



# Administratively Quirky, Constitutionally Murky: The Bush Faith-Based Initiative

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## ADMINISTRATIVELY QUIRKY, CONSTITUTIONALLY MURKY:

### THE BUSH FAITH-BASED INITIATIVE

by Jill Goldenziel<sup>1</sup>

*In this article, Ms. Goldenziel explores the administrative and constitutional peculiarities of the Bush Administration's Faith-Based Initiative. She argues that the Supreme Court's establishment clause jurisprudence offers no clear standards for administrative rule-making. However, the Bush administration has ignored the Supreme Court's guidelines and has crafted a program of dubious constitutionality. The Initiative is nearly impermeable to constitutional challenges or other public checks because of its peculiar place in the administrative structure. Because the Initiative endangers the fundamental constitutional right to freedom from religious establishment, Ms. Goldenziel calls for the Initiative to be publicly accountable, and provides suggestions for how the Bush administration can achieve this goal.*

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## **I. INTRODUCTION**

While a president may legally wear his faith on his sleeve, President George W. Bush has placed faith in more constitutionally dangerous places. The Bush Administration's Faith-Based Initiative facilitates federal funding for faith-based social services, raising serious administrative and constitutional concerns. The administration has ignored the few rulemaking guidelines discernible from the Supreme Court's ambiguous establishment clause jurisprudence, building a framework for social services on shaky constitutional ground. The Initiative and its programs may violate the constitutional rights of program participants and taxpayers. Yet citizens have little recourse to protect their First Amendment rights: the Initiative is nearly immune to constitutional and political challenge because of its unique place in the administrative system.

In this paper, I will explore the constitutional difficulties raised by the unique position of the Bush Administration's Faith-Based Initiative in our administrative and legal structure. First, I will evaluate the program's constitutionality in light of the Supreme Court's murky establishment clause jurisprudence. Next I will explain how the program's peculiar administrative structure makes challenges to its constitutionality nearly impossible. Finally, I will discuss the need for the Faith-Based Initiative to involve more public accountability, and suggest how the Bush Administration might achieve this goal.

## **II. BACKGROUND ON THE FAITH-BASED INITIATIVE**

The Faith-Based Initiative repackages and embellishes a prior Congressional attempt to clarify the proper relationship between government and faith-based social service organizations. For years, groups like Catholic Charities and Jewish Family Services have received millions in

federal grants for social service administration.<sup>2</sup> During the 1996 welfare overhaul, Congress noted that many other faith-based social service providers were refusing government funding because of excessive government intrusion into their practices and for fear of having to compromise the religious nature of their programs. To promote greater participation by faith-based social service providers in government programs, the 1996 welfare reform act first introduced provisions known as “Charitable Choice.”<sup>3</sup> Chiefly sponsored by then-Senator John Ashcroft, Charitable Choice is designed to permit religious organizations to accept certificates, vouchers, and other forms of disbursement under any federal welfare program on the same basis as other non-governmental providers without impairing the religious character of these organizations or harming the religious freedom of welfare beneficiaries.<sup>4</sup> States must consider both faith-based and social service providers under the same criteria for contract evaluation. Charitable Choice provides that faith-based organizations (“FBOs”) may not discriminate against potential service recipients on the basis of religion, religious belief, or a beneficiary’s refusal to actively participate in any religious service, and the state must provide any individuals who object to religious providers with alternate, timely, and convenient assistance. FBOs cannot require individuals to participate in religious prayer services or other religious programs to receive social services. Charitable Choice is also designed to protect FBOs from unnecessary governmental intrusion into their services. A state may not require a FBO to attenuate or modify

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<sup>2</sup> See generally Stephen V. Monsma, *WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY* (New York: Rowman & Littlefield, 1996).

<sup>3</sup> Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C. §604(a) (1996) (permitting participation by FBOs in the Temporary Assistance to Needy Families and Welfare to Work programs). Charitable Choice provisions are also part of the Community Services Block Grant of 1998, 42 U.S.C. §9920, and the Children’s Health Act of 2000, 42 U.S.C. §300x-65. Two other bills have been passed that involve Charitable Choice legislation: H.R. 7, The Community Solutions Act of 2001, and the Senate C.A.R.E. Act of 2003, which are currently awaiting reconciliation by the House Ways and Means Committee.

<sup>4</sup> Stanley Carlson-Thies, *A Guide to Charitable Choice: Appendix*, Center for Public Justice, 1996, 1, *on file with author*.

its religious mission or character as a condition of its participation.<sup>5</sup> In turn, FBOs cannot use government funds to pay for religious services or events, religious instruction, or proselytization.

