Developments in Policy Article

Faith in the Courts? The Legal and Political Future of Federally-Funded Faith-Based Initiatives

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INTRODUCTION

After centuries of church-state cooperation in the field of social service provision, the relationship between government agencies and faith-based organizations has suddenly acquired fame and notoriety.[1] President George W. Bush's emphasis on faith-based service providers as key battalions in his "army of compassion" has sparked vigorous debate in Congress, the popular media, and academic circles.[2] This has infused the notion of government-funded faith-based initiatives with a new level of political salience. That salience, in turn, has raised the specter of a legal challenge, whether constitutional or statutory. In short, to the extent that faith-based organizations are now a common topic of discussion in newsrooms, boardrooms, and living rooms, the number of potential opponents—and litigants—has expanded considerably. This Note seeks to fill a gap in the literature by analyzing the likelihood that a legal challenge will occur, identifying the potential sources of that challenge, defining the contours of such a challenge, and predicting the likely outcomes.

Underlying such a discussion, however, is the simple fact that church-state cooperation—in particular, government funding for faith-based social services—is not new. In fact, the precise contours of the President's plan may not radically alter the well-settled landscape of church-state relations in the United States.[3] Consequently, we believe that more traditional legal challenges—such

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1. For one of the first discussions of the emerging debate about faith-based providers, see Jim Wallis, Editorial, *A Seat at the Table; Faith-Based Organizations Aim to Make America More Just*, WASH. POST, June 11, 1999, at A37.

2. Elizabeth Becker, *Report Finds Bias Against Religious Groups*, N.Y. TIMES, Aug. 17, 2001, at A14.

3. *See infra* note 9.

as an Establishment Clause-based challenge (the usual reaction to questions of church-state relations)—will likely fail. Rather, the future of challenges to government funding for faith-based social services will probably lie in more unconventional actions—such as a Title VII-based statutory challenge—or outside the legal arena entirely. The Bush plan has ushered in a new awareness and, similarly, new legal challenges will be necessary. Our analyses in this Note will underscore this point. Thus, though at times this Note may appear to be advocating a legal challenge to federally-funded faith-based initiatives, that is not our intent. We seek only to demonstrate that the shift toward increased awareness will likely bring about an "equivalent" shift toward an alternative, more successful, legal challenge.

This Note is divided into six sections. Part I offers a broad primer on our motivations. It will explain the impact of Bush's proposals on the preexisting church-state cooperative framework and how such an impact has increased the likelihood and necessity of legal challenges. In Part II, we scour the media and the literature for potential opponents to government-funded faith-based social services, sorting their complaints into three categories of legal challenges. This Note considers these potential challenges in turn in Parts III, IV, and V, tracking our thesis by moving from the more traditional and least likely to succeed to the unconventional and most probable. Part III examines an Establishment Clause challenge. Here we analyze relevant Supreme Court jurisprudence and analogize to school vouchers cases, which provide a richer body of doctrine from which to draw conclusions and make predictions. In Part IV, we consider whether, and to what extent, faith-based initiatives might tread on free speech. Specifically, we are concerned with a legislative provision that prevents groups organized solely for the purpose of proselytizing from receiving public funding. This part focuses on distinctions between "government speech" and a limited public forum, as well as jurisprudential clashes between free speech and the Establishment Clause. Part V explores the potential of a statutory-based anti-discrimination challenge to a new faith-based regime. Government-funded religious providers might try to escape federal anti-discrimination employment laws through Title VII's religion exemption, prompting a prospective employee to challenge the exemption's applicability. Finally, in Part VI, we recognize that the future of government-funded faith-based social services may not lie in the courts at all, but rather in politics. This Note therefore engages in a brief discussion of the political dynamics at play in this now-raging debate before concluding.

I. THE IMPACT OF THE BUSH INITIATIVE

In one of his first moves as President, George W. Bush signed an executive order ("the Order") establishing the White House Office of Faith-Based and Community Initiatives as part of a broader effort "to expand opportunities for

faith-based and other community organizations and to strengthen their capacity to better meet social needs in America's communities."[4] As head of the new office, he installed John DiIulio, a political science professor at the University of Pennsylvania and a specialist in faith-based social services.[5] The Order, and the Bush Administration's related legislative and policy initiatives, met with intense opposition. In fact, the unexpected, widespread, and vehement criticism compelled the White House to scale back its legislative and administrative initiatives and to eliminate some of the more divisive proposals shortly after the president unveiled his plan.[6]

Bush's basic aim—to attract more religious group involvement in government-funded programs to provide social services—is neither novel nor historically controversial, however.[7] After all, as political scientist Stephen Monsma has observed, "a host of religiously based nonprofit organizations . . . receiv[e] millions of public tax dollars."[8] Thus, the Bush plan is noteworthy because it has drawn such intense criticism.[9] This first Part seeks to illuminate the uniqueness of this public scrutiny and, in so doing, to demonstrate the increased likelihood of a legal challenge.

In order to understand fully the impact of Bush's initiative, it is instructive to explore briefly the historical contours of the relationship between faith-based organizations and government funding, including the most recent changes

4. Exec. Order No. 13,199, 66 Fed. Reg. 8499 (2001).

5. *See generally* WHAT'S GOD GOT TO DO WITH THE AMERICAN EXPERIMENT? (E.J. Dionne & John J. DiIulio eds., 2000). DiIulio resigned his post in August 2001, citing family reasons and asserting that he had completed his basic mission. Rebecca Carr, *Bush Losing Key Aide*, ATLANTA J.-CONST., Aug. 17, 2001, at 1A.

6. Dana Milbank & Thomas B. Edsall, *Faith Initiative May be Revised; Criticism Surprises Administration*, WASH. POST, Mar. 12, 2001, at A1. Don Eberly, deputy director of the White House Office of Faith-Based and Community Initiatives, observed: "We're not ready to send our own bill up." *Id.* He acknowledged that the proposal "may need to be corrected in some areas," particularly the interplay between religious programs and government funding. *Id.*

7. *See infra* text accompanying notes 12-34. American religious organizations have dipped into the public coffers for literally centuries—to such a significant extent that many modern faith-based service providers rely primarily on government funding for their operations. STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY 1-28 (1996). In fact, the current relationship between religious nonprofits and government agencies is the product of a natural and fluid evolution over the course of the past two centuries. *Id.* at 5-7; *see also* LESTER M. SALAMON, AMERICA'S NONPROFIT SECTOR 46-47 (1992). Monsma found that the reliance runs both ways: national, state, and local governments fund non-profit organizations, including faith-based entities, rather than create their own service delivery frameworks, and in turn nonprofits rely on the government for a substantial percentage of their funding. MONSMA, *supra*, at 4.

8. MONSMA, *supra* note 7, at 1.

9. We do not mean to say that the Bush plan is not also noteworthy for the changes it proposes to make regarding faith-based social service providers and their ability to obtain and use government funding. For our purposes, though, the major change wrought by the Bush plan is one of perception rather than of substance. Notwithstanding the effect the President's plan eventually has on the long-standing relationship between church and state, the Bush plan nonetheless has attracted an unmatched level of public scrutiny. That scrutiny, in turn, has increased the likelihood and expanded the potential sources of a constitutional challenge. Moreover, the particulars of the Bush plan are still changing. *See infra* note 42.

wrought by the 1996 passage of Charitable Choice.[10] We begin, then, with a brief exploration of the "ambiguous embrace"[11] between government and faith-based organizations.

A. *Church, State, and Service: A Long History of Cooperation*

The "mutual dependence" of faith-based providers and government agencies "significantly blurs the line between church and state, yet it has existed almost without question" for two centuries.[12] In the early 1800s, the government allocated funds to private orphanages and hospitals, many with religious mandates, as part of its broader framework of social service provision.[13] Throughout the remainder of the nineteenth century, the federal government disbursed funds to church agencies through the "Civilization Fund" for education of Native Americans.[14] Since the establishment of Lyndon Johnson's Great Society in the mid-1960s, federal and state governments have expanded their monetary allocations to large and powerful faith-based organizations like the Salvation Army, Catholic Charities, and Alcoholics Anonymous.[15] Federal dollars continue to flow freely to church-affiliated health care organizations, colleges, and universities.[16]

Religious providers have played a significant role in addiction counseling and prison service work.[17] Furthermore, in his survey of faith-based entities, Stephen Monsma found that most of the aid money funneled to faith-based organizations over the past few decades—both indirectly and directly—had been devoted to two main endeavors: child welfare initiatives (including teen delinquency and drug counseling) and higher education.[18] In short, right into the

10. The term "Charitable Choice" refers broadly to legislation sponsored by then-Senator John Ashcroft that allows religious social service organizations to apply for federal block grant funding whenever private secular organizations are eligible to receive such funding. *See generally* DEREK DAVIS & BARRY HANKINS, WELFARE REFORM AND FAITH-BASED ORGANIZATIONS (1999) (collection of essays critiquing and discussing Charitable Choice). At times in this paper, we will also use the phrase "charitable choice" as short-form for the concept of government funding for faith-based initiatives.

11. CHARLES L. GLENN, THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH-BASED SCHOOLS AND SOCIAL AGENCIES (2000).

12. Susanna Dokupil, *A Sunny Dome with Caves of Ice: The Illusion of Charitable Choice*, 5 TEX. REV. L. & POL. 149, 169-70 (2000); *see also supra* note 7.

13. MONSMA, *supra* note 7, at 6.

14. J. BRUCE NICHOLS, THE UNEASY ALLIANCE: RELIGION, REFUGEE WORK, AND U.S. FOREIGN POLICY 24-25 (1988).

15. *See* MONSMA, *supra* note 7, at 64-70.

16. *E.g.*, Darci McConnell, *Churches Will Take Money, But Don't Want the Strings*, DETROIT NEWS, Feb. 18, 2001, at 19 ("Dioceses that comprise Catholic Charities USA in 1999 received $2.3 billion from county, state and federal governments, accounting for about 62 percent of the organization's budget."); Chris Poynter & Jim Carroll, *President's Plan: Putting Faith To Work*, THE COURIER-J. (Louisville, Ky.), Feb. 1, 2001, at 1A (listing the federal funding for faith-based groups in the Louisville, Kentucky area over the past four years).

17. *E.g.*, Prison Fellowship Ministries, *at* http://www.pfm.org (last visited Oct. 15, 2001); Teen Challenge World Wide Network, *at* http://www.teenchallenge.com (last visited Oct. 15, 2001).

18. MONSMA, *supra* note 7, at 64-70.

mid-1990s, faith-based organizations competed extensively, and effectively, for federal aid in a wide array of social service fields.

Over time, politicians favoring faith-based initiatives grew increasingly committed to the proposition that faith-based entities are effective precisely because of their use of faith in service provision.[19] In the mid-1990s, this line of thinking propelled the Charitable Choice program[20] into the statute books.[21] The provision, sponsored by then-freshman Republican Senator John Ashcroft of Missouri, was incorporated in 1995 into the hotly contested and widely publicized welfare reform measure during Senate deliberations on the original House bill.[22] The amendment passed the Senate by a sixty-seven to thirty-two vote.[23]

Charitable Choice legislation consisted of three major prongs: (1) a prohibition on state discrimination against religious organizations that opt to compete for public social service funds and grants;[24] (2) authorization for states to contract with religious organizations to provide various types of welfare and anti-poverty services;[25] and (3) authorization for states to provide welfare beneficiaries with certificates or vouchers for redemption with private organizations, including faith-based groups.[26] The legislation is a basic guarantee to religious organizations that they may engage in sectarian activities with government contracts or voucher funding. It explicitly allows these entities to maintain a religious environment, preserve their sectarian governance structures, and hire according to their religious beliefs.[27]

One scholar has observed that the scant legislative history available on the Charitable Choice provision indicates that the law prior to its implementation, codified in the Child Care and Development Block Grant Act,[28] "did not allow the use of funding for a sectarian purpose regardless of whether the funds were given in grants or in contracts."[29] To the extent that Congress bound itself to

19. *E.g.*, Marci A. Hamilton, *Free? Exercise*, 42 WM. & MARY L. REV. 823, 871 (2001) ("We need to be absolutely clear here: the but-for reason proffered for the success of these religious welfare service programs is the presence of God, or religion, in the program. They claim they work better *because* God is integrally incorporated throughout the program.").

20. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 42 U.S.C.).

21. CENTER FOR PUBLIC JUSTICE & CHRISTIAN LEGAL SOCIETY CENTER FOR LAW AND RELIGIOUS FREEDOM, A GUIDE TO CHARITABLE CHOICE: THE RULES OF SECTION 104 OF THE 1996 FEDERAL WELFARE LAW GOVERNING STATE COOPERATION WITH FAITH-BASED SOCIAL-SERVICE PROVIDERS 10 (1997) (asserting that the religious character of faith-based organizations is "the very source of their genius and success").

22. 141 CONG. REC. S11,640 (1995).

23. Mike Brown, *Making Welfare Work*, THE COURIER J. (Louisville, Ky.), Feb. 2, 1997, at 1A.

24. 42 U.S.C. § 604a(c) (Supp. V 1999).

25. 42 U.S.C. § 604a(a) (Supp. V 1999).

26. *Id.*

27. 42 U.S.C. § 604a(d) (Supp. V 1999).

28. 42 U.S.C. § 9858 (Supp. V 1999).

29. Michelle P. Ryan, Comment, *Paved With Good Intentions: The Legal Consequences of the*

this interpretation of the pre-existing legal regime, Charitable Choice revolutionized the relationship between church and state.[30] Wherever independent organizations compete for government dollars to implement state welfare programs, including such mainstays as the Temporary Assistance for Needy Families program and the Supplemental Security Income program, religious organizations may also compete to create and implement their own sectarian initiatives bankrolled, in part, by public funding. Faith-based service organizations can thus provide government-funded job training, nutrition and medical assistance, drug and alcohol counseling, and other social services.

Yet, Charitable Choice barely caused a splash in the American media,[31] perhaps reflecting the deep-seated tradition of government funding to faith-based organizations. In 1996, in the months leading up to and following passage of the welfare reform bill, the words "charitable choice" appeared in a grand total of six articles in major American newspapers. Furthermore, after Clinton signed the bill into law, *USA Today* buried on page 13A a description of the amendment as a "little-noticed yet potentially landmark provision."[32] Similarly, the *St. Petersburg Times* observed on page 4D: "While most foes of the recently passed welfare reform legislation were lamenting its impact on poor children, an obscure provision sneaked through. It is a provision that could divert welfare money . . . into the coffers of religious organizations."[33] In fact, even in 2000, shortly after Bush took office, DiIulio noted that most churches, mosques, and synagogues were not aware of then-Senator Ashcroft's handiwork.[34]

B. *The New Political Salience of Faith-Based Organizations*

Some of the Bush plan has reflected this amicable and relatively quiet history. For example, Bush's proposal to expand the charitable tax deduction to cover those who do not itemize has faced almost no opposition.[35] On the whole,

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Charitable Choice Provision, 102 DICK. L. REV. 383, 385 (1998) (citing H.R. Conf. Rep. No. 104-725, § 92 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2705).

