. Wilkinson*, a case that squarely confronts the question implicit in the concept of permissive accommodation: At what point does an exemption from a regulation that is burdensome to religion become a special advantage conferred on religion, in violation of the Establishment Clause?

Cutter squarely confronts the question implicit in the concept of permissive accommodation. At what point does an exemption from a regulation that is burdensome to religion become a special advantage conferred on religion, in violation of the Establishment Clause? The Court addressed this issue in *Corporation of the Presiding Bishop v. Amos*, in which a former employee of the Mormon Church challenged the exemption of religious organizations from the Title VII prohibition on religion-based discrimination.[112] The employee alleged that the exemption conferred an improper benefit on religious organizations. The Court rejected his argument and upheld the exemption. After a close examination of Title VII, the Court found that the exemption was closely related to a religious organization's free exercise right to choose those who

[109] 494 U.S. 872 (1990). The *Smith* decision left open several narrow pathways for claiming mandatory accommodations under the Free Exercise Clause, including one invoked in the *FOP Newark Lodge* case cited above, but the court rejected any broad principle of religious exemption from religion-neutral rules.

[110] See Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993), in which the Court found that the City of Hialeah violated a Santerian congregation's free exercise rights when it prohibited "animal sacrifice" within the City's limits. The Court held that such an ordinance was impermissible because it prohibited religious conduct (animal sacrifice) while permitting virtually indistinguishable non-religious conduct (a wide range of other practices in which animals are killed).

[111] 521 U.S. 507 (1997). RFRA still applies to the federal government.

[112] 483 U.S. 327 (1987).

articulate the organization's message, and represented a reasonable effort by the government to avoid the need for religious entities or government officials to judge which employees convey that message and which do not. Moreover, the exemption was limited to the non-profit activities of religious institutions. In short, the exemption was not intended to confer a material advantage on religious entities, nor did it have that principal effect.

Two years later, however, in *Texas Monthly v. Bullock*, the Court struck down a Texas statute that exempted religious publications from a generally applicable sales tax.[113] The Court found that the Texas exemption was not reasonably related to any specific concern about free exercise violations, and that the tax exemption provided a distinct material advantage to religious organizations.

Those who administer service programs for government agencies should be aware that the Court may impose some limits on their discretion to accommodate religious practices or conduct within their government-funded programs.

The question raised in *Cutter*, therefore, is whether RLUIPA's accommodation of prisoners' religious conduct is more like the Title VII exemption in *Amos* or the tax benefit in *Texas Monthly*. In contrast to *Amos*, *Cutter* involves a broad claim of religious exemption from general regulations within prisons, and these regulations – unlike Title VII's prohibition on religion-based discrimination – ordinarily do not implicate the free exercise rights of individuals or entities.[114] Like the tax exemption in *Texas Monthly*, the RLUIPA accommodation can be readily seen as conferring a privileged position on the religious, entitling them to special treatment not afforded others who are similarly situated (non-religious publications in *Texas Monthly*, non-religious prisoners under RLUIPA). On the other hand, the RLUIPA accommodation – at least with respect to prisoners – does involve a context in which extensive government control over the lives of inmates certainly has the potential to impede religious practices, especially those of minority or disfavored faiths. If the Supreme Court upholds the Sixth Circuit's decision in *Cutter*, the ruling could have a dramatic effect across a wide range of regulatory accommodations, from zoning or tax exemptions to provisions that allow conscientious objectors to refuse military service or certain medical procedures.

The Court's eventual decision in *Cutter*, whether it reverses or sustains the appellate court's ruling, will not have a direct effect on the language of the newly promulgated DOL provisions. DOL's rule states that any

[113] 489 U.S. 1 (1989).

[114] Even before *Employment Div. v. Smith*, the Court was quite reticent about recognizing prisoners' claims for free exercise accommodations. See, e.g,. O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

accommodation of religion must be done in "a manner consistent with the Establishment Clause," and the Court's ruling in *Cutter* will therefore determine the scope of the DOL provision. Nonetheless, those who administer service programs for government agencies should be aware that the Court may impose some limits on their discretion to accommodate religious practices or conduct within their government-funded programs.

Even apart from questions about limits under the Establishment Clause, we remain uncertain about the scope of the new emphasis on accommodation in social welfare programs. As we noted earlier, the DOL rule contemplates accommodation of both religious beneficiaries and participating FBOs. Accommodation of the former, especially in the context of DOL programs that place beneficiaries in remote location, would likely involve steps by the government to ensure adequate space and time for beneficiaries to engage in voluntary worship, or perhaps special arrangements for employees to observe religious holidays or dietary requirements.[115] Accommodation of FBOs, however, does not have quite as obvious practical implications. What general regulations might impose significant burdens on FBOs participating in social welfare programs? Restrictions on religion-based hiring provide one possible context; recall HHS's invocation of RFRA last year to assert the exemption of FBOs from agency rules that prohibit all entities from such discrimination.[116] Pending the Court's judgment in *Cutter*, those who administer programs should be wary of granting accommodations that provide FBOs material advantages in competing for grant funds, such as different requirements for professional qualifications of staff providing services, or different rules for accounting for grant funds.

