

Employment at (God's) Will: The Constitutionality of Antidiscrimination Exemptions in Charitable Choice Legislation

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I. INTRODUCTION

If a religious entity contracts with the federal government to provide social welfare services, may it make employment decisions on the basis of religion? Consider the employment relationship between Alicia Pedreira and the Kentucky Baptist Home for Children (KBHC). KBHC is a state-licensed child-care and child-placement agency and the largest private residential child-care provider in Kentucky.¹ According to its mission statement, KBHC “provides care and hope for hurting families and children through Christ-centered ministries . . . [and is] committed to presenting a clear message of Christian values.”² KBHC requires employees to “exhibit values in their professional conduct and personal lifestyles that are consistent with the Christian mission and purpose of the institution.”³ In March 1998, Pedreira began work as a family specialist. Her job responsibilities included teaching independent living skills, counseling, and supervising adolescent youth in a transitional living cottage. She was popular among her charges, and in her six-month evaluation her direct supervisor “described her as a good clinician and a ‘wonderful person to supervise,’ who was ‘very honest and hard working’ and of the ‘highest moral and ethical character.’”⁴

In August of the same year, a photographer displayed a picture at the Kentucky State Fair of Pedreira and her life partner at an AIDS Walk fundraiser. Because of the photograph, members of the KBHC management became aware that Pedreira was a lesbian. KBHC fired her in October.

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¹ Complaint of Alicia Pedreira, filed April 17, 2000, at 4, *in* Pedreira v. Ky. Baptist Homes for Children, Inc., 186 F. Supp. 2d 757 (W.D. Ky. 2001) (No. Civ.A.3:00CV-210-S), <http://www.aclu.org/court/pedreira.pdf>.

² *Id.* at 6.

³ *Id.*

⁴ *Id.* at 7.

KBHC's public statements suggest that Pedreira was fired because her lifestyle contravened KBHC's religious tenets and because she was a lesbian.⁵ In its response to the Title VII religious discrimination lawsuit subsequently filed by Pedreira,⁶ KBHC insisted that it had fired her because of her sexual orientation alone.⁷ Whether KBHC used Pedreira's sexual orientation as a pretext to hide an illegal rationale was crucial to whether KBHC's action violated Title VII of the Civil Rights Act of 1964.⁸ The core federal legislation prohibiting discrimination in the workplace, Title VII prohibits discrimination on the basis of religion but not on the basis of sexual orientation. The federal district court resolved the dispute quickly by determining that KBHC had fired Pedreira on the permissible basis of sexual orientation.⁹

If instead the court had decided that KBHC fired Pedreira on religious grounds, resolution of the Title VII matter would have been more complex. The first level of additional complexity would have been statutory in nature: if KBHC qualifies as a religious organization, an explicit exemption in Title VII allows it to discriminate on religious grounds.¹⁰ KBHC's founding by the Baptist community in Louisville, its mission statement, and its historic association with the Kentucky Baptist Convention suggest that it would have qualified for this exemption.¹¹

The second level of additional complexity may explain why the district court did not rely on the Title VII exemption: KBHC provides social services under state contracts that contain a mix of federal and state funds.¹² Moreover, these government funds pay for the salaries of most KBHC employees, including Pedreira, and for most of the services KBHC provides the youths, who are wards of the state.¹³ As a participant in a program receiving public assistance, KBHC is subject to greater regulation than if it were an independent organization.

⁵ Pedreira's "Termination Statement" declared: "Alicia Pedreira is being terminated . . . because her admitted homosexual lifestyle is contrary to Kentucky Baptist Homes for Children core values." *Id.* at 6. To the media, KBHC stated: "It is important that we stay true to our Christian values. Homosexuality is a lifestyle that would prohibit employment." *Id.*

⁶ *Pedreira*, 186 F. Supp. 2d at 759.

⁷ *Id.*

⁸ 42 U.S.C. § 2000e (1994). Title VII prohibits employers with fifteen or more employees from making hiring, firing, and other employment decisions on the basis of race, color, religion, sex (and pregnancy), and national origin. 42 U.S.C. § 2000e-2(a)(1) (1994). *See infra* text accompanying note 113.

⁹ *Pedreira*, 186 F. Supp. 2d at 764 n.2 (concluding that "KBHC's hiring practices . . . [were] borne of a religious value held by KBHC, but . . . did not impose any religious requirement or restriction upon employees or applicants for employment with KBHC").

¹⁰ An employer is exempt from the prohibition on religious discrimination if it is a "religious corporation, association, educational institution, or society." § 2000e-1(a). The definition of religion includes "all aspects of religious observance and practice, as well as belief." § 2000e(j). *See infra* text accompanying note 113.

¹¹ Kentucky Baptist Homes for Children, "History," <http://www.kbhc.org/history.htm>.

¹² Complaint at 6; *Pedreira*, 186 F.2d. at 763.

¹³ *Pedreira*, 186 F.2d. at 763.

Does KBHC's status as a publicly funded provider mean it cannot discriminate on the basis of religion? This Note argues that when religious organizations choose to accept government funds, they alter their status under constitutional and statutory antidiscrimination provisions and forfeit their Title VII exemption. Therefore, if Pedreira had convinced the court that KBHC's "lifestyle" objections were inextricably linked with its religious objections, the court would have been required to hold that KBHC's decision to fire her violated Title VII.

This Note explores the constitutional and policy implications of employment discrimination by religious organizations that receive government assistance.¹⁴ Congress set the terms for this discussion when it enacted charitable choice provisions in the Personal Responsibility and Work Reconciliation Act of 1996 (the "Welfare Reform Act").¹⁵ Charitable choice provisions, also termed faith- or religion-based initiatives, require government agencies to allow religious institutions to participate in funding opportunities on an equal basis with nonreligious organizations.¹⁶ They also maintain the Title VII exemption for recipient organizations.¹⁷

In 2001 and 2002, President Bush and members of both houses of Congress proposed to extend the charitable choice requirement to all federally funded social welfare programs—President Bush through his Office of Faith Based Initiatives,¹⁸ the House of Representatives through the Charitable Choice Act of 2001 (the "Charitable Choice Act"),¹⁹ and members of the Senate through the Charity Aid, Recovery, and Empowerment Act of 2002 (the "CARE Act").²⁰ This proposed extension revived earlier debates which had focused on the constitutionality of charitable choice initiatives, the appropriate relationship between government and religion, and the capacity of religious organizations to succeed in tackling the nation's social ills.²¹ This Note explores the first two debates.

Part II contains a brief description of the evolving relationship between government and religion that led to enactment of charitable choice provisions. It discusses two threads of Establishment Clause jurisprudence—separationism and neutrality theory—and suggests that after *Bo-*

¹⁴ This Note uses assistance, contracting, funding, and grant relationships interchangeably and as distinct from voucher relationships, which are not addressed. For a comprehensive discussion of six models of government support of nongovernmental entities (contracting, vouchers, grants/subsidies, shared space, franchise, and asset sales), see CHARLES L. GLENN, *THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH-BASED SCHOOLS AND SOCIAL AGENCIES* 104–29 (2000).

¹⁵ Pub. L. No. 104-193, 110 Stat. 2105, 2161–63 (1996) (codified at 42 U.S.C.A. § 604a (West Supp. 2000)).

¹⁶ See, e.g., § 604a(c)–(h). See also *infra* text accompanying notes 61–68.

¹⁷ See, e.g., § 604a(c)–(h). See also *infra* text accompanying notes 61–68, 200–219.

¹⁸ See *infra* text accompanying notes 72–74.

¹⁹ H.R. 7, 107th Cong. § 201 (2001). See *infra* text accompanying notes 69, 200–229.

²⁰ S. 1924, 107th Cong. § 301(a) (2002) (referred to the Committee on Finance, Feb. 8, 2002). See *infra* text accompanying notes 70–71, 209.

²¹ See *infra* notes 75–79.

*wen v. Kendrick*²² and *Mitchell v. Helms*²³ the Supreme Court is likely to uphold charitable choice provisions contained in, and modeled after, the Welfare Reform Act. Part III details the employment discrimination that charitable choice permits. It begins with a discussion of *Corporation of Presiding Bishop v. Amos*,²⁴ which concerned government regulation of religious entities and the relative strengths of organizational and individual free exercise rights. It also surveys the lower federal courts' creation of a constitutional ministerial exception to the Title VII nondiscrimination requirements. Part III concludes that, following the Supreme Court's decision in *Employment Division v. Smith*,²⁵ it is permissible for Congress to exempt religious organizations from generally applicable nondiscrimination laws, and in some circumstances such exemption is constitutionally compelled. Part IV, however, suggests that charitable choice creates a new relationship between government and religious organizations in which other constitutional imperatives outweigh the compulsion for exemption. The addition of federal funding alters the balance between organizational and individual burdens struck in *Amos*; at the moment a religious entity accepts assistance, discrimination even on religious grounds is prohibited. In this new context, the Constitution prevents religious organizations from engaging in employment discrimination. Because the Supreme Court has not yet considered the issue, no single doctrinal formulation explains why exempting religious organizations from nondiscrimination laws that apply to other aid recipients violates the Constitution. Nonetheless, the Free Exercise, Equal Protection, Establishment, and Free Speech Clauses set limits on permissible accommodation from generally applicable laws. This Note concludes that the charitable choice employment discrimination exemption surpasses those limits.

II. GOVERNMENT AND RELIGION: NEW RELATIONSHIPS

Recent charitable choice proposals and their accompanying nondiscrimination exemptions arise in the context of the Supreme Court's evolving understanding of the boundaries between permissible accommodation of religious exercise and impermissible establishment of religion.²⁶ Specifically, the Court often distinguishes between individuals and

²² 487 U.S. 589 (1988). See *infra* text accompanying note 81.

²³ 530 U.S. 793 (2000). See *infra* text accompanying notes 48, 82.

²⁴ 483 U.S. 327 (1987) (upholding the Title VII nondiscrimination exemption for religious employers). See *infra* text accompanying notes 122–144.

²⁵ 494 U.S. 872 (1990) (rejecting respondents' Free Exercise Clause claim to an exemption from a neutral law of general applicability that made peyote use unlawful and prohibited his sacramental use of the substance). See *infra* text accompanying note 179.

²⁶ For example, until 1990, courts evaluated challenges to regulations that infringed on religious exercise under *Sherbert v. Verner*, 374 U.S. 398 (1963), a decision that required the government to articulate a compelling reason before it could intrude on religious liberties. In *Employment Division v. Smith*, 494 U.S. 872 (1990), however, the Court articulated

organizations,²⁷ and in the context of government assistance, the religious nature of recipients and the services they provide.²⁸

Two branches of jurisprudence have emerged to delineate these boundaries: separationism and neutrality theory. Separationism, also termed no-aid, noninvolvement, and nonentanglement, erects a barrier between government and religion. It was the governing theory in *Lemon v. Kurtzman*,²⁹ which articulated a three-pronged analysis that considers whether a government action's purpose and effects are secular and whether the action results in excessive government entanglement with religion. Under this theory, the government may not fund pervasively sectarian organizations, and charitable choice legislation violates the Establishment Clause.

The second branch of jurisprudence to delineate the boundaries between government and religion, neutrality theory, permits a broader spectrum of government interaction with religion. The *Mitchell v. Helms*³⁰ plurality, for example, applied neutrality theory to uphold a program that gave materials to religious schools because it distributed aid neutrally, irrespective of whether schools were religious. Under this approach, the Court is likely to uphold the central principle of charitable choice—that government agencies may not discriminate against institutional welfare service providers on the basis of religious identity so long as the services themselves remain secular. For example, it would likely be constitutional for KBHC to participate in a charitable choice program, provided its child-care services do not incorporate mandatory religious activity.

A. *From Separationism to Neutrality: Expanding the Scope of Permissible Relationships*

The history of American social welfare service provision reveals a multitude of government partnerships with religiously affiliated organizations that are not pervasively sectarian such as Catholic Charities, Jewish Federations, and Lutheran Services.³¹ Through the 1970s, the

a new Free Exercise Clause doctrine that allowed the government much greater freedom provided its law or action was not directed at the religious exercise or belief with which it interfered. See *infra* text accompanying note 179.

²⁷ See, e.g., *Amos*, 483 U.S. at 340–41 (Brennan, J., concurring) (discussing the free exercise concerns of individuals and organizations).

²⁸ See *infra* text accompanying notes 93–99.

²⁹ 403 U.S. 602 (1971).

³⁰ 530 U.S. 793 (2000) (Thomas, J., joined by Rehnquist, C.J., and Scalia & Kennedy, JJ.). To the extent that her endorsement analysis included neutrality theory, Justice O'Connor also adhered to this branch. *Id.* at 836 (O'Connor, J., concurring).

³¹ NINA BERNSTEIN, *THE LOST CHILDREN OF WILDER: THE EPIC STRUGGLE TO CHANGE FOSTER CARE* (2001) (describing the once near-exclusive role of religiously affiliated foster care agencies in New York); Michael McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 183–84 (1992) (discussing government assistance to private welfare organizations during the

reigning model for government-religion interaction generally reflected the separationist theory of the Establishment Clause.³² Justice Hugo Black expounded this model in 1947 in *Everson v. Board of Education*,³³ which held that the government could neither interfere with, fund, nor otherwise aid religious belief or expression and could provide financial support only for institutions that were not “pervasively sectarian.”³⁴ An institution would be considered pervasively sectarian if “a substantial portion of its functions [were] subsumed in the religious mission” and its secular activities were indistinguishable from its religious activities.³⁵ For example, KBHC would be considered pervasively sectarian if it required children to perform religious prayers, but not if its services were strictly secular (even if their delivery were religiously motivated).

Separationism provides a secular lens through which the Establishment Clause may be viewed as an impermeable, or semi-permeable, barrier between government and religion. Justice Black wrote: “In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.’”³⁶ In *Lemon*, the Court articulated a three-pronged test to evaluate whether a government action satisfied the required separation: (1) whether the program had a secular purpose; (2) whether the program’s primary effect was secular, meaning it did not lead to the advancement or inhibition of religion; and (3) whether the program created excessive entanglement either by fostering excessive government involvement in religion or by encouraging the fusion of religion with government.³⁷ The Court’s application of *Lemon* came to define the Establishment Clause as meaning at

nineteenth and early twentieth centuries); Ronald Thiemann et al., *Responsibilities and Risks for Faith-Based Organizations*, in *WHO WILL PROVIDE? THE CHANGING ROLE OF RELIGION IN AMERICAN SOCIAL WELFARE* 51–70 (Mary Jo Bane et al. eds., 2000) (setting forth a history of religious service provision in the United States).

³² Michael McConnell summarized the significance of separationism: “Despite their differences, the two sides on the Warren and Burger Courts shared a conception that everything touched by government must be secular.” McConnell, *supra* note 31, at 134.

³³ 330 U.S. 1 (1947) (concluding that the Township did not violate the Establishment Clause when it reimbursed all parents for their children’s bus fare to and from school, including parochial schools).

³⁴ *Id.* at 43–44, 61 (describing the prohibition on public funding of “sectarian” schools, the precursor term for “pervasively sectarian”). See, e.g., *Mitchell*, 530 U.S. at 885–87 (Souter, J., dissenting) (discussing the Court’s jurisprudence that distinguishes and highlights the inherent dangers of giving aid to pervasively sectarian institutions). Religious social service providers generally were separately incorporated from their affiliated institution and were “required to adhere to our civil rights laws.” *State and Local Implementation of Existing Charitable Choice Programs: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong. 11 (2001) (statement of Rep. Jerrold Nadler, Member, House Comm. on the Judiciary).

³⁵ *Mitchell*, 530 U.S. at 850 (O’Connor, J., concurring). See GLENN, *supra* note 14, at 79–93 (discussing definitions of pervasively sectarian).

³⁶ *Everson*, 330 U.S. at 16.

³⁷ *Lemon*, 403 U.S. at 607 (stating that the Establishment Clause required the primary purpose and effects of a law to be secular and prohibited excessive government entanglement).

least that the government could not “promote or affiliate itself with any religious doctrine or organization, . . . discriminate among persons on the basis of their religious beliefs and practices, . . . delegate a governmental power to a religious institution, . . . [or] involve itself too deeply in such an institution’s affairs.”³⁸ Therefore, the government could not require state-sponsored prayers in public schools,³⁹ even when the students selected the speaker.⁴⁰ The government also could not delegate to churches its authority to decide whether to grant liquor licenses.⁴¹ In addition, the government could not carve out a school district to consist primarily of one religious denomination.⁴²

Separationism, however, was plagued with doctrinal inconsistencies, and its dominance faltered in the 1980s and 1990s. At that time, several justices began to analyze aid programs through the lens of neutrality theory.⁴³ Chief Justice Rehnquist, for example, articulated a version of neutrality theory that is based on an understanding that “nothing in the Establishment Clause requires government to be strictly neutral between religion and nonreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.”⁴⁴ In the words of one proponent, neutrality theory considers the goal of the Establishment Clause to be “the minimization of the government’s influence over personal choices concerning religious beliefs and practices.”⁴⁵ It follows that the Establishment Clause prohibits the government from preferring one religion to another.⁴⁶ Therefore,

³⁸ *Allegheny v. ACLU*, 492 U.S. 573, 590–91 (1989).

³⁹ *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

⁴⁰ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

⁴¹ *Larkin v. Grendel’s Den*, 459 U.S. 116 (1982).

⁴² *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994).

⁴³ Justice Souter described the Court’s evolving application of neutrality in his dissenting opinion in *Mitchell*. 530 U.S. at 878–84 (Souter, J., dissenting). He characterized the Court’s use of neutrality in *Everson* as a way to describe the government’s required position in its relations with religious and nonreligious organizations. *Id.* at 878–79. Justice Souter observed that in *Lemon*, the Court’s definition shifted on a functional level when it used neutrality to describe a benefit as secular or nonreligious. *Id.* at 880. Finally, Justice Souter described neutrality as beginning to assume its present form of evenhandedness in the 1980s, when the Court increasingly upheld programs because they were general and addressed a broad class of beneficiaries. *Id.* at 881. The shifts that Justice Souter described are best reflected in the Court’s decisions regarding government assistance to parochial schools. For example, although in 1985 the Court presumed that the mere placement of a public employee on parochial school grounds resulted in government indoctrination or in a symbolic union between government and religion, *Aguilar v. Felton*, 473 U.S. 402, 409 (1985), just one year later the Court abandoned the notion that direct government aid to religious schools’ educational functions was invalid, *Witters v. Washington Dep’t. of Servs. for the Blind*, 474 U.S. 481 (1986). For further discussion on the meaning of neutrality, see *infra* text accompanying notes 286–300, 322–334.

⁴⁴ *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).

⁴⁵ Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 26 (1997) [hereinafter Esbeck, *Constitutional Case*].

