Gatekeeping Between Government and Religion:
Faith-Based Initiative Competition and Supervision

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"We share the same belief that every person in need is a worthy child of God. And we share the same goal: We must bring the hope and healing of faith-based services to more and more Americans."

—President George W. Bush,
addressing faith-based service providers.

Communities of the world's major religions have always incorporated care for others into their central teachings. Politicians have recently seized upon the relative success of these faith-based organizations' services. Many politicians and citizens see these faith-based services as a potential "outsource" to solve the problems of American poverty. Others see this outsourcing as a violation of the first amendment to the Constitution and the principle of separation between government and religion. In such a highly charged area of controversy, can there be any easy answers?

This paper addresses two of the points of controversy: the manner in which groups will be selected to receive government funding and how those groups will be monitored in their use of the funds. These two issues raise many of the concerns that people have about the movement to expand the faith-based initiative, such as fair treatment of different religious groups, service recipients' freedom of conscience and the level of involvement between our government and various religious groups. These two issues highlight the pertinent Constitutional law and typical Constitutional concerns.

The idea of government and religious groups working together to alleviate poverty garners 75% of public approval in a Pew Forum on Religion and Public Life national survey. Despite the idea's popularity, the details of such collaboration generated

high levels of concern in the same study. [1] People's concerns center on discriminatory hiring practices, potential proselytizing of clients, and equal access to funds for minority religious groups as well as compliance with the Constitution.[2] As a nation, we seem to support the theory of helping those in need through the most effective means, while being uncomfortable with the practical realities of government funding for religious groups. The relevant Constitutional law parallels this national quandary, and the solution to the conflict lies in a compromise on the degrees of involvement between government and religious service providers. In this context, the popular "wall" between government and religion rightly becomes more of a gated fence.

Competition for Faith-Based Initiative Funding

Finite Funding Will Mean Competition Between Groups

The money available for projects through the faith-based initiative will be a limited pool, and the government will have to make choices about how it will award grants to faith-based organizations. The size of the funding pool is uncertain. The White House advertises the availability of $65 billion in grant opportunities from federal agencies and $50 billion in block grants to states to fund faith-based and community organizations.[3] In other estimates, the amount available for faith-based groups is "up to $10 billion per year."[4] The tremendous amount of money that the White House website promises would approach the total amount that the federal government currently spends

[1] Faith-Based Funding Backed, but Church-State Doubts Abound, Pew Forum for Religion and Public Life, April 10, 2001.
[2] Id.
[3] White House Office of Faith-Based and Community Initiatives (OFBCI) "Grant Opportunities", at http://www.whitehouse.gov/government/fbci/grants-catalog-index.html (last visited April 18, 2003).
[4] Carr, Rebecca Faith Initiative Has Doubters, Atlanta Journal and Constitution, Jan. 30, 2001 at 1A.

on all its non-health social services! Either the whole social services arena is meant to be available for private contracting, or these numbers are somewhat expansive. However, we can safely assume that the amount of money available for faith-based initiatives will fall somewhere in the order of magnitude of tens of billions of dollars. Certainly to organizations often subsisting on budgets in the thousands, any pool measured in the tens of billions sounds bottomless, but with hundreds of thousands of organizations vying for the funds, the money practically available for any one form of service will diminish quickly.

The finite money will have to be carefully allocated. Many groups could use a financial boost for their services. For instance, the Lutheran soup kitchen in Denver operates on an annual budget of $30,000 (mostly rent, as supplies and labor are donated); the Corpus Christi drug rehabilitation center operates on a budget of $1.5 million; and the Prison Fellowship ministries program has a $48 million budget for its US projects[5]. Projects like these exist across the country, and indeed the government hopes more will spring up as grant opportunities through the faith-based initiative develop. The "Compassion Capital Fund" at the Office of Faith-Based and Community Initiatives (OFBCI) provides funding to government departments to develop offices that can assist small organizations. The departments' offices are meant to assist in navigating the paperwork of the grant-application process as well as to assist in training volunteers, encouraging private fundraising, etc.[6] This effort encourages small organizations to seek

[5] Culver, Virginia, Too Much Heat Shuts Soup Kitchen, Denver Post, Aug. 16, 2000 at B-7; Schwartz, Jeremy, Local Treatment Facilities Can't Serve All Who Need Help, Corpus Christi Caller-Times, Nov. 21, 2001 at A8; and Prison Fellowship Newsroom "Fact Sheet" at http://www.demossnewspond.com/pf/presskit/pffactsheet.htm, (last visited Mar. 23, 2003).
[6] OFBCI, Helping Those in Need: An Overview of the Federal Grants Process at http://www.whitehouse.gov/government/fbci/guidance/helping.html#4 (last visited Mar. 29, 2003).

FBCI grants for their social service activities; it should also encourage organizations interested in starting a program to provide poverty services.

Many private charitable groups are deeply concerned that, as government money becomes available, private giving will decrease, reducing overall the groups' poverty-fighting efforts. Conversely, the government apparently expects to be able to reduce its share of funding precisely because private organizations and individuals will step up with "idealistic volunteers and moral principles."[7] Funding for private groups' initiatives will become increasingly tight as responsibility for more social services work is transferred from the government to the private groups. Since funding will be limited, the government will have to choose between different groups' requests for social services funding.