The U.S. Supreme Court's current interpretation of the Establishment Clause does prohibit direct government funding of activities that are "inherently religious," but it also prohibits direct funding of any activity that has significant religious content, whether or not that activity is "inherently religious."

2. Establishment Clause Limitations on the Use of Government Funds for Religious Activities

a. No Direct Government Expenditures on "Inherently Religious Activities"

Each of the new rules promulgated in 2004 states that direct government funding may not be used "for inherently religious activities such as worship, religious instruction, or proselytization." In each of our previous analyses of the Administration's rules and policies for faith-based grantees, including the 2003 State of the Law Report, we have explained that the U.S. Supreme Court's current interpretation of the Establishment Clause bars government funding of a broader set of activities than that encompassed by the phrase

[115] In this respect, accommodation of religion recognizes the same obligation as that discussed below in connection with other programs that involve significant government control over beneficiaries' lives.
[116] See 2003 Report, at pp. 24-26.

"inherently religious activities." The Court's interpretation does prohibit direct government funding of activities that are "inherently religious, ... such as religious worship, instruction, or proselytization," but it also prohibits direct funding of any activity that has significant religious content, whether or not that activity is "inherently religious." For example, a faith-intensive substance abuse treatment program would not be considered inherently religious – substance abuse treatment can be provided by religious or non-religious providers – but the courts have held that direct government funding of a program with significant religious content would nonetheless violate the Establishment Clause.

b. Restrictions on the Use of Government Funds for Religious Structures

Most of the new rules promulgated in 2004 – including those covering programs in USDA, HUD, DOL, and USAID – contain a provision that permits FBOs to use direct grant funds to acquire, construct, or rehabilitate structures "to the extent that those structures are used for conducting eligible activities" under that grant. 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." 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 other half of the time the same rooms are used for religious instruction.

In the 2003 State of the Law Report, we identified three serious constitutional concerns with this rule on the financing of religious structures.[117] First, as we discussed above, this rule provides that government funds may not be used for "inherently religious activities," and it therefore fails to give grantees sufficient guidance about the kinds of activities likely to be found constitutionally inappropriate uses of direct government funding. Because compliance with this rule depends on grantees' ability to distinguish between proper and improper uses of government-financed facilities, the incomplete information given by the "inherently religious" standard in this context places grantees at heightened legal risk.

The religious structures rule advanced by USDA and the other federal agencies offers little in the way of protections against diversion of the aid.

[117] See (pages in 2003 report on HUD, DOI and FEMA) for an extended analysis of the constitutional issues involved in the direct financing of religious structures.

Second, even if the rules were correct in identifying the set of constitutionally prohibited direct expenditures, the rule fails to satisfy an additional requirement under the Supreme Court's Establishment Clause jurisprudence – it provides no "adequate safeguards" to protect against improper diversion of government funds for religious uses. None of the newly promulgated rules includes provisions for monitoring appropriate uses of shared facilities. Indeed, in their responses to comments on proposed rules, the agencies specifically rejected the need for any such provisions. USDA's response is more detailed than that provided by other agencies, but consistent with the others' general approach:

> *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 program recipients' 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.*[118]

A review of the two most recent Supreme Court decisions on direct financing of services provided by religious organizations, *Agostini v. Felton*[119] and *Mitchell v. Helms*,[120] suggests that the monitoring required by the Constitution in order to effectuate the new rule would be significantly greater than that previously upheld by the Court. In *Agostini*, the Court sustained a program that paid for government employees to provide remedial education to eligible children enrolled in secular or religious private schools. The Court found that the employees provided exclusively secular instruction, and received sufficient instruction and monitoring to ensure that they did not engage in any religious instruction. In *Mitchell*, the Court upheld a program that paid for library and media equipment that would be used exclusively for secular instruction. The Court found that the secular character and intended use of the aid were sufficient safeguards against its diversion to religious use.

In contrast to *Agostini* and *Mitchell*, however, the religious structures rule advanced by USDA and the other federal agencies offers little in the way of

[118] 69 FR 41380 (July 9, 2004) (USDA). See also 69 FR 61719 (October 20, 2004) (USAID response to similar comments).
[119] 521 U.S. 203 (1997).
[120] 530 U.S. 793 (2000).

protections against diversion of the aid. The most important distinction is that in *Agostini* and *Mitchell*, the instructors or resources financed by the government are intended to be used exclusively for non-religious purposes. Determining whether the aid has been diverted is relatively simple – any religious use is unauthorized. In sharp contrast, the rule on religious structures permits 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 anything remotely as extensive as the monitoring that would be required to ensure appropriate use of government-financed structures under this rule.