30. For decades, religious organizations like Catholic Charities have spun off separate non-profit subsidiaries to receive and disburse government funds in an effort to avoid Establishment Clause and First Amendment challenges. These entities have pursued this strategy as a means of protecting their "religious mission from government intrusion." Jonathan Friedman, Student Research, *Charitable Choice and the Establishment Clause*, 5 GEO. J. FIGHTING POVERTY 103, 104 (1997).

31. The provision slipped almost unnoticed past a media obsessed with the political and ideological battle over welfare-to-work programs.

32. Stephen E. Burger, *New Hope for Gospel Missions? Devil's in the Details*, USA TODAY, Sept. 3, 1996, at 13A.

33. Robin Blumner, *And Now, Welfare for Churches*, ST. PETERSBURG TIMES, Sept. 1, 1996, at 4D.

34. Mary Leonard, *Activist Leads Effort on Charity*, BOSTON GLOBE, Jan. 30, 2001, at A1.

35. Independent Sector, an association of nonprofits, has predicted as much as a $14 billion (or 11%) annual increase in charitable giving. Rebecca Carr, *Talk of Delaying Tax Breaks Upsets Nonprofits; Incentives Play Crucial Role in Faith Initiative*, ATLANTA J.-CONST., July 7, 2001, at 5B.

however, the Bush plan has been different, evoking intense public scrutiny. This is seen in sharpest relief with regard to Bush's efforts to expand Charitable Choice.[36] While neither Ashcroft's original offering of the arguably revolutionary amendment nor the subsequent Senate debate generated any coverage, American newspapers have written hundreds of articles on the 2001 House legislation. In the five years since the passage of Charitable Choice, major newspapers have written just over 500 articles, in sum total, that refer even briefly to the provision.[37] Of those articles, more than 60% (322) were written since the 2000 presidential election, nearly all of which mention "charitable choice" in the context of President Bush's proposals.

In fact, the public reaction has come from all sides, including traditional proponents of faith-based social services. The Christian Right, counting such powerhouses as Jerry Falwell and "compassionate conservatism" advocate Marvin Olasky,[38] has proven a surprising, and formidable, obstacle to the implementation of Bush's vision.[39] Christian conservatives are concerned about the potential for expanded government regulation implicit in Bush's framework proposals, and remain keen to pursue their evangelical mission free of any significant government entanglement.[40] It should come as no surprise that the Administration was literally blind-sided by the response.[41]

This unusual level of scrutiny has bestowed upon the notion of government funding for faith-based social services a new political significance. For example, on July 19, 2001, the badly-battered Bush legislation[42] required a heated

36. Instead of limiting allocations for religious organizations to a few programs in the Department of Health and Human Services, Bush would expand the faith-based funding and allow religious charities to compete for more than 100 programs in the Departments of Labor (job training), Justice (community policing), Education (after-school programs) and Housing and Urban Development. Milbank & Edsall, *supra* note 6.

37. An August 1, 2001, LEXIS search for the phrase "charitable choice" in the "Major Newspapers" database returned over 500 hits.

38. MARVIN OLASKY, THE TRAGEDY OF AMERICAN COMPASSION (1992).

39. Laurie Goodstein, *Bush's Charity Plan is Raising Concerns for Religious Right*, N.Y. TIMES, Mar. 3, 2001, at A1.

40. These concerns arose during the campaign and have persisted through Bush's first months in office. *E.g.*, Mark O'Keefe, *Faith Community Wary of Funds from Washington*, THE PLAIN DEALER, Oct. 21, 2000, at 3E; Mark Silk, *Old Alliance, New Ground Rules*, WASH. POST, Feb. 18, 2001, at B3; *Talk of the Nation: Interview with Jerry Falwell*, (NPR radio broadcast, Mar. 15, 2001), *available at* LEXIS, News Library, NPR file.

41. Milbank & Edsall, *supra* note 6.

42. After months of anticipation, public debate, and back-room deals, the President's widely scrutinized faith-based program finally came before the House of Representatives in bill form. H.R. 7, 107th Cong. (2001). The watered-down version of his original proposal contained a smaller tax credit than originally envisioned, granting an estimated $13 billion in tax relief by allowing citizens who do not itemize their taxes to deduct $25 in charitable contributions, as well as providing for a host of more targeted tax incentives. The measure also allows faith-based providers to receive federal funding for a broader number of programs than Charitable Choice, most notably social services for at-risk youth and the elderly. Juliet Eilperin, *Faith-Based Initiative Wins House Approval*, WASH. POST, July 20, 2001, at A1. More notably, the House leaders delayed the vote on the bill by one day because they feared they had insufficient support. Jill Zuckman, *Tepid Support Delays Faith Initiative; GOP Moderates in House See Damage to Anti-Bias Laws*, CHICAGO TRIB., July 19, 2001, at 11.

floor debate and a vote of 233 to 198, largely along party lines, to pass in the House.[43] Senate Majority Leader Democrat Tom Daschle coyly responded to the House passage by suggesting the proposal might not come before the Senate until 2002.[44]

Similarly, a survey taken in March 2001 by the Pew Forum on Religion and Public Life reported that Americans in general have become increasingly politicized by the issue of government-funded faith-based initiatives since the President's proposal appeared on the horizon. The survey found that the percentage of Republican voters who *strongly* favor "allowing churches and other houses of worship to apply for government funding to provide social services" had increased to 35%, up from 26% in September 2000.[45] Conversely, the percentage of Democrats who strongly favor had declined from 35% to 28%.[46] Of course, the very fact that such a survey exists further confirms that the nation's attention is fixed on the potential pitfalls, as well as the perceived opportunities, of the President's proposal and the funding framework currently in place. Major civil liberties and civil rights groups such as the ACLU and the NAACP have already brought their formidable public relations machines on line.[47] Policymakers at every level of government—state, local, and national—are attempting to define parameters and establish protocols for implementation of a more carefully scrutinized fund allocation process.[48] Charities that have long received large sums of money from public coffers face the potential of increased, onerous entanglement with the government.[49]

C. *A Shift in Legal Challenges*

Ultimately, this new political import may evolve into legal challenges. While the public generally supports the Bush proposal,[50] many of the particu-

43. 147 CONG. REC. H4281 (daily ed. July 19, 2001) (recorded vote on H.R. 7). A handful of Democrats crossed over to vote with the Republican majority, exhorted to do so by Rep. Tony Hall (D-Ohio), who explained his support of the bill after passage: "This is about the little guy, the small organization with two or three employees. We Democrats need to be careful and not dismiss and discourage people in this country of faith." Elizabeth Becker, *House Backs Aid for Charities Operated by Religious Groups*, N.Y. TIMES, July 20, 2001, at A1.

44. Eilperin, *supra* note 42. On November 7, 2001, President Bush asked the Senate leadership to pass a "slimmed-down version" of the faith-based initiative plan. Elizabeth Becker, *Bush Plan Would Revise Bill to Aid Charities*, N.Y. TIMES, Nov. 8, 2001, at A17.

45. THE PEW FORUM ON RELIGION & PUBLIC LIFE, FAITH-BASED FUNDING BACKED, BUT CHURCH-STATE DOUBTS ABOUND pt. I, http://pewforum.org/events/0410/report/1.php3 (Apr. 10, 2001) [hereinafter PEW SURVEY].

46. *Id.* The survey also found that the percentage of American voters in general who support the bill (favor or strongly favor) had climbed from 67% in September 2000 to 75% in March 2001. *Id.*

47. Becker, *supra* note 43, at A1.

48. *E.g.*, James D. Davis, *Faith-Based Concept Sparks Spirited Debate*, SUN-SENTINEL (Fort Lauderdale), May 31, 2001, at 1B.

49. *See, e.g.*, Dana Milbank, *Bush Assails 'Faith-Based Initiative' Critics; President Cites Habitat for Humanity in Defending His Plan to Aid Charities*, WASH. POST, June 6, 2001, at A6.

50. *See supra* note 46.

lars have left American voters wary. For instance, many Americans have doubts about providing funding to certain religious places of worship, such as Muslim mosques or Buddhist temples,[51] and a strong majority oppose allowing religious groups to discriminate in hiring.[52] If the fierce debate on Capitol Hill is any indication, opponents of Bush's faith-based initiative, and the broader cooperative framework between church and state, will not allow implementation to proceed quietly. Opponents will have a range of potential constitutional and statutory options available to them, the most obvious of which being an Establishment Clause-based challenge.

However, we believe that just as a shift in the public mindset instilled faith-based social services with new political significance and just as that shift in political import will likely bring about increased legal activity, a shift in legal strategy is required to reinstall the viability of a challenge. Similar to how faith-based, government-funded organizations and institutions have comfortably occupied the American social service landscape for literally centuries, the Establishment Clause challenges and constitutional arguments in general have become the tired staple for assessing church-state relations. For instance, the legal academic literature has practically worn out the Establishment Clause with regard to faith-based social services.[53] And current lawsuits that have arisen to challenge programs authorized by the initial wave of federal charitable choice legislation are primarily grounded in the Establishment Clause.[54] However, in

51. A recent survey found that while 62% of American voters favor funding Catholic churches with state funds, only 38% support funding either Muslim mosques or Buddhist temples, and over 50% oppose funding the Nation of Islam or the Church of Scientology. PEW SURVEY, *supra* note 45.

52. According to the Pew Forum on Religion and Public Life, 78% of Americans oppose allowing religious groups that use government funds to be allowed to hire only those who share the religious beliefs of the hiring group. Furthermore, 69% oppose allowing those groups to consider religious beliefs at all when hiring. *Id.*

53. After the implementation of Charitable Choice, the last five years have witnessed a proliferation in the number of pieces on this issue. *See, e.g.*, Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 3-5 (1997) (describing in detail what he perceives to be two distinct, and often dissonant, approaches adopted by the Court in assessing public aid to faith-based entities: "separationism" and "neutrality"); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 43, 45 (1997) (positing, as the title suggests, an "underlying unity of separation and neutrality," and favoring a taxonomy of Supreme Court decisions that incorporates an understanding of "substantive neutrality"); *and* Ira C. Lupu, *Government Messages and Government Money:* Santa Fe, Mitchell v. Helms, *and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 775 (2001) (distinguishing between "money" separationism and "message" separationism). See Jonathan Friedman, *supra* note 30, for predictions of the Court's response to Charitable Choice. He contends that the Court will likely "split the difference" on Charitable Choice, invalidating provisions that "allow contract arrangements between state governments and faith-based providers while upholding the voucher programs." *Id.* at 104.

54. Most of the cases that have already been brought have largely targeted those programs authorized under the Aschcroft amendment. The *National Law Journal* reports three such cases. In the first suit of this kind, *American Jewish Congress v. Bost*, the American Jewish Congress (AJC) alleged that participants in a publicly funded jobs-training program in Brenham, Texas had been pressured to join the organization's church. Michael D. Goldhaber, *Bush's Church Idea Illegal? and State's Future Pet Compassionate Conservative Plans Assailed in Lawsuits*, NAT'L L.J., Jan. 15, 2001, at A1. For a further discussion of the issues in the case, see Christopher Lee & Jeffrey Weiss, *'Charitable Choice' Gets Challenge*, DALLAS MORNING NEWS, July 25, 2000, at 23A. This issue was rendered moot, however,

the past hundred years, the Supreme Court has decided to hear only two cases concerning public financial support for church-affiliated institutions, and it upheld both programs in the face of Establishment Clause challenges.[55] Notably, in the latter case the Court did leave open the possibility of an as-applied challenge,[56] but most scholars have continued to retread the familiar constitutional arguments.[57]

Thus, a successful legal challenge must come from an unconventional quarter. The Bush initiative has begun shifting the status quo for government-funded faith-based social services and we believe the effect on the potential legal challenges will be no different. The remainder of this Note will assess several constitutional and statutory challenges. It will show that the future of government funding for faith-based social services lies in less obvious legal and political pastures. The next Part attempts to identify a few realistic potential

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when the organization decided not to seek renewal of its government contract. R.G. Ratcliffe, *Bush's Faith-Based Idea Wins a Round in Federal Court*, HOUSTON CHRON., Feb. 1, 2001, at A21; *see also* Susan Hogan-Albach, *Jobs-Training Program Sparks Lawsuit*, ORLANDO SENTINEL, Sept. 16, 2000, at E6; Clarence Page, Editorial, *Ensure Separation of Church and State*, BALT. SUN, Feb. 4, 2001, at 3M. In *American Jewish Congress v. Bernick*, the AJC argues that California's set-aside of grant money specifically for faith-based institutions establishes religion. Goldhaber, *supra*. In *Freedom From Religion Foundation v. Thompson*, a Wisconsin faith-based group dedicated to treating substance abuse ("Faithworks") has been charged with being pervasively sectarian. *Id.* The plaintiffs argue that "Faithworks is proselytizing a captive audience of addicted absentee fathers." *Id.*

Two other cases do not stem from the recent charitable choice initiatives, but are nevertheless pertinent. In *Pedreira v. Kentucky Baptist Homes for Children*, No. 3:00CV-210-S, 2001 U.S. Dist. LEXIS 10283, at *8 (W.D. Ky. July 23, 2001), the publicly funded Baptist Homes are being sued for terminating the employment of a lesbian social worker on the grounds that her "beliefs" are antithetical to the purpose of the mission. Eyal Press, *Faith-Based Furor*, N.Y. TIMES, Apr. 1, 2001, § 6 (Magazine), at 62. In *Williams v. Huff*, 52 S.W.3d 171 (Tex. 2001), the Supreme Court of Texas unanimously ruled in favor of inmates who protested the establishment of a Christian-only education facility in the county jail because there was no alternative. *See also* Nancy Calaway, *Court Rejects Jail's God Pod*, DALLAS MORNING NEWS, June 29, 2001, at 39A.

As can be seen, most of these current suits are constitutional challenges under the Establishment Clause. They allege government establishment of religion generally (*Bernick*), through subsidizing religious proselytizing (*Bost, Freedom from Religion Foundation*), and through failing to provide secular alternatives (*Lara*). Only one suit does not come under the Establishment Clause (*Pedreira*). It is a Title VII anti-discrimination suit.