The Factors in the Inter-Group Competition for Funding are Unclear

The text of the current charitable choice legislation provides that "religious organizations are eligible, on the same basis as any other private organization, as contractors to provide assistance, or to accept certificates, vouchers or other forms of disbursement…so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution."[8] The government has not explicitly defined this "same basis" for eligibility. The White House OFBCI tells prospective recipients that it will ask "Does your program work? Does it meet the specific requirements of the grant? Is it turning peoples' lives around? Is it accountable

[7] President Bush Implements Key Elements of the Faith-Based Initiative, at http://www.whitehouse.gov/news/releases/2002/12/20021212-3.html, (Dec. 12, 2002).
[8] Temporary Assistance to Needy Families (TANF), Pub. L. 104-93 § 104(c) (1996).

for the money it receives?" when government determines grant eligibility.[9]

These questions focus on the faith-based groups' "success" with their intended objectives in congruence with the granting department's goals. The Bureau of Prisons faith-based initiative office reports that about 10% of their Community Correction Centers are faith-based organizations under contract to the Bureau to provide community re-entry services to ex-offenders.[10] The Bureau's decision-making process for awarding contracts is based on "…the past performance of the bidder. The Bureau has found that the bidder's prior record of performing similar services is an excellent indicator of how likely the program will succeed."[sic] [11] Other criteria that the government acknowledges in the competition process for faith-based initiative money include: bid competition, community-wide strategy, certification (from Medicaid, HUD, etc. as a proper recipient of funds), board of directors composition (homelessness groups must include a homeless or formerly homeless person on their boards under the Emergency Food and Shelter program), and many other program-specific definitions of factors to be considered.[12] The grants are awarded for proposals within certain grant programs. For example, the Weed & Seed program from the Department of Justice says that "Initiatives eligible for funding may include drug/alcohol treatment, anti-gang activities, offender re-entry monitoring, tutoring and job preparedness training…"[13] The idea is for organizations whose programs fit these parameters to submit grant proposals to the Department for approval and funding. The overarching theme in all the descriptions of the competitive factors was

[9] OFBCI Helping Those in Need: An Overview of the Federal Grants Process, at http://www.whitehouse.gov/government/fbci/guidance/helping.html#1, (last visited Apr. 18, 2003).
[10] Teat, Verna, e-mail correspondence with Bureau of Prisons Contracting Officer for Community Correction Centers, Mar. 23, 2003 (on file with author).
[11] Id.
[12] OFBCI Grants Catalog, at http://www.whitehouse.gov/government/fbci/grants-catalog-index.html, (last visited Apr. 18, 2003).
[13] Id.

the nebulous concept of "success" in the organization's prior work.

Competition on "Success" May Involve Evaluation of Religious Factors

The government's evaluation of "success" for faith-based organizations will, in some cases, be intertwined with evaluation of the services' religiously oriented goals. Certainly some services will not pose serious evaluation problems in terms of "successfulness" being tied to religious factors—either a soup kitchen group provides food for the needy and manages its budget effectively or it does not. However, some services, such as those that expect to create attitude or behavior changes, will be much more difficult to evaluate on simple, objective factors that do not involve the group's religion. Simple quantitative tests for these potentially over-entangled programs—percent reduction in teenage births, reduction in recidivism or addiction rates—appear attractively straightforward, but they result in inadequate analysis under the Constitution's religion clauses.

Simple Quantitative Measurements Do Not Look at the Whole Picture

First, these plain quantitative measures are neither standardized nor simple to compute, despite their appearance to the contrary. The rhetoric surrounding the faith-based initiative often refers to the impressive statistics that religious groups can produce. One hopeful candidate for extended FBCI funding is Chuck Colson's Prison Fellowship rehabilitation ministry. It touts the importance of faith-based prison services by quoting recidivism rates of just 16% for participants in its religious program, compared to 36% for (secular) vocational prison services and 76% for inmates who receive no in-prison

rehabilitation services.[14] Numbers like these make most people eager to harness the success of such programs to reduce recidivism across the country. However, these statistics are nonstandard and self-reported, and they neglect to look at the situations behind the numbers, which often reflect various levels of self-selection. With different pools of clients and different methodologies for calculating statistics the programs' "success" statistics reflect this client selection. For example, in the Prison Fellowship program, the inmates selected for the program must meet the following criteria:

> "They must volunteer for the program, being fully aware of the requirements and the Christ-centered, biblically-based curriculum. Applicants must also be male and
>
> - Be within 18 to 24 months of their release or parole date…
> - Be eligible for discharge or parole in program state,
> - Be healthy
> - Be functionally literate…
> - Have no enemies at the facility site."[15]

With these requirements pertaining to release eligibility and the "no enemies" criterion, these faith-based programs are largely available only to people convicted of less-violent crimes and/or with outstandingly positive attitudes and relationships. Such pool selection tends to favor individuals who already have characteristics in favor of successful rehabilitation. This is a small example of the potential self-selection issues at play in the statistics.