No program of direct financing upheld by the Supreme Court or any federal appellate court – contemplates anything remotely as extensive as the monitoring that would be required to ensure appropriate use of government-financed structures under this rule.

Third, and perhaps most importantly, the rule runs directly contrary to a line of Supreme Court decisions that prohibit the expenditure of government funds on structures that are not "exclusively secular" in their use.[121] The Court's recent changes in Establishment Clause jurisprudence, which have permitted a wider range of opportunities for funding religious entities, have not yet altered the strict prohibition on financing religious structures. It is possible that, in a future case, the Court may ease this restriction, but the Court has shown no inclination to do so thus far.

c. No Special Assurances by FBOs

In their responses to comments on proposed rules, the agencies uniformly declined to impose on FBOs an obligation to provide special assurance that the organization would not use direct government funding for religious purposes.[122] A significant number of the newly promulgated rules delete similar requirements of assurances by FBOs that were present in earlier federal rules. USAID provided a common response to suggestions of the need for special assurances by participating FBOs:

> *This rule directs the removal of those provisions of USAID's agreements, covenants, memoranda of understanding, policies, or*

[121] These decisions include *Tilton v. Richardson*, 403 U.S. 672 (1971); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), and *Hunt v. McNair*, 413 U.S. 734 (1973).

[122] See, e.g., 69 FR 41380-41381 (July 9, 2004) (USDA); 69 FR 31714 (June 4, 2004) (ED); 69 FR 42590 (July 16, 2004) (HHS); 69 FR 41715 (July 9, 2004) (HUD); 69 FR 41888-41889 (July 12, 2004) (DOL); 69 FR 31886-31887 (June 8, 2004) (VA); 69 FR 61717 (October 20, 2004) (USAID).

> *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 of USAID-funded activities, including those prohibiting the use of direct financial assistance from USAID to engage in inherently religious activities.*[123]

In eliminating all requirements for special assurances by FBOs, USAID appeals to the principle of neutrality. This appeal has two dimensions. First, USAID justifies the removal of FBO-specific assurances by invoking the obligation to treat FBOs on an equal basis with non-religious providers. All providers, whether FBOs or non-religious, are forbidden to use direct government funds for "inherently religious purposes," so any affirmation of that obligation must be imposed on all providers. Second, USAID denies that the prohibition on direct funding of religious activities has any special legal significance. Instead, USAID treats that prohibition as one among many restrictions on uses of government funds. Taken together, these two dimensions of neutrality mean that all providers, whether religious or not, will agree not to use funds for inherently religious purposes, and that assurance will be one given only in the context of a wide range of other agreements not to misuse government funds.

A significant number of the newly promulgated rules delete requirements of assurances by FBOs that they would not use direct government funding for religious purposes, justified by invoking the obligation to treat FBOs on an equal basis with non-religious providers. But diversion to religious use is the only expenditure likely to involve a violation of constitutional law, and the duty to take reasonable precautions against such diversion is a duty imposed not by accounting rules, or even statutes, but by the Constitution itself.

The problem with this approach is that it seems to neglect the constitutionally distinctive character of religion and religious activities – and, by extension, religious organizations. It is true that the limit on religious use of direct government money is but one of a number of provision restricting grantees' use of funds. But diversion to religious use is the only expenditure likely to involve a violation of constitutional law, and the duty to take reasonable precautions against such diversion is a duty imposed not by accounting rules, or even statutes, but by the Constitution itself. Moreover, it is of course true that the duty not to use direct government funds for religious use is imposed on all grantees, not just FBOs. The government's duty to provide reasonable safeguards against diversion, however, is not identical with respect to religious and non-religious grantees, because one important aspect of "reasonableness" in law is "foreseeability." What may be a reasonable precaution when dealing with non-religious grantees – where one ordinarily would not expect diversion of funds to religious use – may not be reasonable in the context of a grant to a

[123] 69 FR 61717 (October 20, 2004) (USAID).

house of worship, where such diversion may well be foreseeable. The failure of agencies to account for these differing expectations may make it more difficult to prevail in a constitutional challenge to direct funding programs under the Faith-Based and Community Initiative.

d. Direct Financing of Religion for Individuals Under Significant Government Control

Rules promulgated this year by DOL and USAID establish an important exception to the general ban on direct financing of "inherently religious activities." Here is the relevant provision from the new DOL rule:

> *[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.*[124]

At a very basic level, the new rules accurately restate the principle that government must 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 – steps taken in order to facilitate such individuals' free exercise of religion do not violate the Establishment Clause. Thus, paragraph (iii) of the DOL rule is constitutionally appropriate. Where the government places an individual under significant control, the government may need to provide financial or other institutional assistance to ensure that such individual can continue to practice his or her religion.[125]

Government must take affirmative steps to facilitate the free exercise of religion of those under significant control by the government.