55. At the turn of the century, the Court approved a capital improvement grant for a church-affiliated hospital in *Bradfield v. Roberts*, 175 U.S. 291 (1899). Federal taxpayers challenged an 1897 Congressional appropriation to an officially chartered hospital for the purposes of building a quarantine ward on Establishment Clause grounds. They contended that the financial relationship between the federal government and the Providence Hospital represented an instance in which "public funds are being used and pledged for the advancement and support of a private and sectarian corporation." *Id.* at 293. The Court found that the hospital's charter was entirely secular, and held that appellants produced insufficient evidence that the hospital engaged in sectarian activities. Less than two decades ago, the Court revisited public aid to faith-based organizations in *Bowen v. Kendrick*, 487 U.S. 589 (1988). *See* discussion *supra* Section III.A.

56. *See* discussion *supra* Section III.A.

57. In a lengthy piece on post-welfare reform government funding, Martha Minow briefly addresses this issue. She notes that "if charitable choice in practice promotes only one religion, or an identifiable subset of religions, or even religious organizations to the exclusion of nonreligious ones, the program could be challenged as an as-applied Establishment Clause violation under a *Bowen* rationale." Martha Minow, *Choice or Commonality: Welfare and Schooling After the End of Welfare As We Knew It*, 49 DUKE L.J. 493, 537 (1999).

causes of action.

II. SKETCHING THE POTENTIAL LITIGATION

A number of possible grounds for litigation exist, but the cases with the greatest likelihood of being brought, and hence those deserving discussion, are the cases that reflect the following questions: If state-sponsored organizations engage in spiritual pedagogy, is there a possibility that Establishment Clause concerns might be raised? Concomitantly, if only "popular" faith groups are awarded contracts, will there be similar Establishment Clause concerns voiced, or perhaps even free speech concerns? Can government-funded organizations discriminate on the basis of religion? If so, is there a danger that religious discrimination may spill over into realms of gender and race? These questions are the questions being asked by critics and opponents of the Bush plan.

This Part seeks to identify the most likely causes of action[58] against the notion of government-funding for faith-based social services, and in so doing, lay the foundation for the upcoming in-depth case law evaluation of how legal challenges might actually fare, as discussed in Parts III, IV, and V. To do so, this Part sorts the notable comments and criticisms of Charitable Choice-type provisions—some being made in the media today—into distinct legal theories, noting in particular the likely plaintiffs. In sum, this Part sketches three probable legal challenges: Establishment Clause, free speech, and Title VII-based statutory anti-discrimination suits.[59]

A. *Establishment Clause Challenges*

The "establishment of religion"[60] is far from a concrete concept. As a result, an Establishment Clause challenge could take one of many forms.

58. *See generally Faith-Based Solutions: What are the Legal Issues?: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2001) (testimony of Richard T. Foltin, Legislative Director and Counsel, the American Jewish Committee Office of Government and International Affairs) [hereinafter Testimony of Foltin].

59. To be sure, there are other possible causes of action. For instance, while we shall see in this Part that many plaintiffs feel compromised by the pervasive reach of religion, another set of plaintiffs might consider the federal laws that regulate government funding for religious institutions unduly coercive and therefore, an infringement of Free Exercise. One of the critics of faith-based initiatives is the Reverend Pat Robertson. Robertson believes excessive governmental regulation, oversight, and interference will ultimately harm the spiritual mission of many successful and sectarian social service providers. Pat Robertson, Editorial, *Mr. Bush's Faith-Based Initiative Is Flawed*, WALL ST. J., Mar. 12, 2001, at A22.

Professor Jeffrey Rosen echoes some of Robertson's concerns. He argues that "without the ability to discriminate on the basis of religion in hiring and firing staff, religious organizations lose the right to define their organizational mission enjoyed by secular organizations that receive public funds." Jeffrey Rosen, *Religious Rights*, THE NEW REPUBLIC, Feb. 26, 2001, at 16. Rosen even considers the possibility that gender discrimination might be acceptable under a Free Exercise rubric. *Id.* at 17.

60. U.S. CONST. amend. I.

1. *Unequal Religious Preference*

One set of plaintiffs would be those faith-based groups who feel as if their religious organizations are disfavored, relative to more popular, traditional faiths. Already some groups have been lobbying to deny federal funding to other groups considered outside the mainstream of the Judeo-Christian ethic.[61] These outlier groups include Christian Scientists, the Nation of Islam, the Unification Church, Wiccans, and Hare Krishnas.[62] President Bush has stated that he has a "problem with the teachings of Scientology being viewed on the same par as Judaism or Christianity."[63] Similarly, Bush has said, with regard to the Nation of Islam, that he does not "see how we can allow public dollars to fund programs where spite and hate is the core of the message."[64]

Of course, the Administration knows that "any legislation that specifically excludes government aid based on a particular faith is unlikely to be constitutional."[65] As applied, however, serious discrimination may still take place. If a "fringe" religion puts forth an acceptable alcohol treatment or jobs-training program proposal, is it possible that it could be rejected on ancillary grounds not related to the merits of the program itself? "Either you fund all faith groups, even groups you radically don't like, or you fund none . . . . How do you distinguish between a Methodist and a Moonie? The answer is, you can't."[66] But surely, somewhere, government officials will try.

2. *A Lack of Secular Alternatives*

Government-funded faith-based initiatives have all included the mandate that secular alternatives be provided. As applied, questions will abound with regard to how approximate such alternatives must be and how complementary the services will be. Individuals troubled by the inconveniences may bring suit, especially in rural areas where the population may not support two sets of service providers.[67] An additional twist to this problem is the question of who or what governmental body is responsible for providing a secular alternative. States themselves, if forced to supply secular provision, may consider the obli-

61. However, even groups within the Judeo-Christian ethic have received tepid support. While the Pew survey found that 69% of American voters supported funding "charitable religious organizations," only 52% and 51% supported funding evangelical Christian churches and Mormon churches respectively. PEW SURVEY, *supra* note 45.

62. Steven Waldman, Editorial, *Doubts Among the Faithful*, N.Y. TIMES, Mar. 7, 2001, at A19; Robertson, *supra* note 59. The Pew Forum on Religious and Public Life had similar findings. PEW SURVEY, *supra* note 45.

63. Waldman, *supra* note 62.

64. Laurie Goodstein, *Bush's Call to Church Groups To Get Untraditional Replies*, N.Y. TIMES, Feb. 20, 2001, at A1.

65. Waldman, *supra* note 62.

66. Goodstein, *supra* note 64 (quotation marks omitted).

67. Kenneth Roe, Editorial, *Faith-Based Groups Need Safeguards*, DALLAS MORNING NEWS, Feb. 10, 2001, at 29A.

gation to be an unconstitutionally coercive federal mandate.[68] Finally, the question of secular alternatives poses a problem that bleeds somewhat into the next issue of government-funded proselytizing. It is open to interpretation whether the existence of a secular service provider alternative, say, across the street, is a sufficient option, such that religious infusion within the sectarian program would not seem as coercive.

3. *Prohibiting Proselytizing*

The Court has held that the Establishment Clause of the First Amendment "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."[69] While there has recently been agreement in the House Judiciary Committee that no overt proselytizing will be tolerated,[70] the possibility of religious coercion remains[71] and, in these cases, aggrieved beneficiaries may bring suit to challenge undue religious pressure. For instance, some groups seeking federal funding are unabashed about their proselytizing fervor. Teen Challenge, a Christian group devoted to treating alcoholism, is seeking federal funding, but is unwilling or unable to "disassociate their religion-teaching mission from the provision of the social services for which they are receiving government funds."[72] Alarmed observers noted that Teen Challenge based their assessment of Jewish patients' success on their willingness to convert to Christianity—Jewish beneficiaries were labeled either "uncompleted" or "completed" Jews based on whether they had fully converted.[73]

Less obviously, religious messages may spill into social service provision in ways that might be hard to disentangle or disaggregate, leaving the courts the epistemological and psychological responsibilities of determining when religious teachings become too forceful. This is particularly difficult given that the

68. The Constitution prohibits Congress from conscripting agents of a state (by legislation) into acting on behalf of the federal government or into carrying out Congress' objectives in "a federal regulatory program." Printz v. United States, 521 U.S. 898, 935 (1997); *see also* New York v. United States, 505 U.S. 144 (1992).

69. Sch. Dist. v. Ball, 473 U.S. 373, 385 (1985).

70. *See* Zuckman, *supra* note 42 ("The House Judiciary Committee had already rewritten language in the bill to prevent faith-based groups from proselytizing the people they serve.").

71. Real, informed choice may appear in the legislative text, but be completely absent in practice. For example, the House Judiciary Committee had decided there would be no overt proselytizing, but would "leave it up to the children in an after-school program to ask for a non-religious alternative." *Mr. Bush's Faith-Based Agenda*, N.Y. TIMES, July 8, 2001, § 4, at 10.

72. Testimony of Foltin, *supra* note 58.

73. The observers stated that "there can be no clearer a violation of core constitutional concerns than for taxpayer dollars to flow to an organization engaged in such proselytizing." *Id.* Moreover, in Texas, a publicly funded rehabilitation center, Victory Home, devotes much of its programming to instilling Christian values. Critics proclaim that "[t]he whole program is geared to a particular modality—which is accept Jesus and accepting Jesus will drive out the addiction—and that's not going to work for everyone." Karen Branch-Brioso, *Faith-Based Drug Rehabilitation Program Offers Only One Treatment: Jesus Christ*, ST. LOUIS POST-DISPATCH, Feb. 11, 2001, at A1.

impetus for these initiatives is the incorporation of faith itself.[74] Consider, for example, that there is often a fine line between "optional" prayer meetings and coerced sectarian practices. In addition, for those likely to patronize social service providers—namely those who are vulnerable, impoverished, or troubled—that which is voluntary may quickly meld into that which is expected or required, either as a function of peer pressure or in response to a perceived quid pro quo.

B. *A Free Speech Case*

The flip-side of the previous issue, government-funded proselytizing, is that groups barred from government funding due explicitly to their belief that proselytizing is necessary might bring allegations of free speech violations. Both President Bush and John DiIulio have explicitly stated that government-funded proselytizing will not be tolerated, and groups who cannot divorce social service provision from evangelizing will not receive federal grants.[75] The exclusion of funding to some religious groups because their service programs involve proselytizing implicates the Free Speech Clause.[76] Those groups denied funding—or groups who receive funding on the condition that they don't use it for proselytizing service provision—might bring free speech claims against Bush's proposal to fund faith-based initiatives.

C. *Anti-Discrimination Suits*

While Title VII law permits religious discrimination within private religious organizations,[77] it has not permitted spillover into race, color, or sex. Nevertheless, bona fide characteristics inconsistent with the practical and principled

74. A recent survey found that 62% of Americans agreed that a reason to support faith-based initiatives is because the "power of religion can change people's lives." PEW SURVEY, *supra* note 45; *see also* Virginia Culver, *Local Clergy Supportive But Cautious*, DENVER POST, July 20, 2001, at A15 (quoting the Denver Roman Catholic Archbishop's spokesman as saying, "[T]he social service things we do now we do because of our faith").

75. Mike Allen & Serge F. Kovaleski, *Bush Argues Case for Church-Based Social Services*, WASH. POST, June 26, 2001, at A2 (noting that Bush said he "recognizes that government money must not be spent for evangelizing . . . ."); Thomas B. Edsall, *Jewish Leaders Criticize 'Faith-Based' Initiative*, WASH. POST, Feb. 27, 2001, at A4 (reporting DiIulio said social service providers who try to convert clients to the provider's religion would not be eligible for federal funding).

76. Rebecca G. Rees, Note, *"If We Recant, Would We Qualify?": Exclusion of Religious Providers from State Social Service Voucher Programs*, 56 WASH. & LEE L. REV. 1291, 1315 (1999).

77. 42 U.S.C. § 2000e-1 (1994 & Supp. V 1999); *see also* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE CHARITABLE CHOICE PROVISIONS OF H.R. 4365 SHOULD BE AMENDED TO BAR ANY FORM OF DISCRIMINATION IN THE USE OF FEDERAL FUNDS (n.d.), *available at* http://www.house.gov/scott/c-choice/naacp_ldf.pdf. Section 702(a) reads as follows: "This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2001e-1 (1994 & Supp. V 1999). This exemption has been held to apply beyond the religious activities of the organization to those activities that are secular. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327 (1987).

tenets of the organization have been considered sufficient grounds to justify discriminatory hiring/firing practices.[78] Consider a particularly unsubtle hypothetical involving Bob Jones University and its policy against interracial dating.[79] What if Bob Jones were to receive funding for social services, and the University required its instructors to subscribe to its religious tenets on dating or face dismissal? Under Title VII, it is open to interpretation whether relief would be available.

Consider also the Nation of Islam. The group's common African-descent is an intricate part of its understanding of itself and its spiritual and communal mission. If the Nation of Islam were to receive federal funds to offer social services, the conflation of religious and racial differences could yield bona fide racial discrimination suits.[80] Indeed, the Pew Forum on Religious and Public Life found potential discrimination in hiring practices to be "[p]robably the biggest red flag . . . for proponents of government funding for faith-based social service programs."[81]

As we have argued earlier,[82] we do not consider all three legal challenges to be equal. Over the next three Parts, we take a closer look at each in turn, explicating the doctrine and evaluating the likelihood of success. The three Parts are ordered in such a way as to track the anticipated shift in legal theories[83] from conventional, and probably less successful, constitutional challenges to the unconventional actions. We begin in Part III with the expected Establishment

78. A series of cases have permitted discrimination that impinges on sexuality and impacts women. *See, e.g.*, Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 624 (6th Cir. 2000) (holding that the ability to employ "individuals of a particular religion" under § 702 includes decisions to terminate lesbian employee whose "conduct or . . . beliefs are inconsistent with those of its employer" (internal quotation marks omitted)); Cline v. Catholic Diocese of Toledo, 206 F.3d 651 (6th Cir. 2000) (holding that dismissing a single, pregnant parochial school teacher is permissible on the grounds that her behavior violated the religious and moral precepts against premarital sex); Killinger v. Samford Univ., 113 F.3d 196 (11th Cir. 1997) (holding that § 702 permits religious organizations to employ only persons whose beliefs are consistent with the organization's leadership, provided employee's work relates to organizational mission); Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410 (6th Cir. 1996) (upholding the right of a religiously affiliated school to dismiss a single pregnant teacher); Little v. Wuerl, 929 F.2d 944 (3rd Cir. 1991) (upholding Catholic organization's right to fire a female teacher who remarried without seeking annulment of first marriage); Maguire v. Marquette Univ., 814 F.2d 1213 (7th Cir. 1987) (upholding Catholic university's refusal to hire a professor because of her views on abortion were inconsistent with Catholic teaching); EEOC v. Miss. College, 626 F.2d 477 (5th Cir. 1980) (holding that if a religious institution presents convincing evidence that a dismissal was religiously motivated, the EEOC should not investigate further to "determine whether the religious discrimination was a pretext for some other form of discrimination"); Ganzy v. Allen Christian Sch., 995 F. Supp. 340 (E.D.N.Y. 1998) (permitting dismissal of a single, pregnant teacher).