For the purposes of this paper, however, we will assume that the statistics give accurate pictures of the efficacy of faith-based programs. Additional factors make these statistics inappropriate as a rationale for the faith-based initiative. America's principles indicate that a deeper look, one beyond merely the end result that an organization

[14] Prison Fellowship Newsroom Prison Fellowship Snapshot, at http://www.txcorrections.org/article.pdf (last visited Apr. 18, 2003).
[15] InnerChange Freedom Initiative FAQ's, at http://www.ifiprison.org/aboutfaqs.shtml, (last visited Apr. 15, 2003).

delivers, is critical. The Constitution shows a certain tension between 'getting things done'—a professed American value, and protecting civil liberties—another popularly professed value. Any private organization that competes for government funding should do so on factors that reflect its whole program, both the results *and* the methods. President Bush made the statement, "When decisions are made on public funding, we should not focus on the religion you practice; we should focus on the results you deliver."[16] However, the simple "Can you deliver results? Are the numbers better?" analysis is inadequate for complex human services programs in general, but especially for those programs that may involve the civil liberties embodied in the Constitution's religion clauses. The Constitutional issues remain just as important to the analysis in their own right as governing principles as the efficacy of a program. As the Supreme Court once observed,

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general… that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praise-worthy government officials no less, and perhaps more, than mediocre ones.[17]

President Bush's statement assumes, in part, that the "results" delivered are measurable and separable from the religion practiced by the group delivering the services. This segregation would be the key to evaluation that is permissible under the Establishment Clause. Unfortunately, the segregation between religious and non-religious activities is not possible with types of social service that involve modification of an individuals' personal conscience. For example, the SPRANS Community-Based

[16] President Bush Implements Key Elements of the Faith-Based Initiative, at http://www.whitehouse.gov/news/releases/2002/12/20021212-3.html, (Dec. 12, 2002).
[17] Stanley v. Illinois, 405 U.S. 645 (1972).

Abstinence Education Program Grants are listed as an opportunity for faith-based groups by the Department of Health and Human Services. In order to be effective beyond current programs, the group would likely have to, and indeed *want* to include its tenets of faith regarding sexuality. Such a program could probably deliver the result of a reduced teen pregnancy rate, and it would probably be a great program for a religious group to initiate on its own funding. However, such inclusion in a faith-based initiative program amounts to teaching religious beliefs with government money, a clear violation of the Establishment Clause. In such a scenario, the "how" behind the results is critical to the program's Constitutionality.

Simple Quantitative Factors Neglect Important Considerations

Under the Constitution, our society cares about *how* results are accomplished as well as the ends that are achieved. The government *must* look at whether a federally funded group's methods improperly establish or burden religion. Of particular interest for the faith-based initiative, the Constitution protects individuals' religious freedom from both positive and negative governmental influence—the government can neither establish a religion nor hinder anyone in their free exercise of religion.[18] This Constitutional protection of conscience requires an inquiry into *how* government contractors execute their duties and whether that execution threatens individual consciences or establishes a religion. Individuals in need of basic human services are particularly vulnerable to coercion in their beliefs, which are hardly the first priority for people in need of a place to stay, a job, a meal, or a better situation in prison. The Constitution is meant to protect rights exactly when they are threatened, and these ideas

[18] U.S. Const. amend. I.

must be a part of the evaluation of any particular faith-based initiative project.

Conscience-Changing Programs Will Require Government Evaluation of Religion

Measuring the successfulness of faith-based programs that seek to change individuals' behavior and personal conscience will involve some evaluation of religious factors. President Bush made it clear that he sees the faith-based initiative as focusing on the results a group can deliver, and also promised, "[W]hen government gives that [financial] support, charities and faith-based programs should not be forced to change their character or compromise their mission."[19] In practice, this will mean that rather than requiring a group to change to comply with the Establishment clause, the government will have to choose groups that can comply without change. Either way, the Establishment clause must remain in the picture. In making a choice of groups that would naturally meet the requirements of the Establishment clause, the government ends up evaluating the religiosity of faith-based groups. The government probably cannot avoid this sort of evaluation entirely, but it does not need to do so. Again, the solution lies in a compromise on the degree of partnership between religious groups and the government.

The government is bound to avoid "endorsing a religious creed, or directly funding religious worship or religious teaching" with government money.[20] Certainly some faith-based groups' charitable services are so tightly tied to worship and religious teaching that they would not qualify for federal funding under the Establishment clause. But the line where this "pervasively sectarian" charitable service begins, and thus where

[19] President Bush Implements Key Elements of the Faith-Based Initiative, at http://www.whitehouse.gov/news/releases/2002/12/20021212-3.html, (Dec. 12, 2002).
[20] Id.

the Establishment clause prohibits federal action, is unclear. Issues of religious freedom become more critical as the faith-based service program moves closer to purposeful intervention in an individual's personal conscience, such as the programs that pertain to family formation/counseling, drug/alcohol rehabilitation, and prison rehabilitation. Other services that do not involve this kind of intervention seem like good candidates for government support that would not violate the Establishment clause.

Segregation of Religious and Non-Religious Activities is Often Impossible

The proponents of the faith-based initiative plan suggest that the faith-based groups can segregate their activities and avoid the Constitutional issue: religious activities funded by the religious group itself and conducted on its own time; secular-type services provided with financial assistance from the government in separate activities. At first glance, this solution seems attractive, but closer analysis and practice cast doubt on this "solution."