[124] 29 CFR §2.33(b)(3). See also 22 CFR §205.1(b) (parallel, though less specific, provision in USAID regulation).
[125] The leading judicial decision on this principle is *Cruz v. Beto*, 450 U.S. 319 (1972).

As our discussion of the concept of accommodation suggests, however, the principle advanced in this DOL rule contains its own limitation. The principle that justifies the government's positive involvement in facilitating individuals' religious exercise does not also provide a blanket justification for the government to support 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 life of individuals.

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 would be justified; if the latter, the expenditures would likely violate the Establishment Clause.

The *Prison Fellowship Ministries* case, discussed briefly above and in detail in our 2003 Report, provides an instructive example.[126] The plaintiffs allege that the Iowa 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, which was then used for a program of intensive education, personal and group reflection, and character transformation, all done from an evangelical Christian perspective. Iowa offers neither analogous secular programs nor similar programs from other religious perspectives.

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 would be justified; if the latter, the expenditures would likely violate the Establishment Clause.[127] In our 2003 Report, we suggested that the prison ministry program seems inconsistent with a religion-neutral 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.

[126] See 2003 Report, at pp. 68-75.

[127] This assumes that participation in the program is voluntary; if prisoners were required to participate in a thickly religious activity, their free exercise rights would also be implicated.

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 (i) and (ii) of the rule. It is true, of course, that direct government funds may be used to support the work of chaplains, including the work of institutions that assist chaplains in performance of their duties. Yet the exception is necessarily limited by the principle that justifies government financing of such chaplains. To the extent that the government supports programs that facilitate individuals' free exercise in contexts of significant government control, the new rule correctly reflects the Establishment Clause limits. The rule, however, should more explicitly state that the exception does not constitute general permission to use government funds to sponsor and promote intensely religious activities, even when the activities occur in institutionalized settings.

e. The Constitutional Significance of Indirect Financing

Consistent with the U.S. Supreme Court's decision in *Zelman v Simmons-Harris*,[128] the newly promulgated rules correctly state that the constitutional limits on directly financed activities do not apply in the same way to programs that involve "beneficiary choice" of service providers. This element is especially important for DOL's program of Individual Training Accounts (ITA), a widely used mechanism for financing education and training of workers. A prior DOL rule prohibited the use of ITAs for "sectarian activities," but the new rule eliminates that restriction so long as beneficiaries who receive ITAs are free to use them at a wide range of service providers.

The constitutionally determinative aspect of indirect financing programs is the extent to which individual beneficiaries decide whether or not they will receive services from an intensely religious provider, not whether that financing actually passes through the hands of the beneficiary.

Some of those who commented on proposed rules for indirect financing programs suggested that the funding in "beneficiary choice" programs must actually pass through the hands of beneficiaries, and go from the beneficiaries to the service providers, or else the rules prohibiting direct financing of religious activity would apply. Most of the agencies cite the recent decision of the U.S. Court of Appeals for the Seventh Circuit, in *Freedom From Religion v. McCallum*,[129] which held that a program met the constitutional requirements for "beneficiary choice" so long as the beneficiary was free to

[128] 536 U.S. 639 (2002). For a more complete analysis of *Zelman*'s significance for social service programs, see our 2002 Report, at pp. 22-25.
[129] 324 F.3d 880 (7th Cir. 2003). For a more complete analysis of this decision, see our 2003 Report, at pp. 65-68.

decide where the funds would be spent, even if the funds went directly from the government to the grantee. We believe that *McCallum* was correctly decided. The constitutionally determinative aspect of indirect financing programs is the extent to which individual beneficiaries decide whether or not they will receive services from an intensely religious provider, not whether that financing actually passes through the hands of the beneficiary. Of course, the financing of such programs must be *completely* indirect, that is, all monies flowing to FBOs must be the result of beneficiary designations.

3. Protections for the Religious Liberty of Program Beneficiaries

No Religion-Based Discrimination Against 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 funds for religious activities, the Faith-Based and Community Initiative has also developed a set of protections for the religious liberty of program beneficiaries. These protections have taken two basic forms. The first emerges from the rules governing use of direct or indirect funding for religious activities, and 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, 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 a range of service providers. The range may include intensely religious providers, but it must also offer beneficiaries adequate secular alternatives. If a program meets that standard, beneficiaries' religious liberty should be sufficiently protected.

Prior to the rule changes of the last two years, no federal-government wide standard prohibited religion-based discrimination 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.

The second aspect can be found in the rules' prohibition on religion-based discrimination against beneficiaries in programs of direct financing. Every rule adopted under the Faith-Based and Community Initiative has contained a provision that bars service organizations from discriminating "against a current or prospective program beneficiary on the basis of religion or religious belief."[130] In last year's report, we noted that the Initiative has substantially expanded the scope of protections for the religious liberty of social welfare recipients. Prior to the rule changes of the last two

[130] 29 CFR §2.33(a) (DOL). See also 7 CFR §16.3(a) (USDA); 45 CFR §87.1(e) (HHS); 24 CFR §5.109(f) (HUD); 38 CFR §61.64(e) (VA).

years, no federal-government wide standard prohibited religion-based discrimination 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.