⁴⁶ The neutrality theory incorporates the equal treatment norms of Equal Protection

“when government provides benefits to enable activities that serve the public good, . . . there should be neither discrimination in eligibility based on religion, nor exclusionary criteria requiring these charities to engage in self-censorship or otherwise water down their religious identity as a condition for program participation.”⁴⁷

The plurality’s opinion in *Mitchell*,⁴⁸ upholding the federal provision of materials to all qualifying schools, including sectarian schools, exemplifies the Court’s shift to neutrality theory. Three years prior to *Mitchell*, in *Agostini v. Feltman*,⁴⁹ the Court had collapsed the effects and entanglement prongs of the *Lemon* analysis. The *Mitchell* plurality modified the *Agostini* analysis and adopted a two-pronged test (that may well become the Court’s test for challenges to charitable choice⁵⁰): to be permissible a program was required to have a secular primary purpose *and* primary effects that neither supported religious indoctrination, funded religious activity such as worship, nor endorsed religion.⁵¹ Significantly, the Court announced there would be a strong presumption of constitutionality if the law were evenhanded and generally applicable, and if it selected recipients and distributed benefits to them irrespective of their religious identity.⁵²

Despite the advantages of neutrality theory,⁵³ separationism is by no means extinct. Notably, three justices—Justice Souter, joined by Justices Stevens and Ginsburg—dissented from the *Mitchell* plurality on separa-

Clause jurisprudence. *See infra* note 138 and accompanying text. *See, e.g.*, Esbeck, *Constitutional Case*, *supra* note 45, at 23. A significant debate that is beyond the scope of this Note concerns whether the government could ever be neutral where religion is involved. Compare Esbeck, *Constitutional Case*, *supra*, with Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of “Neutrality Theory” and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 243 (1999) [hereinafter Brownstein, *Interpreting*].

⁴⁷ Esbeck, *Constitutional Case*, *supra* note 45, at 20–21. *See also* GLENN, *supra* note 14, at 76–77.

⁴⁸ 530 U.S. at 793.

⁴⁹ 521 U.S. 203, 209 (1997) (reversing *Aguilar*) (holding that government actions were permissible under the Establishment Clause if they had a secular purpose and did not run afoul of three criteria used to determine their primary effect—they did not result in government indoctrination, define their recipients on the basis of religion, and create excessive entanglement).

⁵⁰ *See infra* Parts II.C, IV.C.

⁵¹ *Mitchell*, 530 U.S. at 808.

⁵² *See, e.g., id.* at 796, 801–36; *id.* at 837–38 (O’Connor, J., concurring) (remarking on the weight the plurality accorded to neutrality); *see also infra* text accompanying note 93.

⁵³ Neutrality theory requires the government to include religious organizations as eligible recipients, whereas separationism requires the government to fund only secular programs. In addition, neutrality theory eliminates separationism’s “pervasively sectarian” distinction. Esbeck, *Constitutional Case*, *supra* note 45, at 37. It is also more accommodating of the view that American civil society should include partnerships between government and religion. Martha Minow, *Partners, Not Rivals? Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061 (2000) [hereinafter Minow, *Redrawing the Lines Between Public and Private*] (discussing the shifting relationships between government and private, religious, and nonprofit organizations).

tionist grounds.⁵⁴ Two justices—Justice O'Connor, joined by Justice Breyer—concurred in judgment but warned that the plurality placed too much significance on neutrality and not enough on possible endorsement effects.⁵⁵ Furthermore, because *Corporation of Presiding Bishop v. Amos*⁵⁶ was the last decision in the Establishment Clause regulatory context and it applied the *Lemon* test, it is uncertain whether separationism continues to govern that area.⁵⁷ Thus, although neutrality theory may be the favored approach, separationism and the *Lemon* test remain viable alternatives.

B. The Emergence of Charitable Choice

Neutrality theory's increasing popularity has given politicians impetus to challenge the boundaries of permissible government interaction with religious organizations. Charitable choice provisions in social welfare legislation exemplify this challenge.⁵⁸ Through an approach to social welfare that is markedly different from the separationist strategy that arose after *Everson v. Board of Education*,⁵⁹ charitable choice prohibits the government from excluding potential grantees even when they are pervasively sectarian.⁶⁰

A good example of the key aspects of enacted and proposed charitable choice provisions is Section 604a of the Welfare Reform Act ("Section 604a").⁶¹ Section 604a seeks "to allow States to contract with religious organizations . . . without impairing the religious character of such

⁵⁴ *Mitchell*, 530 U.S. at 885 (Souter, J., dissenting).

⁵⁵ *Mitchell*, 530 U.S. at 836 (O'Connor, J., concurring). See Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837, 863 (2001) ("O'Connor acknowledged that formal neutrality may be a necessary condition for the funding of religious organizations, but she maintained that neutral allocations were not enough to satisfy Establishment Clause review.").

⁵⁶ 483 U.S. 327 (1987) (upholding the Title VII nondiscrimination exemption for religious employers). See *infra* text accompanying notes 123–144.

⁵⁷ See *infra* text accompanying notes 123–144.

⁵⁸ See, e.g., Children's Health Act of 2000, Pub. L. No. 106-310, § 3305, 114 Stat. 1101, 1212–14; New Markets Venture Capital Program Act of 2000, Pub. L. No. 106-554, app. H, § 582, 114 Stat. 2763, 27631-34 to -35 (2000); Community Services Block Grant Act, Pub. L. No. 105-185, § 679, 112 Stat. 2702, 2749–50 (1998); Personal Responsibility and Work Reconciliation Act of 1996 (the "Welfare Reform Act"), Pub. L. No. 104-193, § 104, 110 Stat. 2105, 2161–63.

⁵⁹ 330 U.S. 1 (1947). See *supra* text accompanying notes 31–42; see also, e.g., Stanley Carlson-Thies, "Don't Look to Us": *The Negative Responses of the Churches to Welfare Reform*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 667 (1997) (summarizing evolving national social policy and former President Clinton and former House Speaker Newt Gingrich's differing approaches); Lewis D. Solomon & Matthew J. Vlissides, Jr., *Faith-Based Charities and the Quest to Solve America's Ills*, 10 CORNELL J.L. & PUB. POL'Y 265, 269–75 (2001) (discussing twentieth-century welfare reforms).

⁶⁰ See statutes cited *supra* note 58.

⁶¹ 42 U.S.C.A. § 604a (West Supp. 2000). See generally Carlson-Thies, *supra* note 59 (describing the charitable choice provision and the debate surrounding its enactment in the Welfare Reform Act).

organizations, and without diminishing the religious freedom of beneficiaries of assistance.”⁶² It bars states from discriminating against religious applicant organizations,⁶³ authorizes states to contract with religious service providers and allow vouchers to be redeemed with them,⁶⁴ and requires states to monitor recipient organizations to ensure they do not use government money for religious purposes.⁶⁵ To safeguard what Congress perceives to be the organizations’ constitutional rights, Section 604a maintains the Title VII exemption for religious employers.⁶⁶ At the same time, Section 604a protects beneficiaries’ free exercise rights by prohibiting providers from discriminating against beneficiaries on the basis of religion,⁶⁷ and requiring states to provide an alternative program if a beneficiary objects to the religious nature of a service provider.⁶⁸

In 2001 and 2002, the House of Representatives, members of the Senate, and President Bush pushed beyond the traditional boundaries of government interaction with religion when they declared that religious service providers were central to their social welfare agenda. First, the House passed the Charitable Choice Act,⁶⁹ which proposes the extension of the Welfare Reform Act’s charitable choice provisions to a broader range of social service providers. Second, Senators Lieberman and Santorum introduced the CARE Act,⁷⁰ which would prohibit government agencies from discriminating against potential service providers on the basis of religion, but would omit the constitutional safeguards contained in charitable choice legislation.⁷¹

Finally, President Bush announced to an assembly of religious and nonprofit leaders that:

⁶² § 604a(b).

⁶³ § 604a(c).

⁶⁴ § 604a(a).

⁶⁵ § 604a(e)–(j).

⁶⁶ § 604a(f).

⁶⁷ § 604a(g).

⁶⁸ § 604a(e)(1).

⁶⁹ H.R. 7, 107th Cong. § 201 (2001). See *infra* text accompanying notes 200–229 for further discussion of the implications of the Charitable Choice Act as well as the debate surrounding its passage.

⁷⁰ S. 1924, 107th Cong. § 301(a) (2002) (referred to the Committee on Finance, Feb. 8, 2002). See *infra* text accompanying notes 209–212.

⁷¹ S. 1924, § 301(a). Title III of the CARE Act does not explicitly incorporate charitable choice provisions. Rather, it provides that religious social service programs shall not be required to alter their premises or governing documents to remove religious artwork or provisions. See *infra* text accompanying notes 209–229 (discussing the employment discrimination debate). In addition, the CARE Act omits many constitutional safeguards generally contained in the charitable choice provisions such as those in the Welfare Reform Act described above. These omissions include auditing requirements and use restrictions that would prevent recipient organizations from applying federal money to religious purposes, and requirements that the government make available an alternative secular service provider at the request of a beneficiary.

Government has important responsibilities for public health or public order and civil rights [A]nd government will never be replaced by charities and community groups. Yet when we see social needs in America, my administration will look first to faith-based programs and community groups We will not fund the religious activities of any group, but when people of faith provide social services, we will not discriminate against them.⁷²

To effectuate these principles, President Bush issued two executive orders. One created the White House Office of Faith-Based and Community Initiatives, whose purpose is to ensure that religious organizations “[will] be able to compete for funding on an equal basis and in a manner that does not cause them to sacrifice their mission.”⁷³ The second order sought to “clear away the bureaucratic barriers in several important agencies . . . [and to] establish centers at five agencies—Justice, HUD, HHS, Labor and Education—to ensure greater cooperation between the government and the independent sector.”⁷⁴

The recent efforts to expand religious organizations’ involvement in federally funded programs raise a host of policy concerns. First is the general question regarding the appropriate relationship between government and religion.⁷⁵ Second is the difficult question whether the government should fund religious organizations that engage in employment discrimination.⁷⁶ For example, Representative Waters commented that the

⁷² Press Release, Office of the White House Press Secretary, Remarks by the President in Announcement of the Faith-Based Initiative (Jan. 29, 2001), <http://www.whitehouse.gov/news/releases/20010129-5.html>.

⁷³ *Id.* (discussing Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001)).

⁷⁴ *Id.* (discussing Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 29, 2001)).

⁷⁵ See *infra* text accompanying notes 203–229; see also, e.g., MARTHA MINOW, PARTNERS, NOT RIVALRY: PRIVATIZATION AND THE PUBLIC GOOD (forthcoming 2002) (discussing policy implications of different forms of government relationships with nongovernmental entities); E.J. Dionne, Jr. & Ming Hsu Chen, *When the Sacred Meets the Civic: An Introduction*, in SACRED PLACES, CIVIC PURPOSES 14 (E. J. Dionne, Jr. & Ming Hsu Chen eds., 2001) (discussing the broad contours of the policy debates); Rabbi David Saperstein, *Appropriate and Inappropriate Use of Religion*, in SACRED PLACES, CIVIC PURPOSES, *supra*, at 297–304, 301 (advocating “a robust role for religion in American public life and in providing social services,” but not through charitable choice); Marc D. Stern, *Charitable Choice: The Law as It Is and May Be*, in CAN CHARITABLE CHOICE WORK?: COVERING RELIGION’S IMPACT ON URBAN AFFAIRS AND SOCIAL SERVICES 157 (Andrew Walsh ed., 2001).

⁷⁶ See *infra* text accompanying notes 203–229; see also, e.g., Religion News Service, *44 Groups Urge Bush to Halt ‘Charitable Choice,’* L.A. TIMES, Oct. 6, 2001, at B19. A recent study revealed that seventy-five percent of the American public favored allowing religious organizations to participate in government programs but seventy-eight percent opposed allowing them to engage in religious employment discrimination. PEW FORUM ON RELIGION AND PUBLIC LIFE, REPORT: FAITH-BASED FUNDING BACKED, BUT CHURCH-STATE DOUBTS ABOUND (2001), <http://perforum.org/events/0410/report/execsum.php3>. A year later, a similar study found that support for government funding of religious service providers had fallen to seventy percent, but did not query the employment issue. PEW FO-

proposed Charitable Choice Act would open a “Pandora’s box to expand discrimination beyond what we know and understand about discrimination today.”⁷⁷ Finally, other policy questions include the capacity of religious organizations to succeed in tackling America’s social ills,⁷⁸ and the potential divisiveness that may result when religious groups compete for federal support.⁷⁹

Despite the policy concerns, “governments are already contracting nearly \$124 million worth of social services work to 726 faith-based organizations. Of those, about half had not had a previous financial relationship with government.”⁸⁰ Thus, even as the details of federal legislation are being worked out, government entities across the country have already begun revising existing regulations and practices to make it easier to contract with religious service providers.

C. Facial Challenges to Charitable Choice

The political efforts to include religious organizations in public-private partnerships to deliver social welfare services raise serious constitutional concerns. Although the Supreme Court has not yet considered a facial challenge to charitable choice, the Court’s likely approach can be inferred from *Mitchell* and from *Bowen v. Kendrick*.⁸¹ Both decisions upheld federal legislation that provided assistance on a neutral basis to secular and religious institutions. *Mitchell* upheld a program that distributed materials to schools,⁸² while *Bowen* upheld a statute that provided

RUM ON RELIGION AND PUBLIC LIFE, REPORT: AMERICANS STRUGGLE WITH RELIGION’S ROLE AT HOME AND ABROAD 26 (2002), <http://pewforum.org/publications/reports/poll2002.pdf>.

⁷⁷ H.R. REP. NO. 107-138, pt. 1, at 189 (2001) (Rep. Maxine Waters (D-Cal.)).

⁷⁸ See generally BYRON R. JOHNSON, CTR. FOR RESEARCH ON RELIGION AND URBAN CIVIL SOC’Y, OBJECTIVE HOPE: ASSESSING THE EFFECTIVENESS OF FAITH-BASED ORGANIZATIONS: A REVIEW OF THE LITERATURE (2002); Dionne, Jr. & Chen, *supra* note 75 (discussing religious social service providers’ capacity to provide teen pregnancy, crime, and substance abuse preventive programs, as well as community development, child care, and educational services); Laurie Goodstein, *Church-Based Projects Lack Data on Results*, N.Y. TIMES, Apr. 24, 2001, at A12 (reporting on the lack of empirical data on the effectiveness of religious social service providers).

⁷⁹ See, e.g., *State and Local Implementation of Existing Charitable Choice Programs: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong. 51 (2001) (statement of Brent Walker, Executive Director, Baptist Joint Committee on Public Affairs); Religion News Service, *supra* note 76. But see STEPHEN V. MONSMA, POSITIVE NEUTRALITY: LETTING RELIGIOUS FREEDOM RING 49–51 (1993) (suggesting a significant role for diverse religious perspectives in policy debate and that “the divisiveness standard threatens the free exercise of religious beliefs that have a strong, societal relevance,” *id.* at 51).

⁸⁰ Mark O’Keefe, Religion News Service, *Federal, State Agencies Quietly Foster Faith-Based Initiatives* (Mar. 7, 2002), <http://pewforum.org/news/index.php3?NewsID=1054>.

⁸¹ 487 U.S. 589 (1988).

⁸² *Mitchell v. Helms*, 530 U.S. 793, 801 n.1 (2000).

grants for adolescent sexual education and pregnancy services.⁸³ They suggest that the Court is likely to analyze charitable choice within the two frameworks articulated in *Mitchell*: the plurality's two-pronged test (secular purpose and effects with an emphasis on neutrality),⁸⁴ and Justice O'Connor's additional effects test (no endorsement).⁸⁵ Under this three-pronged combination, the Court will most likely uphold charitable choice provisions.⁸⁶

The first prong of the Court's likely inquiry, the purpose prong, asks whether the law was designed to support (or punish) religious groups or conduct.⁸⁷ If a court finds that the legislature selected beneficiaries or targeted groups on account of their religious status, then it generally must invalidate the law.⁸⁸ If instead a court concludes that the law applies on a neutral, evenhanded basis, then the court should defer to the stated secular purpose even if it suspects the existence of an additional impermissible purpose.⁸⁹ For example, *Bowen* upheld the Adolescent Family

⁸³ *Bowen*, 487 U.S. at 610–11, 617.

⁸⁴ 530 U.S. at 808. *See supra* text accompanying notes 48–52. For application of the two-pronged analysis to the charitable choice exemption for religious employers from nondiscrimination requirements, see *infra* Part IV.C.

⁸⁵ 530 U.S. at 836 (O'Connor, J., concurring). *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 688, 688 (1984) (stating that endorsement exists if an objective observer perceives the government action as “send[ing] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community”). Justice O'Connor's endorsement test is discussed in greater detail in Parts III and IV, *infra* text accompanying notes 133–135, 335–356.

⁸⁶ This premise is highly contested. Compare Kathleen M. Sullivan, *Religious Participation in Public Programs: Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 221 (1992) (maintaining that “[t]he affirmative implication of the Establishment Clause is the establishment of the civil public order” in which religion is banished from the public square), with McConnell, *supra* note 31, at 185 (contending that there is no establishment when religious organizations participate in public programs on an equal basis with nonreligious institutions). For another analytical approach to charitable choice, see Elbert Lin et al., *Faith in the Courts? The Legal and Political Future of Federally-Funded Faith-Based Initiatives*, 20 YALE L. & POL'Y REV. 183, 203–04 (2002), in which the authors seek to identify potential plaintiffs, their claims, and the likelihood of their success. They suggest that claims under the Establishment and Free Speech Clauses are less likely to succeed than are lawsuits challenging the “scope and application” of the Title VII exemption. Additionally, they contend that political challenges to charitable choice may be the most successful in thwarting such legislation.

⁸⁷ In *Mitchell* the secular purpose of the Act was not at issue, 530 U.S. at 808–09; thus the standard for the purpose inquiry necessarily draws from earlier discussions. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (“[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral.”).

⁸⁸ *See, e.g.*, *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994) (dismantling school district because it was specially created to benefit a religious group); *City of Hialeah*, 508 U.S. at 533 (holding that because the primary legislative motive for outlawing particular types of animal slaughter was to target Lukumi ritual slaughter practices, the law facially violated the Establishment Clause “unless it is justified by a compelling interest and is narrowly tailored to advance that interest”); *Stone v. Graham*, 449 U.S. 39 (1980) (finding no secular purpose in posting the Ten Commandments in public schools).

⁸⁹ *Bowen*, 487 U.S. at 603 (concluding that even if the legislature had been improperly

Life Act of 1981⁹⁰ (AFLA) because it had a stated secular purpose, despite the suggestion that Congress may have impermissibly desired to benefit religion by requiring grant applicants to describe “how they will involve religious organizations in the programs funded by AFLA.”⁹¹ The stated secular purpose of charitable choice, like the stated purpose of AFLA, is to ensure that the government delivers social welfare services through a diverse group of providers and does not discriminate against religious service providers.⁹² Thus the Court is likely to find that this goal satisfies the purpose inquiry.

The second prong of the Court’s likely analysis, the effects prong, asks whether the primary effect of the government action is religious activity, indoctrination, or excessive entanglement with religion. The *Mitchell* plurality concluded that neutral programs presumptively do not have impermissible primary effects.⁹³ Michael McConnell aptly summarized the rationale:

When the government provides no financial support to the non-profit sector *except for churches*, it aids religion. But when the government provides financial support to the entire nonprofit sector, religious and nonreligious institutions alike, on the basis of objective criteria, it does *not* aid religion. It aids higher education, health care, or child care; it is neutral to religion.⁹⁴

motivated by the desire to support the counseling efforts of religious organizations against premarital sex, the secular purpose of the statute satisfied the purpose inquiry).