During the second week of his presidency, President Bush announced that promoting faith-based initiatives would be one of his foremost legislative priorities for his first year in office.<sup>6</sup> On January 29, 2001, he signed two executive orders creating the White House Office of Faith-Based and Community Initiatives (“WHOFBCI”)<sup>7</sup> and satellite Centers in five cabinet agencies:<sup>8</sup> the Departments of Justice (“DOJ”), Health and Human Services (“HHS”), Housing and Urban Development (“HUD”), Labor (“DOL”), and Education (“DOE”). Similar centers were established in the Department of Agriculture (“DOA”) and the Agency for International Development (“USAID”) in 2003.<sup>9</sup> The Executive Department Centers were charged with “coordinat[ing] department efforts to eliminate regulatory, contracting, and other programmatic obstacles to the participation of faith-based and other community organizations in the provision of social services,” including an annual audit of departmental cooperation with these groups.<sup>10</sup> HHS and DOL were also charged with conducting a comprehensive review of all programs governed by previous Charitable Choice legislation to assess and promote departmental compliance.<sup>11</sup> President Bush charged the WHOFBCI with coordinating these efforts and developing and leading the administration’s policy agenda affecting faith-based and community

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<sup>5</sup> Stanley Carlson-Thies, *A Guide to Charitable Choice: Overview*, Center for Public Justice, 1996, 4, *on file with author*.

<sup>6</sup> AMY E. BLACK, DOUGLAS L. KOOPMAN, AND DAVID K. RYDEN, *OF LITTLE FAITH: THE POLITICS OF GEORGE W. BUSH’S FAITH-BASED PROPOSALS*, 198 (Georgetown University Press, forthcoming 2004), *draft, on file with author*.

<sup>7</sup> *Executive Order: Establishment of White House Office of Faith-Based and Community Initiatives*, January 29, 2001, *available at* <http://www.whitehouse.gov/news/releases/2001/01/20010129-2.html>, *accessed* December 28, 2003.

<sup>8</sup> *Executive Order: Agency Responsibilities with Respect to Faith-Based and Community Initiatives*, January 29, 2001, *available at* <http://www.whitehouse.gov/news/releases/2001/01/20010129-3.html>, *accessed* December 28, 2003.

<sup>9</sup> *Executive Order: Responsibilities of the Department of Agriculture and the Office for International Development with Respect to Faith-based and Community Initiatives*, December 12, 2002, *available at* <http://www.whitehouse.gov/news/releases/2002/12/20021212-5.html>, *accessed* December 28, 2003.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

initiatives.<sup>12</sup> He appointed Professor John J. DiIulio, Jr., a University of Pennsylvania social scientist, to direct the initiative's initial stages. Professor DiIulio resigned on August 17, 2001,<sup>13</sup> and the President appointed Jim Towey, a career public servant, as the Center's new director on February 1, 2002.<sup>14</sup>

The WHOFBCI has primarily furthered its goals in three ways: by acting as a watchdog and advocacy group for the interests of FBOs and Community-Based Organizations ("CBOs") by conducting academic studies of governmental coordination with FBOs and CBOs, and by holding conferences to help FBOs and CBOs better partner with government. In its capacity as an advocate, the WHOFBCI has helped coordinate efforts to pass further Charitable Choice legislation. After the House Community Solutions Act of 2001,<sup>15</sup> stalled in the Senate, President Bush issued another executive order in an attempt to enact what he saw as the primary aims of the legislation.<sup>16</sup> The Executive Order of December 12, 2002 laid out the fundamental goals and rule-making criteria for equal treatment of FBOs that were stated in the original Charitable Choice legislation. Bush also ordered all seven agencies with FBCI centers to review and evaluate existing policies in accordance with these guidelines.<sup>17</sup>

Bush's decision to order what the House and Senate could not democratically pass was met with some controversy. Many saw Bush as acting unilaterally to impermissibly advance religion where deliberative lawmaking bodies rightly refused to do so.<sup>18</sup> However, Bush saw himself as acting to promote social welfare while Congress was mired in procedural details. As

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<sup>12</sup> *Executive Order: Establishment of White House Office of Faith-Based and Community Initiatives*, supra note 7.

<sup>13</sup> AMY E. BLACK, DOUGLAS L. KOOPMAN, AND DAVID K. RYDEN. OF LITTLE FAITH: THE POLITICS OF GEORGE W. BUSH'S FAITH-BASED PROPOSALS, 226 (Georgetown University Press, forthcoming 2004), *draft, on file with author*.

<sup>14</sup> *Id.*, 230.

<sup>15</sup> H.R.7 (2001)

<sup>16</sup> *Executive Order: Equal Protection of the Laws for Faith-based and Community Organizations*, available at <http://www.whitehouse.gov/government/fbci>, accessed December 29, 2003.