That said, the protections afforded beneficiaries under programs of the Faith-Based and Community Initiative could be made even more robust, but the Administration thus far has declined to do so. Those who offered comments on proposed rules frequently suggested that agencies should adopt the protections for beneficiaries found in many Charitable Choice programs, such as Temporary Aid to Needy Families (TANF) or SAMHSA substance abuse treatment services. The Charitable Choice provisions require that beneficiaries must be notified of their right not to participate in religious activities offered by a provider, and their right to receive services from an alternative provider if they object to receiving services from a particular FBO.[131] Agencies have not imposed any affirmative 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.

B. Analysis of Distinct Features of Specific Agency Rules

As we discussed in the previous section, most of the new regulations relating to FBOs' participation in government service programs focus solely on implementing the core elements of the Faith-Based and Community Initiative. Our analysis in this section turns to distinctive elements present in several of the new agency rules.

1. Department of Agriculture (USDA)

The USDA rule applies the core elements of the Initiative to all USDA assistance programs. This rule, however, has one notable difference, concerning beneficiaries' participation in religious activities. While the other rules prohibit service providers from making delivery of the service conditional on beneficiaries' participation in religious activities, the USDA rule exempts religious schools that participate in programs funded by the School Lunch Act and the Child Nutrition Act. In practical terms, this exemption means that "students at religious schools that receive school lunch assistance may be required to attend religion classes and assemblies," and that "schools receiving assistance under [the acts may] consider religion in their admission practices."[132]

[131] For a complete discussion of the Charitable Choice rules, see our 2002 Report, at pp. 52-54, 63-64; 2003 Report, at pp. 18-19.
[132] 69 FR 41379 (July 9, 2004).

As a general matter, any rule that would permit grantees to condition delivery of government-funded services on beneficiaries' participation in religious activities deserves close scrutiny.

As a general matter, any rule that would permit grantees to condition delivery of government-funded services on beneficiaries' participation in religious activities deserves close scrutiny. Opponents of the Faith-Based and Community Initiative regularly point out the danger that vulnerable individuals might be required to pray or attend worship in order to receive government-financed welfare, and provisions such as this exemption would seem to justify that concern. The USDA's exemption for religious schools, however, does not pose a threat to the religious liberty of beneficiaries. Eligible students receive the same benefit whether they attend religious schools or public schools; the benefit is not an inducement to attend a religious school.

2. Department of Labor (DOL)

In addition to new rules that bring the full range of its programs into conformity with the policies of the Faith-Based and Community Initiative, DOL issued rules that bear on two specific programs. The first, which concerns Individual Training Accounts (ITAs) created under the Workforce Investment Act (WIA), we discussed above in the section on programs of indirect financing. The second rule change also involves WIA, and deals with the statute's limitation on the sites at which service beneficiaries may be employed. Under section 188(a)(3) of WIA, program service providers may not employ WIA participants to construct, operate, or maintain "any part of any facility that is used or to be used for sectarian instruction or as a place for religious worship."[133] Providers may, however, employ participants to maintain a facility used for religious purposes, so long as the facility "is not primarily or inherently devoted to religious instruction or worship," and the facility is being operated by a WIA service provider.

The previous rule[134] linked this limit on assistance for religious facilities to a broader ban on any use of WIA funds for training in religious activities. The new rule breaks that link, and does so for two reasons. First, as we discussed earlier, DOL's new rule provides that ITA funds may be used for religious training because they are expended as a result of beneficiaries' choice. The limit on use of funds to construct or operate religious facilities, however, applies to both direct and indirect funding streams under WIA. Thus, an individual may use her ITA for religious training if she so chooses, but she may not receive WIA benefits – including ITA benefits – to construct or operate a religious facility. By separating the new rule implementing WIA § 188(a)(3) from that governing the use of ITAs, DOL more clearly defines the

[133] Codified at 29 USC 2938(a)(3).
[134] The text of the former rule can be found at 64 FR 61723 (November 12, 1999).

absolute limit on the use of any WIA funding, whether direct or indirect, to build or operate religious facilities.

DOL also provides a second, and less helpful, reason for decoupling the limit on assistance to religious facilities from the general ban on the use of WIA funds for religious activities. In its response to comments on the proposed rule, DOL states that the limit on assistance to religious facilities should not be seen as a part of the agency's broader effort to define the proper use of DOL funds by faith-based providers.