An essayist for the Federalist Society notes, "The problem is that many of the more effective service agencies, most notably drug rehabilitation organizations such as Teen Challenge, cannot so neatly segregate the "religious" aspects of their programs (prayer, Bible reading and devotions, worship, etc.) from the "secular" aspects, which in turn renders them "pervasively sectarian" in the minds of some."[21] Which activities are the "religious" ones and which are "secular" is impossible to tell for many successful faith-based groups. Certainly such segregation in many contexts would be possible only with intensive evaluation of religious belief prohibited by the Establishment Clause. For

[21] Pavlischek, Keith J. Religious Liberty, Welfare Reform and Charitable Choice at http://www.fed-soc.org/Publications/practicegroupnewsletters/religious%20liberties/rl010301.htm, (2001).

example, to decide whether the fundamentalist Christian conversion expected of Prison Fellowship's clients is primarily a religious baptismal experience or primarily a turning point in a person's outlook on criminality would require evaluation of the group's religion that is inseparable from the "secular" service for which the group hopes to receive funding. Indeed, the group's own promotional brochure asserts "All programming—all day, every day—is Christ-centered"[22]

The Federalist Society commentator goes on to suggest that the solution is therefore to abandon the "pervasively sectarian" examination entirely. This is not a good solution. How the evaluation process will deal with the religious factors is unclear. However, we cannot simply say that since evaluation violates the law in some circumstances, we should simply skip the evaluation! The religious aspects of the services may or may not be the crucial component of faith-based providers' "success" in helping the needy, but those religious aspects are surely critical to proper application of the Constitution and cannot be ignored.

The religious aspects of a service provider will necessarily play a critical role in the competition process. In fact, President Bush and many others believe in the faith-based initiative's potential precisely because those religious groups "are guided by moral principles" and "believe that every person in need is a worthy child of God."[23] If part of the success of a faith-based program is its actual basis in faith, then that basis in faith has to be a part of the evaluation. If it is a part of the evaluation, then the government is in the position of deciding on which faith the services would be best based. President Bush's own personal faith is a widely discussed, deeply held evangelical Christianity, and his

[22] Goodstein, Laurie, Group Sues Christian Program at Iowa Prison, N.Y. Times, Feb. 13, 2003 at 39.
[23] President Bush Implements Key Elements of the Faith-Based Initiative, at http://www.whitehouse.gov/news/releases/2002/12/20021212-3.html, (Dec. 12, 2002).

"worthy child of God" language quoted above comes from that religious tradition.[24] Minority religions widely express concern that since much of the special interest group pressure for expanded faith-based initiative programming comes from the Christian "Religious Right", much of the funding might pass the minority religions by. A faith-based initiative system should certainly reflect the needs of the populations it serves (i.e., having more Mormon groups in Utah than in Georgia would seem reasonable), but the government should guard against even the appearance of "establishment" of any religion over another.

Proponents of an expanded role for faith-based initiative programs speak a great deal about removing discrimination against religious groups in funding decisions. However, we should step back from the word "discrimination" with its connotation of racism and sexism and other forms of unfair treatment. Our Constitution requires that the government guard itself against endorsing or curtailing religious expression. In other words, the law requires the government to avoid doing certain things with respect to religion. Choosing words like "ending discrimination" couches the faith-based initiative in the language of remedying unfair treatment. Under the first amendment, the government is *required* to "discriminate"—to avoid doing things that would endorse or unduly burden religion. It is not choosing to single out religion for unfair treatment. It is important to realize that the expansion of the FBCI would in fact be a change in what is right and wrong for the government to do instead of merely being a remedy for past wrong acts. Currently the government is not allowed to fund programs that have a non-secular purpose or effect; it is technically a discrimination of sorts, but hardly the malevolent kind that much of the rhetoric seems to imply.

[24] Woodward, Kenneth L. The White House: Gospel on the Potomac, Newsweek, Mar. 10 2003, at 29.

Constitutionality of Considering Religious Elements in Competition for FBCI Funds

The Constitutional issues surrounding competition among faith- and community-based groups for federal funding stem largely from the first amendment's religion clauses. In the Free Exercise Clause and the Establishment Clause, the Constitution mandates that the government will not interfere either positively or negatively in individuals' personal consciences with respect to religious belief or non-belief. The two clauses come into conflict with one another when both are given a strong reading—when "free exercise" means full access to every benefit as well as no burdens and "[non]establishment" means no support for either any particular religion or for religion as a whole (as opposed to non-religion). Under this strong reading of the religion clauses, neither inaction nor action on the religious elements of competition could protect the government's actions from Constitutional challenge. Clearly, the strong reading must be modified—the Constitution simply cannot operate under such a catch-22. In light of the historical development of the religion clauses and the ethos behind governmental and religious collaboration, a narrower reading is more appropriate. The narrower reading of the religion clauses sees coercion as the key factor—the government cannot support a religion in a way that would coerce citizens into participation, nor can government treat individuals in such a way that their freedom of conscience is curtailed. The coercion model allows the free exercise and establishment clauses to coexist both logically and in practice. There need not be a "wall" between government and religion in all cases—a fence where freedom conscience is threatened should be sufficient in the faith-based initiative context.

Historical Development of the Religion Clauses

Historically, the religion clauses seem to have been designed to protect the idea that states, not the national government, could establish religion, but that individuals were free to act apart from those religions if their consciences so dictated. Coming from a background of persecution among versions of Christianity in Europe, the Founders wanted to ensure a secular government and freedom of conscience in America. In the social services, the historical background has interestingly made nearly a complete circle.