⁹⁰ Pub. L. No. 97-35, 95 Stat. 578 (codified as amended at 42 U.S.C. § 300z to 300z-10). AFLA provides grants for premarital adolescent sexual relations and pregnancy services to public and nonprofit organizations, including religious organizations. Its stated purpose was “the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood.” *Bowen*, 487 U.S. at 602.

⁹¹ *Id.* at 603.

⁹² See, e.g., 42 U.S.C.A. § 604a(b)–(c) (West Supp. 2000). See also Sen. John Ashcroft, *Ashcroft Charitable Choice Provision Triumphs in New Welfare Reform Law*, at http://www.policyexchange.iel.org/seminars/charitable_choice_ashcroft.html (Oct. 1, 1996) (“It is Senator Ashcroft’s hope that these protections in the law will encourage successful charitable and faith-based organizations to expand welfare services while assuring them that they will not have to extinguish their religious character in receiving government funds.”); Rep. Robert C. Scott, *Questions and Answers About Charitable Choice*, at http://www.house.gov/scott/c_choice/cc_qa.htm (last visited Mar. 17, 2002) (“Charitable Choice . . . seeks to require various governmental agencies to contract with faith-based organizations on the same basis as any nonprofit provider without discriminating against the religious character.”) (internal quotation marks omitted).

⁹³ *Mitchell*, 530 U.S. at 796. The Court also discussed other traditional indicators of effects, including: whether aid is allocated directly; whether aid supplements or supplants the recipient’s traditional resources; whether the public funds are divertible for religious use; and whether the recipients are pervasively sectarian. Although Justice Souter emphasized these factors and more in his dissenting opinion, *id.* at 877, the plurality found them more or less irrelevant after a neutrality determination was made, *id.* at 793. See also *Bowen*, 487 U.S. at 607–08.

⁹⁴ McConnell, *supra* note 31, at 184.

The plurality's concept of neutrality is evenhandedness—legislation is not required to be silent with regard to religion provided it treats religion and nonreligion equally. The plurality identified several indicators of neutrality including: whether the federal aid funds religious activity or indoctrination;⁹⁵ whether the selection criteria used to distribute aid considers religious affiliation or lack thereof;⁹⁶ and whether the program allocates aid on the basis of individual choice.⁹⁷ Additionally, the plurality indicated that a neutral program may impose auditing and oversight requirements so long as it treats recipient organizations equally.⁹⁸ For example, *Bowen* dismissed a “no excessive entanglement” challenge to AFLA because it found that a monitoring provision was both necessary and sufficient to ensure that funds were spent as intended.⁹⁹

Thus far, the two models of charitable choice legislation, the Welfare Reform Act and the proposed Charitable Choice Act, appear to satisfy several of these indicators of neutrality, suggesting that they would be presumed to have permissible effects. The models restrict the use of money received under the program to secular activity,¹⁰⁰ prohibit government agencies from considering religion when they select aid recipients,¹⁰¹ address a broad class of beneficiaries and forbid recipient organizations from engaging in religious discrimination against them,¹⁰² and subject religious organizations “to the same regulations as other contractors to account in accord with generally accepted auditing principles.”¹⁰³ Moreover, the charitable choice models are, if anything, less entangling than the provisions in *Bowen*—if a religious organization segregates government funds into a separate account, only that account need be audited.¹⁰⁴

Finally, the third prong of the Court's likely analysis, Justice O'Connor's endorsement test, is unlikely to preclude a finding that charitable choice is constitutional. In *Bowen* and in *Mitchell*, Justice O'Connor analyzed the disputed programs' potential effects and concluded that they would not constitute impermissible endorsement.¹⁰⁵ The charitable choice models share those statutes' significant features, including use restrictions and neutral eligibility, selection, and distribution criteria.

⁹⁵ *Mitchell*, 530 U.S. at 809.

⁹⁶ *Id.* at 810.

⁹⁷ *Id.*

⁹⁸ *Id.* at 799; *Bowen*, 487 U.S. at 616–17.

⁹⁹ *Bowen*, 487 U.S. at 616–17.

¹⁰⁰ 42 U.S.C.A. § 604a(j) (West Supp. 2000); Charitable Choice Act, H.R. 7, 107th Cong. § 201, at 1991(j) (2001). *See also infra* note 228.

¹⁰¹ 42 U.S.C.A. § 604a(c); H.R. 7, § 201, at 1991(c).

¹⁰² 42 U.S.C.A. § 604a(g); H.R. 7, § 201, at 1991(h).

¹⁰³ 42 U.S.C.A. § 604a(h)(1); H.R. 7, § 201, at 1991(i)(1).

¹⁰⁴ 42 U.S.C.A. § 604a(h)(2); H.R. 7, § 201, at 1991(i)(2).

¹⁰⁵ *Bowen*, 487 U.S. at 622–24 (O'Connor, J., concurring); *Mitchell*, 530 U.S. at 842–43 (O'Connor, J., concurring).

Although the Court is likely to uphold a facial challenge to charitable choice under the federal Constitution, it is worth noting that charitable choice expenditures could raise state constitutional difficulties. Moreover, specific charitable choice grants may face as-applied challenges. For example, in January 2002, a federal district court ruled that the state of Wisconsin violated the Establishment Clause when it granted money to Faith Works, a faith-based long-term residential drug and alcohol treatment center.¹⁰⁶ Faith Works' bylaws state that the center seeks to use "a holistic, faith-based approach to bring healing to mind, body, heart and soul. While the program is inherently Christian, services will be offered to all persons who seek it [sic], regardless of their faith background."¹⁰⁷ The program's "detoxification process" includes prayer and relapse prevention.¹⁰⁸ Furthermore, its mandatory Alcoholics Anonymous program is more explicitly faith-based than standard programs. Faith Works' employees are available to provide Bible studies, prayer, and chapel services.¹⁰⁹ "Commitment to Christian beliefs and values is a hiring consideration for counseling staff,"¹¹⁰ and the employees' Standards of Practice states that staff are expected to attend church, "to serve as Jesus served," and "to be mature in [their] faith and work habits in order to be truly able to be witnesses to the Lord and His Grace."¹¹¹ The court held that the state grant impermissibly constituted "unrestricted, direct funding of an organization that engages in religious indoctrination."¹¹² The Wisconsin case should serve as a reminder that although neutrality theory means that charitable choice is likely to be found constitutional in the abstract, the Establishment Clause continues to constrain the government's interactions with religion in specific cases.

In sum, the new relationship that Congress is constructing between the federal government and religious organizations treads on uncertain constitutional ground. The previous discussion explains why it is likely that the Court will not overturn charitable choice provisions that prohibit government agencies from discriminating against service providers on the basis of religion. The remainder of this Note explores the tensions that charitable choice creates by allowing religious organizations to engage in otherwise unlawful employment discrimination.

¹⁰⁶ *Freedom from Religion Found. v. McCallum*, 179 F. Supp. 2d 950, 960 (W.D. Wis. 2002). Wisconsin was administering funds received under the Temporary Assistance to Needy Families (TANF) program, 42 U.S.C.A. § 603 (West Supp. 2000).

¹⁰⁷ *Freedom from Religion Found.*, 179 F. Supp. 2d at 958.

¹⁰⁸ *Id.* at 956.

¹⁰⁹ *Id.* at 955.

¹¹⁰ *Id.* at 956.

¹¹¹ *Id.* at 954.

¹¹² *Id.*

III. CHARITABLE CHOICE ANTIDISCRIMINATION EXEMPTIONS

Title VII of the Civil Rights Act of 1964,¹¹³ the Age Discrimination in Employment Act of 1967 (ADEA),¹¹⁴ and the Americans with Disabilities Act of 1990 (ADA)¹¹⁵ prohibit employment discrimination on the basis of race, color, national origin, religion, sex, age, and disability. However, two exemptions for religious organizations—the legislatively granted Title VII exemption and the judicially created ministerial exception—permit privately funded religious employers to discriminate on the basis of religion. Charitable choice purports to preserve this limited ability to discriminate when religious organizations receive federal assistance. This means that if an organization like Kentucky Baptist Homes for Children accepts federal assistance under charitable choice, the statute would permit it to engage in religious employment discrimination against employees in any position.

The breadth and constitutionality of the exemptions are best understood in light of the exemptions from civil rights laws for independent religious entities. Two major themes can be derived from the Court's jurisprudence in this area: The Court's decision in *Corporation of Presiding Bishop v. Amos*¹¹⁶ indicates that, at times, the Establishment Clause permits Congress to exempt religious organizations from generally applicable laws (such as Title VII); however, the Court's decision in *Employment Division v. Smith*¹¹⁷ suggests that the constitutional imperative for the accommodation is weak. Within these parameters, Congress is free to decide whether to grant an accommodation.

A. Antidiscrimination Exemptions as Permissible Accommodations

1. Legislative Exemptions: The Constitutionality of the Title VII Exemption

The Court has determined that the Establishment Clause *permits* Congress to exempt religious employers from laws of general applicability in order to facilitate their free exercise of religion; however, the Court has not considered whether the Free Exercise Clause *requires* such ac-

¹¹³ 42 U.S.C. §§ 2000e to 2000e-17 (1994).

¹¹⁴ 29 U.S.C. §§ 621–623 (1994). For application of the ministerial exception to the ADEA, see cases cited *infra* note 157.

¹¹⁵ 42 U.S.C. §§ 12101–12112 (1994). For application of the ministerial exception to the ADA, see cases cited *infra* note 157.

¹¹⁶ 483 U.S. 327 (1987) (upholding the Title VII nondiscrimination exemption for religious employers).

¹¹⁷ 494 U.S. 872 (1990) (rejecting respondents' Free Exercise Clause claim to an exemption from a neutral law of general applicability that made peyote use unlawful and prohibited his sacramental use of the substance).

commodation.¹¹⁸ The Title VII exemption for religious employers illustrates this type of permissible accommodation. Title VII prohibits private and public employers of fifteen or more employees from making hiring, firing, compensation, and other employment-related decisions on the basis of their employees' race, color, national origin, religion, or sex.¹¹⁹ The exemption for religiously affiliated organizations explicitly permits them to discriminate on the basis of religion.¹²⁰ Although in its original form this exemption narrowly applied to employees in ministerial or clergy positions, in 1972 Congress expanded it to include all employees.¹²¹

A unanimous Court upheld the Title VII exemption against an Establishment Clause challenge in *Amos*.¹²² The case was brought by two former employees of businesses that had "no corporate or financial existence separate from" the Mormon Church: Christine Amos, a former personnel employee at a clothing mill, and Arthur Mayson, a former building engineer at a nonprofit gymnasium open to the public.¹²³ They claimed to represent a class of similarly situated employees who were fired because they did not satisfy the "worthiness requirements" to qualify for church membership.¹²⁴ The employees claimed that, although their employer might qualify as a religious organization for the Title VII exemption, application of the exemption to their secular positions was unconstitutional. The district court agreed and held that the 1972 extension of the exemption to cover secular positions violated the Establishment Clause.¹²⁵ The Supreme Court reversed, concluding that application of the exemption to secular employment positions was valid because Congress's goal was to lift a burden on the exercise of religion.¹²⁶

The Court conducted its analysis under the *Lemon* test. In its first inquiry, the Court found a permissible purpose: "to alleviate significant

¹¹⁸ *Amos*, 483 U.S. at 339 n.17. See *infra* text accompanying note 172.

¹¹⁹ 42 U.S.C. §§ 2000e-2(a), 2000e(b) (1994).

¹²⁰ § 2000e-1(a).

¹²¹ *Id.*

¹²² *Amos*, 483 U.S. at 339 n.17.

¹²³ *Amos v. Corp. of Presiding Bishop*, 594 F. Supp. 791, 800 (D. Utah 1984).

¹²⁴ *Id.* at 796.

¹²⁵ Because the district court found that "disputed issues of material fact precluded summary judgment" in Amos's case, only Mayson's case proceeded on appeal. *Amos*, 483 U.S. at 333 n.13. Four justices would have limited the judgment to the constitutionality of religious organizations' nonprofit secular activities without addressing for-profit activities. *Id.* at 340 (Brennan, J., concurring, joined by Marshall, J.); *id.* at 346 (Blackmun, J., concurring); *id.* at 346 (O'Connor, J., concurring). As Justice Brennan explained, the Court's concern was to allow religious organizations sufficient freedom to determine for themselves which activities were religious. *Id.* at 343 (Brennan, J., concurring). He felt that the risk of excessive entanglement and interference with internal governance—the risk that permitted accommodation in the first place—was more significant in the nonprofit context because it was more likely that "the activities themselves are infused with a religious purpose." *Id.* at 344.

¹²⁶ *Id.* at 335–39. Because the Court upheld the exemption under the Establishment Clause, it did not consider whether the Free Exercise Clause required the exemption. *Id.* at 339 n.17.

governmental interference with the ability of religious organizations to define and carry out their religious missions.”¹²⁷ The Court explained that there is a fine line between permissible government regulation of religious employers’ employment activity and regulation that excessively interferes with religious institutions’ internal governance.¹²⁸ Even if the Court itself would not hold such regulation unconstitutional, Congress is free to exempt religious organizations.

The Court next concluded that the Title VII exemption satisfied the *Lemon* effects analysis. “A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose.”¹²⁹ Rather, for a law to be unconstitutional, “it must be fair to say that the government *itself* has advanced religion through its own activities and influence.”¹³⁰ The Court found that, although Mayson’s “freedom of choice in religious matters was impinged upon, . . . it was the Church, . . . and not the government, who put him to the choice of changing his religious practices or losing his job.”¹³¹ Rather than enable the government to advance religion, the Court concluded that the Title VII exemption “effectuates a more complete separation.”¹³²

Justice O’Connor concurred in the judgment but adopted a different analytical framework. She harkened back to the endorsement analysis she had suggested in an earlier case: “whether government’s purpose is to endorse religion and whether the statute actually conveys a message of endorsement.”¹³³ Justice O’Connor focused on separating “those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations.”¹³⁴ She concluded that application of the Title VII exemption to nonprofit religiously affiliated organizations’ general activities is a permissible accommodation of free exercise because it lifts both the burden of demonstrating that the activities are religious and the prohibition against religious employment discrimination.¹³⁵

The Court also rejected Mayson’s Equal Protection Clause challenge to the Title VII exemption. Mayson claimed that Title VII’s different treatment of religious and secular employers constituted religious gerry-

¹²⁷ *Amos*, 483 U.S. at 335.

¹²⁸ *Id.* at 336.

¹²⁹ *Id.* at 337.

¹³⁰ *Id.*

¹³¹ *Id.* at 337 n.15.

¹³² *Id.* at 339.

¹³³ *Wallace v. Jaffree*, 472 U.S. 38, 67, 69 (1985) (finding that because the primary purpose of an Alabama statute that authorized a daily period of silence in public schools for prayer or meditation was religious, the act violated the Establishment Clause). *See infra* text accompanying notes 335–341 for application of the endorsement analysis to the charitable choice exemption.

¹³⁴ *Amos*, 483 U.S. at 348.

¹³⁵ *Id.* at 348–49.

mandering in violation of *Larson v. Valente*.¹³⁶ The Court concluded that whereas *Larson* required strict scrutiny of laws that distinguish among religions, it only required rationality review of laws that grant a uniform benefit to all religions.¹³⁷ Because the Title VII exemption does not differentiate among religions, and is “rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions,” it did not violate the Equal Protection Clause.¹³⁸

Although *Amos* was decided before *Mitchell*, it remains the Court’s most recent evaluation of religious accommodations from a regulatory law. Therefore, it is not clear which test the Court would apply to determine the permissibility of accommodations if the issue were considered today: the three-prong *Lemon* test;¹³⁹ the two-prong *Mitchell* neutrality analysis;¹⁴⁰ or Justice O’Connor’s endorsement test.¹⁴¹

2. Judicial Exemptions: The Ministerial Exception

Most of the federal circuit courts have granted religious employers an additional accommodation by creating a constitutional ministerial exception to the nondiscrimination provisions.¹⁴² The ministerial exception extends the century-old doctrine of nonjusticiability concerning “matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law”¹⁴³ to Title VII and other laws of general applicability. In so doing, it prevents courts from interfering with employment disputes that involve employees in “ministerial” (clergy-type) positions. As a result, the ministerial exception shields religious employers from all discrimination suits, not merely from the religious discrimination suits exempted by Ti-

¹³⁶ 456 U.S. 228, 246 (1982) (striking down a Minnesota charitable contributions statute because its reporting and registration requirements favored particular religious groups).

¹³⁷ *Amos*, 483 U.S. at 339.

¹³⁸ *Id.* For further discussion of the relationship between religious organizations, First Amendment rights, and the government’s compelling interest in promoting equality, see Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514 (1979). See also *supra* note 46.

¹³⁹ See *supra* text accompanying note 37.

¹⁴⁰ See *supra* text accompanying notes 84–104.

¹⁴¹ See *infra* text accompanying notes 335–341.

¹⁴² See cases cited *infra* note 156.

¹⁴³ *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976). See *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (declining to intervene in an intrachurch property dispute because the Free Exercise Clause safeguarded the ability of the church membership “to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine”); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929) (decided on constitutional grounds; refusing to interfere with appointment decisions that were based on a chaplain’s interpretation of Roman Catholic canon law); *Watson v. Jones*, 80 U.S. 679, 728–29 (1871) (decided on general common law grounds; declining to resolve a dispute about interpretations of church law because of ecclesiastical governance’s importance to church integrity).

tle VII. Therefore, if the ministerial exception continues to apply when religious organizations receive federal assistance, it will permit a much broader scope of federally funded employment discrimination than the Title VII exemption, albeit for a narrower set of positions.

The Fifth Circuit, in *McClure v. Salvation Army*,¹⁴⁴ was the first circuit to recognize a ministerial exception to Title VII. A commissioned officer (minister), welfare casework supervisor, and secretary of the Salvation Army, Billie McClure filed suit against the organization under Title VII, claiming that she “had received less salary and fewer benefits than that accorded similarly situated male officers,” and that she was fired in retaliation for her complaints to the Equal Employment Opportunity Commission.¹⁴⁵

Although the Title VII exemption could not shield the Salvation Army from McClure’s claim of gender discrimination, the Fifth Circuit nonetheless held that the dispute was nonjusticiable because it involved a ministerial position.¹⁴⁶ The court’s analysis, conducted under *Sherbert v. Verner*,¹⁴⁷ determined that judicial review would raise two constitutional problems. First, the statutory antidiscrimination provisions of Title VII would impermissibly collide with the free exercise rights of the Salvation Army. Second, judicial review threatened to excessively entangle government with religion by interfering with church administration. Thus, *McClure* and the cases that followed it precluded application of Title VII to ministerial positions on the ground that the Religion Clauses gave religious organizations a constitutional right to autonomy in matters of internal governance.

The Supreme Court has never considered application of the ministerial exception to Title VII, but it has considered its application to government regulation under the National Labor Relations Act¹⁴⁸ and Fair Labor Standards Act (FLSA).¹⁴⁹ *NLRB v. Catholic Bishop of Chicago*¹⁵⁰ held that the National Labor Relations Board (NLRB) did not have jurisdiction to consider unfair labor practice complaints by Catholic high school teachers who provided students with religious training. The Court stated that, in general, the First Amendment did not preclude the NLRB

¹⁴⁴ 460 F.2d 553 (5th Cir. 1972).