79. In *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Court held that Bob Jones was not entitled to the indirect benefits of federal tax-exempt status in light of its policies forbidding interracial dating. *Id.* at 580.

80. For more on the concern that the law might effectively authorize race discrimination, financed with public funds, see Wendy Kaminer, *The Joy of Sects*, AM. PROSPECT, Feb. 12, 2001, at 32.

81. PEW SURVEY, *supra* note 45.

82. *See* discussion *supra* Section I.C.

83. *Id.*

Clause claims before examining potential free speech cases and concluding with a consideration of the Title VII exemption that will probably be where the legal battle will truly be fought.

III. THE USUAL SUSPECT: AN ESTABLISHMENT CLAUSE CHALLENGE

Whether the program can withstand constitutional scrutiny under the Establishment Clause is perhaps the most fundamental, and natural, question that can be asked of any government-funded faith-based initiative. The Establishment Clause states that "Congress shall make no law respecting an establishment of religion . . . ."[84] To the casual observer, what could be a clearer instance of the government's "establishing" a religion than when the government funds religious organizations? As such, the Establishment Clause has been *the* legal challenge throughout the church's long, quiet relationship with government funding.[85] Which begs the question: why would it suddenly work now?

This Part will show that, in fact, an Establishment Clause-based cause of action is unlikely to succeed. To begin with, in *Bowen v. Kendrick*,[86] the Court appeared to have settled in the negative whether government-funded faith-based social services run afoul of the Establishment Clause. Moreover, the closest analog—a line of Court cases regarding government aid to religious schools—seems to confirm the *Bowen* doctrine and even close the one loophole left by the *Bowen* Court.

A. *The Precedent:* Bowen v. Kendrick

In 1988, the Supreme Court dealt with the issue of public aid flowing to private, possibly sectarian, institutions for the purpose of carrying out a social welfare program. The case, *Bowen v. Kendrick*, addressed the Adolescent Family Life Act ("AFLA" or "the Act"),[87] which provided grants to public or non-profit private organizations for services in the area of premarital adolescent sexual relations and pregnancy. Respondent challenged the constitutionality of the Act, alleging that some organizations with ties to religious denominations had received grant money and that this constituted a violation of the Establishment Clause.[88] The Court held that the Act, on its face, did not violate the Constitution, but remanded the case for a factual determination of whether specific grants violated the Establishment Clause by funding "specifically religious activit[ies] in an otherwise substantially secular setting."[89] That is to say, the Court left open the possibility that the legislation *as applied* could violate the

84. U.S. CONST. amend. I.
85. *See* discussion *supra* Section I.C.
86. 487 U.S. 589 (1988).
87. 42 U.S.C. § 300z (1994).
88. *Bowen*, 487 U.S. at 593-98.
89. *Id.* at 621 (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)).

Establishment Clause.

In finding AFLA constitutional, the Court determined that the Act neither had the primary effect of advancing religion nor created excessive entanglement between church and state. With regard to the first question, the Court gave several reasons. Of note, it expressly rejected the argument that Congress's finding that religious organizations have a role to play in addressing the social problem improperly advanced religion.[90] In addition, the Court found that allowing religious organizations to participate in the grant program did not have the primary effect of advancing religion because the program was administered neutrally to a wide variety of organizations without respect to whether an institution was religious or secular.[91] Finally, it also rejected the district court's arguments that the Act was unconstitutional because it authorized teaching by religious organizations on matters that were elements of religious doctrine, namely premarital sex and abortion.[92] Upon reaching the "excessive entanglement" question, the Court quickly concluded that the level of supervision and monitoring required to ensure compliance with the constitutional mandate was not excessive or intrusive.[93]

Under *Bowen*, it is hard to imagine that a facial challenge to a faith-based social welfare program would be successful. Individual, as-applied challenges to particular grant recipients would have to be made.[94] However, even if suc-

90. *Id.* at 607. The Court found that it was "quite sensible" for Congress to conclude that religious organizations can influence values and have an effect on social problems. It held that any resultant advancement of religion was too "incidental and remote" to be constitutionally problematic. *Id.* (quoting Lynch v. Donnelly, 465 U.S. 668, 683 (1984)).

91. *Id.* at 608. This holding is in line with other cases involving aid that goes directly to universities regardless of religious affiliation. *See, e.g.*, Roemer v. Md. Bd. of Pub. Works, 426 U.S. 736 (1976) (allowing state subsidies to universities regardless of religious affiliation); Hunt v. McNair, 413 U.S. 734 (1973) (allowing state benefits to institutions of higher learning whether or not they had a religious affiliation); and Tilton v. Richardson, 403 U.S. 672 (1971) (upholding a congressional statute giving construction grants to colleges and universities without regard to religious affiliation). The Court distinguished away cases like *School District v. Ball*, 473 U.S. 373 (1985), which denied aid to parochial schools because of their "pervasively sectarian" nature, *Id.* at 397, by reasoning that even though aid to "pervasively sectarian" institutions was not allowed, this is not enough to facially challenge such a broad statute when only a small percentage of the neutral aid would ever reach such an institution. *Bowen*, 487 U.S. at 610. See *infra* note 114 and accompanying text for an explanation of the rejection of the "pervasively sectarian" analysis by the modern Court.

92. The Court found that the fact that the goals of Congress and some religious organizations coincided was not problematic. *Id.* at 612-13. Additionally, the Court found that the projects authorized (educational services, counseling, prenatal care, etc.) were not religious activities and did not become so simply because they are carried out by religious organizations. *Id.* at 613.

93. *Id.* at 616-17. The Justices found that government review of all programs and educational materials was not excessive. In addition, the site visits by government employees to the sectarian institutions to make sure they are carried out in accordance with statutory and constitutional requirements did not amount to "excessive entanglement." *Id.* Notably, the Court rested its conclusions about entanglement on their previous analysis that there was not a problem concerning the "pervasively sectarian" nature of the institutions. The subsequent abolition of the "pervasively sectarian" analysis by the plurality in *Mitchell v. Helms*, 530 U.S. 793 (2000), further strengthens the idea that monitoring for these kinds of programs will not be enough to violate the Establishment Clause. *See infra* note 114 and accompanying text.

94. In this case, the Court suggested that if grantees were allowed to use materials that have an

cessful, the Court specified that the appropriate remedy in the case of a violation should be the withdrawal of the approved grant, not an invalidation of the program in general.[95]

Bowen, though, is the only Supreme Court precedent on this question and as such, may pose certain obstacles to a thorough evaluation of an Establishment Clause challenge. First, *Bowen*'s singularity will likely make it difficult to apply it to all Establishment challenges to faith-based social welfare programs. For instance, it may be easy to distinguish *Bowen* on its facts. Second, concepts or notions that were valid when *Bowen* was decided may have been subsequently rejected in cases deciding analogous issues, such as public aid to sectarian schools. Third, the Court has not always been bound to precedent,[96] and will be less so when that precedent is a single case. In addition, *Bowen* is only authority for *facial* Establishment Clause challenges to government-funded faith-based initiatives; there is no Court precedent for an as-applied challenge. Thus, while any Establishment Clause case will most probably implicate *Bowen*, courts may turn to an analogous line of cases for further guidance. In particular, we believe that the more plentiful religious school aid cases provide the closest analogy.

B. *The Religious School Aid Cases*

In a line of cases beginning in 1971 with *Lemon v. Kurtzman*[97] and ending in 2000 with *Mitchell v. Helms*, the Supreme Court considered whether public aid to religious schools is inconsistent with the Establishment Clause.[98] In *Lemon*,[99] the Court laid out a three-prong test,[100] which it proceeded to modify

"explicitly religious content" or "are designed to inculcate the views of a particular religious faith," then the specific grant might be invalid. *Id.* at 621. But simply showing that the teachings concerning premarital sex and pregnancy happened to coincide with the religious views of the group would be insufficient to showing advancement of religion. *Id.* It is necessary to show an actual intent to indoctrinate the participants into the religion.

95. *Id.* at 622.

96. *See, e.g.*, United States v. Darby, 312 U.S. 100, 117 (1941) (explicitly overruling Hammer v. Dagenhart, 247 U.S. 251 (1918)).

97. 403 U.S. 602 (1971).

98. The Supreme Court recently granted certiorari to another school aid case. The Sixth Circuit case, *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000), *cert. granted* 70 U.S.L.W. 3232 (U.S. Sept. 25, 2001), will be heard in the October 2001 Term, though its oral arguments have yet to be scheduled.

99. *Lemon* involved an Establishment Clause challenge to Pennsylvania and Rhode Island statutes that established a system of direct government aid to private, sectarian schools with the purpose of increasing the salary of teachers in these schools. The Court held that such direct aid programs to sectarian schools violated the Establishment Clause and the Free Exercise Clause. *Lemon*, 403 U.S. at 624-25. The Court began by noting that a "given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment . . . ." *Id.* at 612. This is important to the current discussion because it establishes that a law which provides public aid to religious institutions can be regarded as a law "respecting" religion for the purposes of the Establishment Clause and can therefore come under scrutiny.

100. The three-prong test was as follows: (1) there must be a secular purpose to the legislation under review, (2) the legislation must neither advance nor inhibit religion, and (3) the law must not result

in the years following. Currently, the Court appears prepared to apply the 1997 *Agostini v. Felton*[101] reconstitution of the *Lemon* test. However, the exact interpretation of *Agostini*—in particular, if aid can go directly to schools or whether it must go through individuals first—is unclear because the Court's latest analysis of *Agostini* (in *Mitchell*) was a plurality opinion. Moreover, *Agostini*'s author, Justice O'Connor, only concurred in *Mitchell*. Future evolution of the doctrine thus will probably turn on O'Connor's vote.[102]

1. *Shaping the Test:* Agostini *on* Lemon

In 1997, the Court in *Agostini*[103] established a benchmark test based on the *Lemon* test. First, it continued to apply the first prong of the *Lemon* test by asking the following: Is there a secular purpose to the legislation under review? Second, it asked three questions to determine whether a government program advances religion: (1) Does the program result in government indoctrination; (2) Does it define its recipients with respect to religion; and (3) Does it create excessive entanglements?[104] If any of these questions are answered in the affirmative, then the program will be held to advance religion.

In so ruling, the *Agostini* Court changed the second prong of the *Lemon* test. First, the Court re-affirmed that government aid must generally be given without regard to the sectarian-nonsectarian, or public-nonpublic, nature of the institution.[105] Second, the Court specified that (indirect) aid received by sectar-

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in "excessive government entanglement with religion." *Id.* at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). The first prong of the *Lemon* test is not very important to the development of the jurisprudence because the Court has almost always found a secular purpose for government legislation to provide aid to sectarian institutions. On the other hand, the second prong and third prongs are critical.

The second prong—if the legislation advances religion—is based on *Board of Education v. Allen*, 392 U.S. 236 (1968). *Lemon*, 403 U.S. at 612. In *Allen*, the Court upheld a New York law that allowed local school districts to loan textbooks to private school students free of charge. The *Allen* Court stated that the "necessary effects" of the program did not advance religion because the children and parents were the ones that benefited from the law, not the sectarian schools. *Allen*, 392 U.S. at 243-44. Thus, this prong turns on whether the aid is indirect (it goes to the children and parents) or direct (it goes to the sectarian schools). In addition, *Allen* reveals that this prong also turns on whether the legislation merely makes a general program available also to religious school students. That is, the legislation must be neutral.

As to the third prong, the *Lemon* Court found excessive entanglement based on (1) the pervasively sectarian nature of the institutions benefited, (2) the nature of the aid, in that it went to pay teachers who potentially advance the religious mission of the school, and that to prevent this advancement, (3) the resulting relationship between government and religion would be one of "comprehensive, discriminating, and continuing state surveillance." *Lemon*, 403 U.S. at 616-19. The Court also expressed concern about a broader kind of entanglement arising from political divisiveness surrounding this legislation. The Justices felt that this would violate the purpose of the Establishment Clause by creating political divisions along religious lines. *Id.* at 622.

101. 521 U.S. 203 (1997).

102. Again, by the end of the October term, this discussion may be moot. *See supra* note 98.

103. In *Agostini*, the Court concluded that public school teachers were allowed to go into sectarian schools and provide remedial instruction to the students of those schools. 521 U.S. 203 (1997).

104. *Id.* at 234.

105. *Id.* at 225. This concept, originally present in the *Lemon* test and in various other modifica-

ian schools through individual private choices, rather than government choice, did not advance religion.[106]

Agostini also altered *Lemon*'s third prong by invalidating much of the previous understanding of "excessive entanglement." The Court dispensed with the "pervasive monitoring" standard that had been set out in *Lemon*.[107] Also, the Court dismissed the notions—again, originally set forth in *Lemon*—that administrative cooperation or a resulting political divisiveness would be sufficient grounds for "'excessive' entanglement."[108]

2. *Defining the Test:* Mitchell v. Helms

Last year, the Court clarified and fleshed out the second prong of the new *Agostini* test in *Mitchell v. Helms*,[109] a case upholding a government program that provided for extensive loans of public school materials to private schools.[110] The Court first considered whether the program results in government indoctrination. It defined the relevant criteria, familiarly, as (1) neutrality and (2) private choice. The Court held that if aid is offered to a broad range of people without any regard for religion then it does not result in government indoctrination.[111] Furthermore, aid would be considered neutral if the distribution of the aid was determined by the private choices of numerous individuals.[112]

The second question—defining recipients by religion—is conditioned upon neutrality, as well, but is attuned more to determining whether the program cre-

tions of the *Lemon* test, *e.g.*, Mueller v. Allen, 463 U.S. 388, 397 (1983), had been abandoned in *School District v. Ball*, 473 U.S. 373 (1985). *Agostini* explicitly overruled *Ball*.

106. *Agostini*, 521 U.S. at 226. This change to the *Lemon* test had been in the works for some time. Two years after *Lemon*, the Court modified the second prong of the *Lemon* test, abolishing the distinction between direct and indirect aid in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). It reasoned that the "indirect" reimbursements and tax credits still provide financial support for sectarian schools. *Id.* at 783. In 1983, the Court again modified the second prong of *Lemon*, this time beating something of a retreat from *Nyquist* and re-establishing a distinction between direct and indirect aid. In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court emphasized the fact that "public funds become available only as a result of numerous private choices of individual parents . . . ." *Id.* at 399. In 1986, the Court reasoned in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), that aid given to a student for use at a Christian college for training in the field of religion had been transferred directly to the student and, thus, it was through his decision that the money ended up with a Christian college. Finally, in 1993, the Court upheld a program in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), because the presence of an interpreter at a sectarian school resulted from the private choices of parents. *Id.* at 10.

107. *Agostini*, 521 U.S. at 234.

108. *Id.* at 233-34.