> *[C]areful analysis reveals that the statutory and regulatory provisions at issue do not genuinely deal with "religious activities." Instead, the "activities" they address are the employment of participants in the nonreligious skills of construction, operation, and maintenance. The provisions at issue merely limit the physical locations in which such employment can take place. . . .*[135]

By prohibiting the use of WIA funds to support construction or operation of a religious facility, the statute and new rules largely avoid the constitutionally questionable aspects of the Administration's policy on the financing of religious structures. No WIA funds may be spent to build or rehabilitate a religious facility. That said, the statutory and regulatory permission to use WIA funds for the maintenance of religious facilities still raises constitutional questions.

This response understates the constitutional significance – and potential complexity – of WIA § 188(a)(3). By prohibiting the use of WIA funds to support construction or operation of a religious facility, the statute and new rules largely avoid the constitutionally questionable aspects of the Administration's policy on the financing of religious structures. No WIA funds may be spent to build or rehabilitate a religious facility.

That said, the statutory and regulatory permission to use WIA funds for the maintenance of religious facilities still raises constitutional questions. Similar to the Administration's policy on the financing of religious structures, the WIA rule bars the use of government funds to maintain facilities "primarily or inherently devoted to religious instruction or worship." Moreover, maintenance assistance is limited to facilities that are operated by a WIA provider. One might assume that this limit ensures that at least some portion of the facility's use is non-religious, and so this rule would raise the same problem as the one raised by the Administration's general policy of support for religious structures – i.e., one of determining the proper allocation between

[135] 69 FR 41896 (July 12, 2004).

reimbursable program uses and non-reimbursable religious uses. The WIA rule poses a slightly different problem. Unlike the broader policy, which encompasses construction and rehabilitation, the WIA rule is limited to maintenance, which by definition confers less durable benefits on religious entities, thus lessening the constitutional concern. Two considerations, however, point in the opposite direction. First, the WIA rule does not attempt to limit maintenance expenditures to the portion of the facility used for WIA program purposes; while one might derive such a limit from general accounting rules applicable to all WIA grantees, the limit is not obvious.

Second, DOL's change to restrictions on the use of ITAs now permits beneficiaries to use their ITAs to receive religious training, which means that a WIA "service provider" may be one that provides intensely religious instruction, or some mix of religious and non-religious instruction. Under the WIA statute and new rule, a religious service provider would be permitted to use WIA beneficiaries to maintain its facility. The only limit on such use would be the rule's prohibition on using WIA funds to maintain a facility that is "primarily or inherently devoted to religious instruction or worship." The regulations provide no guidance on how WIA providers should understand that limitation, and DOL's responses to comments on the proposed rule suggest that the agency views the limit as one that raises no special problems of interpretation or oversight. As with the Administration's more general ban on direct financing of "inherently religious activities," we believe that DOL's limit on assistance for maintenance of religious facilities needs greater clarity. For instance, is a facility used half-time as a place for the training of faith-based substance abuse treatment providers, and the other half-time as a place of instruction in scriptures, properly understood as one "primarily or inherently devoted to religious instruction?" The answer depends on how one understands "religious instruction," because training in substance abuse treatment is not "inherently religious." Such questions, of course, point back to what we believe to be an urgent need for the Administration to provide a clearer and more constitutionally appropriate definition for the constitutional limit on directly funded activities.

Under the WIA statute and new rule, a religious service provider would be permitted to use WIA beneficiaries to maintain its facility. The only limit on such use would be the rule's prohibition on using WIA funds to maintain a facility that is "primarily or inherently devoted to religious instruction or worship." The regulations provide no guidance on how WIA providers should understand that limitation.

3. Agency for International Development (USAID)

The new USAID rule incorporates the core elements of the Faith-Based and Community Initiative into all USAID programs in which private (i.e., non-governmental) 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 U.S., the context of foreign expenditure – especially when supervised by private U.S. grantees – raises special concerns about enforcing both regulatory and constitutional policies.

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.

USAID administers a number of programs in which FBOs, both domestic and foreign, may become involved. These include:

- American Schools and Hospitals Abroad, ("ASHA") which supports educational and medical institutions abroad as a way of sharing American ideas and practices in education and medicine;
- Ocean Freight Reimbursement Program, which subsidizes private organizations that ship humanitarian equipment and supplies overseas;
- Food Aid Program, which responds to issues of global hunger;
- Microenterprise Program, which is designed to the help the poor in foreign nations to develop their skills in creating and managing business enterprises;
- HIV Programs, which focus on treatment and prevention of HIV; and
- Child Survival Grants program, which supports programs that are focused on child health and nutrition.

In some of these programs, U.S.-based FBOs may be intermediaries, receiving USAID grants and redistributing them to overseas organizations. The program for schools and hospitals abroad, for example, relies to some considerable extent on domestic FBOs as grantees, which in turn make subgrants to 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.

The USAID rule contains all of the core elements of the Faith-Based and Community Initiative, along with a new provision focusing on the delivery of social services to those who are under significant governmental control. The USAID rule is noteworthy, however, because it adds one additional element to the usual mix of rules governing the Initiative. Because of the potential implications 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."[136]

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 Bush Administration's Faith-Based and Community Initiative 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 undergo unwanted religious experience.

