THE FAITH-BASED INITIATIVE, CHARITABLE CHOICE, AND PROTECTING THE FREE SPEECH RIGHTS OF FAITH-BASED ORGANIZATIONS

VERNADETTE RAMIREZ BROYLES, ESQ.*

We ought not to worry about faith in our society. We ought to welcome it into our programs. We ought to welcome it in the welfare system. We ought to recognize the healing power of faith in our society.

—President George W. Bush[1]

* Public Policy Director and Legal Counsel, We Care America, Washington D.C.; President G. W. Bush appointee to the Coordinating Counsel on Juvenile Justice and Delinquency Prevention; Attorney General Ashcroft appointee to the National Advisory Committee on Violence Against Women; J.D. 1995, Harvard Law School; B.A. 1987, Yale University.

1. President George W. Bush, Remarks by the President on Welfare Reform (Apr. 18, 2002).

As part of the "faith-based initiative," President Bush has welcomed the faith community back into the public square as equal partners alongside government, corporate, and other community groups in the war on poverty and dependency. Significantly, the President vowed to issue this "call to arms" without impairing the religious character of faith-based social programs that respond.

As this initiative moves forward, however, there is an inadequate understanding of the constitutional protections afforded faith-based organizations ("FBOs") to freely express their unique religious solutions and perspectives on social issues without being excluded from direct public funding. Current statutes and policies that discriminate against the religious viewpoints of FBOs have the effect of suppressing their unique character and risk alienating them entirely from participating in government programs. More significantly, they deny FBOs the right of freedom of speech guaranteed in the United States Constitution.

One example of the threat to FBOs' free speech rights is a section of Charitable Choice (a provision of the Welfare Reform law) that prohibits the use of federal funds for "sectarian instruction" or "proselytizing" by private social service organizations. Agency guidelines contain similar speech restrictions as a condition of funding. While the intent behind such prohibitions may be to avoid the use of public funds for exclusively religious activities, these injunctions are likely to restrict speech that conveys a religious perspective relevant to publicly funded social issues. As such, they risk violating FBOs' free speech rights by subjecting them to viewpoint discrimination against their constitutionally protected religious speech.

This article addresses the free speech protections for the religious speech of faith-based social service providers and the Establishment Clause concerns involved in direct funding of FBOs. Part I discusses how many FBOs incorporate religious viewpoints on social problems (like drug addiction) into their programs and the religious speech restrictions in Charitable Choice and in federal agency guidelines. Part II discusses the free speech protections afforded FBOs for their religious social perspectives in direct government funding. This section explains that to exclude FBOs from public benefits solely because of their religious perspectives concerning social issues would constitute discrimination based on the speaker's point of view, in violation of the First Amendment guarantee to freedom of speech. Part III addresses the Establishment Clause concerns raised by direct

public funding of expressively religious social service providers. This section discusses how viewpoint discrimination would violate the principle of neutrality toward religion required by the Establishment Clause and risks excessive entanglement with religion. It, furthermore, clarifies that the concern for government religious indoctrination does not justify violating FBOs' free speech rights. Part IV provides specific policy recommendations on ways to prevent both viewpoint discrimination against FBOs and government establishment of religion as the faith-based initiative moves forward.

Fundamentally at issue in this arena is whether faith-based solutions are to be granted equal recognition and protection (as promised) in the marketplace of ideas relative to the social problems that plague our communities. In order for the faith-based initiative to remain true to its original intent, FBOs must be granted equal right to speak freely on social issues from their unique faith-based perspectives without fear of censorship, exclusion, or loss of funding.

I. CONTEXT

A. Many FBOs Express Religious Perspectives on Social Problems

Many faith-based social service providers adopt a holistic approach to social disorders. These organizations operate from a worldview in which no area of a person's life can be adequately addressed in isolation from the spiritual and moral—that spiritual and moral well-being have a profound and direct effect on a person's psychological, physical, social and economic well-being. As a result, these FBOs routinely express spiritual and religious perspectives and solutions as an integral part of their social programs.

This approach has, for generations, proved invaluable in the war on hopelessness. More recently, it also has begun to receive credible support from the scientific and academic community. For example, The National Center on Addiction and Substance Abuse at Columbia University recently examined the therapeutic role of religion and spirituality in the prevention and treatment of substance abuse and addiction.[2] Its report concluded that religion and spirituality can be important, and sometimes determinative, companions to the treatment

2. THE NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV., SO HELP ME GOD: SUBSTANCE ABUSE, RELIGION AND SPIRITUALITY (2001). The authors reviewed over 300 publications and examined programs that incorporate religious components in their methodology.

and recovery process in substance abuse addiction. Programs that incorporate spiritually-based components demonstrate superior treatment outcomes to those lacking a spiritual base. The report specifically recommends that substance abuse specialists discuss patients' and clients' spiritual needs and desires in order to better serve them. Ultimately, the authors concluded:

> [I]f ever the sum were greater than the parts it is in combining the power of God, religion and spirituality with the power of science and professional medicine to prevent and treat substance abuse and addiction . . . . [A] better appreciation by the medical profession, especially psychiatrists and psychologists, of *the power of God, religion and spirituality to help patients with this disease* holds enormous potential for prevention and treatment of substance abuse and addiction that can help millions of Americans and their families.[3]

It is, thus, understandable that faith-based practitioners view the explicitly spiritual components of their programs (such as prayer or discussion of relevant scriptural principles), used in conjunction with conventional social services, as fundamental to their ability to achieve desirable secular, social goals. Prohibitions on their ability to share religious perspectives and discuss the psycho-spiritual needs of clients as an integral part of their social programs would substantially compromise their effectiveness, as well as their faith-based character.

In addition, many clients specifically prefer to receive social services from faith-based providers. The reason for this preference is several-fold. Many clients share the faith perspective of FBOs and perceive a therapeutic value in addressing spiritual concerns and solutions as part of their assistance. Perhaps as a result, many clients experience more favorable outcomes with faith-based programs and feel they can only be effectively helped in such a setting. Moreover, many FBOs are part of the fabric of their community and provide an accessible, trusted, and familiar environment. Therefore, allowing expressively faith-based providers to participate in government funding on equal footing with other organizations *empowers clients' choices* and protects against the government discriminating against *beneficiaries'* religious choices and perspectives.

B. Charitable Choice and Agency Guidelines Impose Speech

---

3. Joseph A. Califano, Jr., *Accompanying Statement* to THE NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV., SO HELP ME GOD: SUBSTANCE ABUSE, RELIGION AND SPIRITUALITY, at ii (2002) (emphasis added).

Restrictions in Directly Funded Programs

Charitable Choice is a provision of the 1996 Welfare Reform Act,[4] the Community Services Block Grant,[5] and programs within the Substance Abuse and Mental Health Services Administration.[6] This provision was designed to encourage states to enlist the aid of faith-based providers in the fight against poverty and other social ills. It allows faith-based providers to compete on equal footing with other private entities for social service grants, contracts, and vouchers, while protecting providers' autonomy, religious character, and Title VII religious employment exemption.[7] It also forbids religious discrimination against beneficiaries and requires that an alternative be provided for those who do not wish to be served by a FBO.

The President has encouraged Congress to expand Charitable Choice to additional federal programs. To that end, the Community Solutions Act was passed by the House of Representatives in the summer of 2001,[8] and Charitable Choice expansion legislation awaits introduction in the Senate. And on December 12, 2002, President Bush signed an Executive Order expanding the basic charitable choice provisions to virtually all social services.[9]

Charitable Choice prohibits federal funds (provided directly to FBOs) from being expended for "sectarian worship, instruction, or proselytization" (the "religious speech restriction").[10] The Community Solutions Act and the President's recent Executive Order retain this religious speech restriction for directly funded programs.[11]

Federal agency guidelines also contain similar speech restrictions in a variety of contexts. For instance, the AmeriCorps program of the Corporation for National and Community Service prohibits grantees from engaging in "religious instruction" or "any form of religious proselytizing" while charging time to the program.[12]

Because the Charitable Choice religious speech restriction and similar agency guidelines may be defined broadly to include all

4. 42 U.S.C. §§ 601-619 (2000).
5. *Id.* § 9920 (2000).
6. *Id.* § 290kk (2000).
7. *Id.* § 604a (2000).
8. H.R. 7, 107th Cong. § 201 (2001).
9. *See* Exec. Order No. 13279, 67 Fed. Reg. 77141 (Dec. 12, 2002).
10. 42 U.S.C. § 604a(j).
11. H.R. 7, 107th Cong. § 201 (2001).
12. AMERICORPS, CORP. FOR NAT'L AND CMTY. SERV., 2003 AMERICORPS GUIDELINES 32 (2003).

religious speech, government officials charged with implementing these restrictions are likely to view the religious speech of FBOs on social issues as prohibited. Recent Supreme Court decisions, however, provide that relevant religious perspectives on social issues, including speech that some may describe as "proselytizing" and "religious instruction," are protected under the Free Speech Clause. The restrictions in Charitable Choice and agency guidelines will, therefore, likely result in the denial of the freedom of speech for FBOs who integrate religious perspectives into their programs.