109. 530 U.S. 793 (2000) (plurality opinion).

110. The decision in *Mitchell* served to overrule the Court's previous rulings in *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977). Both of those cases had struck down state programs lending educational materials (excluding textbooks) to private sectarian schools such as the program at question in *Mitchell*.

111. *Mitchell*, 530 U.S. at 809.

112. *Id.* There cannot be government indoctrination if the choices are privately, and not governmentally, made.

ates a financial incentive to choose sectarian education.[113] The presence of this incentive would show that the government was seeking to advance religion by effectively encouraging the choice of sectarian education over public education. The criteria for this test are also (1) neutrality of the aid and (2) whether genuine, independent private choice is a factor in the aid program.

Lastly, with regard to excessive entanglement, the *Mitchell* plurality explicitly disavowed the use of the "pervasively sectarian" test.[114] The four Justices claim that this label was born of anti-Catholic bigotry and has no further place in the jurisprudence.

3. *The* Mitchell *Headcount*

That said, the *Mitchell* decision was only a plurality opinion.[115] Moreover, *Agostini*'s author, Justice O'Connor, only concurred in *Mitchell*, casting some doubt on the robustness of the *Mitchell* conclusions. O'Connor's concurrence in *Mitchell* and her majority opinion in *Agostini*, though, give a clear signal as to what this swing Justice will determine to be acceptable public funding of sectarian institutions.

In her opinions, Justice O'Connor belied a preference for "true individual choice," indicating that she will likely require aid go first to individuals who can then direct the money to sectarian schools. While O'Connor's *Agostini* opinion focused some on the religion-neutral basis of aid allocation, she believes the *Mitchell* plurality opinion focused too heavily upon neutrality.[116] She noted in the *Mitchell* concurrence that in *Agostini* she looked to more than simple neutrality in upholding the program.[117] The plurality believes that a per-capita aid program—a program that would provide aid directly to a religious institution based on the number of participants or students it has enrolled—would satisfy "private choice." O'Connor believes that such a program, *while facially neutral*, cannot pass constitutional muster because it leads to a reasonable belief that "government has communicated a message of endorsement."[118] Rather, in a "true private choice" plan where the aid would go first to the par-

113. The Court maintained that "this incentive is not present . . . where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.* at 813.

114. They hold that inquiry into the religious views of a recipient to determine whether or not they are "pervasively sectarian" is unnecessary and that nothing in the Establishment Clause "requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs . . . ." *Id.* at 828-29.

115. Justice Thomas authored the opinion in *Mitchell* with Justices Rehnquist, Scalia, and Kennedy joining him. Justice Souter filed a dissent in which Justices Stevens and Ginsburg joined. Finally, Justice O'Connor filed a concurring opinion in which Justice Breyer joined.

116. *Id.* at 837-38 (O'Connor, J., concurring).

117. *Id.* at 839. In particular, Justice O'Connor cited the lack of evidence of inculcation, the requirement that public aid funded instruction was purely supplemental, and the fact that no public funds reached the sectarian institution's coffers as the true undergirding to the neutrality requirement.

118. *Id.* at 843.

ticipant (most often in the form of a voucher) who would then submit it to the religious institution. The concurrence goes on to assert that the distinction between private choice and per-capita programs extends to several other aspects of government aid to religious schools, further confirming O'Connor's commitment to a true private choice program.[119]

C. *Applying the School Aid Conclusions*

Thus, it appears that the religious school aid cases confirm the *Bowen* analysis: a government-funded faith-based initiative should be able to clear an Establishment Clause challenge, given that it is properly tailored. To begin, it is unlikely that the first prong of the *Agostini* test—whether the legislation has a secular purpose—will provide any obstacle to government-funded faith-based initiatives.[120] This brings the discussion to the second prong of the test, which asks, in three steps, whether the primary effect of the program is to advance or hinder religion. First, would a state-funded faith-based initiative result in government indoctrination? To pass this test, the plurality in *Mitchell* would require only that the aid program distribute to a broad range of groups without regard to their religion.[121] The concurrence, on the other hand, would require disbursements conducive to individual private choice. To ensure the support of five Justices (the plurality and O'Connor), then, a faith-based social welfare bill would need to require the aid flow directly to individuals who would then make a choice about where to direct their money.

Second, does the program define its recipients with respect to religion? The *Mitchell* Court would again look to the neutrality of the disbursed aid to answer this question. The focus here, however, would be whether the aid allocated creates a financial incentive to choose religion over a secular option.[122] Again, on the other hand, O'Connor would be strict about aid flowing to individuals first and providing those individuals with true choices, notwithstanding whether the aid created a financial incentive. Thus, to pass this test with at least five Justices, a faith-based social welfare program would need to provide secular options and route aid directly to individuals involved in the program, perhaps in

119. First, if individuals receive money from the government and then choose to direct it to a particular religious school, this money can then be "diverted" for religious purposes. *Id.* at 840-41. O'Connor insists, however, that this diversion is unconstitutional if done under a per-capita program. *Id.* This, in O'Connor's mind, is what was going on in *Witters* and *Zobrest*, i.e., both of these cases involved aid given to students who then made a wholly independent decision as to which school (sectarian or non-sectarian) their money would flow. *Id.* at 841-42. Second, when a per-capita program is in place, direct monetary payments by the government should not be allowed while with a private choice program, these direct payments should be acceptable. *Id.* at 843-44.

120. As the Court has previously stated, it is "reluctan[t] to attribute unconstitutional motives to the States." Mueller v. Allen, 463 U.S. 388, 394 (1983). This reluctance to contemplate unconstitutional motives will undoubtedly extend to Congress as well as the state.

121. *Mitchell*, 530 U.S. at 809.

122. Agostini v. Felton, 521 U.S. 203, 231 (1997); *Mitchell*, 530 U.S. at 813.

the form of vouchers. A program that provides only religious options or block grants to religious institutions is likely to garner the support of only four Justices.

Third, does the government program result in excessive entanglement between the State and religious institutions? Over time, this test has been considerably relaxed and should not present much of an obstacle. For instance, four Justices in *Mitchell* explicitly rejected the "pervasively sectarian" analysis.[123] In addition, concerns about administrative entanglement have been effectively tabled.

To be sure, the school aid cases do introduce an element of private choice that may be a more difficult standard than that presented in *Bowen*. The *Bowen* Court relied primarily on neutrality between religious and non-religious providers, something to which O'Connor might object, in light of her *Mitchell* concurrence. However, the O'Connor standard is clear and neither difficult nor onerous to meet. Furthermore, the "extra" element of private choice must be considered opposite the fact that the religious school aid cases seem to have closed the *Bowen* "as-applied" loophole by rejecting the remaining "pervasively sectarian" restriction. Moreover, as precedent on this issue, *Bowen* may be given more weight than any conclusions drawn analogously from *Agostini* or *Mitchell*. Therefore, it seems clear that an Establishment Clause challenge is unlikely to succeed.

IV. FEDERAL FUNDING AND FREE SPEECH

The tailoring necessary to comply with the Establishment Clause[124]—in particular, a prohibition on using federal funds to aid religion[125]—will in effect bar funding to groups for whom religious practice cannot be separated from service provision.[126] For instance, religious groups might be denied grants for their charitable activities because they believe that religious indoctrination of clients is the only means of providing social services. Alternatively, groups might receive funding on the condition that they do not attempt to indoctrinate clients. Either set of religious groups might argue that, as applied, the law violates the Free Speech Clause because it discriminates against their viewpoint that religious protestations are inseparable from service provision.

Because they receive government funding, however, these plaintiffs may not have the full protection of the First Amendment. In *Rust v. Sullivan*,[127] the

123. *See supra* note 114 and accompanying text.

124. *See* discussion *supra* Part III.

125. Allen & Kovaleski, *supra* note 75 (noting Bush said he "recognizes that government money must not be spent for evangelizing").

126. When asked about a "Texas church-run antidrug program that specifically sought to convert clients to believe in Jesus to cure their addictions," Dilulio said such a program would not be eligible for federal funding. Edsall, *supra* note 75.

127. 500 U.S. 173 (1991).

Court decided that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."[128] The Court's decision in *Rust* has been interpreted to mean "that when the state itself speaks, it may adopt a determinate content and viewpoint, even 'when it enlists private entities to convey its own message.'"[129] However, receipt of government funding does not always turn the beneficiary into a government speaker whose speech can be limited permissibly by the state as its own. The Supreme Court has found that in some situations "[s]peech may be subsidized and yet nevertheless remain within public discourse," deserving traditional protections from government regulation of speech.[130] In *Rosenberger v. Rector and Visitors of the University of Virginia*[131] the Court found that when a state funding program creates a limited public forum,[132] the government cannot favor one viewpoint over another "when [the viewpoint discrimination is] directed against speech otherwise within the forum's limitations."[133] Thus, the success of a free speech plaintiff's challenge to legislation providing for government-funded faith-based social services will depend on whether the Court finds the legislation converts grant recipients into government speakers or creates a limited public forum.[134]

Though less traditional than an Establishment Clause challenge, this free speech challenge is also not the necessary shift in legal theory. This Part will show that a free speech cause of action is also unlikely to be successful, though perhaps less so than an Establishment Clause case. In particular, it will show that with regard to free speech rights *Rosenberger* is more protective than *Rust*, but furthermore, though a *Rosenberger* analysis is more likely, the thresholds the plaintiff must overcome in such an analysis are high. Moreover, a successful *Rosenberger* case would ultimately require the Supreme Court to choose between free speech and the Establishment Clause, a possibility that may cause the Court to avoid this issue entirely.

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128. *Id.* at 193.

129. Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 156 (1996) (quoting Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995)). A government funding program can turn the grant recipient into a "public functionary" when he engages in his state-subsidized duties. *Id.*

130. Post, *supra* note 129, at 156.

131. 515 U.S. 819 (1995).

132. A limited public forum can be defined as "public property that is not a designated public forum open for indiscriminate use for communicative purposes" but that has been opened by the owner for the discussion of selected subject matter by selected speakers "'so long as the distinctions drawn [between speech and speakers allowed in the forum] are reasonable in light of the purpose served by the forum and are viewpoint neutral.'" Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392-93 (1993) (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).

133. *Rosenberger*, 515 U.S. at 829-30.

134. *See* Post, *supra* note 129, at 155 ("[S]ubstantive First Amendment analysis will depend on whether the citizen who speaks is characterized as a public functionary or as an independent participant in public discourse.").

A. *The Government as Speaker:* Rust v. Sullivan

When the government creates a funding program, it can approve grants selectively to encourage some activities and not others.[135] Thus, the *Rust* Court held that the government could prohibit Title X grantees from discussing abortion in federally-funded family planning projects.[136] In subsequent decisions, a majority of the Court has come to characterize what the *Rust* Court called "fund[ing] one activity to the exclusion of the other" as permissible viewpoint discrimination.[137] The Court said explicitly this year that "[v]iewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker."[138] Accordingly, if the Court finds that a federal subsidy funds the government's speech, the private recipient organization is treated like a public functionary and few—if any—First Amendment protections are afforded to the speaker.[139]

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135. Rust v. Sullivan, 500 U.S. 173, 193 (1991).

136. *Id.* at 192-93 ("'[T]he government may 'make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds.'" (quoting Maher v. Roe, 432 U.S. 464, 474 (1977))).

137. Legal Servs. Corp. v. Velazquez, 121 S. Ct. 1043, 1048 (2001). However, the Court said at the time that in making such funding decisions, the government did not discriminate on the basis of viewpoint. *Rust*, 500 U.S. at 193.

138. *Velazquez*, 121 S.Ct. at 1048. *Velazquez* furthers an understanding of *Rust* that took shape in *Rosenberger* when the Court said *Rust* meant that when the government is funding private groups to speak on behalf of the government, the government can engage in content-based discrimination. *Rosenberger*, 515 U.S. at 833.

> [W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.

Id. In general, it appears the Court would find viewpoint-discriminatory subsidization programs constitutional so long as they do not eliminate viewpoints entirely from the marketplace of ideas. National Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998); *see also* Regan v. Taxation With Representation of Wash., 461 U.S. 540, 550 (1983) (saying subsidies should not be used to suppress dangerous ideas). But, "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Finley*, 524 U.S. at 587-88. In *Rust*, Justice Rehnquist made clear that the first Bush Administration's interpretation of Title X did not suppress the speech of Title X clinic workers because they could continue to engage in abortion advocacy through programs not funded by Title X. *Rust*, 500 U.S. at 196.

139. Government speakers are not given traditional free speech rights because "[t]he state must be able to regulate speech within managerial domains so as to achieve explicit governmental objectives. . . . As a result of this instrumental orientation, viewpoint discrimination occurs frequently within managerial domains." Post, *supra* note 129, at 164. Post's conception of managerial domains comports with the majority opinion in *Rust*, which explained that the Court could not find Title X regulations were impermissibly viewpoint discriminatory because "[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect." *Rust*, 500 U.S. at 194.

However, although Post agrees with the doctrine in *Rust* that generally speech can be regulated in managerial domains, he contends the doctrine was misapplied in *Rust* because doctor-patient speech should not be considered within a managerial domain since a doctor's professional judgment should prevail over organizational interests. Post, *supra* note 129, at 173. In *Velazquez* the Court agreed with Post's argument about professional responsibilities. Writing for the majority, Justice Kennedy argued that Legal Aid attorneys funded by federal grant could not be considered government speakers because

Faith-based plans would likely resemble the Title X funding in *Rust*, giving the Court reason to apply the government-as-speaker[140] doctrine in evaluating the plaintiff's free speech challenge. Both the initiative and Title X allow administrative agencies to award federal grants to entities that provide a service (using a method) the State wants to fund. Since the Court found Title X grant recipients to be government speakers, the Court may find charitable choice grant recipients are also government speakers and consequently, the Court might cite *Rust* in denying the plaintiff's free speech challenge.

The Court, however, is unlikely to find *Rust* apposite for two reasons. First, the Court could find that receipt of government funding is not enough to turn religious organizations into government speakers. One allure of government funding for faith-based initiatives is the de facto privatization of traditionally public services.[141] If the independence of religious service providers supplies one of the justifications for the initiative, treating service providers as government functionaries—or mouthpieces of the government—would contradict the intent of the legislation. The legislation in *Rust* bore no such intent. Second, and more importantly, applying *Rust* to government-funded faith-based organizations would run afoul of the Establishment Clause. The Court would be creating a category of religious government speakers, yet there may not be government "establishment of religion."[142] The government may not "favor or disfavor" religion.[143] Of note, the *Rosenberger* limited-public-forum doctrine (to be discussed in the next Section) will likely not face problems of inapplicability to religious organizations because *Rosenberger* dealt specifically with public funding of religious speech.