¹⁴⁵ *McClure*, 460 F.2d at 555.

¹⁴⁶ *Id.* at 554–55, 558–60 (observing that courts have deemed Officers to be ministers because one of their primary functions is to further the organization’s spiritual mission).

¹⁴⁷ 374 U.S. 398 (1963). Only a showing of a “compelling state interest in the regulation of a subject within the State’s constitutional power to regulate” may justify upholding a state action that imposes even an “incidental burden” on the free exercise of religion because this showing ensures that “only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.” *Id.* at 406, quoted in *McClure*, 460 F.2d at 558.

¹⁴⁸ 29 U.S.C. §§ 151–169 (1994).

¹⁴⁹ 29 U.S.C. §§ 201–219 (1994).

¹⁵⁰ 440 U.S. 490, 503 (1979).

from asserting jurisdiction over religious schools.¹⁵¹ In this case, however, the religious nature of the teachers' responsibilities suggested that the very process of the NLRB's inquiry might unconstitutionally interfere with the schools' religious affairs.¹⁵²

Six years later, in *Tony and Susan Alamo Foundation v. Secretary of Labor*,¹⁵³ the Court reiterated that the First Amendment only prevented government regulation of religiously affiliated organizations' operations if such regulation created a significant risk of interference with internal governance. Therefore the Alamo Foundation's Christian mission did not shield its commercial activities from FLSA's minimum wage, overtime, and record-keeping requirements.¹⁵⁴ Thus, both *Catholic Bishop* and *Alamo Foundation* provide support for the application of the ministerial exception to government regulation of religious, but not secular, activities.¹⁵⁵

While *Catholic Bishop* and *Alamo Foundation* established the parameters of the ministerial exception, circuit courts, following *McClure*, have widely applied it to disputes arising under Title VII¹⁵⁶ and other federal antidiscrimination legislation.¹⁵⁷ These courts have broadly construed the ministerial exception so that it "exempts matters touching the relationship between a church and its ministers."¹⁵⁸ The central inquiry focuses on the employee's position rather than the employer's motive for its employment decision.¹⁵⁹ A reviewing court evaluates the employee's du-

¹⁵¹ *Id.* at 497 (noting that the Board "asserts jurisdiction over all private, nonprofit, educational institutions with gross annual revenues that meet its jurisdictional requirements whether they are secular or religious").

¹⁵² *Id.* at 503.

¹⁵³ 471 U.S. 290 (1985).

¹⁵⁴ *Id.* at 305–06.

¹⁵⁵ *See, e.g.,* DeMarco v. Holy Cross High Sch., 4 F.3d 166, 169, 172 (2d Cir. 1993) (applying the principles of *Catholic Bishop* to support a finding that the ADEA applied to a school's decision not to renew the contract of a math teacher whose duties included leading the students in prayer and taking them to Mass); *Volunteers of America-Minnesota-Bar None Boys Ranch v. NLRB*, 752 F.2d 345, 348–49 (8th Cir. 1985) (affirming the NLRB's authority to require the Ranch to engage in collective bargaining for its maintenance, laundry, housekeeping, and child care workers, and finding that Bar None Boys Ranch, a co-educational residential treatment center for children, was a secular institution because it lacked a "commitment of the faculty to religious values . . . and the obligation to propagate those values which provide the risk of entanglement").

¹⁵⁶ *See, e.g.,* Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000); *EEOC v. Catholic Univ.*, 83 F.3d 455 (D.C. Cir. 1996); *Young v. N. Ill. Conference of United Methodist Church*, 21 F.3d 184, 185 (7th Cir. 1994); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1577–78 (1st Cir. 1989); *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir. 1986); *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1168–69 (4th Cir. 1985). *But see* *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940 (9th Cir. 1999).

¹⁵⁷ *See, e.g.,* *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360 (8th Cir. 1991) (ADEA); *Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1989) (ADA). *But see* *Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038 (8th Cir. 1994) (ADEA).

¹⁵⁸ *Young*, 21 F.3d at 185 (quoting *EEOC v. Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980)).

¹⁵⁹ *See, e.g., DeMarco*, 4 F.3d at 171 (concluding that under the Establishment Clause,

ties to determine whether they are religious in nature. Religious duties include teaching, spreading the faith, conducting church governance, supervising a religious order, and leading religious ritual and worship.¹⁶⁰ Additionally, as the Fourth Circuit has observed, the ministerial exception “does not depend upon ordination but upon the function of the position.”¹⁶¹ Therefore, on one hand, courts have applied the exception to clergy,¹⁶² lay choir directors,¹⁶³ university professors,¹⁶⁴ and other employees of nonprofit religious organizations.¹⁶⁵ On the other hand, courts have declined to apply the exception when the employee was a secretary¹⁶⁶ or a seminary student.¹⁶⁷

the fact-finder conducting a pretext inquiry under the *McDonnell-Douglas* test for Title VII “will necessarily have to presume that an asserted religious motive is plausible in the sense that it is reasonably or validly held” because the pretext inquiry is “directed toward determining whether the articulated purpose is the actual purpose for the challenged employment-related action” and does not challenge “the plausibility of putative religious purposes”); *Rayburn*, 772 F.2d at 1169 (stating that, as in all “quintessentially religious” matters, the free exercise clause . . . protects the act of a decision rather than a motivation behind it . . . [and] the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content” (quoting *Milivojevich*, 426 U.S. 696, 720 (1976))).

¹⁶⁰ *Rayburn*, 772 F.2d at 1169; *Young*, 21 F.3d at 185.

¹⁶¹ *Rayburn*, 772 F.2d at 1168.

¹⁶² *See, e.g.*, *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000) (declining to review a clergyman’s allegation of constructive discharge and retaliation); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999) (finding that a reverend was precluded from bringing a pregnancy discrimination claim); *Young*, 21 F.3d at 184 (concluding that a black female minister could not bring Title VII claims of sex and race discrimination against the church conference).

¹⁶³ *See, e.g.*, *EEOC v. Roman Catholic Diocese*, 213 F.3d 795 (4th Cir. 2000) (barring Title VII sex discrimination claim brought by music director and teacher because her work furthered the church’s spiritual mission); *Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999) (barring ADA claim brought by lay choir leader because she was “responsible for the planning, recruiting, implementing and evaluating of music and congregational participation in all aspects of this ministry . . . [and] religious music plays a highly important role in the spiritual mission of the church”).

¹⁶⁴ *See, e.g.*, *EEOC v. Catholic Univ.*, 83 F.3d 455, 464 (D.C. Cir. 1996) (finding that professor of canonical law served the spiritual and pastoral mission of the ecclesiastical faculty and was vital to the spiritual and pastoral mission of the church); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. 1981) (concluding that nonordained faculty at Baptist seminary were ministers); *Powell v. Stafford*, 859 F. Supp. 1343, 1346 (D. Colo. 1994) (finding that teaching Roman Catholic doctrine rendered a high school teacher’s duties “pervasively religious in nature”); *Maguire v. Marquette Univ.*, 627 F. Supp. 1499 (E.D. Wis. 1986) (applying ministerial exception to female associate professor of theology at Roman Catholic university).

¹⁶⁵ *See, e.g.*, *Bell v. Presbyterian Church*, 126 F.3d 328 (4th Cir. 1997) (barring Title VII claim by director of interfaith outreach organization).

¹⁶⁶ *EEOC v. Pac. Press Publ’g Ass’n*, 676 F.2d 1272 (9th Cir. 1982) (permitting Title VII sexual harassment suit by church publishing house secretary).

¹⁶⁷ *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 946–50 (9th Cir. 1999), *reh’g denied en banc*, 211 F.3d 1331 (9th Cir. 2000) (finding that Bollard’s claim did not implicate a substantive relationship between a church and its minister and concluding that the Jesuits had failed to articulate a viable free exercise claim). The Jesuits failed to provide a sufficient religious rationale for sexual harassment that could overcome Bollard’s showing that their religious beliefs discouraged such activity. *Id.* at 946–48. The court concluded that, without the substantive concerns, the dangers of procedural entan-

The scope of the ministerial exception to Title VII is both broader and narrower than the statutory exemption. It is broader because it shields religious employers from race, color, national origin, sex, age, and disability challenges; it is narrower because it applies only to ministerial positions, whereas the Title VII exemption applies to *all* employees of religious organizations. *Amos* illustrates the second of these differences—the broader legislative exemption applied to Mayson because he was an employee of a religious employer, but the ministerial exception would not have applied because his position as buildings engineer was not ministerial.¹⁶⁸

In addition, although *McClure* found that a welfare casework supervisor served ministerial functions, there is no reason to believe that all social service workers serve ministerial positions. The district court of Maryland in *Shirkey v. Eastwind Community Development Corporation*,¹⁶⁹ for example, found that the responsibilities of a “community developer” did not include leading religious services or acting as a pastoral counselor. Therefore the court allowed a white minister to bring suit alleging that he was denied employment as a community developer because the church sought a black minister instead. Similarly, in the more difficult context of sectarian educational institutions, several courts have held that a school was not immune from employment discrimination claims when the teacher’s role was not directly related to furthering a religious mission.¹⁷⁰

gument (e.g., protracted litigation and government surveillance) were not greater than they would be for secular organizations. *Id.* at 948–50. The dissent to the denial of an en banc rehearing concluded that the “panel opinion narrows the ministerial exception to the point of extinction” and, interpreting the *Milivojevich* rule, would have held that because “Bollard’s future in the priesthood is at the heart of his claim This [claim] directly implicates the minister-church relationship” and requires the judiciary to interfere with matters outside the permissible First Amendment scope. *Bollard*, 211 F.3d at 1331 (Wardlaw, J., dissenting).

¹⁶⁸ The Supreme Court did not consider *Amos*’s claim because the district court had found that “disputed issues of material fact precluded summary judgment” in her case. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 333 n.13 (1988). *See, e.g., Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038 (8th Cir. 1994) (permitting employee responsible for supervision of building maintenance and custodial personnel to bring ADEA action against synagogue); *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57 (E.D. Pa. 1991) (permitting ADEA action by director of religious hospital’s plant operations).

¹⁶⁹ 941 F. Supp. 567 (D. Md. 1996).

¹⁷⁰ In university employment disputes, *see, e.g., EEOC v. Miss. Coll.*, 626 F.2d 477, 488–89 (5th Cir. 1980) (allowing Title VII claim against sectarian university by psychologist who was denied full time faculty position); *Welter v. Seton Hall Univ.*, 608 A.2d 206 (N.J. 1992) (permitting nuns who taught computer science at sectarian university to bring a breach of employment contract claim). In the primary and secondary school context, *see, e.g., Gargano v. Diocese of Rockville Ctr.*, 80 F.3d 87, 90 (2d Cir. 1996) (allowing ADEA claim by second grade teacher because deciding the dispute would not involve “extensive or continuous . . . judicial intrusion into the functions of [a] religious institution” (quoting *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 170 (2d Cir. 1993))); *DeMarco*, 4 F.3d at 166 (permitting ADEA claim by math teacher whose responsibilities included leading her students in daily prayer at pervasively sectarian school). *But see Catholic Univ.*, 83 F.3d at

B. Exemptions and Entitlements

Extension of the ministerial exception to Title VII means that religious employers are armed with both legislative and constitutional defenses against discrimination suits. This Note contends that the constitutional basis for the exemption is not strong enough to trump competing constitutional imperatives when religious organizations accept charitable choice funding. The following discussion explores the constitutional basis of the exemptions as a preface to the analysis of the competing constitutional values in Part IV.

The case for a constitutionally mandated exemption from Title VII is weak because it is unclear what provisions of the Constitution would require the exemption, and because *Employment Division v. Smith*¹⁷¹ suggests that such a requirement would only arise if a government action burdened a hybrid of constitutional rights.¹⁷²

First, the constitutional grounds for an entitlement are uncertain. Historically, two types of challenges have been raised against government regulation of religion. Some commentators suggest that a regulation may create unconstitutional entanglement with religion under the Establishment Clause.¹⁷³ Others contend that the Free Exercise Clause protects employment decisions because it bars interference with religious organizations' internal governance.¹⁷⁴ Courts are often ambiguous regarding the

455 (barring Title VII sex discrimination claim by female professor).

¹⁷¹ 494 U.S. 872, 882 (1990) (rejecting respondents' claim of a free exercise right to an exemption from a neutral law of general applicability that made peyote use unlawful and prohibited his sacramental use of the substance).

¹⁷² Note that *Amos* did not consider whether the Religion Clauses mandated either exemption. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 339 & n.17 (1987) ("We have no occasion to pass on the argument of the [employers] . . . that the exemption to which they are entitled under section 702 is required by the Free Exercise Clause."). See Steven K. Green, *The Ambiguity of Neutrality*, 86 CORNELL L. REV. 692, 721 (2001) (book review) [hereinafter Green, *Ambiguity of Neutrality*].

¹⁷³ See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-11, at 1231 (2d ed. 1989) ("[D]octrinal entanglement in religious issues . . . [is the f]inal type of prohibited entanglement . . . [under the Establishment Clause because it] involves government in religion's very *spirit*, in its decisions on core matters of belief and ritual."); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 51 (1998) [hereinafter Esbeck, *Establishment Clause*] ("The [autonomy] cases are far more a consequence of conceptualizing the Establishment Clause as structural than they are a result of the Court's concern for individual free exercise rights.").

¹⁷⁴ See, e.g., *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (declining to consider an employment discrimination dispute concerning the position of an assistant minister because, in "quintessentially religious" matters, the free exercise clause . . . protects the act of a decision rather than a motivation behind it" (quoting *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 720 (1976))); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1394-95 (1981) (advocating that the Establishment Clause concept of entanglement is "irrelevant or misleading in the process of adjudication" and that the Free Exercise Clause provides a much sounder basis for autonomy cases).

grounds for their decisions—they implicate the concepts of free exercise, freedom from excessive government entanglement, and the First Amendment generally, without specifying the exact constitutional basis.¹⁷⁵ Moreover, neither an establishment nor a free exercise rationale for the ministerial exception is fully satisfactory after the Court's emphasis on neutrality in *Bowen*,¹⁷⁶ *Smith*,¹⁷⁷ and *Mitchell*.¹⁷⁸ If neutrality between religion and nonreligion is a factor that supports constitutionality, then how could the Constitution also require accommodations that undermine such neutrality?

The second flaw in the case for a constitutionally mandated exception is the holding of *Smith* itself. In *Smith*, the Court rejected an individual's free exercise claim to an exemption from a law prohibiting all use—including sacramental use—of peyote.¹⁷⁹ In so doing, the Court implied that the Religion Clauses do not create a constitutional entitlement to accommodation from neutral laws; rather, such an accommodation is a legislative policy decision.¹⁸⁰ Whereas before *Smith* neutral laws that burdened religion were subject to a heightened “compelling interest” standard (the standard on which circuit courts have generally relied in creating the ministerial exception),¹⁸¹ after *Smith* such laws were subject only to the equivalent of rationality review.¹⁸²

Interestingly, despite this explicit change in standard, many circuit and district courts have sought to preserve the idea of a constitutionally

¹⁷⁵ Laycock, *supra* note 174, at 1378–88 (discussing the grounds for church autonomy in the context of courts' failing to distinguish between the Religion Clauses). *See, e.g.*, Esbeck, *Establishment Clause*, *supra* note 173, at 50 (“When abstaining from intrachurch dispute cases, the Supreme Court references the First Amendment generally, not expressly singling out either the Establishment Clause or Free Exercise Clause. This has puzzled academics. Indeed, legal commentators often regard this line of cases as a discrete and archaic backwater of First Amendment law, and one not easily classifiable under either of the Religion Clauses.”); McConnell, *supra* note 31, at 131 (discussing doctrinal confusion and inconsistencies between the two Religion Clauses and demonstrating that the *Lemon* test “stands in the way” of advancing the purposes of the Religion Clauses through accommodations made “to avoid devastating injury to the religious lives of [the government's] people”).

¹⁷⁶ *Bowen v. Kendrick*, 487 U.S. 589 (1988).

¹⁷⁷ *Smith*, 494 U.S. at 872.

¹⁷⁸ *Mitchell v. Helms*, 530 U.S. 793 (2000).

¹⁷⁹ *Smith*, 494 U.S. at 882.

¹⁸⁰ *Id.* at 890 (“[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.”).

¹⁸¹ *Sherbert v. Verner*, 374 U.S. 398 (1963) (setting forth the “compelling state interest” test for state actions that impose even an “incidental burden” on the free exercise of religion). *See supra* text accompanying note 147.

¹⁸² *Smith*, 494 U.S. at 886 n.3 (1990) (“Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest.”).

mandated ministerial exception. These courts distinguish *Smith* as addressing a fundamentally different burden on the exercise of religion.¹⁸³ Whereas *Smith* protects an *individual's* right to maintain independent beliefs, but not to avoid compliance with an otherwise valid and neutral law of general applicability,¹⁸⁴ the ministerial exception ensures that *religious organizations* are free from state interference in internal matters.¹⁸⁵ But this argument finds little support in *Smith*, which focused not on the individual/organization distinction but rather on the distinction between beliefs and acts: while Congress may not proscribe religious *belief* in the necessity of employment discrimination,¹⁸⁶ it may prohibit the *act* itself.¹⁸⁷ The circuit courts may have reached the right conclusion—religious organizations are entitled to an exception from certain burdens imposed by Title VII—but their reliance on the Free Exercise Clause alone is misplaced.

An alternative distinction to preserve the ministerial exception from the force of *Smith* can be found in the language of *Smith* itself:

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.¹⁸⁸

¹⁸³ See, e.g., *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1302–03 (11th Cir. 2000); *EEOC v. Catholic Univ.*, 83 F.3d 455, 461–63 (D.C. Cir. 1996).

¹⁸⁴ *Smith*, 494 U.S. at 879 (concluding that the right of free exercise did “not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)” (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982))). In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court later clarified that a neutral law of general applicability would not be considered constitutionally suspect on its face because “[w]hen the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.” *Id.* at 535.

¹⁸⁵ See, e.g., *McClure*, 460 F.2d at 560.

¹⁸⁶ See, e.g., *Smith*, 494 U.S. at 877 (affirming *Torcaso v. Watkins*, 367 U.S. 488 (1961) and *United States v. Ballard*, 322 U.S. 78 (1944)). The government also cannot impose special burdens “on the basis of religious views or religious status,” ban particular activities because they are practiced for religious reasons, or interfere in controversies regarding religious dogma or internal governance. *Id.*

¹⁸⁷ *Id.* at 878. Many commentators and jurists have found this result outrageous. Arguably, proscribing the conduct that flows from a religious belief has the same effect as inhibiting the religion, thus infringing entirely on the right of free exercise. Similarly objectionable is that *Smith* “gives social policy, determined by the State, primacy over the rights of religious communities to order their affairs according to their own convictions.” *McConnell*, *supra* note 31, at 138.

¹⁸⁸ *Smith*, 494 U.S. at 881.

From this perspective, the ministerial exception is not an absolute constitutional entitlement; it derives from a tenuous combination of the employers' free exercise right to noninterference in matters of internal governance (a right *Smith* affirmed¹⁸⁹), and their First Amendment right to expressive association.