II. FREE SPEECH PROTECTIONS FOR FAITH-BASED PROVIDERS

This section discusses the First Amendment protections afforded faith-based providers for their socially relevant religious perspectives in direct government funding decisions. The Supreme Court has held that the Free Speech Clause of the U.S. Constitution forbids the government to discriminate against a group based solely on their point of view, perspective, or motivating ideology on otherwise relevant subjects. The government discriminates against FBOs when it denies them the same funding or access provided to others simply because of the religious perspectives expressed in their programs. Speech that addresses social topics from a religious perspective must not be subjected to such "viewpoint discrimination" in government funding decisions.

A threshold question, of course, is whether federal funding of social service programs raises legitimate free speech issues. This section explains that the Supreme Court has progressively moved away from a formalistic "public forum" analysis in favor of one that, essentially, asks whether the government has placed a substantial restriction on private speech. Because the religious speech of faith-based contractors and grantees is private—and not government—speech, government funding policies that substantially burden FBOs' speech implicate private speech rights. This section, furthermore, addresses erroneous conclusions reached regarding this important issue in the recent faith-based initiative district court decision, *Freedom from Religion Foundation, Inc. v. McCallum.*

A. The Free Speech Clause Protects the Religious Speech of Faith-Based Providers from Viewpoint Discrimination

The most recent Supreme Court decisions to address the

intersection between free speech rights and the Establishment Clause, *Rosenberger v. Rector of the University of Virginia*[13] and *Good News Club v. Milford Central School*,[14] and the recent speech cases, *Board of Regents v. Southworth*[15] and *Legal Services Corp. v. Velazquez*,[16] provide a timely roadmap for determining the appropriate bounds of religious speech in the current faith-based initiative. Collectively, these cases support the conclusion that excluding FBOs from public benefits provided all other organizations solely because of their religious solutions and perspectives on social issues constitutes discrimination based on the speaker's point of view. Such government viewpoint discrimination violates the First Amendment guarantee to freedom of speech.

In *Rosenberger*, the University of Virginia denied funding to a student group for the cost of printing their student newspaper, citing the religious content of their publication.[17] The student paper discussed news, social and cultural topics from a decidedly Christian religious perspective, even inviting people to a relationship with Jesus Christ and discussing scripture as it relates to life issues.[18]

Despite the explicitly religious nature of the views expressed, the Supreme Court held that the University engaged in viewpoint discrimination when it denied funding for the student group because of the religious viewpoints espoused in its newspaper.[19] Significantly, the Court held that the University, a public institution, could not fund some student groups' speech, while withholding funds from others simply because of the religious nature of their views on social issues.[20]

As explained in *Rosenberger*, viewpoint discrimination occurs when the government selects a speaker for disfavored treatment based on their point of view on otherwise permissible subjects. The government may exclude speech on a subject that is outside the scope or purpose of the public program or forum.[21] It cannot, however, discriminate against speech on subjects that are otherwise within the

13. 515 U.S. 819 (1995).
14. 533 U.S. 98 (2001).
15. 529 U.S. 217 (2000).
16. 531 U.S. 533, 544 (2001).
17. *See Rosenberger*, 515. U.S. at 827.
18. *See id.* at 826.
19. *See id.* at 845-46.
20. *See id.*
21. *See* Rust v. Sullivan, 500 U.S. 173 (1991).

scope or purpose of the program or forum, based on the speaker's motivating ideology, opinion, or perspective.[22]

The requirement of viewpoint neutrality in publicly funded programs elaborated in *Rosenberger* was reaffirmed by the Court in *Southworth*.[23] There, the University of Wisconsin charged student fees to support a variety of extracurricular activities. Student groups applied to the University for a portion of collected fees. The plaintiffs objected to fees going to groups whose speech offended their personal beliefs.

The Supreme Court, nevertheless, upheld the University's policy of funding diverse student speech so long as the program was viewpoint neutral, stating, "[t]he proper measure, and the principal standard of protection for objecting students . . . is the requirement of *viewpoint neutrality* in the allocation of funding support."[24] The Court again found it improper for a public entity to prefer some viewpoints over others in the disbursement of public funds.

The requirement of viewpoint neutrality is also addressed in the "public access" cases. Here the Supreme Court has ruled that the government may not deny access to its facilities based on the religious viewpoints of faith-based groups on subjects otherwise permitted within the forum.[25]

In the recent public access case, *Good News Club v. Milford Central School*, a public school denied access to an after school club that taught character development and civic moral lessons from a religious perspective.[26] Notably, the club taught character lessons (such as overcoming jealousy, how to treat others, and obedience) by telling Bible stories, memorizing scripture, prayer, and encouraging children to cultivate a relationship with God.[27] Nevertheless, the

22. *See Rosenberger*, 515 U.S. 819 (1995); *see also* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-07 (2001) (holding that the State's power to restrict speech does not extend to the right to engage in viewpoint discrimination); Bd. of Regents v. Southworth, 529 U.S. 217, 221 (2000) (finding that it is within a public university's First Amendment rights to charge students an activity fee used to facilitate extracurricular student speech, provided the program is viewpoint neutral); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) (finding that the school district violated the Free Speech Clause of the First Amendment when it denied a church access to school facilities for a film exhibition based solely on the film's religious standpoint).

23. *Southworth*, 529 U.S. 217 (2000).

24. *Id.* at 233 (emphasis added).

25. *See Lamb's Chapel*, 508 U.S. 384 (1993); Bd. of Ed. v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).

26. 533 U.S. 98 (2001).

27. *See id.* at 103, 108-09.

Court held that the school violated the club's free speech rights by denying the club access on the ground that it approached these secular topics from a religious perspective.[28]

Similarly, in an earlier public access case, *Lamb's Chapel v. Center Moriches Union Free School District*, a public school district denied access to show a film series with a religious perspective on family and child rearing.[29] The Court held that the school could not discriminate on the basis of viewpoint by "permit[ting] school property to be used for the presentation of *all* views about family issues and child rearing *except* those dealing with the subject matter from a religious standpoint."[30] The Court explained, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."[31]

The Supreme Court has looked increasingly to the public access cases for instruction on speech rights in public funding cases. For instance, in *Rosenberger*, the Court rejected the government's distinction between the government funding speech and the government providing access to public facilities to speak as a justification for engaging in viewpoint discrimination.[32] While noting that the student activity fund was not a forum for speech in the traditional spatial or geographic sense, the Court, nevertheless, held that the same free speech principles applied.[33] Similarly, in *Southworth*, the Court held that "the standard of viewpoint neutrality" found in public forum cases was the *controlling standard* in that speech subsidy case.[34] Most recently in *Velazquez* (discussed below in greater detail), the Court looked to the limited forum cases as *instructive* to federal subsidy cases.[35]

The take-home message is that when the government selects speakers for disfavored treatment based solely on their particular viewpoint, the same speech protections should apply, regardless of whether it is in the context of providing access to public facilities or access to public funds.

---

28. *Id.* at 111-12.
29. 508 U.S. 384 (1993).
30. *Id.* at 393 (emphasis added).
31. *Id.* at 394 (quoting Cornelius v. NAACP Legal Def. & Ed. Fund, Inc., 473 U.S. 788, 806 (1985)).
32. Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 835 (1995).
33. *Id.* at 830.
34. Bd. of Regents v. Southworth, 529 U.S. 217, 230 (2000).
35. 531 U.S. 533, 544 (2001).

Much like the religious viewpoints expressed in *Rosenberger*, *Good News Club*, and *Lamb's Chapel*, many FBOs bring a message of personal empowerment through discussion of Biblical or spiritual principles and a relationship vis-à-vis a "higher power." Their religious perspectives form the premise and motivating ideology for their unique solutions to social dysfunctions (like drug addiction). Prayer and the discussion of religious texts that address social problems serve as the foundation for their perspectives and the positive outcomes achieved in their counseling, training, and social services in much the same way that secular programs incorporate purely ethical, humanist, feminist, or psychological instruction or ideology as the basis for positive behavior and character modification. Placing restraints on the socially relevant religious speech of faith-based programs, as a condition of funding, subjects FBOs to viewpoint discrimination not levied against other providers.