B. *The Government as Facilitator: The Limited-Public-Forum Doctrine*

Receipt of government funding does not always reduce the First Amendment protections extended to the subsidized speaker. "The leeway that government has in advancing its own message disappears when it is funding speech not attributable to government."[144] When the government creates a limited public forum,[145] the State must afford speakers whose speech falls within the

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they are professionally obligated to speak on behalf of their private, indigent clients. *Velazquez*, 121 S. Ct. at 1049.

140. The term "government-as-speaker" was used by Justice Souter in *Finley*, 524 U.S. at 610 (Souter, J., dissenting).

141. Dana Milbank, *Bush Unveils 'Faith-Based' Initiative*, WASH. POST, Jan. 29, 2001, at A1. Six in ten Americans are persuaded that religious groups could provide social services more efficiently than government programs. PEW SURVEY, *supra* note 45.

142. U.S. CONST. amend. I.

143. Rees, *supra* note 76, at 1319-20 n.147.

144. Abner S. Greene, *Government Speech on Unsettled Issues*, 69 FORDHAM L. REV. 1667, 1685 (2001).

145. The State creates a limited public forum when it voluntarily opens access to government facilities or funding to the community for a particular purpose. *See* Good News Club v. Milford Cent.

established purpose of the forum the same First Amendment protections generally extended to participants in public discourse.[146] Importantly, a limited public forum need not be spatial. When the state provides funding on an equal basis to meet a prescribed purpose, it has created a "metaphysical" forum.[147]

Within a limited public forum, the government generally cannot engage in content discrimination or viewpoint discrimination unless it has a compelling interest to do so.[148] Content discrimination occurs when the State burdens speakers "based on the content of their expression" or their subject matter.[149] The government engages in viewpoint discrimination "when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."[150] The Court has come to conceptualize denying religious groups access to public facilities and State funding as viewpoint discrimination.[151] It seems, then, that the Court would view a free speech plaintiff's claim against legislation providing state funding to faith-based organizations as involving viewpoint discrimination rather than content discrimination,[152] though it may not really matter which label is used.[153]

Sch., 121 S. Ct. 2093, 2099-2100 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 391 (1993); Widmar v. Vincent, 454 U.S. 263, 267 (1981). The Court applies stricter scrutiny of burdens on speech in traditional public forums than in limited ones. *Good News Club*, 121 S. Ct. at 2100.

146. Post, *supra* note 129, at 157. "Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set." *Rosenberger*, 515 U.S. 819, 829 (1995).

147. *Rosenberger*, 515 U.S. at 830 (finding the University of Virginia's Student Activities Fund was a limited public forum because disbursements were made to all groups related to the educational purpose of the university).

148. However, when the State creates a limited public forum, it can engage in content discrimination if it is necessary to "preserve[] the purposes of that limited forum." *Id.* at 830. But, when the speech falls "within the forum's limitations," the government cannot engage in viewpoint discrimination. *Id.*

149. *Id.* at 828-29.

150. *Lamb's Chapel*, 508 U.S. 384, 394 (1993) (citation and quotation marks omitted). "Viewpoint discrimination is thus an egregious form of content discrimination." *Rosenberger*, 515 U.S. at 829.

151. Good News Club v. Milford Ctr. Sch., 121 S. Ct. 2093, 2100 (2001) (finding the school district's barring of the religious Good News Club from using school facilities constituted viewpoint discrimination); *Rosenberger*, 515 U.S. at 831 (finding university's refusal to allocate money from the Student Activities Fund to pay the publishing costs of a religious magazine constituted viewpoint discrimination); *Lamb's Chapel*, 508 U.S. at 393 (finding the school district engaged in viewpoint discrimination by barring the use of school facilities to show films describing Christian methods of dealing with family and child-rearing issues). However, at first, in *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court characterized the University of Missouri's policy of denying religious groups access to university facilities as impermissible content discrimination.

152. In *Good News Club*, decided last spring, the Court said it was viewpoint discriminatory to exclude speakers from a limited public forum because they discuss a permissible subject from a religious viewpoint. *Good News Club*, 121 S. Ct. at 2102. Similarly, the plaintiff challenging the faith-based initiative could argue that it is being discriminated against not because of the subject of its speech—treatment or service provision—but because of the religious viewpoint that permeates its discussion of those issues. *See* discussion *infra* Subsection IV.B.2.

153. Even if the Court found the faith-based legislation involved content—rather than viewpoint—discrimination, the standard of review would not change. In *Widmar*, which involved content discrimination, the Court applied the same standard of review as it did in the subsequent cases (*Lamb's Chapel*,

Unfortunately for the plaintiff, although "[d]iscrimination against speech because of its message is presumed to be unconstitutional,"[154] a discriminatory rule can survive a free speech challenge if the government can prove the rule serves a compelling interest.[155] And in *Widmar v. Vincent*, the Court said that the government's interest in complying with the Establishment Clause is compelling.[156] Thus a successful free speech challenge will require the plaintiff to show: (1) the government created a limited public forum; (2) the provision in question is viewpoint discriminatory; and (3) the government does not need the provision to comply with the Establishment Clause, i.e., there is no compelling interest justifying the provision.[157]

1. *Does a Faith-Based Initiative Create a Limited Public Forum?*

The Court has found that the State creates a limited public forum when it opens a government-owned facility to the public for a specific purpose.[158] In *Widmar*, the Court held that by giving registered student organizations use of university facilities, the University of Missouri created a limited public forum from which the school could not exclude some student groups.[159] Similarly, in *Lamb's Chapel v. Center Moriches Union Free School District*, the Court said the school district created a limited public forum when it opened its property for "social, civic, and recreational" purposes.[160] In *Rosenberger*, the Court went one step further when it decided that the University of Virginia's Student Ac-

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Rosenberger and *Good News Club*) involving viewpoint discrimination.

154. *Rosenberger*, 515 U.S. at 828.

155. *Widmar*, 454 U.S. at 270.

156. *Id.* at 271. In *Widmar*, *Lamb's Chapel*, *Rosenberger*, and *Good News Club* the government argued that its viewpoint-discriminatory policies were necessary to comply with the Establishment Clause. Although the government dropped its Establishment Clause argument in *Rosenberger*, the question certified for review by the Court was: "Whether the Establishment Clause compels a state university to exclude an otherwise eligible student publication from participation in the student activities fund, solely on the basis of its religious viewpoint, where such exclusion would violate the Speech and Press Clauses if the viewpoint of the publication were nonreligious." *Rosenberger*, 515 U.S. at 837 (citation and quotation marks omitted). In *Rosenberger* the Court found the University of Virginia's funding rules were not necessary to comply with the Establishment Clause and, as a result, did not have to determine whether satisfying the Establishment Clause is a compelling enough interest to justify viewpoint discrimination.

Despite the Court's conclusion in *Widmar* that compliance with the Establishment Clause is a compelling interest, the Court suggested in its most recent case on this issue, *Good News Club*, that the Establishment Clause might not provide a sufficient compelling interest to justify viewpoint discrimination.

157. However, it is possible that even if the Court finds a viewpoint-discriminatory provision is necessary to comply with the Establishment Clause, the Court will reject the provision. The Court could find that compliance with the Establishment Clause is not a compelling enough interest to justify viewpoint discrimination, in effect announcing that free speech trumps the Establishment Clause when the two are mutually exclusive. *See infra* notes 172-178 and accompanying text.

158. *See supra* note 132.

159. *Widmar*, 454 U.S. at 267.

160. *Lamb's Chapel*, 508 U.S. 384, 391 (1993). In *Good News Club* the parties stipulated that the school was a limited public forum.

tivities Fund (the "Fund") was a "metaphysical" limited public forum.[161] Legislation expanding charitable choice would probably encourage government agencies to allow religious groups to compete for federal grants to provide social services. Presumably, agencies would consider grant proposals from all groups whose projects met the purpose of the funding program, such as providing day care. This sort of program strongly resembles the *Rosenberger* Fund, and *Rosenberger* may serve as a model for the Court.[162]

However, the faith-based initiative can be distinguished from the Student Activities Fund. In *Rosenberger* all eligible groups were invited to submit bills (for money that had already been spent) to the student council for guaranteed payment from the Fund.[163] In contrast, the likely faith-based funding plan would only allow eligible groups to *apply* for federal funding. Unlike in *Rosenberger*, funding would not be guaranteed to those groups that met the statutory criteria for eligibility. In this respect, the initiative is more similar to the Title X funding in *Rust* than the Student Activities Fund in *Rosenberger*. Given the discretion left to the State, the Court may look to *National Endowment for the Arts v. Finley*[164] for guidance. In *Finley*, the Court allowed broad discrimination in the determination of grants, distinguishing the National Endowment for the Arts (NEA) from the Fund in *Rosenberger* on the ground that the NEA constantly makes subjective choices between proposals whereas the Fund disbursements are guaranteed to all eligible groups.[165] Consequently, in *Finley*, the Court refused to apply limited-public-forum analysis.

Thus, funding for faith-based social services may resemble *Rosenbeger* and, as such, the Court may find a limited public forum. Conversely, the Court may distinguish *Rosenberger* and look instead toward *Finley*, ending the plaintiff's case. If the Court follows the *Rosenberger* route, however, the plaintiff moves to step two—the Court must determine whether a provision denying funding to those who use preaching as a method of service provision constitutes viewpoint discrimination.

2. *Is a Faith-Based Initiative Viewpoint Discriminatory?*

In *Lamb's Chapel* the Court found that it was viewpoint discriminatory "to permit school property to be used for the presentation of all views about family

161. *Rosenberger*, 515 U.S. 819, 830 (1995). The purpose of the Student Activities Fund was to "support a broad range of extracurricular student activities that 'are related to the educational purposes of the University.'" *Id.* at 824.

162. Since the Court in *Rosenberger* considered a limited public forum created by a funding program, it is more applicable to the funding program expanding Charitable Choice than are the other limited public forum cases, which involve geographic forums.

163. *Id.* at 824-25. Naturally, the bills were screened to ensure they covered appropriate expenses. Otherwise, eligible groups were guaranteed payment.

164. 524 U.S. 569 (1998).

165. *Id.* at 586.

issues and childrearing except those dealing with the subject matter from a religious standpoint."[166] In other words, because groups could use school facilities to discuss the subject of childbearing but not from the Christian perspective—a viewpoint—the school was engaging in viewpoint discrimination. Similarly, in *Rosenberger*, the Court termed it viewpoint discriminatory for the University of Virginia to allow disbursements to all campus media except to a Christian magazine, *Wide Awake*.[167]

The possibly suspect provision of legislation expanding Charitable Choice could similarly be defined as viewpoint discriminatory. Under the likely provision, groups that provide the types of services the legislation purports to fund would be denied grants if they exercised the viewpoint that service provision must include encouraging clients to embrace religion. Since the program would exclude those who think preaching and provision are inseparable but not those who think services can be provided without encouraging clients to embrace religiosity, the Court might find the type of viewpoint discrimination identified in *Lamb's Chapel* and *Rosenberger*.

However, the Court might also categorize the provision as content discriminatory. That is, the law bars religious content from service programs. This may not change the standard of review since the Court has once before found content discrimination where it now appears to find viewpoint discrimination.[168] But, the distinction between content and viewpoint would probably be determinative if the Court found the law only discriminated against groups whose religious content did not fulfill the purpose for which the limited public forum was created because, in such an instance, content discrimination is permitted.[169]

3. *Is There a Compelling Interest to Overcome Viewpoint Discrimination?*

In general, the Court may only tolerate viewpoint (or content)[170] discrimination within a limited public forum if the government has a compelling interest justifying the discriminatory rule. *Widmar* and *Lamb's Chapel* suggest that even if the Court finds (a) the faith-based initiative creates a limited public forum and (b) the prohibition on making grants to proselytizing service providers is viewpoint (or content) discriminatory, the Court may uphold the regulation if

166. *Rosenberger*, 515 U.S. at 830 (quoting Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393 (1993)).

167. *Id.* at 831. The Court noted that the distinction between viewpoint and content when discussing religion is not precise, noting that "[i]t is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought." *Id.*

168. Widmar v. Vincent, 454 U.S. 263, 269-70 (1981); *see also supra* note 151.

169. *Rosenberger*, 515 U.S. at 830; *see also supra* note 157.

170. *See supra* note 168 and accompanying text.

it is necessary to bring the faith-based plan into compliance with the Establishment Clause[171]—that is, the Establishment Clause is a compelling interest.[172] Since the challenged provision probably is necessary to comply with the Establishment Clause,[173] the Court may uphold the provision even though, as applied, it violates the First Amendment rights of the groups.

However, last term the Court seemed to question its presumption that satisfying the Establishment Clause is a compelling interest warranting a viewpoint discriminatory rule. In *Good News Club*, the Court said that "it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination."[174] Thus, the Court added fuel to the debate over which First Amendment right should prevail when the Free Speech and Establishment clauses are mutually exclusive.[175] Since there is a good chance that the Supreme Court would find that a provision denying funding to groups who provide religion as social services is both necessary to comply with the Establishment Clause[176] and viewpoint discriminatory,[177] the faith-based initia-

171. In *Widmar,* the Court said, "[i]n order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech . . . [the University] must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Widmar*, 454 U.S. at 269-70. The Court went on to say that "complying with its constitutional obligations," such as obeying the Establishment Clause, is a compelling interest. *Id.* at 271. The Court proceeded to determine the Establishment Clause did not necessitate the suspect provision. Similarly in *Lamb's Chapel* the Court evaluated whether the suspect rule was necessary to comply with the Establishment Clause, concluding it was not. By applying the compelling interest inquiry in *Lamb's Chapel*, a case explicitly involving viewpoint discrimination—not content discrimination as in *Widmar*—the Court made clear that both viewpoint and content discrimination could be justified by a compelling interest.

172. However, since in *Widmar*, *Lamb's Chapel*, and *Rosenberger* the Court found the viewpoint discriminatory rules were not necessary to satisfy the Establishment Clause, the Court has not had cause to uphold a viewpoint discriminatory provision on Establishment Clause grounds. Conversely, the minority in *Rosenberger* did not decide which clause should prevail when they are mutually exclusive because it found the suspect rule was necessary to comply with the Establishment Clause but was not viewpoint discriminatory. *Rosenberger*, 515 U.S. at 892, 895 (Souter, J., dissenting).

173. *See supra* Part III.

174. Good News Club v. Milford. Cent. Sch., 121 S.Ct. 2093, 2103 (2001). The Court went on to say that it did not need to determine which clause would prevail in a head-on bout because the rule in question was not necessary to comply with the Establishment Clause. "Because Milford has not raised a valid Establishment Clause claim, we do not address the question whether such a claim could excuse Milford's viewpoint discrimination." *Id.* at 2107.