In this regard, USAID would be well-advised to take special precautions with respect to instructions to overseas grantees, and with respect to U.S. grantees that may make subgrants to foreign FBOs. Grantees and subgrantees (wherever located) of course must follow the provisions of the USAID rule in order to be and remain eligible for assistance, and constitutional issues may also be in the picture. In monitoring compliance with this set of rules, USAID should be unusually diligent to avoid or correct foreign misunderstandings of a unique set of American legal concerns.

In the context of domestic programs, two sections of the proposed USAID role would raise 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 questionable. The 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 these two policies?

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

[136] 22 CFR § 205.1(i).

material that bears sharply on that question. Moreover, at least one prominent decision of a federal Court of Appeals has ruled that the Establishment Clause does apply to foreign expenditures of USAID.

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.[137] 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.[138]

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.

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. 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, the Supreme Court has held that taxpayers may bring suit to complain of governmental expenditures that are alleged to violate the Establishment Clause.

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*[139] that the Clause indeed applied to USAID expenditures on overseas programs. *Lamont* involved the program for American Schools and Hospitals Abroad. A group of 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

[137] U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990) (Fourth Amendment does not protect Mexican citizen tried in U.S. court from an unreasonable search of his residence in Mexico).
[138] Reid v. Covert, 354 U.S. 1 (1956).
[139] 948 F. 2d 825 (2d Cir. 1991).

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. 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 obtains inside the U.S. 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.

The U.S. Court of Appeals in *Lamont v. Woods* 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.

If the opinion in *Lamont* is sound, the USAID rules would be analyzed for their constitutionality in much the same way as would rules to be applied in the domestic context. The prohibition on federal government support of "inherently religious activities" would still be required by the Constitution, and our usual concerns 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 U.S.

We question, however, whether the view of the *Lamont* Court would 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 on protecting taxpayers against "religious uses" of public funds has been eroded somewhat, in particular by the Supreme Court's decision in the Cleveland voucher decision (*Zelman v. Simmons-Harris*). The Supreme Court's most recent decisions regarding the Establishment Clause emphasize the secularity of the government's purpose at issue, neutrality between religion and nonreligion, and (least well-settled) 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 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 moderate versions of Islam with pro-American values.

The most controversial question raised by USAID programs involving foreign FBOs may be whether they implicate the U.S. government in religious indoctrination. 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, may coalesce into quite ample authority to finance overseas religious education.

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 and Community 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." The Secretary's authority to waive agency rules of course may not be extended to approval of 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, may coalesce into quite ample authority to finance overseas religious education. Moreover, the rule's 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.

The force of the Establishment Clause abroad is a legally underdeveloped subject. Ultimately, the USAID's participation in the Faith-Based and Community Initiative may provide fertile ground in which to test the boundaries of that subject, but the proposed rule does not manifest any particular focus on providing the framework for such a test. Instead, most of the new rule brings USAID into line with other government agencies on the policies governing the Initiative. Nevertheless, constitutional challenges to at

least some of those policies in the context of USAID programs may play out differently than would comparable challenges to their domestic counterparts.

III. STATE CONSTITUTIONAL LAW

In our 2002 Report, we discussed at length the existence and status of the so-called Blaine Amendments, which limit the power of various states to aid or finance religious education, activities, or institutions. And in our 2003 Report, prepared before the Supreme Court's decision in *Locke v. Davey*, we noted that "a decision against Washington State on the broad grounds of free exercise and nondiscrimination would deal a massive blow to the . . . Blaine Amendments."

That axe did not fall. As we discuss above, *Locke v. Davey* upheld, against federal constitutional attack, a state constitutional provision that prohibited aid to religion beyond those limits already required by the federal constitution. Courts may yet identify federal constitutional barriers to exercise of the state's power to exclude institutions with a religious character from otherwise available benefits, but *Locke* signals a substantial amount of state discretion in this regard. Accordingly, the pressure on states to be sure that their own constitutional law of church-state relations coincides perfectly with federal constitutional law – that is, neither favoring nor disfavoring religion one whit more than federal law dictates – is much less than it otherwise might have been.

Courts may yet identify federal constitutional barriers to exercise of the state's power to exclude institutions with a religious character from otherwise available benefits, but *Locke* signals a substantial amount of state discretion in this regard.

A recent and significant decision of an intermediate appellate court in the State of Florida, in the case challenging Florida's Opportunity Scholarship Program ("OSP"), provides the most important recent example of the state's escape from that pressure. Florida enacted the OSP in 2000. It permits children in persistently failing public schools to leave those schools and receive a tuition voucher from the state to be used at other public schools or participating private schools, religious or secular. In August 2002, a County Court in Florida held that the OSP violated Florida's Blaine Amendment,[140] which provides:

> *"No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."*[141]

The County Court opinion rejected the state's argument that the U.S. Supreme Court's opinion in the Cleveland voucher case (*Zelman v. Simmons-Harris*) should be the guidepost in construing the state constitution's Blaine Amendment.