Restricting the religious speech of FBOs raises the specter of government censorship by subjecting religionists to uniquely disfavored treatment in publicly funded programs. As the Supreme Court explained in *Board of Education v. Mergens*: "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."[36]

Moreover, such restrictions eviscerate the very purposes of Charitable Choice. These include: (1) to "prohibit discrimination against religious organizations on the basis of religion" in government programs; and (2) to allow FBOs to participate equally in government programs "without impairing [their] religious character and autonomy."[37] An organization's character is inevitably actualized through its speech. It is, therefore, contradictory to purport to protect the "character" of FBOs while muzzling speech that expresses their character. And when FBOs realize their speech may be scrutinized for its religious content, many effective programs will be unwilling to participate in government programs for fear of compromising their

36. 496 U.S. 226, 248 (1990) (quoting McDaniel v. Paty, 435 U.S. 618, 641 (1978) (Brennan, J., concurring)).

37. H.R. 7, 107th Cong. § 201 (2001); *see also* 42 U.S.C. § 604a(b) (2000) ("The purpose of this section is to allow . . . religious organizations to accept certificates, vouchers, or other forms of disbursement . . . on the same basis as any other nongovernmental provider without impairing the religious character of such organizations.").

faith-based character.

B. The Free Speech Clause Protects Relevant Speech That May be Characterized as Proselytizing or Religious Instruction from Viewpoint Discrimination

Just because speech may be characterized as "proselytizing" or "religious instruction" does not exclude it from the First Amendment's protection against government viewpoint discrimination. In *Rosenberger* and *Good News Club*, the Supreme Court found a wide variety of explicitly religious speech pertinent to discussions of social issues and moral and character development. The speech included articles and discussions inviting others to consider a personal relationship with God, discussion and memorization of scripture, and prayer. Such speech could readily be characterized as "proselytizing" or "religious instruction" by government officials under a broad interpretation of these terms. Yet, the Supreme Court recognized the speech as expressions of relevant perspectives on social issues deserving constitutional protection from viewpoint discrimination under the Free Speech Clause.[38]

As the Court explained in *Rosenberger*: "Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered."[39] The Court warned that targeting speech from a religious perspective for exclusion would "raise[] the specter of governmental censorship" to ensure that all speech at issue "meet some baseline standard of secular orthodoxy."[40]

Similarly, in *Good News Club*, the lower court believed that its characterization of the club's activities as religious warranted different treatment from the other activities permitted by the school.[41] The Supreme Court, however, rejected the notion that "any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a 'pure' discussion of those issues."[42] For free speech purposes, the Court found "no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other

38. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 111 (2001); *Rosenberger*, 515 U.S. at 831-32.

39. *Rosenberger*, 515 U.S. at 831.

40. *Id.* at 844.

41. *Good News Club*, 533 U.S. at 110-11.

42. *Id.* at 111.

associations to provide a foundation for their lessons."[43]

Restrictions found in Charitable Choice, the President's Executive Order, and in agency guidelines on proselytizing and religious instruction were included, presumably, to avoid potential Establishment Clause problems where funds are directly provided to FBOs (discussed later in greater detail). These injunctions, however, are *overly broad* in that they are likely to restrict speech relevant to publicly funded social issues that is protected under the Free Speech Clause. As such, these restrictions are bound to subject many FBOs to viewpoint discrimination by government granting and contracting officials.

At first blush, the Community Solutions Act and President's Executive Order might appear to mollify the speech restrictions in the original Charitable Choice provision by requiring that proselytizing and religious instruction be "voluntary and separate."[44] This does little, however, to protect many FBOs from unconstitutional viewpoint discrimination. Such speech is part of the very core of their programs. FBOs could no more segregate their faith-based perspectives from their social programs (without dismantling them) than the Administration could separate the words "faith-based" from the faith-based initiative without abandoning it. The Community Solutions Act provides no cure to the First Amendment infirmities in this provision.

C. *Government Funding of Social Services Implicates Private Free Speech Rights*

A threshold question regarding the applicability of the Free Speech Clause in this area is whether government funding of social services raises free speech issues. The Supreme Court decisions in *Rosenberger* and *Southworth* and, more recently, *Velazquez*, make increasingly clear that public funding of nongovernmental social service providers implicates private speech rights.[45]

However, in a decision reached earlier this year, *Freedom from Religion Foundation, Inc. v. McCallum*, a federal district court in the

43. *Id. See also* Deboer v. Vill. of Oak Park, 267 F.3d 558 (7th Cir. 2001) (stating that by restricting the plaintiffs from using the means of expression that best reflects their views, albeit grounded in Christianity and the Bible, on how to address civic problems, the government was requiring a "sterility of speech" from the plaintiffs not demanded of other groups).

44. H.R. 7, 107th Cong. § 201 (2001).

45. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542 (2001).

Western District of Wisconsin departed from Supreme Court precedent and refrained from upholding the free speech rights of a faith-based substance abuse program.[46] This case is one of the earliest decisions by a federal court with direct implications for the faith-based initiative and is representative of the common, but erroneous, presumptions made about the speech rights of FBOs in this arena.

In *McCallum*, the State of Wisconsin provided Faith Works of Milwaukee ("Faith Works") various types of funding to provide residential substance abuse treatment and employment assistance to criminal offenders and welfare recipients.[47] Faith Works is a non-profit organization that operates a faith-based alcohol and drug addiction program. It is representative of many faith-based social-service providers in that it discusses issues of faith and spirituality (with those wishing to explore such matters) as part of helping clients achieve positive social goals (such as sobriety, responsible fatherhood, and stable employment). The program serves all religious backgrounds and does not require conversion to any faith.

The district court held that barring Faith Works from receiving direct unrestricted grants because of its sectarian viewpoint would not violate its free speech rights.[48] The court's free speech analysis, however, was based on an erroneous conclusion that the speech of faith-based providers receiving direct public funding is government speech.

This section discusses a number of reasons why the reasoning and conclusions reached in *McCallum* regarding the speech issue are incorrect. First, it failed to recognize that FBOs' speech—though publicly funded—is still private speech protected from viewpoint discrimination. Second, *McCallum* wrongfully argues that because government social services do not have as their object the creation of a forum for private speech, free speech protections against viewpoint discrimination do not apply. Third, this decision puts misplaced reliance on the *Rust v. Sullivan* decision. Fourth, its reasoning would, in effect, convert all private social services into an arm of the government merely by virtue of receiving a government subsidy.

---

46. *See* Freedom from Religion Found., Inc. v. McCallum, 179 F. Supp. 2d 950 (W.D. Wis. 2002). The court's opinion was issued on a motion for partial summary judgment.

47. *See id.* at 954-55.

48. *Id.* at 954.

1. The Speech of Publicly Subsidized Faith-Based Providers is Private Speech

When the State is the speaker or when the government uses private speakers to transmit information pertaining to its own program, the speech is government speech.[49] In such cases, the Supreme Court has held that viewpoint-based funding decisions can be sustained.[50] When the government itself, however, does not speak, but instead funds the speech of private speakers, the speech is private speech.[51]

The government cannot engage in viewpoint discrimination involving private speech. For instance, in *Rosenberger* the Supreme Court ruled the students' religious publication—though subsidized by a public university—was *private speech*, where the University of Virginia took pains to disassociate itself from the groups it funds and did not endorse or determine the content of the private group's speech.[52] The Court found the University's adherence to a rule of *viewpoint neutrality* in administering its student fee program prevented any mistaken impression that the student newspaper spoke for the University.[53]

Similarly, in *Southworth*, the Court held that the offending students' speech was private speech—though directly funded by the University—where the University was not directly responsible for its content.[54] Because the government subsidized speech at issue in these cases was private speech, the state could not subject the private expression to viewpoint discrimination.

These cases establish that the receipt of government funding alone does not convert a private entity's speech into government speech. The Supreme Court further clarified this point in *Velazquez*, its most recent public funding speech case.[55] *Velazquez* is particularly helpful because it involved federal funding for service—in this case, legal services.

In Velazquez, the Legal Services Corporation Act ("LSCA") established the Legal Service Corporation to distribute federal grants to local organizations for the purpose of providing legal services to

---

49. *See* Rust v. Sullivan, 500 U.S. 173, 193-95 (1991).

50. *Id. See also* Bd. of Regents v. Southworth, 529 U.S. 217, 229, 235 (2000) (stating that the government may use funds to advocate and defend its own policies).

51. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542 (2001).

52. *See* Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 841-42 (1995).

53. *Id.*

54. *Southworth*, 529 U.S. at 229.

55. *Velazquez*, 531 U.S. 533.

indigent persons seeking welfare benefits.[56] The LSCA prohibited funds from being used by local attorneys to challenge existing welfare law.[57]

Significantly, the Court held that the attorneys' speech was *private* speech, even though directly funded by a federal program.[58] The Court, thus, ruled that the LSCA violated the attorneys' free speech rights by placing restrictions on the views they may express, explaining: "As we have pointed out, '[i]t does not follow . . . that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors, but instead expends funds to encourage a diversity of views from private speakers.'"[59]

2. Whether the Government Specifically Intended to Create a Public Forum For Speech is Not the Issue

A common objection to asserting the speech rights of FBOs is the contention, articulated in *McCallum*, that government social services do not have as their object the creation of a forum for speech of private citizens.[60] The argument continues that *Rosenberger* and *Southworth* do not apply because in those cases the government specifically created a forum for diverse student speech.[61]

This argument is wrong for at least two reasons. First, this characterization of *Rosenberger* and *Southworth* is not accurate. The purpose of the Student Activity Fund in these cases was not the creation of a forum for speech, but, rather, to further the educational purpose of the University. It just so happened that the students' expressive activities were one of many activities that met this goal.