175. Some scholars, citing *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), believe the Court has already indicated that in a clash between the Free Speech and the Establishment clauses, speech will prevail. Christina E. Wells, *Introduction: The Difficult First Amendment*, 66 MO. L. REV. 1, 5 (2001); *see also* Martha M. McCarthy, *Free Speech Versus Anti-Establishment: Is There a Hierarchy of First Amendment Rights?*, 108 ED. LAW REP. 475, 484 (1996) ("Although the Supreme Court has not overtly specified that speech rights prevail over anti-establishment, such a hierarchy seems implicit in recent decisions."); John S. Stolz, Casenote, Rosenberger v. Rector and Visitors of the University of Virginia, 7 SETON HALL. CONST. L.J. 1047, 1083 (1997) ("Without expressly stating it as such, the Rosenberger Court has held that viewpoint discrimination is a greater offense to the First Amendment than the establishment of religion."). However, in *Rosenberger* the Court did not find a university rule denying funding to a religious magazine was necessary to comply with the Establishment Clause, so the Court did not have to decide which clause should triumph when both are implicated.

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

tive may provide the fact pattern that will force the Supreme Court to definitively announce a hierarchy of First Amendment rights.[178]

C. *The Failure of Free Speech*

Thus, a free speech challenge is unlikely to succeed, though that likelihood depends largely on which doctrine the Court chooses to apply in evaluating the claim. If the Court defines grantees as government speakers, the Court will likely uphold the provision because the government can edit its own message without running afoul of the First Amendment. However, if the Court applies limited-public-forum analysis, the likelihood of success is much greater. To win an as-applied challenge on free speech grounds under this analysis, though, the plaintiff will have to show at the very least that (a) the government created a limited public forum when it opened access to federal funding for social service providers and (b) a rule denying funding to groups that propose religion as treatment is viewpoint discriminatory, neither of which are given. Furthermore, even if the plaintiff can meet those two thresholds, her claim will fail if the Court ultimately decides the rule is necessary to comply with the Establishment Clause. And finally, the very prospect of having to announce a hierarchy of First Amendment rights may shunt the Court away from even entertaining such a limited-public-forum analysis.

V. ANTI-DISCRIMINATION SUITS FOR FAITH-BASED HIRING

The least obvious challenge to government-funded faith-based social services lies well removed from the Constitution, buried in a single provision in statutory employment anti-discrimination law. Opponents of government-funded faith-based programs warn that these faith-based services could circumvent anti-discrimination laws passed in hard-fought civil rights struggles of the 1960s, specifically Title VI and Title VII of the Civil Rights Act of 1964, since religious institutions are statutorily exempt from some employment rules.[179] According to current precedent, not all federally-funded faith-based social services will qualify for Title VII's religious exemption. For those that do qualify, the exemption could be broadly construed, even though the doctrine treats the exemption narrowly in most cases, and religious and other minorities could suffer discrimination under the guise of Title VII's religious exemption. Thus, if programs implementing government-funded faith-based initiatives re-

177. *See* discussion *supra* Subsection IV.B.2.

178. We note that this is a potentially interesting side effect of the increased legal challenges to government-funded faith-based organizations, though exploring this possibility is outside the scope of this Note.

179. *See generally* Memorandum from David M. Ackerman, Legislative Attorney, American Law Division, Congressional Research Service, to Hon. Robert C. Scott (on file with author) (discussing impact of proposed Charitable Choice Amendment to the Even Start Program) (Feb. 15, 2000).

tain the Title VII exemption, anti-discrimination lawsuits will likely be brought to challenge the scope and application of the religious exemption.

We believe that this type of challenge provides the shift in legal theory necessary to challenge viably our nation's well-entrenched church-state relations. Indeed, as mentioned earlier, a recent survey found employment discrimination by federally-funded faith-based social services to be the "biggest red flag."[180] Moreover, Senate Majority Leader Daschle pledged specifically that the Senate would reject the faith-based social service measure that recently passed the House unless the language exempting recipient organizations from anti-discrimination laws is excised.[181] This Part will show that the unconventionality of this type of anti-discrimination lawsuit has created an uncertainty in the doctrine and thus, an increased possibility of success. Mostly, this Part will explore the doctrinal lines along which these Title VII anti-discrimination suits will be fought.

A. *Federal Statutory Protections: Title VII and the Religious Exemption*

Federal law includes some significant protections against employment discrimination, the strongest of which come through Title VII of the Civil Rights Act of 1964.[182] Title VII applies to the majority of both public and private employers. Specifically, it prohibits employers from discriminating in terms of hiring or firing on the basis of "race, color, religion, sex, or national origin."[183]

Title VII's guarantees, however, are not universal across employment sectors. Section 702 of Title VII codified a so-called "religious exemption" to its anti-discrimination provisions. The religious exemption originally applied only

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180. PEW SURVEY, *supra* note 45 (discussing survey respondents' "widespread resistance to any sort of discriminatory hiring practices on the part of religious organizations that receive government funds").

181. Eilperin, *supra* note 42. In the horse-trading and posturing preceding the July vote, the bill's sponsors ultimately convinced fellow Republicans to accept a provision stating that the legislation would preempt state and local anti-discrimination laws. *Compare* Karen Branch-Brioso, *Republican Wavering Stalls House Debate on Faith-Based Funding; Concern Over Possible Discrimination in Hiring Prompts the Delay*, ST. LOUIS POST-DISPATCH, July 19, 2001, at A4, *with* Jackie Koszczuk, *House OKs Faith-Based Plan; Bush's Big Win Clouded by Worries Over Discrimination*, VENTURA COUNTY STAR, July 20, 2001, at A12.

182. Another possible basis of federal statutory protection comes in Title VI of the same Civil Rights Act. This provision prohibits racial discrimination in federally-funded programs, of which faith-based programs will expressly or implicitly be a part. 42 U.S.C. §§ 2000e to 2000e-17 (1994 & Supp. V 1999). Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994). Importantly, though, Title VI does not prohibit religious discrimination, nor does it pertain to discrimination on the basis of sex or sexual orientation. *E.g.*, New York City Jaycees, Inc. v. U.S. Jaycees, Inc., 377 F. Supp. 481 (S.D.N.Y 1974) (finding in part that Title VI does not reach claims of discrimination on the basis of sex). Thus, while some charitable choice proposals expressly retain Title VI restrictions for faith-based social services, such provisions would actually have minimal effect, since Title VI provides no broader protection than Title VII.

183. 42 U.S.C. § 2000e-2 (1994 & Supp. V 1999).

to *religious* activities of religious employers.[184] As amended in 1972, the religious exemption was broadened to *non-religious* activities as well, allowing that Title VII employment discrimination protections do not apply to any "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with carrying on by such corporation, association, educational institution, or society of its activities."[185] The amended religious exemption, as one Senator explained, was meant to "take the political hands of Caesar off of the institutions of God, where they have no place to be."[186] Indeed, the exemption might help protect the free exercise of religion as mandated by the First Amendment, even if its protections seem overinclusive.[187]

The religious exemption, though, becomes especially worrisome in the face of faith-based social services. There, religious organizations, groups that would appear to qualify for the Title VII religious exemption, receive federal funds through social-service contracts. Civil liberties advocacy groups warn that as federal funds are diverted from government-run social service agencies to faith-based agencies, minority groups could be excluded from a majority of social service jobs under the guise of permitted religious discrimination. Indeed, if a faith-based proposal were to omit the "secular alternative" language, religious, or possibly racial, minorities could effectively be barred from some careers in social service.

B. *What Is a "Religious Organization?"*

Opponents' warnings notwithstanding, the question remains as to the scope and application of the religious exemption for federally-funded faith-based social service providers. The doctrinal history of the religious exemption spans several courts and circuits and provides some guidance in examining these issues. First of all, not all faith-based organizations are sure to qualify as "religious organizations" under the existing doctrine. Courts have generally taken a case-by-case look at the nature of each organization and its particular programs to determine whether it should be considered "religious" for purposes of the Title VII exemption.

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184. Amos v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 594 F. Supp. 791, 805-06 (D. Utah 1984), *rev'd* 483 U.S. 327 (1987).

185. 42 U.S.C. § 2000e-1 (1994 & Supp. V 1999).

186. Corp. of Presiding Bishops of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 n.9 (1987).

187. *See* Miller v. Bay View United Methodist Church, 141 F. Supp. 2d 1174 (E.D. Wis. 2001) (holding that the Free Exercise Clause barred a terminated African-American employee's Title VII action since her position as choir director fell within the Title VII ministerial exception); *see also* discussion *supra* Part III. *But see* King's Garden v. FCC, 498 F.2d 51, 56 (D.C. Cir. 1974) (describing the "tight rope" upon which Congress must balance in order to avoid violating the Establishment Clause in its protection of free exercise).

1. *Funding as a Determinant Factor*

One category that courts have looked to in determining the "religious" status of an organization is the source of its funding. But several courts have found that an organization's source of funding does not in itself determine its religious status with respect to the Title VII religious exemption. In *Killinger v. Samford University*,[188] the Eleventh Circuit found that Samford University could be considered a religious university with respect to Title VII's religious exemption.[189] The *Killinger* court noted that the school's largest single funding source was its founder, the Alabama Baptist State Convention (the "Convention").[190] But the court went on to consider several other factors, including its religious founding, its reporting requirements to the Convention, and its membership in the Association of Baptist Colleges and Schools.[191] Samford University's religious funding was a factor, but not dispositive, in its classification as a Title VII-exempt religious institution.

Nor would the nature of funding be dispositive if the funding came directly from the federal government. A plaintiff in the Sixth Circuit recently alleged that a religious school waived its religious exemption by accepting federal funds.[192] In response, the Sixth Circuit held that "the statutory exemptions from religious discrimination claims under Title VII *cannot be waived* by either party," regardless of the funding source.[193] This decision implies that the receipt of federal funds is irrelevant in determining whether a faith-based institution is considered a "religious institution."

Similarly, inserting an element of choice into programs that fund faith-based initiatives appears to diminish the determinative role of federal funding. A Georgia district court found that a religious school that received federal funds through "various grants and government programs which provide money to *students* to attend colleges of their choice" was not directly federally subsidized.[194] Depending on their final composition, programs funding faith-based initiatives could include choice elements; indeed, some faith-based proposals require the government to offer a "secular alternative" for those who opt out of faith-based social services. Clients who opt for faith-based social services will therefore have chosen them, much as the students described above, rendering the federal subsidies indirect for purposes of the Title VII religious exemption.

188. 113 F.3d 196 (11th Cir. 1997).

189. *Id.* at 200.

190. *Id.* at 199.

191. *Id.*

192. Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 625 (6th Cir. 2000).

193. *Id.* (emphasis added and citations omitted).

194. Siegel v. Truett-McConnell College, 13 F. Supp. 2d 1335, 1344 (N.D. Ga. 1994), *aff'd*, 73 F.3d 1108 (11th Cir. 1995) (unpublished table decision) (emphasis in original); *cf.* discussion *supra* Section III.B (exploring the U.S. Supreme Court's doctrine regarding federal aid to parochial schools).

2. *The Religious Character of an Organization's Activities*

Besides funding, courts have also questioned the religious character of an institution's core activities in determining whether to consider the organization as religious. In *King's Garden v. FCC*,[195] the D.C. Circuit clearly held that the religious exemption could not be read too broadly, lest it exempt a "trucking firm, a chain of motels, a race track, a telephone company, a railroad, a fried chicken franchise, or a professional football team" that was owned by a religious sect, which would lead to potential Establishment Clause and even Fifth Amendment (Equal Protection) concerns.[196] But commercial involvement is not dispositive, either. In practice, courts have been equally skeptical of granting an overly broad religious exemption to non-commercial religious endeavors. In *Fike v. United Methodist Children's Home*,[197] a U.S. district court in Virginia found that while the children's home in question may have originally been religious in nature, it was no longer religious enough to be considered a religious organization for the purposes of Title VII exemption.[198] Aside from providing an example of a non-commercial, non-religious organization, this case deals with a faith-based social service that is operated by a church but does not emphasize its religious roots.[199] This begs the question, of course, as to whether faith-based services that include an integral faith-based counseling component, for example, might be shielded more effectively.[200]

Thus, it is clear that rather than looking toward any single factor in determining whether to exempt an institution on religious grounds, courts examine institutions on a case-by-case basis. This conclusion, however, by no means diminishes the fact that many faith-based social service providers could conceivably, and probably will, qualify for the Title VII religious exemption.

195. 498 F.2d 51 (D.C. Cir. 1974).

196. *Id.* at 54-55, 57. *But see* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329-30 (1987) (holding that the religious exemption does not violate the Establishment Clause).

197. 547 F. Supp. 286 (E.D. Va. 1982), *aff'd*, 709 F.2d 284 (4th Cir. 1983).

198. *Id.* at 290 ("For an organization to be considered 'religious' requires something more than a board of trustees who are members of a church . . . . [T]he United Methodist Children's Home is, quite literally, Methodist only in name. It is a secular organization.").

199. Importantly, the court in *Hall v. Baptist Memorial Health Care Corp.* notes that just because an institution has secular goals in addition to its religious ones does not make it a secular institution. Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 625 (6th Cir. 2000) (finding that a religious college can be considered a Title VII-exempt religious institution notwithstanding that it "trains its students to be nurses and other health care professionals"); *see also* Feldstein v. Christian Science Monitor, 555 F. Supp. 974, 978 (D. Mass. 1983) (finding that the *Christian Science Monitor* is a "religious activity of a religious organization, albeit one with a recognized position and an established reputation in the secular community" and thus exempt from Title VII).

200. Such considerations might provide a strong incentive for faith-based social service providers to include a pervasive spiritual component to their service programs.

C. *The Scope of the Exemption*

Even among the faith-based charities that qualify for the religious exemption, the exemption turns out, in most instances, to be narrow in scope. However, in certain circumstances the exemption can be extensive. In particular, religious organizations are often given a wide berth under the religious exemption when hiring and firing ministers.

Since the 1972 amendments to the religious exemption, once an employer is deemed to be a "religious institution," the Title VII religious exemption applies to hiring across its operations. In *Little v. Wuerl*,[201] the Third Circuit found that "Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not [they] play[] a direct role in the organization's 'religious activities.'"[202] The Title VII exemption promises to apply to all staff. Similarly, the Western District of Washington has found that Title VII-exempt religious employers can ask even their non-religiously involved employees not to wear garb required by another religious tradition.[203]

While it applies to all staff members, the Title VII religious exemption clearly allows only discrimination on the basis of religion. In *Rayburn v. General Conference of Seventh-Day Adventists*,[204] the Fourth Circuit explicitly found that "Title VII does not confer upon religious organizations a license to make [relevant hiring] decisions on the basis of race, sex, or national origin."[205] Indeed, the court observed that Congress "plainly did not" exempt religious employers from non-religious Title VII claims even though the legislature had that option.[206] The Northern District of Iowa has reasoned that if the religious exemption were construed to exempt anything more than just religious discrimination, it might violate the Establishment Clause.[207]

One exception to this rule is that Title VII cannot be enforced at all when it comes to religious organizations and their hiring of "ministers." The Fifth Cir-

201. 929 F.2d 944 (3d Cir. 1991).