Two areas of jurisprudence outline the components of this potential entitlement: one developed in *Roberts v. United States Jaycees*¹⁹⁰ and *Boy Scouts v. Dale*¹⁹¹ concerning the discriminatory actions an organization may take under the right of association; and one articulated in *Watson v. Jones*¹⁹² regarding religious autonomy. The developments in *Jaycees* and *Boy Scouts* appear to favor a constitutional exception to Title VII. Under these cases, the right of association raises a high bar against government interference when an organization must discriminate to define its identity. The height of this bar depends on such factors as the "size, purpose, policies, selectivity, and congeniality" of the organization and on how important the prohibited practice is to furthering the goals of the organization.¹⁹³ For example, the right of association protects family associations against application of discriminatory regulations, but not professional associations.¹⁹⁴ This understanding prompted the Court's conclusions that the Jaycees were not entitled to discriminate in their membership levels on the basis of sex because the discrimination had only social purposes;¹⁹⁵ however, the Boy Scouts were entitled to discriminate on the basis of sexual orientation because such discrimination was central to the organization's mission, to which homosexuality was allegedly anathema.¹⁹⁶ Because some religious organizations may feel that hiring exclusively coreligionists is necessary to maintain their religious identity, the right of association suggests at least a limited entitlement to discriminate.

In contrast, the developments under *Watson* and the religious autonomy cases are less favorable to religious employers. The government may not inquire into ecclesiastical and other matters of internal governance that are central to organizations' religious missions.¹⁹⁷ Nonetheless,

¹⁸⁹ *Id.* at 877.

¹⁹⁰ 468 U.S. 609, 621 (1984) (finding that Minnesota's compelling interest in eradicating discrimination against women trumped the Jaycees' interest in excluding women from certain membership classes because the Jaycees lacked "the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women").

¹⁹¹ 530 U.S. 640 (2000) (striking down application of a New Jersey antidiscrimination law that would require retention of a homosexual scout leader because it violated members' freedom of expressive association).

¹⁹² *Watson v. Jones*, 80 U.S. 679, 728–29 (1871) (declining to resolve a dispute about interpretations of church law).

¹⁹³ *Jaycees*, 468 U.S. at 620–21.

¹⁹⁴ *Id.* at 619.

¹⁹⁵ *Id.* at 627–28.

¹⁹⁶ *Boy Scouts*, 530 U.S. at 651–52.

¹⁹⁷ *See Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring) ("[T]he character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This

mere inquiry into secular matters that coincidentally involve religious personnel does not invade this sphere.¹⁹⁸ Thus, the Free Exercise and Establishment Clauses do not necessarily shield religious employers from government interference in employee matters. The ministerial and statutory exceptions to Title VII are therefore tenuous and should not be considered as entitlements derived from the Religion Clauses alone.

C. Federally Supported Employment Discrimination

President Bush's faith-based initiatives and the legislative charitable choice proposals discussed in Part II focused national debate on the constitutionality of extending the private employment discrimination exemptions to religious recipients of federal aid. The following analysis demonstrates that current legislation and proposals extend the Title VII exemption, but generally not the ministerial exception, to religious organizations' federally funded activities. As a matter of statutory interpretation, this suggests that if Kentucky Baptist Homes for Children receives charitable choice funds, such receipt does not rescind KBHC's ability under the Title VII exemption to discriminate on the basis of religion in any of its employment positions, including Alicia Pedreira's.¹⁹⁹ The following analysis focuses on the exemption contained in the proposed Charitable Choice Act²⁰⁰ because its language is modeled on the language of the enacted Welfare Reform Act,²⁰¹ and it exemplifies standard charitable choice provisions.²⁰²

Statements by members of the House Judiciary Committee during the mark-up of the Charitable Choice Act reveal the most recent understanding of the policy and constitutional concerns on both sides. Proponents of extending the Title VII exemption to charitable choice recipients advocated that religious recipients have a right to remain both "autonomous and independent"²⁰³ from government interference. They contended

results in considerable ongoing government entanglement in religious affairs. Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity.").

¹⁹⁸ See, e.g., *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 431 (2d Cir. 1999) (stating that "the First Amendment does not prevent courts from deciding secular civil disputes involving religious institutions when and for the reason that they require reference to religious matters," and concluding that the court could consider a former parishioner's allegations of sexual abuse by a priest). See *supra* Part III.A discussion of the ministerial exception.

¹⁹⁹ See *infra* Part IV discussion of whether it may do so as a constitutional matter.

²⁰⁰ H.R. 7, 107th Cong. § 201 (2001). For further discussion of the bill's context in the history of government-religion relationships and charitable choice, see *supra* Parts II.B, II.C.

²⁰¹ See *supra* text accompanying notes 61–68.

²⁰² See statutes cited *supra* note 58.

²⁰³ *Constitutional Role of Faith-Based Organizations in Competitions for Federal Social Service Funds: Hearing Before the House Subcomm. on the Constitution, Comm. on the Judiciary*, 107th Cong. 10 (2001) (statement of Carl H. Esbeck, Senior Counsel to the

that requiring religious organizations “to change their hiring practices . . . would undermine the character of the organization[s].”²⁰⁴ Opponents, however, noted the proposal’s vigorous secularity requirements and asked why there was “such a fierce defense of the right to discriminate based on religion.”²⁰⁵ They argued that the exemption “represent[ed] a historic reversal of decades of progress and civil rights law enforcement”²⁰⁶ and violated “the basic principle . . . that the federal government should not be financing religious discrimination against others.”²⁰⁷ Moreover, if religious service providers feel a need to discriminate in their employment practices, they simply do not need to accept federal assistance.

In the midst of this debate, the House of Representatives passed the Charitable Choice Act in a close vote in July 2001. Because of the highly charged nature of the employment discrimination issue, the Senate indicated that it most likely would not consider charitable choice provisions as such this term.²⁰⁸ In February 2002, President Bush and Senators Lieberman and Santorum reached a “compromise”—President Bush would not push for specific statutory language and the Senate would consider the proposed CARE Act.²⁰⁹ The CARE Act does not follow the traditional contours of charitable choice legislation. Like charitable choice, the CARE Act prohibits the government from discriminating against applicant service providers on the basis of religion, and appears to allow religious employers to discriminate in federally funded programs.²¹⁰ But

Deputy Attorney General, United States Department of Justice) (“One of the most important guarantees of institutional autonomy is an FBO’s ability to select its own staff in a manner that takes into account its faith.”); *id.* at 23 (statement of Douglas Laycock, Associate Dean for Research and Alice McKean Young Regents Chair in Law, University of Texas Law School) (“To say that a religious provider must conceal or suppress its religious identity, . . . or hire people who are not committed to its mission, . . . uses the government’s power of the purse to coerce people to abandon religious practices. . . . Charitable choice provisions that protect the religious liberty of religious providers are pro-separation; they separate the religious choices and commitments of the American people from government influence.”). This right means that the religious recipients’ ability to define, develop, and express their religious beliefs shall not be altered by participation in the program. H.R. 7, § 201, at 1991(d)(1). The Charitable Choice Act safeguards the right by prohibiting the government from interfering with religious recipients’ internal governance or charter documents. *Id.* It also allows these recipients to display religious art and symbols and to discriminate by hiring only coreligionists. *Id.* at 1991(d)(2), (e).

²⁰⁴ H.R. REP. NO. 107-138, pt. 1, at 193 (2001) (Rep. Lindsey Graham (R-S.C.)).

²⁰⁵ *Id.* at 184 (Rep. Anthony D. Weiner (D-N.Y.)).

²⁰⁶ *Id.* at 171 (Rep. Robert C. Scott (D-Va.)).

²⁰⁷ *Id.* at 131 (Rep. Sheila Jackson Lee (D-Tex.)).

²⁰⁸ *See, e.g.,* Dave Boyer, *Faith-Based Plan for Needy Wins House OK; Prospects Less Clear in Senate*, WASH. TIMES, July 20, 2001, at A1; Rebecca Carr & Mei-Ling Hopgood, *House OKs Faith Initiative; Senate Passage Uncertain for Plan to Aid Poor*, ATLANTA J. & CONST., July 20, 2001, at A1.

²⁰⁹ S. 1924, 107th Cong. § 301(a) (2002) (referred to the Committee on Finance, Feb. 8, 2002). For discussion of the bill’s context in the history of government-religion relationships, see *supra* Part II.B.

²¹⁰ S. 1924, § 301(a)(2) (providing that recipient organizations’ charter provisions shall not “affect the application to a nongovernmental organization of any law that would . . . apply to the nongovernmental organization”); Charitable Choice Act, H.R. 7, 107th Cong.

the CARE Act is silent with regard to whether religious recipients may engage in employment discrimination,²¹¹ and it omits important constitutional safeguards that charitable choice requires, including use restrictions and the requirement that the government provide alternative service providers to beneficiaries who so request.²¹² Thus it is unclear whether the Senators achieved their stated objective of ensuring a more constitutionally sound proposal than the Charitable Choice Act.

Neither the enacted nor the proposed statutes reflect unambiguous congressional intent to extend the Title VII exemption to federally funded activities. The first sentence of subsection (e) of the Charitable Choice Act, for example, uses the same language as the Welfare Reform Act to provide that receipt of charitable choice funding does not eliminate religious organizations' Title VII exemption altogether: "A religious organization's exemption provided under [Title VII] . . . regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described in subsection (c)(4)."²¹³ Yet the second sentence adds that "[n]othing in this section alters the duty of a religious organization to comply with the nondiscrimination provisions of Title VII . . . in the use of funds from [charitable choice] programs."²¹⁴ The obvious tension between these sentences has spawned competing interpretations of subsection (e). At the mark-up, for example, Representative Weiner asserted that because "we're extending Federal dollars for this non-government program operating under a religious umbrella . . . for those purposes, you can't discriminate based on religion."²¹⁵ Similarly, Representative Watt interpreted the second sentence as limiting the Title VII exemption to recipients' activities not related to charitable choice, whereas "in the use of Federal funds we will not tolerate employment discrimination."²¹⁶ In contrast, Chairman Sensenbrenner stated that the Charitable Choice Act enables religious recipients to engage in religious

§ 201, at 1991(e) (2001).

²¹¹ S. 1924, § 301(a).

²¹² *Id.* For example, in a letter to Senator Lieberman on behalf of the American Jewish Congress, Marc Stern wrote: "Existing charitable choice legislation made a stab—albeit an inadequate stab—at limiting proselytizing and ensuring adequate secular alternatives for beneficiaries. The present bill contains no such safeguards and apparently would permit unrestricted proselytizing at government expense. There is also nothing in the bill to ensure that beneficiaries could receive services without being forced into religious programs. The bill is on these scores a giant step backward." Press Release, American Jewish Congress, In Letter to Sen. Lieberman, Objections Are Detailed: AJCongress Says So-Called "Compromise" on Charitable Choice Bill Unacceptable (Feb. 19, 2002), http://ajcongress.org/pages/RELS2002/FEB_2002/feb02_03.htm.

²¹³ H.R. 7, § 201, at 1991(e). The Welfare Reform Act states: "A religious organization's exemption provided under section 2000e-1 [Title VII] . . . regarding employment practices shall not be affected . . ." 42 U.S.C.A. § 604a(f) (West Supp. 2000).

²¹⁴ H.R. 7, § 201, at 1991(e).

²¹⁵ H.R. REP. NO. 107-138, pt. 1, at 186 (Rep. Anthony D. Weiner (D-N.Y.)).

²¹⁶ *Id.* at 198 (Rep. Melvin L. Watt (D-N.C.)).

employment discrimination in both their independent and federally funded activities.²¹⁷

The Judiciary Committee adopted Chairman Sensenbrenner's interpretation in its report to the House floor.²¹⁸ The report indicates that subsection (e) of the Charitable Choice Act permits religious recipients to engage in employment discrimination on the basis of religion, but not on any other legislatively proscribed basis.²¹⁹ Therefore, as it appears now, the Charitable Choice Act combines with Title VII to permit religious employers to engage in religious discrimination with regard to any employment decision, irrespective of both the religious character of the activity and the activity's source of funding.

Whereas the charitable choice provisions explicitly refer to the Title VII exemption, they do not address whether participation in covered programs precludes application of the judicially created ministerial exception.²²⁰ Yet the text of the statutes suggests that employment positions funded by federal programs will not qualify for the ministerial exception. As discussed above, a court may find that a position is ministerial only if two conditions are met. First, the responsibilities and duties of the employee's position must be religious in nature.²²¹ Because charitable choice provisions prohibit employees from infusing government-funded programs with discussion of religious values and beliefs,²²² a recipient organization cannot plausibly contend that its federally funded employment positions are religious in nature. Second, the employee's actual responsibilities must serve the employer's spiritual and pastoral mission.²²³ On one hand, "[m]any faith-based organizations believe that they cannot maintain their religious vision . . . without the ability to replenish their staff with individuals who share the tenets and doctrines of the association."²²⁴ But on the other hand, employees' responsibilities in the charita-

²¹⁷ *Id.* at 157 (Rep. F. James Sensenbrenner, Jr.(R-Wis.)).

²¹⁸ *Id.* at 12 ("The so-called 'charitable choice' principles . . . permit them to maintain their religious character by choosing their staff, board members, and methods.").

²¹⁹ *Id.* at 32 ("Subsection (e) makes clear that religious organizations retain their duty to follow the title VII nondiscrimination provisions regarding race, color, sex, and national origin, . . . H.R. 7 maintains the status quo regarding the § 702(a) exemption in title VII.").

²²⁰ *Id.* at 33 n.89 (distinguishing between the Title VII exemption and ministerial exception but not expressly stating whether Congress intended for the ministerial exception to apply to federally funded programs).

²²¹ *See supra* text accompanying note 160. Religious duties include teaching, spreading faith, conducting church governance, supervising a religious order, and participating in religious ritual and worship. *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985); *Young v. N. Ill. Conference of United Methodist Church*, 21 F.3d 184, 185 (7th Cir. 1994).

²²² *See, e.g.*, Charitable Choice Act, H.R. 7, 107th Cong. § 201, at 1991(c), (j) (2001) (requiring that the welfare service offered be consistent with the Establishment and Free Exercise Clauses, that recipients certify the secular nature of their programs, and that prohibited activity remain separate from the charitable choice program).

²²³ *See supra* text accompanying notes 159–167.

²²⁴ H.R. REP. NO. 107-138, pt. 1, at 31.

ble choice context reach well beyond the traditional realm of ecclesiastical or religious propagation of doctrine.²²⁵ It is difficult to contend that such responsibilities serve religious organizations' missions in the same way as the responsibilities of clergy. Even proponents of employment discrimination exemptions for religious recipients acknowledge the absence of this relationship in a secular program.²²⁶

Nonetheless, there may be limited circumstances in which an employee serves a ministerial function as well. The Charitable Choice Act does not preclude organizations from employing one person in two positions: a secular position funded by federal charitable choice programs, and a privately funded religious position.²²⁷ Rather, the use restrictions imply that a charitable choice employee may engage in religious activities when she is not serving in her federally funded capacities.²²⁸ For example, a Sunday School teacher can also direct the church's federally funded soup kitchen, and a choir director can also counsel battered women in the church's federally funded shelter for victims of domestic abuse. This means that there may be some room for application of the ministerial exception even to federally funded programs.

To summarize, the provisions in the Welfare Reform Act, the proposed Charitable Choice Act, and the CARE Act appear to extend the Title VII exemption to employment decisions by federally funded religious service providers, but only in very limited circumstances might they extend the broader scope of the ministerial exception. As a result, because the Title VII exemption authorizes "a religious organization . . . to condition employment in certain activities on subscription to particular religious tenets,"²²⁹ this legislation permits religious employment discrimination in federally funded social service programs.

²²⁵ *Id.* at 293 (dissenting view) ("They cannot have it both ways—either the Federal funds will be used for religious purposes, in which case there may be a justification for tolerating religious discrimination (but would render the legislation constitutionally suspect); or the funds will be used in a non-sectarian manner, in which case there is no reason to discriminate on the basis of religion."). See also *EEOC v. Southwestern Baptist Seminary*, 651 F.2d 277 (5th Cir. 1981).

²²⁶ See, e.g., H.R. REP. NO. 107-138, pt. 1, at 33 n.89 ("[P]ersons are not covered by the so-called 'ministerial exception' unless they perform ministerial functions Consequently, volunteers and other personnel at faith-based organizations performing secular, clerical, custodial, or administrative functions would not be covered by the ministerial exception.").

²²⁷ Even the dissent to the Judiciary Committee Report recognized that some recipients of aid might "share the costs of their clergy between their religious and secular accounts." *Id.* at 296 (dissenting view).

²²⁸ See, e.g., Charitable Choice Act, H.R. 7, 107th Cong. § 201, at 1991(j) (2001) ("No funds provided . . . to a religious organization . . . shall be expended for sectarian instruction, [or] worship. . . . If the religious organization offers such an activity, it shall be . . . offered separate from the program funded."); 42 U.S.C.A. § 604a(j) (West. Supp. 2000).

²²⁹ *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987).

IV. WHY THE CHARITABLE CHOICE ANTIDISCRIMINATION EXEMPTION IS UNCONSTITUTIONAL

As the previous discussion suggests, charitable choice legislation threatens to permit religious service providers like Kentucky Baptist Homes for Children to engage in discrimination on the basis of religion and, to a lesser extent, race, color, national origin, sex, disability, and age, in *federally funded* programs. In addition to raising the complicated public policy questions mentioned in Part II, the charitable choice employment discrimination exemption runs up against four constitutional limitations on the way the federal government can spend its money. First, the employees and potential employees of recipient organizations may be able to assert a free exercise claim against religious discrimination in federally funded programs.²³⁰ Second, the religious organizations' discriminatory act or Congress's decision to authorize such discrimination may amount to impermissible government discrimination in violation of the Equal Protection Clause.²³¹ Third, even if a court does not find an equal protection violation, it should impute recipient organizations' discriminatory actions to the government through an Establishment Clause analysis. The exemption arguably violates two central establishment principles: the *Mitchell* principle of neutrality and the traditional prohibition against government endorsement of religion.²³² Finally, the exemption may violate the Free Speech Clause prohibition against government viewpoint-based discrimination.²³³ Therefore, current jurisprudence suggests that employment discrimination under charitable choice legislation is unconstitutional.

A. Whose Free Exercise Trumps?

The first constitutional challenge to the charitable choice exemption for religious organizations is that it permits unconstitutional infringement of the free exercise rights of employees.²³⁴ Note that even if this free exercise challenge succeeds, it reaches only religious discrimination and not gender, racial, or other discrimination that may be shielded by the ministerial exception.

²³⁰ See *infra* Part IV.A.

²³¹ See *infra* Part IV.B.

²³² See *infra* Part IV.C.

²³³ See *infra* Part IV.D.

²³⁴ A similar argument cannot be made on behalf of welfare service beneficiaries because charitable choice legislation explicitly prohibits all recipient organizations from discriminating against beneficiaries on the basis of religion. See, e.g., 42 U.S.C.A. § 604a(b) (West Supp. 2000). In addition, the statutes require the government to make available an alternative service provider if a beneficiary objects "to the religious character of the organization or institution from which the individual receives, or would receive, assistance." § 604a(e)(1).