Second, even if *Rosenberger* and *Southworth* were distinguishable in the manner suggested, the Court's decision in *Velazquez* decidedly cuts the legs out from underneath this argument. In *Velazquez*, the purpose of the Legal Services Corporations Act was clearly not the creation of a public forum for speech, but rather the provision of legal services to indigent welfare clients. In fact, the Court specifically

---

56. *See id.* at 536.
57. *Id.* at 536-37.
58. *Id.* at 542.
59. *Id.* (alteration in original) (quoting Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 834 (1995)).
60. *See* Freedom From Religion Found., Inc. v. McCallum, 179 F. Supp. 2d 950, 978-79 (W.D. Wis. 2002).
61. *See id.* at 980.

rejected a similar attempt to distinguish *Rosenberger*, explaining: "Although the LSC program differs from the program at issue in *Rosenberger* in that its purpose is not to 'encourage a diversity of views,' the salient point is that, like the program in *Rosenberger*, the LSC program *was designed to facilitate private speech*, not to promote a governmental message."[62] Thus, the real inquiry, according to the Supreme Court, is not whether the government program had specifically intended to create a forum for speech, but whether the program substantially restricts private speech.

Starting in *Rosenberger*, the Court has moved away from a formalistic "public forum analysis" in its public subsidy speech cases. Here (and again in *Southworth*), the Court found that the student activity fund was not a forum for speech in the traditional sense, but rather only in a "metaphysical sense."[63] The Court, nevertheless, found that valid private speech rights were at issue.

In *Velazquez*, the Court made only passing reference to the public forum doctrine. Instead, its decision was founded on two basic questions: (1) is private speech a necessary and inherent part of the funded activities; and (2) has the government placed a substantial restriction on that speech.[64] The Court also gave some consideration to whether the restriction would tend to distort the existing private speech system or network; whether the government had a specific message to convey related to the funding; and whether the speech restrictions are such that they substantially foreclose access to services for some beneficiaries.

Government funding of faith-based social service providers clearly implicates private free speech rights under the Court's reasoning in *Velazquez*. The crux of the services FBOs provide to clients is information (on job opportunities, etc.), counseling (regarding job retention, substance abuse, etc.), and education (on job skills, parenting skills, etc.). Much like legal services, speech is clearly a necessary and inherent component in the provision of social services. By restricting the use of public funds for all socially relevant speech that may be characterized as "sectarian instruction" or "proselytizing," Charitable Choice and agency guidelines place substantial speech restrictions on faith-based providers whose religious perspectives are integral to their solutions to societal

62. *Velazquez*, 533 U.S. at 542 (emphasis added).
63. *Rosenberger*, 515 U.S. at 830.
64. *Velazquez*, 531 U.S. at 544.

problems.

There are several other relevant considerations. First, the faith community has long provided a system of caring for the needy in their communities through local and national charitable organizations and networks. Requiring FBOs to excise all "sectarian instruction" or "proselytizing" would distort the historic core and character of many faith-based programs. Second, federal agencies typically do not have a specific programmatic message to convey to beneficiaries. Neither do they typically determine the specific content of community programs that they fund. Third, because many clients specifically desire faith-based programs, speech restrictions resulting in the de-funding of many faith-based providers would, in effect, foreclose access to social services for many beneficiaries of federal assistance.

3. *McCallum* Places Too Much Reliance on *Rust v. Sullivan*

Ignoring both the holding and reasoning in *Velazquez*, the *McCallum* opinion relies almost exclusively on *Rust v. Sullivan* for its erroneous conclusion that Faith Works' speech was government speech. *Rust*, however, does not apply to the facts in McCallum (and similar faith-based settings) for at least two important reasons.

The first reason is that the Supreme Court did not sanction viewpoint discrimination against private speech in *Rust*—even where the government provides direct funding. In *Rust*, the government prohibited Title X grant recipients from using Title X funds to provide information about abortion services. The Court found that such information related to *post*-conception services, whereas the federal program chose to fund only *pre*-conception family planning services, an entirely different category of services.[65] The Court captured this distinction in its discussion of *Rust* in *Velazquez*, explaining, "Title X did not single out a particular idea for suppression because it was dangerous or disfavored." In other words, Rust did not involve viewpoint discrimination.[66] Rather, Congress was simply refusing to fund speech pertaining to activities that were *outside the scope* of the federal program.[67]

Furthermore, in *Velazquez*, the government had argued that, like *Rust*, the LSCA speech restrictions were necessary to "define the

65. *See* Rust v. Sullivan, 500 U.S. 173, 194-95 (1991).
66. *Velazquez*, 531 U.S. at 541 (explaining *Rust*, 500 U.S. at 194-95).
67. *Rust*, 500 U.S. at 193-94.

scope and contours of the federal program."[68] But the Court specifically rejected this argument, stating: "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."[69] The government was, in effect, seeking to define the "scope" of the legal services it funds by excluding only certain ideas.[70] This, the Court recognized, was impermissible viewpoint discrimination.[71]

An analogy from the social service setting may better illustrate the distinction between viewpoint discrimination and limiting the scope of the federal program in this context. Say a federal substance abuse program defines the scope of its program by specifically targeting funding for only short-term treatment and not long-term treatment. The government may refuse to fund speech activities relating to long-term residential treatment because such activities lie outside the defined scope of the program. It cannot, however, single out for exclusion only certain (otherwise relevant) ideas or perspectives pertaining to short-term treatment and attempt to cast such conditions as merely defining the scope of its program. Such restrictions constitute prohibited viewpoint discrimination.

The *Rust* decision finds no parallel in *McCallum* (or in similar scenarios involving faith-based social service providers). Unlike the disputed speech in *Rust*, the issue raised by the Wisconsin district court regarding Faith Works' speech was not that it pertained to a category of activities the government did not intend to fund. Faith Works provided precisely the type of services intended by the federal program. In fact, the court noted that spiritual issues were discussed specifically in order to promote the state objectives of providing alcohol and drug addiction treatment and obtaining stable employment.[72] Rather, the court's objection was that the *viewpoints* expressed by Faith Works regarding drug addiction and joblessness embraced a particular perspective—a religious perspective. The court, therefore, erroneously sanctioned government discrimination against selected views (here, faith-based views) that otherwise pertained to activities directly *within* the scope of its funding program. This,

68. *Velazquez*, 531 U.S. at 547.
69. *Id.*
70. *Id.* at 548.
71. *See id.* at 548-49.
72. *See* Freedom from Religion Found., Inc. v. McCallum, 179 F. Supp. 2d 950, 955 (W.D. Wis. 2002).

simply put, is viewpoint discrimination, which the First Amendment condemns.

There is a second important distinction between *Rust* and the faith-based initiative. Even if it may be argued that federal social programs convey a message analogous to that in *Rust*, this still would not justify viewpoint discrimination against FBOs. In *Rust*, the speech restriction directly furthered a goal of the federal program, which was "a value judgment favoring childbirth over abortion and implement[ing] that judgment by the allocation of public funds."[73] By contrast, the speech restrictions in Charitable Choice and agency guidelines do not further the underlying goals of federal social service programs. In fact, the only message conveyed by these restrictions is that religious views and perspectives on social matters are either less welcome or less legitimate than other competing worldviews.

4. *McCallum* Would Convert All Social Service Contractors and Grantees Into an Arm of the Government

Finally, the *McCallum* decision makes a remarkable statement that, if true, would change the entire complexion of the faith-based initiative: "[Wisconsin's] decision to privatize a portion of its social services does not . . . implicate the protected speech of individuals *any more than the state's decision to hire additional employees or purchase government vehicles*."[74] This reasoning would convert all FBOs (and, for that matter, all government contractors and grantees) into an arm of the state simply because they receive a government subsidy to help carry out their work. This is a remarkable proposition that misstates the law and, incidentally, would be received with consternation by the faith community (and other private contractors).

The mere receipt of government funding does not convert a private entity into a state actor. That is a much more complex question involving a number of considerations, such as the degree of direct control exerted over the day to day operations of the private organization, whether the purpose of the contract involves a traditional police power, and whether a third party would reasonably look to the private organization as an arm of the government.[75] The government subsidies granted Faith Works to assist drug addicted

73. Rust v. Sullivan, 500 U.S. 173, 192-93 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

74. *McCallum*, 179 F. Supp. 2d at 980.

75. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982).

individuals no more converted this private non-profit into an agent of the state, or its speech into government speech, than the federal grants received by private corporations to provide legal services to indigent clients in *Velazquez*.

It is important to recognize that faith-based social ministries do not become a "government program" simply because they receive federal dollars to do on a larger scale what they are already doing. FBOs have long been serving the social needs of their community, independent of the government. The fact that the goals and ideals of faith-based providers may overlap with the state's interests and goals in serving the needy does not make their program the government's program.

Like the speech in *Rosenberger* and *Velazquez*, the religious views of FBOs on social issues funded under Charitable Choice involve private—not government—speech. Charitable Choice specifically states that religious organizations participating in government programs remain autonomous from the government.[76] In fact, one of the main purposes of Charitable Choice (and of the faith-based initiative) was to encourage a greater diversity of *private* community-based solutions to social problems that plague our communities. A basic premise of Charitable Choice is that FBOs receiving government subsidies for their social programs remain separate private entities. If this was not true (and FBOs were to become a part of and speak for the government), then the protections in Charitable Choice for FBOs' religious character, art, and religious hiring exemption are arguably unconstitutional.

Clearly, Charitable Choice contemplates that religious social service entities do not speak for the government. Because the religious speech of faith-based providers is private speech, the Free Speech Clause protects FBOs from government discriminating against their religious perspectives on social matters.

III. ADDRESSING ESTABLISHMENT CLAUSE CONCERNS

It is axiomatic that the Establishment Clause forbids the government to fund exclusively religious activities. The Supreme Court has never held, however, that this restriction justifies or compels violating faith-based entities' free speech rights by subjecting them to viewpoint discrimination. To the contrary, when the government discriminates against faith-based providers solely

76. *See* 42 U.S.C. § 604a(d)(1) (2000).

because of their religious social views, it violates the principles of neutrality toward religion required by the Establishment Clause and risks greater entanglement with religion.

Rather than adopting a knee-jerk response that subjugates all First Amendment rights to Establishment Clause concerns, the government must be guided by *both* the Free Speech and Establishment Clauses in its funding policies. This section discusses ways to reconcile the two First Amendment clauses and creates an appropriate distinction between protected and prohibited religious speech activities that can act as a guide to policymakers.

A. *Viewpoint Discrimination Violates the Principle of Neutrality Toward Religion Required by the Establishment Clause*

The Establishment Clause requires the government to be neutral—not hostile—toward religion and religious expression. As demonstrated in *Zelman v. Simmons-Harris*[77], *Mitchell v. Helms*,[78] *Good News Club*,[79] and *Rosenberger*,[80] neutrality toward religion is emerging as perhaps the most significant (although not the sole) factor in the Court's evolving Establishment Clause jurisprudence. "[N]eutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[81]

In considering the University of Virginia's student funding policy, the Court in *Rosenberger* observed:

> The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which *could undermine the*

77. 536 U.S. 639 (2002) (Holding that because Ohio's school choice program, which allowed parents to use federal tuition assistance to send their children to a wide variety of schools, including private religious schools, did not violate the Establishment Clause because it was neutral with respect to religion and because government aid was directed toward religious schools wholly as a result of the genuine independent private choices of parents.)

78. 530 U.S. 793 (2000).

79. 533 U.S. 96, 106 (2001).

80. 515 U.S. 819, 839 (1995).

81. *Good News*, 533 U.S. at 114 (quoting *Rosenberger*, 515 U.S. at 839).

very neutrality the Establishment Clause requires.[82]

Thus, what has begun to emerge from the Court's recent First Amendment decisions is a *principle of neutrality* toward religion and religious speech as a unifying doctrine that would harmonize the various clauses of the First Amendment.

Like the University's failed policy in *Rosenberger*, Charitable Choice language and agency guidelines that, in effect, restrain religious speech on social issues would require government agencies to scan and interpret the speech of faith-based programs to discern their underlying assumptions respecting religious belief. Such action would foster unique hostility toward religious social perspectives not levied against other worldviews (ethical, secular moral, feminist, psychosocial, etc.) that form the basis of the behavior and character modification sought by other groups. This would undermine—not preserve—government neutrality toward religion in federal programs.[83]

Some might cite the "special Establishment Clause dangers" associated with direct monetary subsidies to religious organizations noted in *Mitchell* and prior cases.[84] A plurality of the Court in *Mitchell*, however, noted that this issue need not raise an insurmountable barrier to the direct provision of public funds to FBOs.[85] As the plurality explained, "It is arguable . . . that the principles of *neutrality* and *private choice* would be adequate to address those special risks."[86]

82. *Rosenberger*, 515 U.S. at 845-46 (emphasis added); *see also Good News*, 533 U.S. at 118 ("[W]e cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.").

83. Under the *Lemon* test (which has been little used in establishment and free speech decisions), to withstand an Establishment Clause challenge a government program of aid must: 1) serve a secular purpose; 2) not have the "primary effect" of advancing religion; and 3) not create "excessive entanglement" between religious organizations and the state. Funding expressively faith-based providers on equal footing with other organizations would pass the *Lemon* test. First, it serves the secular purpose of caring for the needy. Second, the primary effect would be to permit states to aid needy individuals by means of a variety of private organizations, some of which express a religious perspective on social problems. The excessive entanglement prong is discussedin the text. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

84. *See* Mitchell v. Helms, 530 U.S. 793, 818-19 (2000).

85. *See id.* at 819 n.8.

86. *Id.*

B. Viewpoint Neutral Protection of FBOs' Religious Speech Would Not Constitute an Endorsement of Religion

The other factor most prominently discussed in recent Establishment Clause cases is whether the government would be perceived as endorsing the religious message of religious organizations. As Justice O'Connor explained in *Mergens*, when the government treats religious and non-religious groups equally, "the message is one of neutrality rather than endorsement."[87]

In *Rosenberger*, the Court clarified the distinction between government speech endorsing religion, which is forbidden by the Establishment Clause, and private speech endorsing religion, which is not.[88] Because the University disassociated itself from the private group's speech and allowed other groups equal opportunity to express their views, the Court found the government was not endorsing religion.[89] The Court held that a *policy of viewpoint neutrality* would prevent any mistaken impression that the religious student group spoke for the University.[90]

Similarly, under Charitable Choice the government would not be endorsing the religious speech of FBOs receiving government subsidies for several reasons: (1) Charitable Choice permits access to funding for FBOs "on the same basis" as all other organizations; and (2) Charitable Choice states that FBOs remain independent from state agencies. The Community Solutions Act specifically renounces any endorsement of FBOs' religious beliefs. For the government to provide funding to expressively faith-based programs on an equal (view-point neutral) basis with other nongovernmental providers would not communicate an endorsement of religion, but rather neutrality toward religion and religious perspectives.

C. Prohibitions on Religious Speech Risk Excessive Entanglement

When the government discriminates against the religious speech of FBOs it risks greater entanglement with religion than adopting a policy that provides an even playing field for all perspectives on social problems, including religious ones. As the Supreme Court explained in *Rosenberger*, to draw distinctions between speech that is

87. Bd. of Ed. v. Mergens, 496 U.S. 226, 248 (1990); *see also* Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

88. *See* Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 841 (1995).

89. *See id.* at 841-42.

90. *Id.* at 839.

evangelistic in nature and speech that is not "too religious" would require the government "to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquires would tend inevitably to entangle the State with religion in a manner forbidden by our cases."[91]

Restrictions imposed in Charitable Choice or agency guidelines on relevant religious speech would require the State to parse through FBOs' speech and make judgments about whether their viewpoints are too religious, not religious, or just religious enough. Such judgments are surely beyond the competency of government officials. And it would entangle the government in the religious beliefs of faith-based providers far more than a religion-blind and viewpoint neutral funding policy.

D. Concern for Government Religious Indoctrination Does Not Override Free Speech Protections for FBOs

The Supreme Court has stated in a number of cases, most recently in *Mitchell*, that the diversion of public funds (disbursed directly to an organization) to promote religious indoctrination violates the Establishment Clause.[92] The Supreme Court has never held, however, that this restriction justifies or compels violating faith-based entities' free speech rights by subjecting them to viewpoint discrimination. Instead, the caselaw suggests the government must be guided by *both* the Free Speech and Establishment Clauses in its funding policies.

This section discusses two ways to reconcile both First Amendment clauses in this arena. The first way, suggested by a unified reading of *Rosenberger*, *Mitchell*, and *Good News Club*, is to recognize that when faith-based providers discuss relevant religious perspectives as part of their social programs, they are not engaging in "religious indoctrination" as intended in Establishment case law. Rather, they are engaging in speech that furthers a secular social goal and is

91. *Id.* at 845 (quoting Widmar v. Vincent, 454 U.S. 263, 270 (1981)).