Originally social service activities were done almost solely by private organizations. "The structures and processes of philanthropic practice in the earliest days of this society were, by our standards, fairly informal. Care for the poor was handled primarily through the church or town. In many areas, as in New England, those civic and ecclesiastical structures were intertwined."[25] In the mid-1800's private organizations were able to establish endowments and use the tools of the courts of equity to become autonomous entities, and religious charitable organizations began to resemble the independently run organizations we see today.[26]

In the 20th century, non-profit organizations independent from religious organizations boomed, especially during prosperous years, and government provision of aid became acceptable and even expected, especially during lean years.[27] Religious groups continued to play a role in social service provision. In many cases the "religious group" in question became an agency separate from any primary body of religion (one such group is Habitat for Humanity, "a nonprofit, nondenominational, Christian housing

[25] Jeavons, Thomas H. When the Bottom Line is Faithfulness: Management of Christian Service Organizations 6 (Indiana Univ. Press, 1994).
[26] Id., 10-17.
[27] Id., 19-21.

organization"). Other religious organizations developed separate agencies with particular missions (for instance, Catholic Charities, one of the largest service providers in the country, separates its faith-promotion activities from its faith-application activities—the former for Catholics and funded by Catholics, the latter for all people in need in the spirit of Catholics' professed religious beliefs that "Actions of aid, relief, and assistance should be conducted in a spirit of service and free giving for the benefit of all persons without the ulterior motive of eventual tutelage or proselytism."[28]) Still other religious groups operate service programs as individual congregations (for example, St. Ann's Church in New York City runs a children's center, food pantry and general community ministry[29]). Both the content and the structure of faith-based service provision come to bear on the Constitutionality of the faith-based initiative. These models of faith-based service provision create different Constitutional issues with respect to the religion clauses and the level of involvement between government and religious organizations that the nation desires.

It will be easiest for the government to make non-religiously based decisions about groups like Habitat for Humanity. Although these groups have a religious background and motivation, their service is provided on a neutral basis and is easily and completely evaluated on non-religious grounds because there is no interference with freedom of conscience in their services. Individual congregations and some of the large organizations with significant ties to particular religious traditions or denominations will generally be the more difficult to analyze in permissible ways. These groups' social

[28] Kammer, Fred, 10 Ways Catholic Charities are Catholic, at http://www.catholiccharitiesusa.org/beliefs/10ways2.htm (quoting Pope John Paul II in 1997 speech).
[29] Kozol, Jonathan, Amazing Grace: The Lives of Children and the Conscience of a Nation (Perennial, 1996).

services work is highly varied in its degree of separation from worship and proselytizing activities and a case-by-case analysis of the type of work to be done.

Cultural Development of the Religion Clauses

America's cultural heritage regarding who should provide social services has shifted in the past and continues to shift. The nation, however, seems to have absorbed the "separation between church and state" as a deeply valued idea. The workable principle behind the idea is that we value freedom of conscience, the freedom to decide one's personal values for oneself. This is a viable principle, but one that remains intact under the faith-based initiative only with great care. The separation between religion and government need not be absolute or mechanistic, but it deserves emphasis when the program is meant to affect an individual's conscience.

The Constitution is a living document, not, as in the famous phrase, a "suicide pact"[30]. The phrase comes from the idea that the Constitution is something we follow because it works, not simply because it holds an honored place. We will not destroy the society (whatever one's personal conscience says such 'destruction' would be) simply for the sake of adhering to the document. The Supreme Court will continue to interpret the document to meet the nation's needs and beliefs rather than holding onto a doctrine for its own sake. In the context of the faith-based initiative, the Court and the country will have to find a way to strike a balance between the need to find better solutions for the problems of poverty and our existence as a nation of ideas and principles. One way to

[30] "The Constitution is not a suicide pact" is a popular phrase, variously attributed to Supreme Court Justices Jackson and Goldberg. See David Corn "The Suicide Pact Mystery" at http://slate.msn.com/id/2060342/, posted 4 Jan. 2002 at slate.com for an explanation of the several meanings and sources attributed to the phrase.

strike that balance is by looking at the narrower, freedom of conscience reading of the religion clauses.

Constitutional Doctrine Regarding the Religion Clauses and Government Funding

The modern Supreme Court doctrinal development of these Constitutional issues began in the 1940's with the *Everson*[31] case, which, along with *Cantwell v. Connecticut*[32], determined that the religion clauses were applicable to the states through the 14th amendment.[33] The Supreme Court has dealt extensively with the potential collision between the religion clauses in the area of government funding for religious schools, which bears some resemblance to the issues surrounding the faith-based initiative's government funding for religious service providers.

The focus of the Court's debate over faith-based schools has been to insulate the government from making monetary choices in favor of any particular religious body. School cases have looked at the distinctions between lending textbooks and tools to parochial schools, lending teaching support to those schools, providing a deaf student with a publicly funded interpreter in a parochial school, and giving parents various financial benefits to assist in funding parochial education.[34] The overriding theme of the cases, such as the "theme" can be in such a developing field, has been for approval of cases in which the government does not directly deposit money with the religious school. In cases where the funding arrives indirectly or where no actual money changes hands the

[31] Everson v. Board of Educ., 330 U.S. 1 (1947).
[32] 310 U.S. 296 (1940).
[33] Brest, Paul, et. al. Processes of Constitutional Decisionmaking Cases and Materials 406 (Aspen Law & Business 2000 & Supp. 2002).
[34] Mitchell v. Helms 530 U.S. 793 (2000); Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481 (1986); Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

Court approved the collaboration between the government and the religious body operating the school. Such direct financial contact seems to be the current touchstone of government "endorsement" of the religious recipient body. The most recent case on the subject, *Zelman v. Simmons-Harris*, indicates that

> Where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily suspect to challenge under the Establishment Clause.[35]

The Supreme Court relies heavily on the "true private choice" of individuals in its ruling in *Zelman* to allow the government to give tuition aid to parents who send their children to private, often religious, schools. On the other hand, Justice Souter, joined in his dissent by three other Justices, refers back to the "inaugural" case of *Everson v. Board of Education*, ("No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion,"[36]) and describes the majority position as resting on mere formalities.[37] Some of the same observations about formalities could apply to the faith-based initiative's plan to use vouchers or grants to fund groups that may include religion intertwined with their service—the end result is still feared to be too often government funding of religious practice or evangelism.