[140] We discuss the County Court decision in our 2002 Report, at pp. 38-40.
[141] Florida Constitution, Article I, Section 3.

Rather, the County Court ruled, the state constitution is broader in its language and Separationist intentions than the Establishment Clause of the First Amendment. Relying heavily on the reference to both indirect and direct state support in Florida's Blaine Amendment, the County Court ruled that the Amendment barred Florida's OSP.

On appeal to an intermediate appellate court, the state renewed its argument that the Florida state courts should construe the Blaine Amendment to prohibit no more than the federal constitution prohibits. During the pendency of the appeal, the case of *Locke v. Davey* was pending in the Supreme Court, and a number of briefs filed in the Florida court asserted that excluding religious schools from a state voucher program would be an unconstitutional infringement on the First Amendment right of voucher recipients to freely exercise religion. A decision in Mr. Locke's favor would have greatly strengthened that argument.

In August, 2004, the appellate state court (dividing 2-1) affirmed the ruling of the County Court, and held that the Florida OSP violated Article I, section 3 of the Florida Constitution. In a lengthy and careful opinion, the court once again dismissed the argument that the Blaine Amendment in the Florida constitution should be construed to be a mirror image of current interpretations of the Establishment Clause by the U.S. Supreme Court. Other state courts have accepted such arguments,[142] but here the language of the state constitution, with its broad and explicit prohibition on both direct and indirect financing of sectarian entities, proved insurmountable. In addition, the appellate court relied explicitly and heavily on *Locke v. Davey*, which by then had been decided by the Supreme Court, in rejecting the argument that state exclusion of religious schools from a voucher program would violate federal norms of nondiscrimination against the recipients' free exercise of religion. Noting that the Supreme Court's opinion had recognized room for states to create and constitutionalize their own policy of church-state relations, the Florida appellate court asserted that excluding OSP recipients from using state-financed vouchers to attend religious schools was analogous to excluding students majoring in theology from using Washington's Promise Scholarships.

Noting that the Supreme Court's opinion had recognized room for states to create and constitutionalize their own policy of church-state relations, the Florida appellate court asserted that excluding OSP recipients from using state-financed vouchers to attend religious schools was analogous to excluding students majoring in theology from using Washington's Promise Scholarships.

In our comment above on *Locke v. Davey*, we mention the possibility that some exclusions of religiously affiliated entities – made without regard to the presence or absence of religious content in their activities – from state-financed programs might seem arbitrary and therefore constitutionally unacceptable. Under the circumstances of the OSP, however, that

[142] The Wisconsin Supreme Court's opinion upholding the Milwaukee school voucher program is a leading example. Jackson v. Benson, 218 Wis. 2d 835, 578 N.W. 2d 602 (Wisconsin 1998).

conclusion seems unavailable. The religious schools open to OSP participants included schools in which religious instruction is mandatory. On these facts, we think that Florida (through its constitution, rather than through its legislation) may decide to maximize its financial distance from institutions of that character. We genuinely wonder if the state may go so far as to exclude from state benefit programs all entities with a religious identity, even if such entities are entirely secular in the content of what they do in programs that are financed, in whole or in part, by the government.[143] But none of the parties in the Florida case focused the question in this way, and it's not clear whether any of the private schools that have been participating in the OSP program have this character.

On November 12, 2004, as this Report was going to press, an *en banc* panel of the Florida District Court of Appeal (First District) affirmed (9-5) the August, 2004 ruling of a smaller panel of that court. The reasoning in the majority opinion of the *en banc* panel is substantially the same as that described above.[144] The *en banc* panel, recognizing the importance of the question presented in the case, certified it for immediate review by the Florida Supreme Court. The case will now be briefed and argued there, with a decision expected by sometime in 2005. Although the outcome cannot be known in advance, *Locke v. Davey* definitely will have an appreciable affect on the Florida Supreme Court's view of the scope of state constitutional discretion to exclude religious providers of service from state support.

[143] In any event, the appellate court held that the OSP's inclusion of sectarian schools as providers rendered the act unconstitutional "on its face." That conclusion made it unnecessary for the court to consider whether the Act should be permitted to go forward without religiously-affiliated schools as providers, or whether an explicit exclusion of all religiously-affiliated schools would violate federal anti-discrimination principles. The Court's treatment of the Act as a nonseverable whole obviated the need to consider any such questions.

[144] Chief Judge Wolf concurred only in part in the affirmance. The Chief argued that the OSP should be enjoined only with respect to the participation of religious schools, and that the program should be allowed to operate with respect to public schools and private, nonreligious schools. The full court opinion does not respond to this suggestion, the validity of which turns on the state law of severability of statutes.