<sup>17</sup> *Id.*

<sup>18</sup> See, e.g., Mary Leonard, *Bush Pressed Funding For Faith Groups*, BOSTON GLOBE, November 30, 2003, at A1, available at 2003 WL 66479778.

he recently explained, “I got a little frustrated . . . [Congress was] arguing process. I kept saying, wait a minute, there are entrepreneurs all over our country who are . . . helping us meet a social objective. Congress wouldn’t act, so I signed an executive order – that means I did it on my own.”<sup>19</sup> These words were met with spontaneous applause at a WHOFBCI conference of service providers in March, 2004.<sup>20</sup>

The WHOFBCI has also helped to steer government policy toward FBOs and CBOs by releasing academic studies about partnerships between government and these organizations. Under Professor DiIulio, the WHOFBCI focused its efforts on removing barriers to participation by faith-based service providers. The Office released the coordinated results of its initial five-department audit in August 2001 in the report *Unlevel Playing Field: Barriers to Participation by Faith-based and Community Organizations in Federal Social Service Programs*.<sup>21</sup> Under Mr. Towey, the office released a report clarifying the “religious hiring rights” of faith-based organizations who receive government funds.<sup>22</sup>

In response to the Executive Order for Equal Treatment of the Laws for Faith-based and Community Organizations (“Executive Order for Equal Treatment”), each agency developed new administrative rules setting forth policies for evaluating contract applications by faith-based organizations and stating what faith-based organizations must do in order to receive funds from

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<sup>19</sup> George W. Bush, Transcript of President’s Remarks at Faith-Based and Community Initiatives Conference, March 3, 2004, *available at* <http://www.whitehouse.gov/news/releases/2004/03/print/20040303-13.html>, *accessed* March 24, 2003.

<sup>20</sup> *Id.*

<sup>21</sup> WHITE HOUSE FAITH-BASED AND COMMUNITY INITIATIVE, UNLEVEL PLAYING FIELD, *available at* <http://www.whitehouse.gov/fbci>, *accessed* December 29, 2003.

<sup>22</sup> PROTECTING THE CIVIL RIGHTS AND RELIGIOUS LIBERTY OF FAITH-BASED ORGANIZATIONS: WHY RELIGIOUS HIRING RIGHTS MUST BE PRESERVED, *available at* <http://www.whitehouse.gov/government/fbci>, *accessed* December 29, 2003.

those agencies.<sup>23</sup> These rules are all similar in content but vary from agency to agency. Some agencies chose to adopt holistic policies for treatment of religious organizations,<sup>24</sup> while others chose to vary their rules for religious organizations from program to program.<sup>25</sup>

Each center's other work varies because of each department's unique opportunities for partnering with faith-based and community organizations. The WHOFBCI has documented an increase in overall funding to faith-based organizations since the audits were completed. A review of \$14.5 billion in Federal competitive non-formula grant programs at HHS, HUD, DOE, DOJ, and DOL revealed that faith-based funding increased in all agencies from fiscal year 2002 to fiscal year 2003, with \$1.17 billion awarded to faith-based organizations.<sup>26</sup> HHS and HUD, which already had experience dealing with faith-based and social service organizations after the 1996 Charitable Choice legislation, have led other federal agencies in encouraging faith-based participation.<sup>27</sup> HHS spent \$580 million in fiscal year 2003 on "faith-based grants and funding," a 19% increase from the previous year.<sup>28</sup> HUD spent \$532 million on faith-based grants and funding during the same period, an increase of 11% from 2002.<sup>29</sup> More than half of HUD's

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<sup>23</sup> Rules and proposed rules for all departments affected are available at <http://www.whitehouse.gov/government/fbc/>, under the heading "More Regulatory and Policy Changes." (accessed December 28, 2003).

<sup>24</sup> See, e.g., Department of Housing and Urban Development, *Participation in HUD Programs by Faith-Based Organizations; Providing for Equal Treatment of all HUD Program Participants*, 24 CFR Part 92 et al, 56397, Tuesday, September 30, 2003.

<sup>25</sup> See, e.g., Department of Health and Human Services, Administration for Children and Families, *Charitable Choice Provisions Applicable to the Temporary Assistance for Needy Families Program*, CFR Part 260, RIN 0970-AC12, Tuesday, September 30, 2003; Department of Health and Human Services, Administration for Children and Families, *Charitable Choice Provisions Applicable to Programs Authorized Under the Community Services Block Grant Act*, 45 CFR Part 1050; Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, *Charitable Choice Regulations Applicable to States Receiving Substance Abuse Prevention and Treatment Block Grants*, 42 CFR Parts 54 and 54a; Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, *Public and Private Providers Receiving Discretionary Grant funding from SAMHSA for the Provision of Substance Abuse Services Providing for Equal Treatment of the SAMHSA Program Participants*, 45 CFR Part 96.

<sup>26</sup> White House Office of Faith-Based and Community Initiatives, *Select Grants to Faith-Based Organizations at Five Agencies*, March 2, 2004, available at <http://www.whitehouse.gov/fbc/>, accessed March 24, 2004.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

Section 202 Elderly Housing funding went to faith-based organizations.<sup>30</sup> The WHOFBCI has not published comparable statistics on funding to community-based institutions separate from faith-based funding.