In the faith-based initiative, unlike in parochial schools, *direct* financial support from the government is a major aspect of the FBCI. The details of how the funding could work for the FBCI are not fully established, but the main proposals are a system of grants to the groups for providing particular services and a voucher-based system for clients

[35] Zelman, 536 U.S. at 616.
[36] Everson, 330 U.S. at 16.
[37] Zelman, 536 U.S. (dissent, J. Souter).

choosing between service providers. The voucher-based system would work as well for some social services as it does for schools under the Constitutional analysis (and probably survive based on *Zelman*'s "truly private choice" doctrine[38]), but for practical reasons, the voucher system does not appear to fulfill individuals' needs in many areas of social service. The grant system is comparatively less problematic in practical application.

Constitutional and Practical Implications of Vouchers in Social Services

One way to deal with the competition problems is to establish a voucher system much like the private schools have been able to use. The TANF legislation seems to lean toward using vouchers extensively in the faith-based initiative field, mentioning "certificates, vouchers or other forms of disbursement" in its statutory list[39]. The vouchers would ensure that the Supreme Court's holding regarding "true private choice" was honored.[40] Religious groups in support of the faith-based initiative (not all religious groups are in favor of the plan) very much supported the voucher provision in the TANF bill. Indeed, some of them asserted that the grant proposal served only to draw debate away from the voucher provision, which would accomplish the same ends of getting money to religious groups but without the obvious establishment clause problems.[41]

However, the voucher system is not well-suited to most of the social services that the government seems to hope to turn over to religious and other community groups. Vouchers in schools work because of parents who can take the time to search out the best

[38] Zelman, 536 U.S. at 649.
[39] TANF, Pub. L. 104-193 § 104(b), (c) (1996).
[40] Mitchell, 530 U.S.
[41] Olasky, Marvin Rolling the Dice, World Magazine, Aug. 4, 2001.

fit among many schools for their child. Such decisions reward the family that has the interest and the wherewithal to be actively involved in its child's schooling. Additionally, the school voucher decision tends to revolve around one somewhat standard service: K-12 education at one or another of area schools.

In contrast, the social services voucher scenario would ask individuals with varying needs to make educated choices between different services, and very likely multiple choices for a client's multiple needs. This plan would require people whose lives have reached such a crisis level that they're seeking assistance to muster their resources to compare different groups' services and religious (or non-religious) aspects and make all these decisions with "truly private choice". Empowerment for people experiencing poverty is an important and often-forgotten thing, but a person in need probably does not want to be handed a certificate and a list of places around town that will accept the certificate in exchange for assistance, let alone have the spare energy to devote to comparison-shopping on the religious aspects of a program. The inmates at Prison Fellowship's Iowa program are alleged to have been improperly enticed by greater privileges under the Fellowship's program.

Equally important as the practical aspects is the fact that the voucher system potentially abdicates all Establishment Clause analysis. In many of its supporters' imaginations it looks like a pure private choice regime. However, without oversight for the voucher system, the government has little way of protecting clients from religious coercion, which is the older and narrower reading of the religion clauses that allows the Establishment and Free Exercise clauses to exist side-by-side. On the other hand, if a program must be approved by the government before accepting vouchers, then the same

competition problems arise as with grants—the non-invasive programs that can successfully separate religious inculcation from services are likely to work and the others are not. The voucher system in the attitude-changing social services does not live up to the standards set in the school context, and the problem goes back to the "how" questions that are so important to the analysis. Technically speaking, the vouchers will work under the Constitution, but in practice they will not be consistent with the ethos of the religion clauses.

Grant-Based Systems Are Practical Applications of the Faith-Based Initiative

The Supreme Court has held that a grant system allowing religiously based education providers to receive "public benefits neutrally available to all" does not necessarily violate the Constitution in all situations.[42] Instead, the Court called for individual assessments of how such grant systems are applied to individual situations to make sure that the public benefits do not violate the Constitution's religion clauses. Although this holding could potentially generate a stream of litigation over individual instances of Establishment Clause violations, such a result could be minimized by restricting the faith-based initiative to the types of services that do not attempt to change individual's personal consciences.

The grant system works better than vouchers on the practical level because of the nature of social services provision. Grants allow programs to establish themselves and provide clients with a less fragmented picture of providers than vouchers envision. Grants also maintain government oversight over the goals of the programs more easily than vouchers, and since it is tax money that funds the programs, such direction is critical

[42] Bowen v. Kendrick, 487 U.S. 589 (1988).

to the integrity of the faith-based initiative.