92. *See* Mitchell v. Helms, 530 U.S. 793 (2000); *see also* Agostini v. Felton, 521 U.S. 203, 234 (1997) (finding that a federally funded program providing remedial instruction did not violate the Establishment Clause where aid was provided on a neutral basis and aid did not result in governmental indoctrination); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993) (finding that government aid in a neutral service within a sectarian school does not violate the Establishment Clause, if aid is not skewed towards religion); Bowen v. Kendrick, 487 U.S. 589, 602-03 (1988) (holding that a statute can only be held invalid on its face if the statute is motivated solely by an impermissibly religious purpose, has the primary effect of advancing religion, or requires excessive entanglement between church and state).

equally deserving of free speech protections against viewpoint discrimination. The second is to recognize the difference between private and public religious indoctrination.

In *McCallum*, the district court held that direct public funding of faith-based providers (like Faith Works) who weave religious perspectives into their programs violates the Establishment Clause.[93] The problem with applying this principle is that the Supreme Court has not clearly defined what constitutes prohibited "religious indoctrination," particularly in the context of competing free speech rights. The Court has, at various times, merely decided whether providing funds to certain types of religiously-affiliated institutions would violate the government religious indoctrination prohibition, leaving open the question of precisely what activities the Establishment Clause prohibits.

Because the speech rights of FBOs were *not* before the Court in *Mitchell* (and in prior cases), the Court has not had cause to define the limits of its non-diversion indoctrination principle versus the need to protect a religious group's freedom of speech.[94] By basing its Establishment Clause analysis almost entirely on *Mitchell* (and its antecedents), *McCallum* fails to adequately recognize FBOs' speech rights and overemphasizes Establishment Clause concerns for governmental religious indoctrination.

The only case in which the Supreme Court has considered *both* the free speech protections against viewpoint discrimination and religious indoctrination concerns in the context of direct public subsidies for a faith-based group is *Rosenberger*. Given the lack of guidance from the Court on these issues, particular attention must be given this decision in order to reconcile both First Amendment clauses in this arena.

In *Rosenberger*, the Supreme Court struck down a policy by the University of Virginia designed to restrict funding for groups that engaged in speech that "primarily promotes or manifests a particular belie[f] in or about a deity or ultimate reality" under the Free Speech Clause.[95] Concern for government funding of religious indoctrination

93. Freedom from Religion Found. Inc. v. McCallum, 179 F. Supp. 2d 950 (W.D. Wis. 2002).

94. Similarly, in *Bowen v. Kendrick*, while the dissent discussed evidence that religious beliefs were discussed by religious private organization receiving grants to provide services related to teen pregnancy and parenting, the Court did not address whether providing such social services from a religious point of view renders such activities "religious indoctrination." *See* Bowen v. Kendrick, 487 U.S. 589 (1988).

95. *Rosenberger*, 515 U.S. at 825 (alteration in original) (citation omitted).

was the primary reason the Fourth Circuit had held that funding the religious student group was unconstitutional. The court of appeals found that the religious student publication was devoted to discussing and advancing a Christian theology and that subsidizing this group would "send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wider promulgation of such values."[96]

The Supreme Court overturned the Fourth Circuit's decision, choosing instead to reconcile the apparent conflict between the First Amendment clauses that the Fourth Circuit created. Significantly, the Court held that valid free speech rights were implicated by the government's viewpoint discrimination against the group's religious perspectives and that the government does not establish religion merely by funding relevant religious speech pursuant to a viewpoint neutral policy that funded a diversity of views.[97]

Justice O'Connor's concurrence in *Rosenberger* provides insight into the interplay between the two First Amendment considerations in subsidy cases.[98] She noted that funding the student religious publication potentially implicated the Establishment Clause prohibition on state funding of religious activities.[99] She stated, however, that refusing to finance the student religious publication on equal footing with other organizations would violate the principle of neutrality toward religion found in the religion clauses, as well as the Free Speech Clause.[100] Therefore, despite her recognition of a possible establishment concern, she agreed with the majority that, by withholding from the religious student group a subsidy the University provides generally to others, the University discriminated against the group on the basis of their religious viewpoint and violated their free speech rights.[101]

Thus, the *Rosenberger* decision supports the proposition that, when government funding practices implicate both establishment *and* free speech interests, it cannot be presumed the Establishment Clause take precedence. The Court has never held that the prohibition on

---

96. Rosenberger v. Rector of Univ. of Va., 18 F.3d 269, 286 (4th Cir. 1994).

97. *Rosenberger*, 515 U.S. at 839.

98. Justice O'Connor's concurrence is particularly noteworthy because her concurrence in *Mitchell* firmly denounced diversion of (directly provided) state funds to religious activities and is generally considered the controlling opinion in that case. *See Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring).

99. *See Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring).

100. *See id.* at 847, 852 (O'Connor, J., concurring).

101. *See id.* at 852 (O'Connor, J., concurring).

government religious indoctrination compels the state to subject faith-based providers to viewpoint discrimination and to deny them the freedom of speech through its funding decisions.[102] Instead, the state must be guided by the rights and concerns attendant to *both* First Amendment clauses in its funding policies.

Neither can the rule be that all government funding of religious speech, including speech pertaining to social matters, violates the Establishment Clause—if that were so, *Rosenberger* could not have been decided as it was. Instead, *Rosenberger* demonstrates that the free speech prohibition on viewpoint discrimination justifies subsidizing religious perspectives that furthers the state's goals. This serves the principle of government neutrality toward religion found in both the Establishment and Free Speech Clauses.

The *Good News Club* decision provides additional insight into the Court's current view of the intersection between the Free Speech and Establishment Clauses. The lower court had found that, as part of its character development program, the club focused on teaching children how to cultivate their relationship with God, Bible storytelling, and scripture memorization. The court characterized this speech as "quintessentially religious."[103] But, the Supreme Court rejected this segregated view of religious expression, explaining:

> We disagree that something that is 'quintessentially religious' or 'decidedly religious in nature' cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint . . . . What matters for purposes of the Free Speech Clause is that *we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons.* It is apparent the unstated principle of the [c]ourt of [a]ppeals' [sic] reasoning is its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a 'pure' discussion of those issues. According to the [c]ourt of [a]ppeals, reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not. We, however, have never reached such a conclusion.[104]

---

102. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 113 (2001) ("[I]t is not clear whether a state's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination.").

103. Good News Club v. Milford Cent. Sch., 202 F.3d 502, 510 (2d Cir. 2000), *rev'd and remanded*, 533 U.S. 98 (2001).

104. *Good News Club*, 533 U.S. at 111 (emphasis added).

Thus, under a unified reading of *Good News Club*, *Mitchell*, and *Rosenberger*, the Establishment and Free Speech Clauses may be reconciled by recognizing that when faith-based providers use religious principles to discuss social issues, they are not engaged in *"religious indoctrination"* (as contemplated by the Establishment decisions). Rather, their speech is part of a "pure" discussion of social dysfunctions—one of many viewpoints achieving a secular social goal, which deserves protection from viewpoint discrimination. So when Faith Works discusses the help of a "higher power" in achieving sobriety, it is not engaging in "religious indoctrination." Rather, it is engaged in drug rehabilitation, albeit from a particular—that is, religious—perspective.

This interpretation of the First Amendment clauses is most consistent with the underlying purpose of the Establishment Clause—to protect individual conscience by prohibiting government coercion in matters of religion.[105] Supreme Court decisions recognized government coercion as the essential element of an establishment of religion until 1962.[106] A categorical prohibition on direct funding of religious speech that furthers a secular social purpose does not advance the true intent of Establishment Clause. It be particularly ironic that the First Amendment, incorporated by the Fourteenth Amendment to protect the liberty interests of citizens against state governments, would be used to deny faith-based citizens a fundamental liberty—free speech.[107] A categorical religious speech restriction should not be read into the First Amendment where neither the Founders nor the Court's decisions clearly impose such a mandate.

A second way to reconcile the two First Amendment clauses is to recognize the important distinction between *private* and *government* religious indoctrination. The Establishment Clause targets only indoctrination that can reasonably be attributed to the government.[108] Private religious indoctrination, on the other hand, is permissible.

Because the religious speech of faith-based providers is private

---

105. *Cf.* LEO PFEFFER, CHURCH, STATE AND FREEDOM 20-30 (rev. ed. 1967); *see also* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) ("The Establishment Clause question is whether [the state] is *coercing* parents into sending their children to religious schools.") (emphasis added).

106. *Compare* McGowan v. Maryland, 366 U.S. 420 (1961), Zorach v. Clauson, 343 U.S. 306 (1952), McCollum v. Bd. of Ed. 333 U.S. 203 (1948), Everson v. Bd. of Ed., 330 U.S. 1 (1947), *with* Engel v. Vitale, 370 U.S. 421 (1962).

107. *See Zelman*, 536 U.S. 639 (J. Thomas concurrence).

108. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 808 (2000).

speech (even if publicly subsidized), any resulting religious indoctrination that might occur in faith-based programs should be viewed as private (not government) indoctrination. Put another way, when clients voluntarily choose to participate in faith-based programs and government funding of such programs is pursuant to a viewpoint (and religion) neutral policy, any religious indoctrination that may result from FBOs expressing religious views on social matters cannot reasonably be attributed to the government. If such speech is to be characterized as religious indoctrination at all, it is private indoctrination, which the Establishment Clause does not prohibit.

In determining the proper balance between these two First Amendment provisions, policymakers must consider the context and primary purpose served by the religious speech at issue. The critical distinction is whether such speech is part of an activity conducted for primarily religious purposes or if the speech is expressing a religious perspective on social matters as part of a social service that directly furthers the goals of the public funding agency (such as rehabilitating drug users). In the former case, such "exclusively religious activities" cannot be publicly funded because they do not serve the secular social purpose of the federal program; rather, their primary purpose and effect is to advance religion.[109] The latter speech, however, serves a secular purpose and its *primary* effect is not the advancement of religion, but the achievement of secular social goals. It is speech protected from viewpoint discrimination as one of many worldviews expressed on social matters.

It is also important to recognize that not every government action that has the *incidental effect* of advancing religion as a result of providing religionists equal treatment violates the Constitution.[110] The Establishment Clause did not intend for government to refrain from all benevolence toward religion or its adherents.[111] As the Court

109. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

110. *Zelman*, 536 U.S. 639 (2002).

111. *See* Tilton v. Richardson, 403 U.S. 672, 679 (1971) ("The crucial question is not whether *some benefit* accrues to the religious institution as a consequence of a legislative program, but whether its principal or primary effect advances religion.") (emphasis added); Roemer v. Md. Pub. Works Bd., 426 U.S. 736, 747 (1976) ("*Everson* and *Allen* put to rest any argument that the State may never act in such a way that has the *incidental effect* of facilitating religious activity.") (emphasis added); Bowen v. Kendrick, 487 U.S. 589, 607 (1988) (stating that *incidental* advancement of religion does not render a program of aid unconstitutional); Rosenberger v. Rector of the Univ. of Va., 515 U.S. at 843-44 (1995) ("Any benefit to religion is *incidental* to the government's provision of services for secular purposes on a religion neutral basis.") (emphasis added); Mitchell v. Helms, 530 U.S. 793 (2000).

explained in *Roemer v. Maryland Public Works Board*:

> [R]eligious institutions need not be quarantined from public benefits that are neutrally available to all . . . . Just as *Bradfield* dispels any notion that a religious person can never be in the State's pay for a secular purpose, *Everson* and *Allen* put to rest any argument that the State may never act in such a way that has the incidental effect of facilitating religious activity . . . . The Court never has held that religious activities must be discriminated against in this way.[112]

Finally, a number of considerations common to the social service context mediate in favor of upholding the free speech rights of faith-based providers over arguable Establishment Clause concerns. First, clients typically choose, and many specifically prefer, to receive social services from faith-based providers. Second, Charitable Choice requires the state to make an alternative available to objecting clients, which protects the voluntary nature of their choices.[113] Third, Charitable Choice expressly protects the independence of FBOs from state and federal government.[114] Fourth, state and federal agencies generally do not control the day to day operations or determine the content of community programs they fund. Fifth, public funding typically involves a competitive system that funds a wide array of private organizations. Finally, because FBOs currently represent a small percentage of organizations receiving public funds, faith-based programs hardly threaten to dominate the forum.[115]

These considerations are similar to those that were relevant to the Court's decision in *Rosenberger*: the student groups remained independent from the university; the university did not control the student group's speech; funding was provided to a wide array of views and activities; and the religious speech did not dominate the forum.[116] Thus, all things considered, the Establishment Clause injunction on government religious indoctrination would not prohibit direct public subsidies—on on a religion and viewpoint neutral basis—to FBOs that integrate religious perspectives and solutions into their social programs.

---

112. *Roemer*, 426 U.S. at 746-47 (1976).

113. *See* 42 U.S.C. § 604a(e)(1) (2000).

114. *See id.* § 604a(d)(1) (2000).

115. *Cf.* The White House, *Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs*, (2001), *at* http://www.whitehouse.gov/news/releases/2001/08/unlevelfield.html.

116. *See Rosenberger*, 515 U.S. at 842-44.

E. Clarifying Further the Distinction Between Protected Religious Speech and the Prohibited Funding of Religious Activities

The cases discussed in this article provide a proper distinction between religious activities that cannot be directly funded by public dollars and religious speech that must be protected from viewpoint discrimination in public funding. What follows is a *constitutionally-meaningful distinction* that can act as a guide to developing legal language and funding policies in both the Charitable Choice context and other state and federal agency settings:

> A) PROTECTED: religious views or perspectives, included as part of an FBO's social service program, that directly relate to and help accomplish the social objectives of the public funding agency
>
> B) PROHIBITED:
>
> > (1) FBOs using public funds for what might be termed "*exclusively religious activities*"—activities conducted for primarily religious purposes and that are not directed toward the social objectives of the government funding program
> >
> > (2) The government requiring clients to participate in faith-based programs

The use of public funds for speech in category (A) on a viewpoint neutral basis honors FBOs' free speech rights and does not violate the Establishment Clause. On the other hand, the Establishment Clause forbids using public funds for the activities listed under category (B). Examples of "*exclusively religious activities*" would include things like worship services and traditional religious observances. FBOs must support such religious activities with private dollars.

Additionally, the government cannot fund an expressively faith-based program and require people to attend it. It is also worth noting that, in addition to these constitutional prohibitions, the Charitable Choice provision prohibits FBOs from requiring clients to actively participate in a religious practice as a condition of providing services.[117]

This distinction may best be illustrated by an example. Consider a faith-based non-profit successfully rehabilitating substance abusers by providing drug abuse treatment and counseling. The program discusses Biblical or spiritual views of health, responsibility, self-control, and the value of exploring a relationship with a "higher

117. *See* 42 U.S.C. § 604a(g) (2000).

power" for achieving sobriety. Clients choose of their own free will to participate in this program, either because of its success or specifically because it offers the opportunity for relevant spiritual discussion. For the government to deny this program funding (or require it to separate out its faith-based views and solutions), and yet fund other substance abuse programs that discuss, for example, psychosocial principles, humanistic self-help, or ethical morality as the basis for their behavior modification, would constitute unconstitutional viewpoint discrimination against the FBO's perspective on drug addiction.

On the other hand, if our hypothetical faith-based program offered or required participation in Sunday morning (or Saturday evening) worship service, the government can and should require that public funds be segregated and not used for those activities. Nor could the government require or coerce participation in such a program. These distinctions protect the speech rights of FBOs who wish to receive direct government funding, the valid governmental concern for establishing religion, and the rights of beneficiaries.

IV. RECOMMENDATIONS

Because the constitutional protections afforded FBOs have been poorly understood, a climate of confusion has marked policymaking and implementation of the faith-based initiative. This section outlines the key parameters of government programs that directly fund FBOs. It also provides specific policy recommendations that would help prevent both viewpoint discrimination against FBOs and government establishment of religion. These recommendations include: 1) needed clarifications of and modifications to Charitable Choice language and agency guidelines; 2) the use of a separate 501(c)(3) for publicly funded programs; 3) suggestions for ensuring that participation in faith-based programs is voluntary; and 4) the need to avoid categorizing FBOs by their use of religious speech.

A. Agency Guidelines Must Clarify Existing Charitable Choice Provisions and Amend Existing Agency Restrictions

At present there are no regulations or guidelines defining "sectarian instruction, worship, or proselytization" in Charitable Choice. Guidelines interpreting this provision must be developed for the federal and state agencies tasked with implementing this law.

Such guidelines should interpret this restriction in a manner that

addresses the real establishment concerns and avoids violating valid free speech rights. They must make clear that what this section prohibits is the use of federal funds for exclusively religious activities—that is, activities conducted for primarily religious reasons and that are not directed toward the social objectives of the government funding program. But they must also make clear that speech that is part of a FBO's social service program—including religious content or perspectives relating directly to the objectives of the government funding program—is not prohibited.

Furthermore, as noted above, other federal programs contain similar prohibitions on religious instruction and proselytizing as a condition of direct funding. These restrictions should be removed or amended to state that only the direct public funding of explicitly religious activities is prohibited while expressly protecting the religious viewpoints of FBOs.