All executive agency Centers serve as a White House-sponsored watchdogs, advocating in each department on the behalf of faith-based and community organizations. The staffs of the Centers are appointed by the department heads in consultation with the WHOFBCI, but the original directors were selected by the White House.<sup>31</sup> The Directors report both to their respective cabinet secretaries and directly to the WHOFBCI, creating tensions between the departments and the White House.<sup>32</sup> Former WHOFBCI staff member Stanley Carlson-Thies, who served as liaison to the cabinet centers for a time, explained the difficulty:

To use Biblical imagery, you have to be in the world but not of it--you have to be in the departments but not of them. If you are too much tied to the White House, you are alienated. You have to find a way to become a part and be trusted. It's a continual back and forth, strategizing how you find the right balance.<sup>33</sup>

Perhaps because of these conditions, the original team of directors did not last long: two were fired, one transferred, and two left voluntarily within months.<sup>34</sup> When Jim Towey became director of the WHOFBCI, he allowed each Department head discretion to appoint his or her own Center directors, perhaps in an attempt to soothe tensions over the precariously-placed offices.<sup>35</sup> However, the strange placement structure of the Centers within the government agencies supports the notion that President Bush is establishing faith-based involvement by fiat.

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<sup>30</sup> *Id.*

<sup>31</sup> AMY E. BLACK, DOUGLAS L. KOOPMAN, AND DAVID K. RYDEN. OF LITTLE FAITH: THE POLITICS OF GEORGE W. BUSH'S FAITH-BASED PROPOSALS, 210 (Georgetown University Press, forthcoming 2004), *draft, on file with author.*

<sup>32</sup> *Id.*

<sup>33</sup> Stanley Carlson-Thies, quoted in *Id.* .

<sup>34</sup> *Id.*

<sup>35</sup> Jim Towey, quoted in *Id.* at 231.

### III. THE CONSTITUTIONAL QUAGMIRE

Ambiguous Supreme Court establishment clause jurisprudence makes the constitutionality of the Faith-Based Initiative difficult to assess. The constitutionality of some federal funding of faith-based social service provision is well-established by Supreme Court precedent. However, the recent cases of *Mitchell v. Helms*<sup>36</sup> and *Zelman v. Simmons-Harris*<sup>37</sup> leave open the question of which establishment clause test applies to the Faith-Based Initiative and its programs.

#### A. The Sour *Lemon* Trio

The 1971 case of *Lemon v. Kurtzman* brought a deceptive moment of clarity to establishment clause jurisprudence.<sup>38</sup> In *Lemon*, the Supreme Court introduced a three-part test for determining whether a government program violated the establishment clause. To be constitutional, the program (i) must have a secular legislative purpose, (ii) must have an effect that neither advances nor inhibits religion, and (iii) must not involve excessive entanglement between government and religion.<sup>39</sup> The Court has never officially overruled the *Lemon* test, and has referenced its factors in establishment clause cases ever since. However, the Court has added many other factors to the *Lemon* trio, often without explaining their relative importance to the other factors. While *Lemon*'s test seems clear, its legacy has muddled establishment clause jurisprudence.

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<sup>36</sup> 530 U.S. 793 (2000).

<sup>37</sup> 536 U.S. 639 (2001).

<sup>38</sup> 403 U.S. 602 (1971).

<sup>39</sup> *Id.*

The 1988 case *Bowen v. Kendrick*<sup>40</sup> is the only major establishment clause decision that involves participation by religious organizations in a federal social service program. A coalition of taxpayers, clergy members, and the American Jewish Congress brought suit challenging the Adolescent Family Life Act (AFLA) as violating the establishment clause. AFLA, passed by Congress in 1981, authorized grants to public and nonprofit private organizations, including religious organizations, for “services and research in the area of premarital adolescent sexual relations and pregnancy.”<sup>41</sup> To ensure that funds were not used for religious purposes, the Secretary of Health and Human Services would review the programs set up and run by AFLA grantees, including a review of the educational materials that a grantee proposes to use.<sup>42</sup> The Court upheld the constitutionality of AFLA’s grants to religious organizations using the *Lemon* test. AFLA passes the test because of its secular legislative purpose, and because service provision by religiously affiliated grantees does not necessarily have the effect of advancing religion.<sup>43</sup> The Court also found that AFLA’s monitoring requirements did not constitute excessive entanglement between government and religion under the third prong of the *Lemon* test. Moving beyond *Lemon*, the Court emphasized AFLA’s neutrality in including both religious and secular service providers as a reason for upholding its constitutionality. The Court also noted that an express statutory provision preventing the use of federal funds for religious purposes is not constitutionally required, especially in light of the program’s other monitoring provisions.<sup>44</sup> Although the Court found that the *possibility* that pervasively sectarian institutions may receive AFLA funds does not make the program unconstitutional,<sup>45</sup> the Court remanded for

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<sup>40</sup> 487 U.S. 589 (1988).

<sup>41</sup> *Id.* at 593.

<sup>42</sup> *Id.* at 617.

<sup>43</sup> *Id.* at 612.

<sup>44</sup> *Id.* at 614-15.