The protections on first amendment rights that are offered by the grant system are currently not very extensive, but presumably the Court will set out more specific guidelines as it hears cases directly about the faith-based initiative. In these cases, the law itself could shift in future years. The decisions in this area tend to be close ones, often garnering 5-4 splits on the Supreme Court. A split of this nature creates controlling law, but they demonstrate that there are arguments on both sides of the issue—as well as the fact that a shift in the balance of the Court could affect the strength and content of the doctrine regarding the religion clauses and public funding. Overall, the conflict behind the religion clauses today is the conflict in values between our desires to do what works and to protect time-honored freedom of conscience.

Supervision of FBCI Recipients

The FBCI Program Will Require Supervision of Grantees

Presuming the competition factors resolve themselves under the Constitution, the funded organizations will still require supervision. As much as we all prefer an existence independent from the government, as responsible citizen-taxpayers we also all want oversight of how the government and its contractors spend tax money. Additionally, the "how" question comes up again. Supervision of FBCI groups is necessary to ensure that the Constitutional plan submitted with a group's bid is in fact the plan that the group follows and to ensure that unforeseen effects are dealt with. The Prison Fellowship is currently involved in several lawsuits that assert Constitutional claims based on the program's alleged religious coercion and favoritism in Iowa's state prisons. The lawsuits

highlight the fact that while Prison Fellowship can claim excellent outcome measurements in terms of recidivism rates, there are serious issues concerning the program's implementation:

> Staff members and volunteers in the program, known as the InnerChange Freedom Initiative, are required to sign a statement of faith in a biblical literalist interpretation of Christianity. The lawsuits argue that this is tantamount to employment discrimination. Participants in the 18-month program all live in one cellblock of the medium-security prison. The lawsuits say they are given privileges like access to large-screen televisions and computers, keys to their cell doors and free phone calls… The lawsuits say that the State of Iowa pays for InnerChange by adding a charge to telephone calls to and from inmates.[43]

Results must not be both the beginning and the end of the governments' inquiry into a faith-based group's government-funded provision of services.

Supervision Procedures Will Examine Faith-based Groups' Finances

The plan for the faith-based initiative as Congress has envisioned it calls for segregation of funds within the faith-based organizations' budgets: government and organization money for the approved "secular" service in one account, the organization's money for religious activities in another. A simple accounting statement, at the minimum, will be crucial to ensuring that recipient groups meet this important requirement. However, this requirement makes some religiously oriented service providers apprehensive about government interference. Whether such apprehension springs from desire for privacy or simply mistrust of government intentions, it certainly reflects the feeling that financial oversight of a faith-based organization's books will be a significant entanglement between government and organization.

[43] Goodstein, Laurie, Group Sues Christian Program at Iowa Prison, N.Y. Times Feb.13, 2003 at 39.

Supervision Procedures Will Examine Grantees' Government-Funded Activities

More important will be the necessary oversight of what the group actually does in practice. Some members of the Supreme Court seem to take the view that religiously oriented groups are waiting with barely contained enthusiasm to start forcefully proselytizing with any scrap of support they receive from the government.[44] Such fear seems to be largely unfounded in the vast majority of groups that would survive the competition process discussed above.

However, the content of the groups' FBCI activities will be important to the governmental body contracting for the service and providing the funding.[45] Seeing that purely religious activities are conducted separately from the service provision will be an important oversight function. So will ensuring that the services are provided to individuals regardless of the individuals' religious status and making sure that the services are otherwise "consistent with the Establishment Clause" and the enabling TANF legislation.[46] The supervision required to ensure that all these factors are fulfilled will have to be somewhat extensive and necessarily intrusive.

Both of These Types of Supervision Could Be Unconstitutional

The Supreme Court's interpretation of the ways that government can or cannot be involved in supervision of religious groups has evolved over the years. *Everson* took an extremely strong view of the Establishment Clause, interpreting it to mean a

[44] Bowen, 487 U.S.
[45] The current FBCI plan calls for individual government departments and divisions (Justice, HHS, Education, Bureau of Prisons, etc.) to administer their own FBCI programs. These departments are ranked on a "traffic light color scale" in their progress toward having more private groups' competing for contract funding.
[46] TANF, Pub. L. 104-193 § 104(c) (1996).

"government…stripped of all power…to support, or otherwise to assist any or all religions."[47] The meaning evolved significantly with the *Lemon* and *Nyquist* decisions.[48] *Lemon* and *Nyquist* developed a three part test to determine a program's compliance with the Establishment Clause: (1) the program has a secular purpose, (2) the program has a neutral effect and (3) the program does not entail excessive entanglement between the government and the religious organization. Later, the "entanglement" part of the test was absorbed by the "neutral effect" test, because entanglement at a certain level has to occur, even if only to ensure that the effect is in fact neutral as the program goes along![49] These tests are particularly important to the supervision aspect of the faith-based initiative.

Many faith-based organizations are nervous about accepting FBCI funding for their programs, a wariness that stems largely from the supervision aspects. Their trepidation illustrates the potential Constitutional entanglement issues that FBCI supervision could create. Faith-based groups are dubious for many different reasons, but most seem to revolve around government control arriving with government funding.

This government interference is a part of what the Establishment and Free Exercise clauses were meant to prevent. "The wall of separation between church and state" is a popular and powerful, though extra-Constitutional, image of the relationship between religion and the government. The image comes from both Enlightenment rationalist Thomas Jefferson, who wanted to protect government from the reaches of organized religion, and from religious leader Roger Williams, who wanted to protect the

[47] Everson, 330 U.S. at 11.
[48] Lemon v. Kurtzman, 403 U.S. 602 (1971); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).
[49] Agostini v. Felton, 521 U.S. 203 (1997, overruled on other grounds).