As discussed in Part III.B, *Smith* set forth a new framework for analyzing government actions that infringe on religious exercise.²³⁵ On one hand, generally applicable laws that adversely affect the challenger's religious exercise receive only rational basis scrutiny.²³⁶ For example, the Oregon law that criminalized the use of peyote in *Smith* exemplified a generally applicable law because it did not distinguish between religious and nonreligious peyote use. On the other hand, non-generally applicable laws and government classifications based on religion continue to receive the strict scrutiny of *Sherbert v. Verner*²³⁷ and *Everson v. Board of Education*.²³⁸ The charitable choice exemption is not generally applicable because it eliminates the federal prohibition against religious employment discrimination only for *some* (religious) recipients of federal aid.²³⁹ As a result, the exemption falls into the second *Smith* category and should receive strict scrutiny.

Sherbert and *Everson* embody the principle that the First Amendment prohibits the government from directly or covertly imposing disabilities on the basis of religious belief or exercise. In *Sherbert*, the Court found a free exercise violation when South Carolina denied unemployment benefits to an applicant who had been fired, and could not find new employment, because she refused to work on her sabbath.²⁴⁰ The charitable choice exemption imposes a similar burden on the free exercise rights of employees and potential employees of recipient organizations by selectively permitting employment barriers based on religion.²⁴¹ The exemption authorizes religiously affiliated recipient organizations to impose an impermissible choice on their employees—whether to lose employment or conform their religious practices to those of their employers.²⁴² As a result, the exemption violates the *Everson* principle that gov-

²³⁵ *Employment Div. v. Smith*, 494 U.S. 872, 886, 890 (1990). *See supra* Part III.B.

²³⁶ *Smith*, 494 U.S. at 886 n.3 (1990). *See supra* note 182 and accompanying text.

²³⁷ 374 U.S. 398 (1963).

²³⁸ *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (finding no Establishment Clause violation in reimbursement of parents for their children's bus fare to and from school, including parochial schools). *See supra* text accompanying notes 31–43.

²³⁹ *See infra* text accompanying notes 314–333, discussing the breach of neutrality that results from selectively allocating benefits and burdens among religions. Note that *Amos* was decided before *Smith*, and it is not clear whether the Court would have considered the Title VII exemption to be a generally applicable law. However, this ambiguity is irrelevant to the charitable choice context, where application of the Title VII exemption is determined by which applicants the government selects to assist.

²⁴⁰ *Sherbert v. Verner*, 374 U.S. 398 (1963).

²⁴¹ *See Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 340 (1987) (Brennan, J., concurring, joined by Marshall, J.) (recognizing the penalty an exemption imposes: "Any exemption from Title VII's proscription on religious discrimination necessarily has the effect of burdening the religious liberty of prospective and current employees. An exemption says that a person may be put to the choice of either conforming to certain religious tenets or losing a job opportunity, a promotion, or, as in these cases, employment itself.")

²⁴² *Id.* at 341 ("The potential for coercion created by [the Title VII exemption] is in serious tension with our commitment to individual freedom of conscience in matters of religious belief."); *Sherbert*, 374 U.S. at 404 (concluding South Carolina impermissibly

ernment can neither “pass laws which aid one religion, aid all religions, or prefer one religion over another.”²⁴³ Whereas *Everson* upheld a program that reimbursed parents for the costs of transporting their children to school because it aided all schools equally and did not support particular religious beliefs and practices, the charitable choice exemption aids certain selected organizations’ religions, aids all religions by exempting them from a condition for eligibility, and prefers an employer’s religion to that of its employees. The direct effect of the selectively applied government action promotes certain religious practice and hinders others.

Although analogous, *Amos*’s analysis of the Title VII exemption does not control the Free Exercise Clause analysis of the charitable choice exemption because *Amos* did not involve federal funding. Federal funding implicates the government in private discriminatory actions in a way that poses a different level of constitutional harm.²⁴⁴ The Title VII and charitable choice exemptions accommodate the same free exercise interests for each party—the employer’s interest in internal autonomy for religious matters,²⁴⁵ and the employee’s “right to believe and profess whatever religious doctrine [she] desires.”²⁴⁶ *Amos* focused primarily on the employer’s autonomy interests, rejecting the employee’s free exercise rights in a footnote.²⁴⁷ But Justice Brennan’s concurring opinion suggests that the Court’s decision to focus on the employer’s rights was the result of a tacit balancing of the competing interests:

The authority to engage in this process of self-definition inevitably involves what we normally regard as infringement on free

forced the applicant “to choose between following the precepts of her religion and forfeiting benefits Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship.”); *Everson*, 330 U.S. at 15 (stating that the government can neither “force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion”). See also Brownstein, *Interpreting, supra* note 46, at 251.

²⁴³ *Everson*, 330 U.S. at 16.

²⁴⁴ For other situations where federal funding implicates the government differently than regulatory action, see *infra* Part IV.B discussion of state action under the Equal Protection Clause, Part IV.C discussion of the possibility for government establishment of religion, and Part IV.D discussion of the government’s ability to shape the content of programs it funds.

²⁴⁵ See generally *supra* Part III.A discussion of the ministerial exception.

²⁴⁶ *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).

²⁴⁷ *Amos*, 483 U.S. at 336, 338 & n.15. The Court rejected the employee’s free exercise claim because “Mayson was not legally obligated to take the steps necessary to qualify for a temple recommend, and his discharge was not required by statute.” *Id.* at n.15. Of the employer’s free exercise interest, the Court stated: “[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.” *Id.* at 336.

exercise rights We are willing to countenance the imposition of such a condition because we deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities.²⁴⁸

The addition of government funding should alter the outcome of *Amos*'s tacit balancing. Whereas *Amos* could "not see how any advancement of religion achieved by the Gymnasium can be fairly attributed to the government, as opposed to the Church,"²⁴⁹ the activities under charitable choice now can—and must—"be fairly attributed to the government."²⁵⁰

Professor Minow describes the public/private relationship as a double-edged sword, a description that is borne out in the charitable choice context where acceptance of government funding makes the right of religious organizations to develop the religious character of their programs less compelling.²⁵¹ She identifies two underlying values in the relationship between public and private: "First, individuals' freedoms of religious belief and practice need protection against government-backed preferences. . . . Second, religions need protection from governmental control or censure."²⁵² Both of these values stand in relief for religious organizations that receive no federal funding—the Establishment Clause prevents the government from preferring religion over nonreligion or choosing among religions, and the ministerial exception's rule of nonjusticiability protects their internal governance autonomy.

When religious organizations elect to accept government funding, however, the relevance of the values changes. The organizations maintain the right against discrimination, which is the right to be considered eligible for participation in a government program. However, their right to develop the religious character of their programs is less compelling because they have voluntarily become partners with the government. Moreover, religious organizations further weaken their claims to autonomy when they explicitly cede some organizational independence to the government by complying with financial accountability and use-of-funds auditing requirements.²⁵³

²⁴⁸ *Amos*, 483 U.S. at 342–43 (Brennan, J., concurring).

²⁴⁹ *Id.* at 337.

²⁵⁰ *Id.* See *infra* Part IV.C discussion under the Establishment Clause.

²⁵¹ Minow, *Redrawing the Lines Between Public and Private*, *supra* note 53, at 1088.

²⁵² *Id.*

²⁵³ See, e.g., Charitable Choice Act, H.R. 7, 107th Cong. § 201, at 1991(i), (j) (2001); Minow, *Redrawing the Lines Between Public and Private*, *supra* note 53, at 1081 (stating that when organizations accept government funds, they subject themselves to the "public values that a just legal order both demands and implements. . . . Most notable are public commitments to equality, freedom, and fairness. Translated in our legal system as antidiscrimination, these public commitments traditionally helped undergird the public/private distinction itself, ensuring private freedoms by restricting public incursions.").

At the same time, employees' free exercise rights are strengthened when their salaries are paid from federal coffers. In the private sector, employees do not have a free exercise right against discrimination by a religious employer; however, in the public sector they have a constitutional right not to face governmentally created obstacles because of their religion.

Thus, once government funding is added to the equation, the *Amos* balance of free exercise interests changes. Under charitable choice, the government does not have a compelling interest that outweighs the interests of the employees. Therefore, the exemption unconstitutionally provides federal support for infringement on employees' free exercise rights. The Title VII exemption that is permissible in the private sector is no longer permissible in the charitable choice context.

B. Private Discrimination and State Action Under the Equal Protection Clause

The constitutional significance of attributing charitable choice recipients' discriminatory acts to the government has even greater force under the Equal Protection Clause, and, as discussed in Parts IV.C and IV.D below, under the Establishment and Free Speech Clauses. The Equal Protection Clause forbids government entities²⁵⁴ from making employment classifications based on race, color, national origin, religion, or, to a lesser extent, sex.²⁵⁵ A government action that intentionally discriminates (facially or in application) on the basis of such a classification is presumptively suspect and violates the Equal Protection Clause unless the government can show that its action was necessary to promote a compelling state interest.²⁵⁶ Interpreting this broad command, the Court has held

²⁵⁴ See, e.g., *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (“[T]he state-action requirement of the Fourteenth Amendment . . . excludes from its reach merely private conduct, no matter how discriminatory or wrongful.” (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982)) (internal quotation marks omitted)); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (explicitly applying the Equal Protection Clause to the federal government through the Fifth Amendment).

²⁵⁵ “[I]t has long been recognized that, even though there is no ‘right’ to public employment or to a contract, some constitutional restrictions apply when government attempts to discharge employees . . . for reason of their exercise of constitutionally protected liberties.” GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 1302 (13th ed. 1997). See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (recognizing that the Court was setting aside whether “statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry” (citations omitted)). The Fourteenth Amendment is not limited to protecting minorities. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (“The Fourteenth Amendment . . . provisions are universal in their application.”); *Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (stating that the Fourteenth Amendment guarantees the rights of all persons, including, for example, white as well as black medical students).

²⁵⁶ *Plyler v. Doe*, 457 U.S. 202, 217 (1982) (“With respect to [racial] classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demon-

that the Equal Protection Clause applies to a private entity's conduct only if it is "fairly attributable to the State."²⁵⁷ This limited application simultaneously protects individual freedom and avoids holding the government liable for conduct for which it cannot reasonably be blamed. The central purpose of the Equal Protection Clause is to ensure that the government allocates benefits and burdens neutrally with regard to core identity traits.²⁵⁸

1. Recipient Organizations as State Actors?

The exemption violates the Equal Protection Clause to the extent that the recipient organizations' employment discrimination is fairly attributable to the state.²⁵⁹ Discrimination is "fairly attributable" if (1) it results from the exercise of some right or privilege created by the state, and (2) the party charged with the alleged deprivation is a state actor.²⁶⁰ Charitable choice organizations' private employment discrimination easily passes the first test. The discrimination stems from a state-created privilege because the government allows such discrimination by means of legislation and funding. The second test, however, is more difficult. The leading Supreme Court decisions on the status of social welfare service providers that contract with the government suggest that charitable choice recipient organizations are unlikely to be considered state actors.²⁶¹

strate that its classification has been precisely tailored to serve a compelling governmental interest."). The Court has treated gender classifications as "quasi-suspect," and applied only intermediate scrutiny. *See, e.g., J.E.B. v. Alabama*, 511 U.S. 127 (1994) (applying heightened scrutiny to gender-based classifications in jury selection); *Craig v. Boren*, 429 U.S. 190 (1976) (establishing that the classification must be substantially related to important government objectives and striking down a law that discriminated against males in the sale of beer); *United States v. Virginia*, 976 F.2d 890 (4th Cir. 1992) (rejecting Virginia Military Institute's (VMI) contention that adding women would change the character of the institution).

²⁵⁷ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 50 (affirming this standard).

²⁵⁸ *See Palmore v. Sidoti*, 466 U.S. 429 (1984). *Yick Wo*, 118 U.S. at 369 ("[T]he equal protection of the laws is a pledge of the protection of equal laws. . . . The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.").

²⁵⁹ *Lugar*, 457 U.S. at 938; *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 50.

²⁶⁰ *Lugar*, 457 U.S. at 938.

²⁶¹ *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). The Department of Justice, in an internal memorandum, has also drawn this conclusion. Memorandum from Randolph D. Moss, Assistant Attorney General, to William P. Marshall, Deputy Counsel to the President 21–22 (Oct. 12, 2000) (on file with author). For a discussion of state action in the similar school choice context, see Jesse H. Choper, *Federal Constitutional Issues, in SCHOOL CHOICE AND SOCIAL CONTROVERSY* 235, 252 (Stephen D. Sugarman & Fran R. Kemerer eds., 1999) ("[I]t is highly doubtful that a parochial school would be deemed a state actor under the present state of the law if its religious discrimination in . . . hiring . . . were compelled."); Robert M. O'Neil, *School Choice and State Action, in SCHOOL CHOICE AND SOCIAL CONTROVERSY, supra*, at 215.

To meet the state actor requirement, a recipient organization must satisfy one of two conditions: First, there must be a close nexus between the organization and the government, generally defined by the government's exercise of coercive power over, or degree of involvement in, the organization's activities.²⁶² *Blum v. Yaretsky*²⁶³ and *Rendell-Baker v. Kohn*²⁶⁴ indicate that the nexus between charitable choice recipients and the government, marked by financial dependence and submission to regulation, is by itself insufficient to establish state action.²⁶⁵ *Blum* concluded that a Medicaid contract was insufficient to transform a private nursing home into a state actor because the home's decisions turned on private medical judgments and not on state regulations.²⁶⁶ *Rendell-Baker* held that a private school was not a state actor because the government did not exert coercive power over its educational programming and employment decisions, even though at least ninety percent of the school's operating budget came from public sources and the school was under government contract to provide services for students with special needs.²⁶⁷ The Supreme Court affirmed this conclusion in *American Manufacturers Mutual Insurance Company v. Sullivan*: "the mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment."²⁶⁸

If a court did not find the requisite nexus, it would have to find that religious charitable choice recipients' discriminatory conduct satisfied the second state actor condition—that it fulfilled a public function.²⁶⁹ This condition is difficult to satisfy. *Rendell-Baker* held that merely because "a private entity performs a function which serves the public does not make its acts state action. . . . [T]he question is whether the function performed has been traditionally the exclusive prerogative of the state."²⁷⁰ Although the federal government first took significant responsibility for

²⁶² See *Blum*, 457 U.S. at 1004 (concluding that to meet the state actor requirement there must be a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself" (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)) (internal quotation marks omitted)).

²⁶³ 457 U.S. at 1011.

²⁶⁴ 457 U.S. at 841.

²⁶⁵ See, e.g., *Blum*, 457 U.S. at 1011 ("That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.").

²⁶⁶ *Id.* at 1009.

²⁶⁷ *Rendell-Baker*, 457 U.S. at 832–33, 840–42.

²⁶⁸ 526 U.S. 40, 52 (1999) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974)).

²⁶⁹ See, e.g., *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999); *Marsh v. Alabama*, 326 U.S. 501, 505–06 (1946) (finding a private corporation served a public function through its governance of a town). For further discussion, see Michele E. Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569, 611 (2001).

²⁷⁰ 457 U.S. at 842 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)) (internal quotation marks omitted).

the needs of the nation's poor during the New Deal, the past seventy years of federal activity have arguably made delivery of these services a public function.²⁷¹ However, even with this increase in federal activity, charitable and other entities in the private sector have always had an important role in social welfare service provision, and much of the federal activity has come in the form of supporting their work.²⁷² Moreover, although there is a sense of public obligation to provide social services, neither the federal nor state governments are constitutionally required to do so.²⁷³ Therefore, even though one might argue that charitable choice reverses the trend that began with the New Deal, it is difficult to contend that recipient organizations are substituting for the government in a government role.²⁷⁴

2. *Delegating Prohibited State Action to Private Actors*

An alternative equal protection theory is that unconstitutional discrimination occurs the moment Congress exempts certain recipient organizations from the nondiscrimination provisions.²⁷⁵ This legislative action is undeniably state action, and it is arguably discriminating as well:

²⁷¹ See, e.g., Lewis D. Solomon & Matthew J. Vlissides, Jr., *Faith-Based Charities and the Quest to Solve America's Social Ills: A Legal and Policy Analysis*, 10 CORNELL J.L. & PUB. POL'Y 265, 269 (2001) ("Make no mistake, welfare existed in America before the 1936 Social Security Act and was a subject of great debate. However, the New Deal and Great Society marked the zenith of the American welfare state. . . . Americans accepted government's moral obligation to provide temporary assistance to its less fortunate citizens.").

²⁷² Anna Greenberg, *Doing Whose Work? Faith-Based Organizations and Government Partnerships*, in WHO WILL PROVIDE? THE CHANGING ROLE OF RELIGION IN AMERICAN SOCIAL WELFARE, *supra* note 31, at 179 ("Public funding of the nonprofit world to take on social and economic problems is not a new phenomenon. . . . Salamon estimates that by 1980, roughly 40 percent of the funds spent by federal, state, and local government . . . for a broad range of human service activities supported service delivery by nonprofit organizations." (quoting Lester M. Salamon, *The Marketization of Welfare: Changing Nonprofit and For-profit Roles in the American Welfare State*, 67 SOC. SERV. REV. 16, 19 (1993))).

²⁷³ See, e.g., *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 197–98 (1989) (finding that the Due Process Clause does not require the state to provide protective services to a child from his abusive father); *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) ("[The Fourteenth Amendment] may impose certain procedural safeguards upon systems of welfare administration. . . . But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."). Cf. Minow, *Redrawing the Lines Between Public and Private*, *supra* note 53, at 1082.

²⁷⁴ See Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507 (2001) (suggesting that religious organizations also would not be found to be "officers of the United States" under the Article II Appointments Clause).

²⁷⁵ Memorandum from Randolph D. Moss, *supra* note 261, at 21–22 (suggesting that the problem results not from the organizations' being state actors but from the government decision to give money to religious organizations that discriminate). See O'Neil, *supra* note 261, at 219 (discussing circumstances in which the Court might determine that government funding constitutes endorsement or validation of a private act and is reachable as state action).

it enables the government to contract with private organizations to accomplish something the Fourteenth Amendment precludes the government itself from doing.²⁷⁶ The Mississippi Textbook Purchasing Board conducted this type of forbidden state action when it loaned textbooks to private schools that engaged in racial discrimination. This policy was challenged in *Norwood v. Harrison*,²⁷⁷ which held that by lending the textbooks the Purchasing Board had unconstitutionally expressed support for the private schools' discriminatory practices.²⁷⁸ *Norwood* affirmed the principle that "a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish,"²⁷⁹ and concluded that because "[r]acial discrimination in state-operated schools is barred by the Constitution," the Board's action was unconstitutional as well.²⁸⁰ An argument can be made that charitable choice goes "far beyond" merely lending textbooks when it gives direct cash grants to organizations that discriminate.²⁸¹ If so, it violates the Equal Protection Clause.

In other contexts and more recent cases, however, the Court has been less willing to find that government facilitation of lawful private discrimination violates the Fourteenth Amendment. For example, in *American Manufacturers*, the Court stated:

[P]ermission of a private choice cannot support a finding of state action. As we have said before, our cases will not tolerate the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as authorization or encouragement.²⁸²

As discussed in Part III, religious employment discrimination by religious service providers is not illegal. Therefore, it is likely that a court

²⁷⁶ See O'Neil, *supra* note 261, at 219 (discussing this principle in the context of school choice and stating: "The Supreme Court has stressed that the government may not, consistent with the Fourteenth Amendment, permit private parties to use public facilities or resources in ways that discriminate on racial or other grounds forbidden to the government.").