<sup>45</sup> *Id.* at 611.

consideration of whether AFLA aid *actually* flowed to “pervasively sectarian” institutions.<sup>46</sup>

Thus, after *Bowen*, neutrality of participants appears to be a criterion of paramount importance in determining the constitutionality of government funding for FBOs.

Nine years after *Bowen*, *Agostini v. Felton*<sup>47</sup> changed the establishment clause landscape by “officially” modifying the longstanding *Lemon* test. *Agostini* involved a challenge to Title I of the Elementary and Secondary Education Act of 1965. Title I channels federal funds to local educational agencies (LEAs) to provide remedial education, guidance, and job counseling to eligible students. Services must be “secular, neutral, and nonideological,”<sup>48</sup> and may only be applied to those students eligible for aid. The proposed New York City education plan provided for provision of Title I services in religious schools and non-religious schools, without regard for religion. Teachers could not introduce any religious matter into their teaching or become involved in any way with religious activities of the private schools, and all religious symbols were to be removed from classrooms used for Title I services. The Court upheld the program under a modified version of the *Lemon* test.<sup>49</sup> After acknowledging the program’s secular legislative purpose, Justice O’Connor used the other two *Lemon* prongs as part of a new set of criteria for evaluating the program’s effects.<sup>50</sup> Justice O’Connor found the program does not result in governmental indoctrination, and is administered neutrally because it grants aid to both religious and non-religious recipients. Justice O’Connor explains that neither “administrative cooperation” between a school board and parochial schools nor a program’s potential for

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<sup>46</sup> *Id.* at 621.

<sup>47</sup> 521 U.S. 203 (1997).

<sup>48</sup> 521 U.S. at 211.

<sup>49</sup> 521 U.S. at 233.

<sup>50</sup> 521 U.S. at 234.

political divisiveness constitutes excessive entanglement.<sup>51</sup> Thus, the program does not have the effect of impermissibly advancing religion, and is constitutional.

### B. The Divertibility Factor: *Mitchell v. Helms*

*Agostini* appeared to signal that neutrality is the sine qua non of constitutionality in establishment clause cases. Yet four years later, *Mitchell v. Helms* cast further ambiguity on the Court's framework for establishment clause analysis. *Mitchell* involved a challenge to "Chapter 2," a federally-funded program through which educational materials and equipment is distributed to schools. Under Chapter 2, the federal government distributes funds to states, which then funnel them to state and local intermediary agencies that lend educational materials and equipment to public, parochial, and secular nonprofit private schools. The program includes several restrictions to safeguard the constitutional rights of both individual and organizational participants in the program. As in *Agostini*'s Title I program, the services, materials and equipment provided must be "secular, neutral, and nonideological."<sup>52</sup> Private schools may not acquire control over Chapter 2 funds or title to Chapter 2 materials, equipment, or property.<sup>53</sup> Schools must submit an application explaining how they will use the Chapter 2 equipment, and must not use it for religious purposes.<sup>54</sup>

Justice Thomas delivered a plurality opinion for the court, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy. Justice Thomas evaluated the program under the new *Lemon-Agostini* test. The secular legislative purpose of the Chapter 2 program was not challenged in *Mitchell*, nor was the program challenged on the grounds that it involved excessive

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<sup>51</sup> *Id.* at 233-34.

<sup>52</sup> *Mitchell*, 530 U.S. at 802.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 803.

entanglement between government and religion.<sup>55</sup> Accepting this, Justice Thomas turned to the effects of the legislative program. For Justice Thomas, the program does not result in religious indoctrination because it is neutral toward religion.<sup>56</sup> Under Justice Thomas's definition, the program is neutral because all recipients who adequately further the legitimate secular purpose of the program may participate, regardless of their religious belief or practice.<sup>57</sup> Moreover, the program involves no financial incentive for religious indoctrination.<sup>58</sup> Justice Thomas notes that some prior cases emphasize the private choices of individuals as a way of assuring neutrality.<sup>59</sup> However, he rejects the argument that all direct, nonincidental aid to religious organizations is constitutionally impermissible.<sup>60</sup> Justice Thomas also rejects the argument that all programs involving aid that is divertible to religious use are inherently unconstitutional, noting that the use of governmental aid to further religious indoctrination is not equivalent to impermissible religious indoctrination by the government.<sup>61</sup> Thus, for the Thomas plurality, neutrality is the paramount establishment clause concern. Directness of aid, the potential for divertibility of aid, and the sufficiency of the program's safeguards against divertibility are irrelevant constitutional questions as long as the aid is distributed using neutral criteria.

Yet a majority of the Court in *Mitchell* does not agree with Justice Thomas that the Court should not inquire into the constitutional safeguards against impermissible divertibility. Three justices dissent primarily because of this point, and Justice O'Connor, joined by Justice Breyer, writes separately in concurrence because of it. Justice O'Connor rejects the idea that actual diversion of funding by religious organizations is always constitutionally permissible. While she

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<sup>55</sup> *Id.* at 808.

<sup>56</sup> *Id.* at 809.

<sup>57</sup> *Id.* at 810-11.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 816.