"garden" of the church from the "wilderness" of the government.[50] Under the Roger Williams version, the supervision aspect of FBCI funding threatens to constrain religious organizations in their prophetic, justice-oriented work as well as in their proselytizing mission and hiring practices (In the Pew Forum study, 78% of the individuals surveyed disapproved of the hiring exemption[51], a figure that seems to point to a future revision in that aspect of the FBCI law). Supervision itself must be constrained so as to protect the "garden wall" of the church. On the other hand, supervision is necessary under the Jeffersonian view of the independence and fairness of the government. Without supervision, the religious groups responsible for aspects of social services become the arbiters of social services policy rather than the government's elected officials, and the government is drawn into overly-entangled relationships with recipient religious organizations. The solution may lie in a revision of society's "wall" metaphor. The country's perception of the relationship between government and religion is starting to resemble a fence with many gates. Those gates must be carefully made and guarded to ensure that the Constitution is upheld, but the Constitution does not demand an impermeable wall of separation

Ways to Make Faith-Based Initiatives Work?

The Supreme Court will interpret the law in light of the evolving nature of the relationship between government and religion. Under the Court's latest summary of the law in *Zelman*, the government needs to identify factors for competition and methods for

[50] Howe, Mark DeWolfe, The Garden and the Wilderness: Religion and Government in American Constitutional History, (Univ. of Chicago, 1965).
[51] Faith-Based Funding Backed, but Church-State Doubts Abound, Pew Forum for Religion and Public Life, April 10, 2001.

supervision that will treat all grant-seeking groups fairly, evaluate the groups in ways that do not violate the Establishment clause and do not over-entangle it with religious groups. Such methods perhaps do not exist, but the faith-based initiative will have to aim for this goal. The faith-based initiative is too popular of an idea to disappear completely, and it probably would not serve the nation's impoverished individuals well if it did disappear. However, its practicality and popularity must not overwhelm our principles and our interest as a nation in the ideas and the "hows" behind our actions.

Voucher Solutions' Potential for Success

Although vouchers are seen by many as the ultimate solution to the Establishment Clause issues of the faith-based initiative, this enthusiasm does not take account of the important differences between the school and social services contexts. Vouchers are gaining support from the Court and the country for educational purposes, but they are not an adequate solution for the needs of impoverished individuals, as discussed above. Carefully awarded grants are a better fit for poverty issues, both in terms of the Constitution and practicalities.

Data Collection Improvement

Another potential improvement for the competition and supervision issues is the development of clearly defined, objectively reported outcome data that could be used to assess program "success". Such factors would be properly applied only to the services that lent themselves to such analysis—hunger organizations, housing groups, employment services, etc—the groups that could continue to receive money from the

government because their work can be segregated between religious and non-religious activities. Additionally, factors like location and proximity to target populations, access and ties to the community, and the local need for assistance could play a role in determining which initiatives have the capacity to serve and deserve government dollars. These factors would help to insure fairness between groups of various religions providing non-invasive services, but they do not adequately address the "how" questions that are at the heart of the controversy over the faith-based initiative, especially in the attitude-changing services.

The Faith-Based Initiative is Appropriate for "Disentangled" Services Only

The difficult questions about "how" an agency does its work, about whether religion plays an impermissibly large role in a group's services in light of government funding, will require measurement that reaches far beyond objectively measured charts of outcome statistics. It does not seem possible for the government to select or supervise groups that deeply intertwine their religion with their services and follow the Establishment clause at the same time. Only for the services in which the religion can be effectively disentangled from the secular purpose can the government evaluate and fund any faith-based groups under the Establishment clause.

The same holds true under the factors for supervision of groups once they receive their grants. Groups that can demonstrate separate operations for their religious and "secular" activities and funding will be able to submit to oversight in ways that do not compromise their religious mission. The government can set up clear standards for managing money and clear guidelines for the type of service contracted for. Uniformity

in standards and clear boundaries seem to be the way for the government to avoid Constitutional problems with this plan; hopefully such standards will not stifle the flexibility that may have made these groups so attractively 'successful' in the first place.

Constitutionally permitted factors of competition and supervision exist, but they will work well only with forms of service that do not involve inherently religious components. Some basic-needs type services provided by faith-based organizations do not have interwoven religious elements, and these types of services are ideal for the faith-based initiative. By funding such programs (many of which are already funded amply by the government, and require no expansion of FBCI), the government will free up religious groups' own funds to pursue the deeper faith-based services that run afoul of the Constitution—which will hopefully be a form of aid to religion that is indirect enough to survive Constitutional challenge.

The deeply faith-based services are simply not compatible with government funding. The programs do seem to be successful, and that success (however one measures it) likely stems from the facts that the groups are on various missions and religious experiences tend to affect people deeply. Under the Constitution, however, the government simply cannot participate in such activities. The doctrine from the Supreme Court as well as the attitude of the country could well change the meaning of our Constitution to clearly embrace or reject the faith-based initiative in any of its forms. As it stands, however, the government is truly able to fund only groups that provide services that can be separated from issues of deeply personal freedom of conscience. The government stands as gatekeeper in the mythical fence between religion and government

when it begins to distribute funding to religious groups, and the first amendment's religion clauses must continue to serve as the test for passing the gate.