²⁷⁷ 413 U.S. 455 (1973).

²⁷⁸ *Id.* at 465 ("[I]f the school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination.").

²⁷⁹ *Id.* (quoting *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458, 475–76 (M.D. Ala. 1967)) (internal quotation marks omitted).

²⁸⁰ *Id.*

²⁸¹ Alex J. Luchenister, *Casting Aside the Constitution: The Trend Toward Government Funding of Religious Social Service Providers*, 30 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 615, 618 (2002).

²⁸² *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999) (quoting *Flagg Bros. v. Brooks*, 436 U.S. 149, 164–65 (1978)) (internal quotation marks omitted) (finding that private insurers who provided workers' compensation coverage under state laws were not state actors and that workers did not have a Fourteenth Amendment due process right against insurers that withheld payment for disputed medical treatment pending review).

would reject the claim that Congress's decision to permit such discrimination in charitable choice programs violates the Equal Protection Clause.²⁸³

C. Establishment?

The First and Fourteenth Amendments employ different legal frameworks for attributing private conduct to the government. As we have seen, it is difficult to attribute private discrimination to the government under the Equal Protection Clause. The Court's establishment analysis, however, is less demanding: government action that benefits religion also "establishes" religion if it lacks a legitimate secular purpose or has the primary effect of advancing religion.²⁸⁴ In 1989 a federal court applied the *Lemon* analysis and found that exempting a federally funded employment position from Title VII constituted unconstitutional establishment.²⁸⁵ As discussed in Part II, however, the Court is likely to analyze the charitable choice exemption within the two frameworks more recently articulated in *Mitchell*: the plurality's two-pronged test (secular purpose and secular effects with an emphasis on neutrality), and Justice O'Connor's endorsement test. Although the exemption may satisfy the purpose test, the Court should find that it is nonetheless unconstitutional because it has non-neutral effects and it endorses and punishes particular religious practices.

This Note applies neutrality in the sense used by the Court in *Everson*. In most circumstances, the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; . . . State power is no more to be used so as to handicap religions than it is to favor them."²⁸⁶ Proponents of the exemption contend that this approach is not neutral; rather, it promotes a secularized public realm that excludes religion.²⁸⁷ They defend the exemption with a different concept of neutrality. Senior Deputy Attorney General Esbeck, for example, would use a less stringent test: "[W]hen government provides benefits to enable activities that serve the public good . . . there should be

²⁸³ This second effort to show unconstitutional state action may also fail because of the difficulty of proving intentional discrimination. Under *Washington v. Davis*, 426 U.S. 229 (1976), the legislative *intent* must be to further religious discrimination. In the context of charitable choice, although the congressional decision clearly *permits* religious employment discrimination, such intent is simply not evident. *See, e.g.*, Carl Esbeck, *Charitable Choice and the Critics*, 57 ANN. SURV. AM. L. 17, 22 (2000) [hereinafter Esbeck, *Charitable Choice*]. Indeed, there is near-universal agreement that the purpose of charitable choice is to simultaneously fund social welfare services and allow religious organizations to retain their identity. *See supra* note 92 and accompanying text.

²⁸⁴ *Mitchell v. Helms*, 530 U.S. 793, 808 (2000).

²⁸⁵ *Dodge v. Salvation Army*, No. S88-0353(R), 1989 U.S. Dist. LEXIS 4797 (S.D. Miss. Jan. 9, 1989).

²⁸⁶ *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

²⁸⁷ MONSMA, *supra* note 79, at 42.

neither discrimination in eligibility based on religion, nor exclusionary criteria requiring these charities to . . . water down their religious identity.”²⁸⁸ Professor Monsma has termed this requirement “positive neutrality”—the government must ensure that religious organizations participate equally in government benefits without forfeiting their religious identity.²⁸⁹

Although this definition of neutrality justifies the provisions of charitable choice legislation,²⁹⁰ it fails to sustain the constitutionality of the exemption. Supporters of the exemption must argue from a normative perspective that religious autonomy justifies federally funded religious discrimination, and from a constitutional perspective that such a policy is neutral between religious and secular recipient organizations.²⁹¹ But positive neutrality allows for “double-dipping by religious institutions, which rely on their sectarian character in their quest for autonomy in selecting employees while simultaneously seeking a place as a religion-neutral dispenser of government benefits.”²⁹² Moreover, positive neutrality may rely on an outdated vision of the Free Exercise Clause that requires Congress to demonstrate a compelling interest before it can infringe on religious exercise.²⁹³ As suggested in Part III, Congress has lit-

²⁸⁸ Esbeck, *Constitutional Case*, *supra* note 45, at 20–21.

²⁸⁹ *See generally* GLENN, *supra* note 14, at 78 (“Positive neutrality rests upon a pluralist understanding of the political and social order that recognizes the important role of faith communities and associations alongside other forms of voluntary organization in maintaining society Neutrality is not, from this perspective, an end in itself but a means to ensure fair play among individuals and groups.”); MONSMA, *supra* note 79, at 174, 192–94 (“Government is *neutral* in that it does not recognize or favor any one religion . . . over any other, nor . . . religion as a whole over secular. . . . Sometimes government will have to take certain positive steps.”).

²⁹⁰ *See, e.g.*, Charitable Choice Act, H.R. 7, 107th Cong. § 201 (2001) (ensuring that the government treats religious and secular institutional applicants equally, *id.* at 1991(c)(1)(B), while simultaneously granting religious applicants a special benefit by funding them even if they engage in religious employment discrimination, conduct generally forbidden to all other recipients, *id.* at 1991(e).

²⁹¹ *See, e.g.*, GLENN, *supra* note 14, at 193–211 (suggesting that faith-based agencies should be able to accept government funding and continue to favor coreligionists because they have a right to a shared religious vision of service, employment decisions “affect most decisively whether a faith-based agency or school will maintain its integrity of mission,” and positive neutrality requires the government to fund faith-based services without interfering with the provider’s religious mission); MONSMA, *supra* note 79, at 188–94, 203–06 (asserting that the Establishment Clause is a means of achieving the First Amendment’s basic objective of securing free exercise and suggesting that positive neutrality best protects religious freedoms).

²⁹² Ira C. Lupu, *Religion in the Public Square, Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 820 (2001).

²⁹³ *See, e.g.*, GLENN, *supra* note 14, at 78–79, 196–200 (contending that the Free Exercise Clause is a “constitutional mandate to treat religion with special deference”); MONSMA, *supra* note 79, at 53 (agreeing with Glenn, but acknowledging that the Supreme Court has determined that “the establishment clause burdens on religion outweigh the free exercise protections of religion” so that the Free Exercise Clause is in a “position of reduced power and effect”).

tle constitutional compulsion to create exceptions from generally applicable laws after *Smith*.²⁹⁴

Finally, the regulation/funding distinction between Title VII and charitable choice suggests that in its analysis of the charitable choice exemption, the Court should employ a different definition of neutrality than it used in *Amos*.²⁹⁵ In *Amos*, the Court upheld the Title VII exemption under a theory of “benevolent neutrality . . . [that permits] religious exercise to exist without sponsorship and without interference.”²⁹⁶ However, the Court warned that the permissibility of the accommodation was context-specific.²⁹⁷ Because the Gymnasium in *Amos* remained financially independent, its religious conduct was not “fairly attributable to the government.”²⁹⁸ By contrast, the charitable choice exemption is an example of an accommodation transformed into unconstitutional “fostering of religion.”²⁹⁹ Government funding in charitable choice transports religious conduct into the public arena. It places the government’s imprimatur on the religious beliefs and exercises that the exemption reaches.³⁰⁰

Before beginning the establishment analysis, it is important to consider why the Court’s decision to uphold the Title VII exemption in *Amos*³⁰¹ is not dispositive of the establishment analysis of the charitable choice exemption. As discussed in Part IV.A (free exercise), whereas Title VII merely regulates private activity, charitable choice provides a direct financial subsidy.³⁰² In both *Amos* and *Walz v. Tax Commissioner*,³⁰³ the Court held that the Establishment Clause permitted the government to exempt religious organizations from regulatory or tax burdens because

²⁹⁴ See *supra* Part III.B.

²⁹⁵ See e.g., *Dodge v. Salvation Army*, No. S88-0353(R), 1989 U.S. Dist. LEXIS 4797, at *11 (S.D. Miss. Jan. 9, 1989). (“This Court is of the opinion that although *Amos* does not specifically address the issue of funding, the Supreme Court went to great lengths to distinguish *Amos* from *Lemon* on the questions of financial support and active involvement by the sovereign It is clear . . . that *Lemon* and not *Amos* really controls the issues in this case.”).

²⁹⁶ *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970)) (internal quotation marks omitted).

²⁹⁷ *Id.* at 334–35 (“At some point, accommodation may devolve into ‘an unlawful fostering of religion.’” (quoting *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 145 (1987))).

²⁹⁸ *Id.* at 337. See also *supra* Part IV.A discussion of attribution under the Free Exercise Clause.

²⁹⁹ *Amos*, 483 U.S. at 334–35.

³⁰⁰ Alan Brownstein illustrates an objection to this distinction—the government can create similar incentives through funding or regulatory decisions—through an example based on *Sherbert v. Verner*. Brownstein, *Interpreting, supra* note 46, at 251. He demonstrates that an employee’s incentive toward changing her religion would be the same whether the government denied unemployment compensation because she refused to work on her Sabbath or declined to fund her employer because the employer refused to operate on her Sabbath.

³⁰¹ 483 U.S. 327 (1987). See *supra* text accompanying notes 122–141.

³⁰² See *supra* text accompanying notes 244–250.

³⁰³ 397 U.S. 664 (1970) (upholding property tax exemption for religious organizations that used the property exclusively for religious purposes).

“for government to passively leave religion where it found it logically cannot be a law respecting an establishment.”³⁰⁴ Commentators have echoed the establishment principle of these cases, arguing that “[t]he state does not support or establish religion by leaving it alone”;³⁰⁵ rather, “establishment connotes that government must take some affirmative step.”³⁰⁶ Granting financial assistance is such an “affirmative step.” Justice Brennan recognized this distinction in his concurring opinion in *Walz*:

Tax exemptions and general subsidies . . . are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise An exemption [from tax], on the other hand[,] . . . assists the exempted enterprise only passively.³⁰⁷

Therefore, the financial subsidies in charitable choice transform the relationship between the government and private entity from passive to active and *Amos* no longer controls the analysis. Any accommodation granted to religious entities and denied to secular entities constitutes establishment.³⁰⁸ This transformation should lead to a different constitutional outcome.

1. *Illegitimate Purpose?*

The Court traditionally gives considerable deference to the purpose of a statute as expressed in both the statute itself and its legislative history.³⁰⁹ The charitable choice exemption has a similar stated purpose to that of the Title VII exemption—to allow religious organizations to retain

³⁰⁴ Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 285, 314–15 (1999) (internal quotation marks omitted) [hereinafter Esbeck, *Myths*].

³⁰⁵ Laycock, *supra* note 174, at 1416.

³⁰⁶ Esbeck, *Myths, supra* note 304, at 315.

³⁰⁷ *Walz*, 397 U.S. at 690 (Brennan, J., concurring). See also *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 34–35 (1989) (Scalia, J., dissenting) (observing the difference between passive and active government benefits: “[A]lthough tax exemptions may have the same economic effect as state subsidies, for Establishment Clause purposes such ‘indirect economic benefit’ is significantly different. ‘The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. . . . There is no genuine nexus between tax exemption and establishment of religion.’” (quoting *Walz*, 397 U.S. at 675)).

³⁰⁸ See, e.g., Steven K. Green, *Charitable Choice and Neutrality Theory*, 57 N.Y.U. ANN. SURV. AM. L. 33, 48 (2000) [hereinafter Green, *Charitable Choice*] (“[T]he ability to discriminate in publicly funded positions has the effect of defining recipients of a government benefit by reference to religion; this is an evil the Court has emphasized in its more recent decisions.”).

³⁰⁹ See *supra* text accompanying note 127.

their identity.³¹⁰ Therefore at first glance the tradition of deference suggests that the Court would uphold the exemption.

Yet such deference would be constitutionally tenuous in the case of charitable choice. The difference between regulation and funding that distinguishes the Title VII and charitable choice exemptions may also distinguish their facially similar purposes. *Amos* held that if a generally applicable law imposes burdens on organizations' free exercise, the government may alleviate such burdens.³¹¹ The Court reasoned that Title VII significantly burdened religious organizations' ability to define and carry out their missions, and may have caused them to modify their religious practices to avoid liability.³¹² In the charitable choice context, however, recipient organizations are bound by statute only to use their federal funds for activities that are devoid of religious content.³¹³ Therefore, in the funding context, the problem of not being able to define and carry out a religious mission should be minimal. The real purpose of the exemption is therefore more likely to extend recipient organizations' religious character into public realms.³¹⁴

2. *Illegitimate Effects: Lack of Neutrality*

Because the Court may defer to the stated purpose of legislation rather than probe too deeply for an unstated illegitimate purpose, the constitutionality of the exemption is likely to hinge on whether it impermissibly advances religion. In 1989 a federal court analyzed a claim similar to Alicia Pedreira's, when the Salvation Army fired Jamie Dodge from her position at a domestic violence shelter.³¹⁵ Dodge, employed as a victims assistance coordinator, was fired "because she was a member of

³¹⁰ See *supra* text accompanying note 92.

³¹¹ *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987).

³¹² *Id.* at 336.

³¹³ See, e.g., Charitable Choice Act, H.R. 7, 107th Cong. § 201, at 1991(j) (2001); 42 U.S.C.A. § 604a(j) (West Supp. 2000).

³¹⁴ Arguably, the exemption is an effort to accomplish the stated purpose of Title II, "The Expansion of Charitable Choice," which is "to allow religious organizations to participate in the administration and distribution of such assistance without impairing the religious character and autonomy of such organizations . . ." *Id.* at 1991(b)(4). Because the exemption is from a condition for funding eligibility, however, it also can be seen as a mechanism for furthering religiously motivated discrimination. H.R. 7, § 201, at 1991(e). Moreover, in *Amos* the Court said that "*Lemon's* 'purpose' requirement aims at preventing the relevant governmental decisionmaker—in this case, Congress—from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Amos*, 483 U.S. at 335. The charitable choice exemption abandons neutrality and acts intentionally to promote religious, but not secular, discrimination. This abandonment of neutrality is comparable to the Kentucky legislature's unconstitutional explicit religious purpose in posting the Ten Commandments in school classrooms, *Stone v. Graham*, 449 U.S. 39, 41–42 (1980). In the charitable choice context, however, Congress has specifically stated its permissible purpose of noninterference.

³¹⁵ *Dodge v. Salvation Army*, No. S88-0353(R), 1989 U.S. Dist. LEXIS 4797 (S.D. Miss. Jan. 9, 1989).

the Wiccan religion and was involved at work with the reproduction and dissemination of Satanic manuals and rituals.”³¹⁶ The court acknowledged that as a church the Salvation Army traditionally would have been covered by the Title VII exemption.³¹⁷ However, because Dodge’s position was “funded substantially, if not entirely, by federal, state and local government,” the court found that “constitutional considerations . . . effectively prohibit the application of the exemption to the facts in this case.”³¹⁸ The court held that although the exemption had a permissible purpose, in this context it had impermissible effects: “allowing the Salvation Army to choose the person to fill or maintain the [publicly funded] position based on religious preference clearly has the effect of advancing religion.”³¹⁹ Similarly, the court found that the exemption created excessive entanglement with the Salvation Army’s religious purpose.³²⁰

Although *Dodge* indicates that applying the Title VII exemption to the charitable choice context should be unconstitutional under *Lemon*, the Court’s shift to neutrality theory suggests that it is likely to evaluate the charitable choice exemption under the approaches more recently articulated in *Mitchell*.³²¹

The goal of the plurality’s approach in *Mitchell* was “the minimization of the government’s influence over personal choices concerning religious beliefs and practices.”³²² This goal is realized “when government is neutral as to the religious choices of its citizens” and treats all eligible recipients of a benefit equally.³²³ Therefore, a spending program must be evenhanded with regard to eligibility, selection of service providers, and distribution of aid.³²⁴ The exemption of religious service providers from the nondiscrimination requirement contradicts this neutrality.

Consider four soup kitchens in a predominantly Baptist community with a significant Hindu population. The first is operated out of a Baptist church, directed by an assistant minister, and staffed by paid and unpaid

³¹⁶ *Id.* at *4.

³¹⁷ *Id.* at *6.

³¹⁸ *Dodge*, 1989 U.S. Dist. LEXIS, at *7–*8 (emphasis omitted); *id.* at *9 (“[A]lthough the plaintiff received her paycheck and supervision from the Salvation Army, her employment was made possible by the combined funds of federal, state and local government.”).

³¹⁹ *Id.* at *11.

³²⁰ *Id.* at *12–*13. Despite suggestions to the contrary, *see, e.g.*, Esbeck, *Charitable Choice*, *supra* note 283, at 22 n.23 (collecting cases), prior federal cases have not dealt with directly analogous situations. Some of these cases did not present constitutional challenges. *See, e.g.*, *Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000); *Siegel v. Truett-McConnell Coll.*, 13 F. Supp. 2d 1335 (N.D. Ga. 1994). Others did not involve direct federal funding. *See, e.g.*, *Young v. Shawnee Mission Med. Ctr.*, No. 88-2321-S, 1988 U.S. Dist. LEXIS 12248 (D. Kan. Oct. 21, 1988) (Medicare payments); *Siegel*, 13 F. Supp. 2d at 1335 (tuition grants).

³²¹ *Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (plurality opinion); *id.* at 836 (O’Connor, J., concurring).

³²² Esbeck, *Constitutional Case*, *supra* note 45, at 27.

³²³ *Id.* at 26. *See also supra* Part II.B (discussing the evolution of neutrality theory).

³²⁴ *See generally Mitchell*, 530 U.S. at 809–10.

church members. The second is affiliated with a Hindu temple, and similarly staffed. The third is nonsectarian and staffed by full-time employees as well as community volunteers. Although it is not connected to a church, its employees participate in Bible study classes that they feel strengthen their fellowship and enhance their effectiveness. The fourth soup kitchen is also nonsectarian, but it adheres to a philosophy that its employees should reflect the multidenominational diversity of the community. Therefore, it engages in an affirmative action employment program, basing its hiring decisions on religion when necessary to achieve the desired Baptist-Hindu balance.

Always on the lookout for additional funds, all four soup kitchens apply for federal charitable choice grants. Assuming there is no relevant difference in the quality of their services and the number of people they feed, each should be treated equally. The government agency administering the charitable choice program, however, has limited resources and cannot always fund all four programs equally. The treatment of each applicant quickly reveals three non-neutral aspects of the exemption.

First, the exemption is not neutral among religions. If the government agency chooses to contract with the Baptists but not the Hindus, the applicants will soon realize that the exemption gives the agency the opportunity to benefit or penalize particular religions in two ways. The selection benefits the Baptist kitchen and penalizes the Hindu kitchen on an *organizational* level; that is, it provides special “accommodations” to one religion but not to the other. The selection also benefits Baptists and penalizes Hindus on an *employee* level; that is, it favors the selected organization’s coreligionists. In effect, whereas one religion benefits from the exemption, the other is doubly burdened—the religion is deprived of financial benefits that accompany government contracts, and the employees are deprived of the ability to compete equally for federally funded jobs.