B. Charitable Choice Expansion Legislation in Congress Should be Amended

Because of the problems created for First Amendment rights, language limiting the use of federal funds for "sectarian worship, instruction, or proselytization" should be deleted altogether from future expansions of Charitable Choice. Like the Charitable Choice implementing guidelines above, such language should be replaced with language that addresses the real establishment concerns in the use of public funds by FBOs and protect FBOs' free speech rights. For instance, the provision might read (proposed changes to the Community Solutions Act in italics):

> No funds provided through a grant or cooperative agreement to a religious organization to provide assistance under any program described in subsection (c)(4) shall be expended for *exclusively religious activities; however, the right of such organizations to engage in a wide range of speech, including religious perspectives that directly relates to and furthers the purpose of covered programs shall be protected consistent with the Free Speech Clause of the First Amendment of the U.S. Constitution.* If the religious organization offers *exclusively religious activities*, they shall be *funded separately from funds provided under subsection (c)(4).*
>
> *"Exclusively religious activities" are defined as activities conducted for primarily religious purposes and that are not*

directed toward the social objectives of the government funding program.[118]

C. *A Separate 501(c)(3) Should Be Created To Receive Direct Public Funds*

Federal agencies should urge traditional sectarian institutions (i.e., churches, mosques) wishing to receive direct government funds to create a separate 501(c)(3) non-profit organization to administer those funds and to carry out their state-subsidized social service programs. The non-profit corporation, however, must be allowed to retain a close affiliation with the religious institution, a faith-based mission and character, its Title VII religious employment exemption, and all other rights attendant to FBOs under Charitable Choice.[119]

Current Charitable Choice provisions do not require a separate 501(c)(3). But, the value of creating a separate legal entity to receive and administer government funds is that it reduces the "special Establishment Clause dangers" associated with direct monetary subsidies to traditional sectarian organizations. It ameliorates concerns for public funds being co-mingled with house of worship funds and diverted to exclusively religious activities.[120] It would also make it easier to account for the use of funds, while allowing the full breadth of speech activity for faith-based social programs. Policy-makers should closely consider such a recommendation because of the added protections it provides both traditional religious organizations and the government as the faith-based initiative goes forward.

---

118. H.R. 7, 107th Cong. § 201 (2001). The original unchanged provision states:

> LIMITATIONS ON USE OF FUNDS; VOLUNTARINESS—No funds provided through a grant or cooperative agreement to a religious organization to provide assistance under any program described in subsection (c)(4) shall be expended for sectarian instruction, worship, or proselytization. If the religious organization offers such an activity, it shall be voluntary for the individuals receiving services and offered separate from the program funded under subsection (c)(4). A certificate shall be separately signed by religious organizations, and filed with the government agency that disburses the funds, certifying that the organization is aware of and will comply with this subsection.

Id.

119. *See* 42 U.S.C. § 2000e (2000).

120. *See generally Rosenberger*, 515 U.S. 819 (1995) (in upholding the free speech rights of the religious student group, the fact that the organization was not a traditional sectarian institution was relevant).

D. Essential Parameters of Government Programs That Directly Fund FBOs

This section outlines the essential parameters for government programs that provide direct funding (or other benefits) to FBOs when all relevant First Amendment rights and concerns are taken into account. So long as these basic conditions are met, faith-based providers should be free to express their religious views in ways integral to carrying out their good works without being excluded from direct government subsidies or without having to segregate their programs.

These parameters include the following: (1) the government must employ *neutral criteria* for all organizations (religious and secular), such as uniform eligibility, outcomes, and accountability requirements; (2) the *secular social purpose* for which funding is provided must be carried out; (3) *client participation* in faith-based programs must be *voluntary* (discussed further below); (4) funds must not be *diverted* to *explicitly religious practices* (defined above); and (5) FBOs' *free speech right* to express religious perspectives on social topics must be protected.

Even under the flawed analysis in *McCallum*, the recommendations put forth in this article would survive constitutional challenge if properly implemented. *McCallum* would sanction the direct funding of expressively faith-based providers (like Faith Works) if: (1) participation in the faith-based program was truly the result of private independent choices, and (2) funding was directly tied to the number of enrollees in the program (not a lump sum grant). The recommendations made in this article could be accommodated to this scheme.

E. Ensuring that Participation in Faith-Based Programs Is Voluntary

So that the religious speech of FBOs may not be attributable to the government, participation in faith-based programs must be the result of *genuinely private and independent choices*—not state action. Elements of state action resulting in clients choosing faith-based programs can enter in through, for instance, the granting process, direct state coercion, or the state's failure to provide alternatives when requested to do so.

The following recommendations provide practical ways federal and state agencies can help ensure that participation in faith-based

programs is the result of truly voluntary private choices. These recommendations include: (1) designing procurement policies to fund *diverse providers* in a given area; (2) developing *in-house agency resources or services* that can provide alternative services (particularly where FBOs are the sole providers in the area), if needed; (3) ensuring FBOs go through the usual *competitive process* to obtain funding; (4) removing all elements of *state coercion* in the decision to attend a faith-based program (this would includes doing things like: (a) attaching no penalty, condition, or special incentive to the decision to choose a faith-based program; (b) providing only accurate contact and descriptive information (free from directives or special endorsements) when making referrals to faith-based programs; and (c) allowing clients to contact FBOs on their own, unless prohibited by special circumstances); (5) requiring that clients be *informed of their rights* and that FBOs *disclose their faith-based character or affiliation* at the outset; and (6) where: (a) the services involve an *entitlement* or *are directed by the state*, (b) a client objection has been received, and (c) alternative services are completely unavailable, the state may consider requiring faith-based sole providers to accommodate conscientious objectors *as a last measure only*.

Government agencies must refrain from making this last recommendation a standard operating requirement for all faith-based providers. This would infringe the free speech rights of FBOs. But, it may be argued that where an objecting client stands to loose services to which she is legally entitled (such as welfare benefits) or who has been directed by the state to attend such services (for instance, as a condition of probation), and there are no other available options, there may be a "compelling state interest" to impose an accommodation for conscientious objectors. This suggestion, however, need not apply where indirect funding is involved.

F. Categorizing FBOs Based On Their Use of Religious Speech Should Be Avoided

It has become common parlance in the faith-based arena to use descriptive terms like "*faith-saturated*," "*faith-sprinkled*," or "*faith-seasoned*" in an attempt to categorize FBOs by the degree to which they incorporate faith principles into their programs. Similar to what the Supreme Court has recently concluded about the "pervasively sectarian" label, such categories should be abandoned because they set the stage for viewpoint discrimination based on the extent to

which they integrate religious principles into their programs.

In *Mitchell*, the Supreme Court abandoned the "pervasively sectarian" standard as a relevant test.[121] For decades an organization assigned this label would automatically be excluded from receiving direct government aid. As a plurality of the Court has pointed out, the "pervasively sectarian" category called for inquiry into the recipient's religious views that was unnecessary and offensive.[122] It also collided with the requirement that government refrain from religious viewpoint discrimination in the distribution of public benefits.[123]

The argument in favor of simplistic categories is that they provide convenient descriptive terms for the various faith-based programs. But, like the "pervasively sectarian" label, it is their very ease of use that makes them so troublesome. Labels are easy to assign, but difficult to shed. For instance, although it has been almost three years since the Court rejected the "pervasively sectarian" test, some federal agencies continue to use this category as a basis for eligibility in their programs.

Assigning faith-based labels would reinvigorate the discriminatory tendencies previously embodied in the pervasively sectarian standard. Rather than developing constitutionally meaningful, factually-based descriptions and standards for faith-based programs, it will be tempting to adopt a set of labels that evolve into code for "acceptably religious" and "too religious." We should abandon the use of such labels, as they may provide a basis for discrimination by agency officials who adopt such terminology.

V. CONCLUSION

While Charitable Choice (and the faith-based initiative in general) represents positive advancements in the civil rights of the faith community, current language places restraints on free speech rights that must be addressed. On one hand, this law seeks to protect the character and autonomy of religious organizations that receive government subsidies to help serve their communities. Yet, on the other hand, it fosters government censorship of FBOs' speech (that is an expression of their character) on issues addressed by federal programs. Agency guidelines with similar speech restrictions pose the same threats to valid First Amendment rights. Such restraints will

121. *See* Mitchell v. Helms, 530 U.S. 793, 826 (2000).
122. *Id.* at 828.
123. *Id.* (citing *Rosenberger*, 515 U.S. 819 (1995)).

inevitably alienate the very programs the faith-based initiative seeks to invite to the table—programs transforming their communities (at least in part) because of the "faith factor." In order for this agenda to remain true to its heart and soul, statutory language and agency practices and guidelines must be cured of the First Amendment infirmities discussed in this article and permit FBOs' to speak freely on social issues from their unique faith-based perspective without fear of censorship, exclusion, or loss of funding.

The *McCallum* decision creates a "Catch 22" for faith-based programs that become involved in the faith-based initiative. If they see faith as relevant, they may lose their government funding. Alternatively, if they set aside their faith, they lose their character and effectiveness. Other jurisdictions should refrain from adopting its analysis and conclusions, and the court of appeals (and, if necessary, the Supreme Court) should reconsider its rulings. Until such time, it should not be used as the basis for the development of policy in this area.