202. *Id.* at 951.

203. EEOC v. Presbyterian Ministries, 788 F. Supp. 1154, 1156 (W.D. Wash. 1992) (holding that a Christian retirement home can ask a Muslim receptionist not to wear a religious head-covering).

204. 772 F.2d 1164 (4th Cir. 1985).

205. *Id.* at 1166 (internal citations omitted).

206. *Id.* at 1167.

207. Dolter v. Wahlert High Sch., 483 F. Supp. 266, 269 (N.D. Iowa 1980) (holding that Title VII does not exempt sectarian schools from liability for sex discrimination). Importantly, though, the religious exemption might make it more difficult to investigate claims of sex- or race-based discrimination defended under the *pretext* of religious discrimination. The Fifth Circuit has found that the Equal Employment Opportunities Commission ("EEOC") does not have jurisdiction to investigate claims of religious discrimination as a pretext for other kinds of discrimination, limiting the EEOC's investigatory powers so as "to avoid the conflicts that would result between the rights guaranteed by the religion clauses of the first amendment and the EEOC's exercise of jurisdiction over religious educational institutions." EEOC v. Mississippi College, 626 F.2d 477, 485 (5th Cir. 1980).

cuit held that Title VII's application to the hiring of ministers "would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment."[208] Indeed, the Fifth Circuit has since reiterated that the Free Exercise Clause itself prohibits the application of Title VII to clergy.[209] Between these decisions, the Fifth Circuit also held that a seminary it found to be a Title VII-exempt "religious institution" did not even need to submit employment records of its "ministers" to the EEOC.[210] So in all, Title VII confers little protection to ministers and potential ministers.

The court has interpreted quite broadly exactly who should be considered a minister for the purposes of this exemption. For example, in *McClure v. Salvation Army*,[211] though the plaintiff was functioning as a secretary with the Salvation Army, she was considered a minister because she was qualified to perform ceremonies of the church.[212] Similarly, in *Miller v. Bay View United Methodist Church, Inc.*,[213] the court found that the plaintiff, a choir director, was authorized to be "engaged in traditionally ecclesiastical or religious activities," and thus fit under the ministerial exemption.[214] The Court refused to look further into the case for fear of violating the Establishment Clause.[215]

D. *Legalized Discrimination?*

And so, the question remains whether civil libertarians' warnings are warranted: will faith-based legislation effectively nullify employment law in the provision of social services? On its own, the religious exemption is admittedly quite narrow. A broad ministerial exemption, though, raises the possibility that the religious exemption could bar the enforcement of most employment discrimination laws for faith-based charities. Consider, then, that the impetus for government-funded faith-based initiatives is usually that injecting faith into the process will provide better services. Faith-based service providers may thus be charged with implementing a religious message along with their social services, creating a situation where ordinary counselors could conceivably be considered "ministers," much in the same way as was the choir director in *Miller*. In light

208. McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972) (holding that Congress did not intend to regulate the employment relationship between a church and its minister through Title VII).

209. Combs v. Cent. Texas Annual Conference of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999).

210. EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 282 (5th Cir. 1981), *reh'g denied*, 659 F.2d 1075 (5th Cir. 1981) (holding in part that the seminary in question need not submit employment reports on its "ministers" to the EEOC because "Congress' need for information in an area it cannot constitutionally regulate is not a compelling interest").

211. 323 F. Supp. 1100 (N.D. Ga. 1971).

212. *McClure*, 323 F. Supp. at 1101-04 (N.D. Ga. 1971) (describing the facts of the case).

213. 141 F. Supp. 2d 1174 (E.D. Wis. 2001).

214. *Id.* at 1183.

215. *Id.* at 1184.

of the EEOC's potentially curtailed jurisdiction to investigate religious discrimination as a pretext for race- or sex-based discrimination,[216] faith-based charities could lock entire protected classes—religious, racial, or otherwise—out of federally-funded social service positions without investigation. In particular, if faith-based social services replace rather than augment traditional government services, this worst-case scenario brings some credence to the civil libertarians' fears that protected classes in some cities could legally be locked out of a large section of federally-funded jobs.

However, this outcome—state-funded discrimination—is *no more absolute* than the potential success of anti-discrimination plaintiffs, making these types of challenges extremely viable. The scenario considered above would require courts to come to a series of holdings: find that the funding program in question retains the Title VII religious exemption, conclude that the organization is "religious," determine that the plaintiff is a "minister," and grant ministerial hiring a wide berth. Importantly, this discussion should demonstrate the many stopgaps at which plaintiffs could defeat discrimination by state-funded faith-based initiatives that come under the cover of Title VII's religious exemption.

VI. FROM GOD TO CAESAR

While the concerns about Title VII are well warranted, potentially more sweeping discrimination was recently avoided due to strong political pressures. The White House backed away from a promise it had allegedly made with the Salvation Army that would permit faith-based groups that receive federal money to be exempted from state and municipal employment discrimination laws.[217] The ramifications would have been much larger than the Title VII clause because such state and local laws are often broader than Title VII in that they protect gay men and lesbians, as well.[218]

The lesson here is our final point: while upon first blush, concerns involving legislation impinging on the separation between church and state would seem to be legal issues, political concerns may ultimately determine the scope of government funding for faith-based social services. Indeed, the necessary shift in legal theory may not simply be from constitutional to statutory, or from Establishment Clause cases to Title VII anti-discrimination suits, but from the court room to venues outside the legal arena entirely. Mayor John Street of Philadelphia pointedly rejected legal quibbling as frivolous, asserting that

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216. *See supra* note 207.

217. Dana Milbank, *Bush Drops Rule on Hiring of Gays*, WASH. POST, July 11, 2001, at A1; *see* Frank Bruni & Elizabeth Becker, *Charity is Told It Must Abide by Antidiscrimination Laws*, N.Y. TIMES, July 11, 2001, at A15.

218. *E.g.*, CAL. LAB. CODE §§ 1101-1102 (West 1989 & Supp. 2001). A full list of such state and municipal laws protecting homosexuals is available at Lambda Legal Defense and Education Fund, *Summary of States, Cities and Counties Which Prohibit Discrimination Based on Sexual Orientation* (July 30, 2001), *at* http://www.lambdalegal.org.

"when people need help, what they don't want is a constitutional debate."[219] And now, in the wake of the September 11 terrorist bombings when domestic policy has been tabled, it is even more clear that whether faith-based social services rise or fall is a matter of politics.[220] This final Part, then, engages in a brief discussion—leaving a more thorough analysis to another time and a more appropriate setting—of what the fate of federally-funded faith-based initiatives may be as it falls into political hands.

A. *Religion qua Interest Group Politics*

Jeffrey Rosen, a supporter of a "healthy vision of religious neutrality,"[221] sees a trend toward religion entering the political domain as perfectly natural. He argues that faith has become an increasingly salient topic in our mainstream political discourse, and believes that "traditional defenders of church-state separation are increasingly on the defensive, legally and politically." Ultimately, Rosen thinks religion should be treated as "just another aspect of identity politics in a multicultural age."[222] Indeed, data supports the conclusion that concern about church-state intermingling decreases significantly as age decreases, leaving only the oldest Americans truly concerned about church-state separation.[223]

But, if we are indeed making the transition away from separating God and Caesar's worlds and toward treating God as another interest group constituency under Caesar—if not vice versa—then we must be prepared for the in-fighting that occurs among such non-religious groups. What key constituency backing charitable choice will drop its support once the Nation of Islam or Scientologists are given their first government checks? What safeguards prohibiting discrimination against certain groups in certain contexts will lead other groups to jump off the bandwagon?[224] Indeed, every move the Administration will make

219. *Mr. Bush's Faith-Based Agenda*, *supra* note 71.

220. While we are wary of groundless speculation, we feel it is important to note that when a charitable choice bill returns to the legislative table, the terrorist bombings will undoubtedly have an effect and that the effect could cut a number of different ways. For example, an understanding of the importance of faith in these trying times could increase support for government-funded faith-based social services. On the other hand, the commitment of government funds to heightened homeland security could cripple any charitable choice bill. For a hint of what might actually be coming as an effect of September 11, see Elizabeth Becker, *Bush Is Said to Scale Back His Religion-Based Initiative*, N.Y. TIMES, Oct. 14, 2001, at A18; and Becker, *supra* note 44.

221. Jeffrey Rosen, *Is Nothing Secular?*, N.Y. TIMES, Jan. 30, 2000, §6, at 40.

222. Rosen, *supra* note 221; *see also* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000); Michael W. McConnell, *Institutions and Interpretations: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992).

223. The Pew survey found that 80% of American voters between the ages 18 and 29 supported faith-based funding, whereas 74% of those between ages 30 and 49, 64% of those between 50 and 64, and 54% of those over 65 supported the concept. PEW SURVEY, *supra* note 45.

224. In light of the recent Salvation Army debacle, will other groups be less supportive of the Bush initiatives?

to appease its opponents weakens the support from allies.[225] Thus, politics, not law, may imperil faith-based initiatives.[226]

B. *Real World Politics*

Indeed, recent surveys indicate the potential for deep dissention within the ranks. While the principle behind government funding for faith-based social services is widely supported,[227] once the details are brought to light, the proposal loses a good deal of public support. Thus, though 75% of Americans favor the idea of government-funded faith-based institutions, 78% oppose a policy that permits the faith-based institutions to hire only people of the same faith.[228] Moreover, while the idea of funding mainstream churches is exceedingly popular, only 38% of Americans approve of giving federal money to mosques, only 29% of Americans are willing to support the Nation of Islam with taxpayers dollars, and 26% support granting public funds to the Church of Scientology.[229] Ironically, Americans' taste for prejudice and their revulsion of it represent two significant strands of opposition to the present proposals.

Americans are divided in their support along other politically potent lines. For instance, younger rather than older people are more supportive of funding for faith-based initiatives,[230] 81% of blacks and Hispanics back the idea, whereas 68% of whites are supportive,[231] and college graduates are more skeptical than those who never attended college.[232] On top of that, support for funding faith-based social services varies by particular services, sowing more seeds for public debate. For example, about 40% of Americans feel that religious organizations could do the best job at feeding the homeless, prison counseling, mentoring, and counseling with regard to teen pregnancy.[233] However, only 5%, 9%, and 12% believe religious organizations would be best for coping with job training, health care, and literacy issues, respectively.[234]

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225. E.J. Dionne, Editorial, *The Dwindling 'Armies of Compassion,'* WASH. POST, July 13, 2001, at A21.

226. Interestingly, support for the concept of organized religion taking an active role in politics has declined over the past five years. In June 1996, 54% of Americans believed organized religion should take an active role in politics. By September 2000, that support had decreased to 51% and in March 2001, the number had declined further to 48%. PEW SURVEY, *supra* note 45, pt. III, http://pewforum.org/events/0410/report/3.php3.

227. Both presidential candidates supported faith-based initiatives. *See* Rosen, *supra* note 59, at 17.

228. PEW SURVEY, *supra* note 45.

229. *Id.*

230. *See supra* note 223.

231. PEW SURVEY, *supra* note 45.

232. For example, 46% of those who never attended college say religious groups would be best at counseling teens about pregnancy. Only 26% of college graduates share this opinion, favoring government programs instead. *Id.*

233. *Id.*

234. *Id.*

C. *All Eyes on the Religious Exemption*

In the end, public opposition to and political debate regarding faith-based initiatives may center on issues of discrimination, as we believe it will in the legal realm. Congressman Chet Edwards has recently said: "I don't want Bob Jones University to be able to take federal dollars for an alcohol treatment program and put out a sign that says no Catholics or Jews need apply here for a federally-funded job."[235] And, from the other side, Pat Robertson has said the Unification Church, the Hare Krishnas, and the Scientologists should not be funded.[236] The Anti-Defamation League has requested the Nation of Islam not be funded and the Reverend Jerry Falwell "has called for the exclusion of all Muslim groups on the basis that the religion of Islam 'teaches hate.'"[237]

And so, consider again the Salvation Army mishap. The recognition of the need for a greater level of tolerance with public money will do as much to alter the composition of faith-based service provision as the courts will. The Democratic minority in the House already succeeded in altering H.R. 7, the current charitable choice bill, by prohibiting groups from discriminating on the basis of religion when they hire staff for social programs and pay them using federal money. Furthermore, the religious groups would not be able to proselytize, worship, or provide religious instruction while running a federally-funded program.[238] Arguably, this stance is one more protective of church-state separation than the judiciary would feel compelled to maintain.

What is the legal and political future of federally-funded faith-based social services? The Bush initiative has shifted the status quo. A long, amicable relationship between government funds and faith-based organizations has been interrupted by a media circus and intense public scrutiny. That interruption has altered the political significance of faith-based social services, creating an increased likelihood of legal challenges. The opponents break down into three camps—those who would bring Establishment Clause cases, those who would bring free speech claims, and those who would bring statutory anti-discrimination challenges—but the three legal theories cannot be equal. The shift in the church-state status quo must be matched by a shift in legal strategy. And, in fact, it is the traditional challenge—the Establishment Clause cause of action—whose clear precedent and analogous cases pave the way for well-tailored, Constitutionally-robust legislation. The less conventional free speech

235. *Bush Will Help Religious Groups Fund Aid Efforts*, ST. LOUIS POST-DISPATCH, Jan. 30, 2001, at A1.

236. Pat Robertson, Editorial, *Bush Faith-based Plan Requires an Overhaul*, USA TODAY, Mar. 5, 2001, at 15A.

237. Jane Lampman, *Faith in Government?*, CHRISTIAN SCI. MONITOR, Mar. 15, 2001, at 11.

238. Faith-based Initiative Gets House Judiciary Approval, CQ Comm. (June 28, 2001) (on file with YLPR).

claim has a greater probability of success, but the thresholds for the plaintiff are high, and the doctrinal implications for the Court are extreme. Ultimately, it is the statutory claim in the context of employment discrimination that is sufficiently uncertain and unconventional to pose a viable legal challenge.

The main battle over charitable choice may, however, be a political one.[239] The court of public opinion, the op-ed pages, and the floors of the House and Senate may be the ultimate arbiters on who gets money and how they will use it. Indeed, early legislative skirmishes over the shape of faith-based initiatives suggest that it is political pressure, rather than judicial reasoning that is having a greater influence. This understanding, though, does not diminish the relevance of the legal future of federally-funded faith-based initiatives, for the threat of litigation necessarily sets the outer bounds of any political action.

239. Goldhaber, *supra* note 54.