<sup>61</sup> *Id.* at 820-824.

agrees that neutrality is an important criterion in evaluating the constitutionality of a program under the establishment clause, she would not assign the “singular importance” to neutrality that the Thomas plurality does.<sup>62</sup> Justice O’Connor also states that “the distinction between a per-capita school-aid program and a true private-choice program is significant for purposes of endorsement,” although it is not necessary to decide this case.<sup>63</sup> Finally, Justice O’Connor argues that the plurality’s approval of the actual diversion of federal funds for religious purposes is in tension with existing Supreme Court precedents.<sup>64</sup>

Thus, for Justice O’Connor, potential divertibility of funds is not problematic,<sup>65</sup> but actual diversion of funds might be constitutionally impermissible. However, O’Connor concurs in the Court’s opinion because the facts of *Mitchell* present no evidence of actual diversion. In her view, the Court should presume that school officials are acting in good faith absent evidence of actual diversion,<sup>66</sup> and so pervasive monitoring that could lead to actual entanglement will not be required. Combined with the presumption of good faith, the program’s requirements that all nonpublic schools submit signed assurances that Chapter 2 aid will only supplement and not supplant federal funds, and that the instructional materials and equipment will only be used for “secular, neutral, and nonideological” purposes, are sufficient to prevent diversion.<sup>67</sup> Justice O’Connor sees no need for further inquiry into the practical application of these standards.<sup>68</sup> Even if the Chapter 2 program involved some instances of actual diversion, these instances were

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<sup>62</sup> *Id.* at 837 (O’Connor, J., concurring).

<sup>63</sup> *Id.* at 842.

<sup>64</sup> *Id.* at 840.

<sup>65</sup> *Id.* at 853-54.

<sup>66</sup> *Id.* at 847, 858-60.

<sup>67</sup> *Id.* at 862.

<sup>68</sup> *Id.*

de minimus, and the swift correction of mistakes showed that the program's safeguards were working.<sup>69</sup>

Justice Souter's dissenting opinion in *Mitchell* muddles the already-murky picture of establishment clause jurisprudence created by the majority and concurring opinions. Justice Souter culls eleven factors from prior jurisprudence that the court should consider when determining whether a program is constitutional under the establishment clause. These factors include the types of aid recipients,<sup>70</sup> directness of aid distribution,<sup>71</sup> the type of aid itself, the religious content of the program being funded, the divertibility of the form of the grant, the potential for divertibility or actual diversion in the program and the sufficiency of safeguards against it, the supplantation of traditional expenses of the religious organization, and the substantiability of the aid. Justice Souter's analysis offers no guidance as to which of these factors the Court has found most important, or what the Court should do if these factors point in opposite directions. Yet based on his application of these factors, primarily the concern with safeguards against divertibility, Justice Souter finds the Chapter 2 program unconstitutional. While these factors comprise only a minority test, the very existence of eleven separate factors that the Court has considered key to its establishment clause jurisprudence reveals the Court's inability to establish a coherent, consistent test for establishment clause violations.

Thus, no clear constitutional rule emerges from *Mitchell*. For four justices, neutrality appears to be the supreme constitutional concern in establishment clause cases. However, for five justices, actual divertibility of funds for religious use remains an important concern. Moreover, the five concurring and dissenting justices appear to apply a combination of factors in

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 879-85 (Souter, J. dissenting).

<sup>71</sup> *Id.* at 885.

their establishment clause opinions, including neutrality, divertibility, endorsement, and true private choice. These justices give little guidance as to the relative importance of these factors.

### C. The Salience of True Private Choice?

Building on *Mitchell*, the Court in 2002 upheld the constitutionality of the Cleveland school voucher program in *Zelman v. Simmons-Harris*.<sup>72</sup> The Cleveland voucher program gave financial assistance to families in Ohio school districts who wished to send their children to participating public or private schools, including religious schools. Ninety-six percent of the 3700 participating students enrolled in religious schools.<sup>73</sup> Writing for the Court, Justice Rehnquist again assigned neutrality as the most important factor in assessing the program's effects, and deemed the program to be neutral because it allowed the participation of both students and schools without regard for their religious denomination. However, unlike the *Mitchell* plurality, Justice Rehnquist considers the true private choices of citizens in directing government money toward religious schools of primary importance in upholding the program under the establishment clause. Because the Cleveland voucher program involved direct government aid to individual families who then chose to send their children to religious schools, and not federal aid to religious schools themselves, the program could not be seen as an establishment clause violation.

Thus, after *Zelman*, true private choice appears to be the Court's main criterion for determination of establishment clause violations. However, the status of divertibility, supplantation, excessive entanglement, and other previously used establishment clause factors

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<sup>72</sup> 536 U.S. 639.

<sup>73</sup> *Id.* at 643.

remains unclear. The Court has not explained the relative importance of each of these factors, nor how they should be applied to administrative rule-making.