This double inequality mirrors the constitutional defect of the Virginia legislature’s proposal to support teachers of Christianity that James Madison critiqued in 1785: “As the Bill violates equality by subjecting some to peculiar burdens, so it violates the same principle, by granting to others peculiar exemptions.”³²⁵ Unlike the Title VII exemption, which spreads the benefit of accommodation equally to all religious employers, the charitable choice exemption uses federal coffers selectively to advance and infringe upon different religious beliefs.³²⁶ This preference violates “[t]he clearest command of the Establishment Clause . . . that one religious denomination cannot be officially preferred over another.”³²⁷

³²⁵ James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 66 (1947).

³²⁶ For an explanation of this argument, see *supra* Part IV.A.

³²⁷ *Larson v. Valente*, 456 U.S. 228, 244 (1982).

Second, the exemption favors religious identity over secular identity.

If the agency chooses instead to contract with at least one nonsectarian and one religious soup kitchen, the applicants will soon realize that the exemption financially supports religious but not nonreligious identity-building efforts, even when those efforts are identical. All four soup kitchens believe that discrimination based on religion is a necessary part of their identity, yet the exemption allows only the two church-based organizations to make discriminatory hiring decisions. In *Lee v. Weisman*, the Court emphasized that the Establishment Clause imposes “fundamental limitations” that prevent this type of disparate treatment.³²⁸ The exemption transgresses this boundary by singling out religious conduct for favored treatment and creating “the impression that religious moral principles are more worthy of respect than secular beliefs.”³²⁹

Again, although the Title VII exemption also bases the permissibility of conduct on whether it is religious, the element of financial support transports the exemption beyond the boundaries of permissible differential treatment of religion. *Amos* disposed of the challenge to Title VII by finding that alleviating significant government interference with religious organizations’ free exercise justified differential treatment.³³⁰ As discussed above, the funding in charitable choice shifts the relative balance away from the organization’s free exercise claims and toward the government’s interest in eradicating discrimination.³³¹ The stamp of government support on only religious identity-building activities breaches the government’s constitutional responsibility to be neutral.

Third, the exemption pressures behavior toward religion. In either scenario, by making religious identity-building more valuable, the exemption’s favoritism coerces organizational and personal behavior toward religion. If either of the secular soup kitchens wishes to exclude Hindus from employment opportunities, it has two options: it may violate Title VII and render itself ineligible for charitable choice benefits (and face potential lawsuits), or it may reorganize as a Baptist kitchen. Because the first option may have substantial financial consequences, the exemption imposes significant pressure toward the latter option. Madison stressed “that in matters of Religion, no man’s right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.”³³² The exemption’s coercive effect on the organizational identity of the soup kitchens contravenes this principle.

³²⁸ 505 U.S. 577, 587 (1992).

³²⁹ Brownstein, *Interpreting*, *supra* note 46, at 247. *See also* Green, *Ambiguity of Neutrality*, *supra* note 172, at 715 (observing that “this unequal treatment creates the impression that religious and moral solutions to human problems are superior and preferable”).

³³⁰ *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987).

³³¹ *See supra* Part IV.A.

³³² Madison, *supra* note 325, at 64.

Moreover, if the government agency chooses to fund only the Baptist (or only the Hindu) soup kitchen, the exemption may have similarly coercive effects on the religious practices of employees. To gain employment at the government-funded soup kitchen—as Alicia Pedreira learned—they will need to conform their religious beliefs and personal conduct to the kitchen's religious tenets.³³³ Because of the finite number of employment opportunities, the addition of federal funding may have a significant effect on the market. Thus, the exemption “authorizes faith-based providers to influence the religious choices and behavior of recipients through a government-funded program. Few actions could be more inconsistent with neutrality toward religion.”³³⁴

3. *Illegitimate Effects: Endorsement*

In a series of concurring opinions, Justice O'Connor has developed an alternative approach to the *Mitchell* plurality's neutral effects inquiry.³³⁵ Her endorsement approach recognizes that any exception from a generally applicable burden may advance religion, but seeks to distinguish permissible accommodations of free exercise from those that “provide unjustifiable awards of assistance to religious organizations.”³³⁶ The endorsement framework considers assistance unconstitutional when it “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”³³⁷ A statute unconstitutionally endorses religion if an objective observer, after considering the statute's text, legislative history, and implementation, would perceive it as so doing.³³⁸

The crucial factor in Justice O'Connor's analysis of the Title VII exemption in *Amos* was whether the exempted activity was “involved in the religious mission” of the employer.³³⁹ Justice O'Connor determined that an objective observer would need to distinguish between nonprofit and for-profit activities of religious organizations to answer this question. Because the nonprofit activities of religious organizations were likely linked to their religious missions, she found that the Title VII exemption

³³³ For discussion of free exercise concerns, see *supra* Part IV.A.

³³⁴ Green, *Ambiguity of Neutrality*, *supra* note 172, at 716.

³³⁵ See, e.g., *Amos*, 483 U.S. at 348 (O'Connor, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 687–89 (1984) (O'Connor, J., concurring). See *supra* text accompanying notes 105, 133–135.

³³⁶ *Amos*, 483 U.S. at 348 (O'Connor, J., concurring).

³³⁷ *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

³³⁸ *Amos*, 483 U.S. at 348 (O'Connor, J., concurring).

³³⁹ *Id.* at 349 (“It is not clear, however, that activities conducted by religious organizations solely as profit-making enterprises will be as likely to be directly involved in the religious mission of the organization.”).

was permissible as applied to them.³⁴⁰ However, she explicitly did not resolve the application of the exemption to for-profit activities of the same organizations.

In the charitable choice context, however, Justice O'Connor would not even need to inquire whether the exempted activity is "involved in the religious mission" of the employer. By agreeing to the statutory use restrictions on federal funds, charitable choice recipients consent to apply their grants only to *secular* activities. In essence, they estop themselves from claiming that their activities are linked to their religious mission. Application of Title VII to these activities could not unduly burden free exercise, and an objective observer should find that any nondiscrimination exemption constitutes impermissible government endorsement of religion.³⁴¹

4. *Infringement or Accommodation?*

Although the exemption does not satisfy the *Mitchell* conditions of neutrality or non-endorsement, it might still be constitutional if it qualifies as a permissible accommodation. In some circumstances, for example in *Amos*, the government may create accommodations that are not constitutionally mandated. At other times, however, *Amos* acknowledged that an "accommodation may devolve into unlawful fostering of religion."³⁴² Under *Amos* and a case decided two years later, *Texas Monthly v. Bullock*,³⁴³ an accommodation is considered unconstitutional if it is not required by the Free Exercise Clause and (1) it "directs a subsidy . . . that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion";³⁴⁴ (2) the importance of the government's interest underlying the general law outweighs any burden on free exercise;³⁴⁵ or (3) in Justice O'Connor's framework, it constitutes endorsement.³⁴⁶ This

³⁴⁰ *Id.*

³⁴¹ The endorsement analysis of the charitable choice exemption also differs from that of Title VII exemption in *Amos* because of the funding/regulation distinction. As discussed above, it is more difficult to make a free exercise claim against conditions attached to government funding that no organization has a constitutional right to receive in the first place. See *supra* Part IV.A. In the funding context, preferences for religious organizations convey a stronger message of endorsement to the objective observer. See *supra* text accompanying notes 105, 133–135. See also *Amos*, 483 U.S. at 348.

³⁴² 483 U.S. at 334–35.

³⁴³ *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (holding that exemption of only religious publications from state sales tax constituted unconstitutional establishment).

³⁴⁴ *Id.* at 15.

³⁴⁵ *Id.* at 19 (applying the balancing test set forth in *United States v. Lee*, 455 U.S. 252, 257–58 (1982): "Not all burdens on religion are unconstitutional. . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.").

³⁴⁶ *Amos*, 483 U.S. at 348 (O'Connor, J., concurring); *Tex. Monthly*, 489 U.S. at 9 ("[The] government may not . . . place its prestige, coercive authority, or resources . . .

Note argued earlier that the Free Exercise Clause does not mandate the exemption,³⁴⁷ and that the exemption constitutes endorsement.³⁴⁸ The following analysis shows that the exemption also satisfies the other two conditions.

First, the exemption imposes a marked burden on nonreligious entities because it creates an advantage for religious service providers in the competitive market for federal funding grants.³⁴⁹ This burden distinguishes the impact of charitable choice from that of Title VII itself, which regulates activity that may compete in the private marketplace but does not necessarily compete for government support. The exemption empowers religious institutions like the Baptist and Hindu soup kitchens because it “reduces their costs, and increases their ability to exercise control over their members, attract new adherents, [and] fulfill their normative mission.”³⁵⁰ It similarly frees religious recipients from the fear and costs of employment discrimination lawsuits. This empowerment is one-sided. The exemption does not aid either the secular but Baptist-leaning soup kitchen or the multid denominational kitchen, whose employment decisions remain constrained by Title VII. Moreover, the exemption imposes a direct monetary cost on discriminatory nonreligious service providers by forcing them to forsake federal grants and face Title VII lawsuits. This cost alone creates the necessary burden on secular institutions to satisfy the first condition for finding an accommodation impermissible.

Second, although the stated purpose of the charitable choice exemption (like that of the Title VII exemption) is to alleviate a burden on religious organizations’ ability to further their religious missions, the government’s interest in prohibiting employment discrimination in federal programs outweighs the organizations’ interests in autonomy. As early as 1871, the Court recognized the importance to churches’ integrity of autonomy in matters concerning ecclesiastical governance.³⁵¹ However, as argued above, religious recipients of charitable choice have at best a weak claim to organizational autonomy because they explicitly cede a

behind religious belief in general . . . conveying the message that those who do not contribute gladly are less than full members of the community.”).

³⁴⁷ See *supra* Part IV.A discussion under the Free Exercise Clause, Part III discussion under *Smith*.

³⁴⁸ See *supra* Part IV.C.

³⁴⁹ Cf. *Tex. Monthly*, 489 U.S. at 18 n.8 (finding sales tax exemption for religious literature created competitive advantage for religious publishers).

³⁵⁰ Brownstein, *Interpreting*, *supra* note 46, at 271–73. See also Green, *Ambiguity of Neutrality*, *supra* note 172, at 715.

³⁵¹ *Watson v. Jones*, 80 U.S. 679, 728–29 (1871) (declining on general common law grounds to resolve a dispute about interpretations of church law). The Court has since extended this autonomy right to prohibit government interference with appointment decisions, *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929), with intrachurch property disputes, *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952), and with other “matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.” *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976).

certain amount of independence by agreeing to comply with financial accountability and use-of-funds audit requirements.³⁵²

By contrast, the government's interest in prohibiting religious employment discrimination in its own social welfare programs is paramount. On one hand, the constitutionality of such discrimination is a close question under the Free Exercise, Equal Protection, Establishment, and Free Speech Clauses.³⁵³ For example, a federal district court in Mississippi held that the Salvation Army could not fire a domestic violence shelter employee on the basis of her Wiccan faith because her "position was *funded substantially, if not entirely*, by federal, state and local government."³⁵⁴ On the other hand, Congress has recognized the public policy imperatives of nondiscrimination. For example, Title VII of the Civil Rights Act of 1964 forbids employers, including federal and state governments and their agencies, from discriminating in employment decisions on the basis of religion;³⁵⁵ Title VI similarly forbids recipients of federal assistance from discriminating among beneficiaries.³⁵⁶ Taken together, the constitutional and public policy principles arrayed against religious employment discrimination overwhelm the religious organizations' autonomy claims when such organizations voluntarily accept gov-

³⁵² See *supra* Part IV.A for a discussion of religious organizations' autonomy rights vis-à-vis employees' free exercise rights. See, e.g., Charitable Choice Act, H.R. 7, 107th Cong. § 201, at 1991(i), (j) (2001). See also Minow, *Redrawing the Lines Between Public and Private*, *supra* note 53, at 1081 (asserting that public values must follow public money and that when organizations accept government funds, they subject themselves to the "public values that a just legal order both demands and implements . . . public commitments to equality, freedom, and fairness. Translated in our legal system as antidiscrimination").

³⁵³ See *supra* Parts IV.A, IV.B. See *infra* Part IV.D. See also, e.g., Green, *Charitable Choice*, *supra* note 308, at 48; Luchenister, *supra* note 281, at 618 ("The U.S. Constitution . . . bars government financing of discrimination that is based on invidious criteria such as religion or race.").

³⁵⁴ *Dodge v. Salvation Army*, No. S88-0353(R), 1989 U.S. Dist. LEXIS 4797, at *8 (S.D. Miss. Jan. 9, 1989). See also Luchenister, *supra* note 281, at 625-28 (discussing other contexts in which courts have struck down government-financed religious discrimination).

³⁵⁵ 42 U.S.C. § 2000e to 2000e-17 (1994). Federal employers are specifically included in coverage of Title VII in 42 U.S.C. § 2000e-16(a). In addition to Title VII, other legislation regulates the behavior of employers in interstate commerce with regard to their employees. See, e.g., Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1994) (setting minimum wage and reporting requirements); National Labor Relations Act, 29 U.S.C. §§ 151-169 (1994) (authorizing the National Labor Relations Board to audit employers' employment actions and require collective bargaining on behalf of employees). See *supra* Part III discussion of the Title VII exemption.

³⁵⁶ 42 U.S.C. § 2000d (1994) ("No 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."). The list of prohibited bases for discrimination has since been expanded by executive order for agency regulation of certain federally funded programs. See, e.g., Exec. Order No. 13,160, 65 Fed. Reg. 39, 775 (June 23, 2000) (prohibiting discrimination on the basis of "race, sex, color, national origin, disability, religion, age, sexual orientation, and status as a parent" in federally conducted education and training programs); Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001).

ernment financial support for their secular programs. The Establishment Clause therefore does not permit an accommodation of religion in the charitable choice context.

E. Government Speech and Viewpoint Discrimination

Two doctrinal frameworks govern analysis of the charitable choice exemption under the Free Speech Clause. The first framework permits government entities to shape the content and viewpoint of the projects they sponsor within the bounds of the Establishment Clause.³⁵⁷ The Court has distinguished between religious speech, “undertaken or approved by the State, the primary effect of which is to support an establishment of religion,” and nonreligious speech, “undertaken or approved by the State, the primary effect of which is not to support an establishment of religion.”³⁵⁸ The second framework permits the government to open a public platform to private speakers for a particular use, but not to discriminate among speakers based on their viewpoint.³⁵⁹ Under these two frameworks, the charitable choice exemption of religious recipients from the generally applicable nondiscrimination requirement is unconstitutional if it amounts to government espousal of a religious message or if it constitutes viewpoint-based discrimination.

One approach to analyzing the exemption is to argue that the government maintains the right to favor or restrict any expression by charitable choice recipients because charitable choice programs are government sponsored, and any “message” is government sponsored as well. This approach analogizes the religious recipients of charitable choice funding to the family planning organizations that receive federal grants under the Title X program considered in *Rust v. Sullivan*.³⁶⁰ *Rust* held that the Free Speech Clause permitted the government to impose content and viewpoint-based limitations on private organizations’ publicly funded activities. By analogy, Congress may shape religious charitable choice recipients’ publicly funded employment activities by selectively proscribing their ability to discriminate. The problem with this argument in the context of the charitable choice exemption is that the Establishment Clause precludes government expression that creates a “realistic danger that the

³⁵⁷ See generally Lupu, *supra* note 292, at 821 (discussing “message separatism” and observing that grantees’ private speech is attributable to the government when it is required as a grant condition). The Establishment Clause prevents the government from sponsoring religious speech in a way that can be perceived as government endorsement/espousal of a religious message. See *supra* Part IV.C.

³⁵⁸ *Widmar v. Vincent*, 454 U.S. 263, 271 (1981).

³⁵⁹ See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (rejecting school district’s Establishment Clause justification for violation of Good News Club’s free speech and requiring the district to provide equal access for religious perspectives).

³⁶⁰ 500 U.S. 173 (1991) (upholding restriction on discussing abortion options).

community would think that the [government] was endorsing religion or any particular creed” through selective treatment.³⁶¹

In order to avoid the impermissible speech that results under the *Rust* analogy, supporters of the exemption might argue that charitable choice recipients should be considered private speakers taking advantage of a platform or resources provided by the government. Accordingly, the recipients are much like the student publications in *Rosenberger v. Rector and Visitors of the University of Virginia*,³⁶² and the after-school programs in *Good News Club v. Milford Central School*³⁶³ and *Lamb’s Chapel v. Center Moriches Union Free School District*.³⁶⁴ In those cases, the Court concluded that religious and secular expression represented distinct viewpoints.³⁶⁵ For that reason, the Free Speech Clause prohibited the government from engaging in viewpoint-based discrimination by excluding only religious organizations from the platform or resource.³⁶⁶ In *Rosenberger*, for example, the Court found that the University of Virginia could not distribute publication grants only to nonreligious student publications. Similarly, Congress may not permit employment discrimination in charitable choice programs only by employers with religious viewpoints.

V. CONCLUSION

The constitutional, statutory, and public policy dilemmas raised by the Kentucky Baptist Children’s Home’s decision to fire Alicia Pedreira because her homosexuality contravened the Home’s religious tenets illustrate the tensions inherent in charitable choice legislation. Charitable choice creates a new relationship between government and religion, and represents a shift from passive regulation of private conduct to active

³⁶¹ *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993). See *supra* Part IV.C for a discussion under the Establishment Clause.

³⁶² 515 U.S. 819 (1995) (holding that the Free Speech Clause compelled university to give religious groups equal access to student activities fund).

³⁶³ 533 U.S. 98 (2001) (requiring the district to provide equal access for religious program).

³⁶⁴ 508 U.S. 384 (1993) (striking down total ban on use of facilities by religious organizations).

³⁶⁵ See generally Gary D. Allison, *Prelude to a Church-State: The Supremes Set the Stage for Faith-Based Initiatives*, 37 TULSA L.J. 111, 203 (2001) (concluding that *Good News Club* established religion as a perpetual viewpoint so that the government generally must permit religious speakers to use public forums).

³⁶⁶ The use of public school facilities for after-school programming in *Good News Club* and the reimbursement to student publications for printing costs in *Rosenberger* exemplify government provision of a public platform and benefits. Other public forum free speech cases include: *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975) (holding municipal theater could not refuse permission to present rock musical, “Hair,” because municipal theaters were designated public forums for expressive activity); *Schneider v. New Jersey*, 308 U.S. 147 (1939) (invalidating an ordinance that prohibited leaflet distribution in streets because the right to use streets as a public forum outweighed any government burdens from litter and because there were less restrictive ways for the government to control littering).

funding of religious activities. On one hand, the Court's First Amendment jurisprudence has increasingly allowed the government to contract with and fund religious social service organizations on an equal basis with secular organizations. On the other hand, the Free Exercise, Equal Protection, Establishment, and Free Speech Clauses set limits on permissible accommodation from generally applicable laws. Religious discrimination in the workplace is a practice in which the government itself cannot engage, as well as a practice that violates the strong public policy concerns underlying the Civil Rights Act of 1964. Although it is permissible for the government to exempt religious organizations from the Title VII nondiscrimination requirements in the regulatory context, the Constitution forbids the use of charitable choice funds to extend the exemption into the public sphere.