#### **IV. ASSESSING THE CONSTITUTIONALITY OF FEDERALLY FUNDED FAITH-BASED SOCIAL SERVICE PROVISION**

While the Court's establishment clause jurisprudence may not provide a clear test for evaluating the constitutionality of federally funded, faith-based social service programs, examining these programs through the lenses of *Mitchell* and *Zelman* reveal some constitutional difficulties with the construction of the Bush Faith-Based Initiative. In the absence of a clear constitutional standard, creating rules and regulations that definitely will survive constitutional challenges is nearly impossible. Until the Court elucidates a clear standard for its establishment clause jurisprudence, every program created by the Initiative – and the existence of the Initiative itself – is subject to attack in federal or state courts on the grounds of any number of factors discussed in prior establishment clause jurisprudence.

##### **A. Divertibility and Supplantation**

If divertibility and supplantation remain constitutional concerns, certain policies of the Faith-Based Initiative may be unconstitutional. Examples from the comments to HUD's final rule on Participation in HUD Programs by Faith-Based Organizations, as published in the Federal Register, reveal constitutional problems with the Initiative.<sup>74</sup> Under HUD regulations, a one-room church that uses that room for a soup kitchen on weekdays, but as a place of

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<sup>74</sup> Department of Housing and Urban Development, Participation in HUD Programs by Faith-Based Organizations; Providing for Equal Treatment of all HUD Program Participants, 24 CFR Part 92 et al, 56397, Tuesday, September 30, 2003.

congregational worship only on Sunday mornings, could not receive HUD block grant funds to repair the room because it is the congregation's principal place of worship. However, a synagogue with several rooms that uses one room as a soup kitchen would be eligible for block grant funds to make necessary repairs to the "soup kitchen" because that room is not used as a principal place of worship.

If divertibility and supplantation are constitutional concerns, these HUD policies may amount to impermissible government funding of religion. Six justices in *Mitchell* expressed that divertibility may be a constitutional concern, and even the Thomas plurality stated in a footnote that supplantation "may be relevant to determining whether aid results in governmental indoctrination."<sup>75</sup> In the HUD example, federal funds to the synagogue and church are easily divertible for religious uses. The synagogue is merely supplanting the funds supplanted by federal block grant funds so it can fund religious activities with the privately-raised money it would otherwise have spent on repairs. One can easily imagine a scenario in which the synagogue board decided it needed more money for its religious programs, and rather than raising private funds, it decided to raise money by restructuring its community service programs in a manner likely to receive federal assistance. Federal funding for the synagogue's social service programs would then allow it to divert its social service budget to fund its religious activities. Thus, HUD's policies could amount to impermissible government funding of religion because of the divertibility and potential supplantation of the funds of religious organizations.

## **B. Excessive Entanglement**

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<sup>75</sup> *Mitchell v. Helms*, 530 U.S. 793, 814 note 7 (2000).

If the Court still considers excessive entanglement to be constitutionally important, other Faith-Based Initiative programs may constitute unconstitutional excessive entanglement. Government programs that require monitoring of religious organizations as a condition of receiving religious funds might be in constitutional jeopardy because of excessive entanglement. All monitoring controls on the Faith-Based Initiative would be subject to constitutional scrutiny under this standard. For example, having HUD monitor the board meetings of the hypothetical synagogue above to ensure that its funding decisions are not made for impermissible reasons might constitute excessive entanglement between government and religion.

However, after *Mitchell*, the excessive entanglement standard has been severely restricted. In *Mitchell*, six justices showed their willingness to presume that FBO officials are using government funds constitutionally without inquiring beyond the safeguards facially required by the program. Even without this presumption, the Court has previously found that statements that funds will not be diverted for religious use are adequate constitutional safeguards,<sup>76</sup> and that annual audits to ensure that categorical state grants are not used to teach religion do not constitute excessive entanglement.<sup>77</sup> Until the court clarifies what is left of the “excessive entanglement” factor, the Faith-Based Initiative can only hope that its monitoring mechanisms will survive future constitutional scrutiny.

### C. Endorsement

Endorsement has remained a salient factor in constitutional jurisprudence since it was developed by Justice O’Connor in *Lynch v. Donnelly*,<sup>78</sup> although it has never been a majority test

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<sup>76</sup> See, e.g., *Bowen v. Kendrick*, 487 U.S. 598 (1988); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000).

<sup>77</sup> *Roemer v. Board of Public Works of Md.*, 426 U.S. 736, 764-65.

<sup>78</sup> 465 U.S. 668 (1994) (upholding a city’s display of a nativity scene under the establishment clause).

for determining establishment clause violations. Under the endorsement test, no government program can be constitutional if a “reasonable observer” would believe that the government is endorsing religion by sponsoring such programs. If endorsement remains a salient factor in determining establishment clause violations, all Faith-Based Initiative programs would be subject to the “reasonable observer” test. The hypothetical synagogue above could not receive federal funding unless a reasonable observer would not believe the government is sponsoring religion by supporting the synagogue’s social service programs. Yet despite the importance of endorsement as a test factor in establishment clause jurisprudence, neither the Charitable Choice legislation nor the rules promulgated and adopted by the various cabinet departments under the Initiative explicitly address endorsement and safeguard against it. These programs could be subject to constitutional challenge in courts that consider endorsement to be a salient factor in establishment clause jurisprudence.

#### **D. True Private Choice**

Federal funding to faith-based organizations that do not involve vouchers or otherwise incorporate “true private choice” may also be constitutionally problematic. After *Zelman*, the Court’s primary establishment clause concern appears to be whether programs involve mechanisms for true private choices by individuals. *Zelman* does not dictate that federal funds can constitutionally flow to religious organizations *only* through the private choices of individuals. However, designing programs that direct federal funding to religious organizations only through vouchers or other mechanisms for individual, private choice might be the only way to insulate such programs against establishment clause challenge. The decision in *Zelman* was released in June 2001, just five months after the creation of the WHOFBCI and its satellite

centers and two months before the release of the *Unlevel Playing Field* report and its ensuing reforms in the various departments. Yet the report did not address the issue of true private choice or direct departments to reform their programs accordingly. No legislative directive, executive order, or agency rule has directed departments to design social service programs involving faith-based social service providers in accordance with the principle of true private choice. Some Initiative programs can be easily tailored to comply with true private choice. For example, individuals might receive vouchers for a service like job training or homeownership counseling that are redeemable at any federally-approved social service provider, including both FBOs and secular CBOs. However, the true private choices of individuals cannot determine whether HUD awards block grants to one-room churches, large synagogues, or medium-sized mosques. Where the Faith-Based Initiative allows agencies to entangle themselves in the funding structures of religious bureaucracies, the Initiative's programs may not be constitutional.

The WHOFBCI and the various departments may be waiting for the Supreme Court to clarify its standards before changing their programmatic structure. *Zelman*'s ambiguity suggests that the requirement of true private choice may not extend to all programs directing federal funds to religious organizations. Dicta in *Zelman* suggest it is limited only to the unique context of failing public schools.<sup>79</sup> Yet if the Court has failed to delineate clear establishment clause boundaries, the Bush administration has ignored what little guidance the cases give. The WHOFBCI's failure to act in the window after the release of the *Unlevel Playing Field* report, and President Bush's failure to include "true private choice" in the directives of his Executive Order for Equal Treatment, may make new programs difficult to change in the future if the Supreme Court clarifies true private choice as a criterion for constitutionality under the

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<sup>79</sup> See, e.g., *Zelman*, 536 U.S. 639 at 644 (deciding the case "against this backdrop" of the failing Cleveland school system). See generally *Zelman*, 536 U.S. 639 at 676 (Thomas, J. Concurring).

establishment clause. More importantly, these programs may be violating First Amendment rights in a way that the Supreme Court has already delineated, albeit unclearly.

## V. IS THE WHOFBCI ITSELF CONSTITUTIONAL?

The existence of the WHOFBCI itself might also be constitutionally attacked in the wake of *Mitchell* and *Zelman*. The Office has an undeniably secular legislative purpose of improving social services for all American people. However, the Office might have the functional purpose of impermissibly advancing the interests of religious organizations. Secular CBOs have undoubtedly gained from the WHOFBCI-organized audits that eliminated hurdles to participation of smaller organizations in government funding programs. However, one might argue that most of the Office's efforts have actually focused on furthering the efforts of religious organizations, and that secular organizations are helped only as a by-product of these efforts. Faith-based organizations have experienced prejudice in receiving government grants because of a misperception that religious organizations could not partner with the government in any way, and many of the Office's efforts have been focused on eliminating this misconception, which does not affect secular CBOs. The Office's most recent publication addresses religious hiring rights and is hardly of interest to secular organizations. Professor DiIulio sees the differing foci of the *Unlevel Playing Field* report and the *Religious Hiring Rights* report as representative of the WHOFBCI's shift in focus since his departure.<sup>80</sup> While the DiIulio WHOFBCI focused on equalizing access to government services for all FBOs and CBOs, the Towey WHOFBCI has chosen to focus its efforts on a controversial sticking point that is a particular concern of religious groups that wish to avoid hiring gays and lesbians.

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<sup>80</sup> Personal Interview with Prof. John J. DiIulio, Jr., November 11, 2003.

If Professor DiIulio's observation is truly representative of a shift in WHOFBCI policy, it exemplifies the constitutional problem with the WHOFBCI: the great potential for the Office to be manipulated to serve particular religious interests. The WHOFBCI is not designed to resist interest group capture, which is problematic from both administrative and constitutional perspectives. If the WHOFBCI represented an industry group, the existence of such a lobbying organization, vetted by the President, would be considered reprehensible. Yet if the WHOFBCI is merely a lobbying group for the interests of religious organizations that serves under the President's watch, then the existence of the WHOFBCI is an establishment clause violation. The program would fail the first prong of the *Lemon-Agostini* test, a prong still recognized by both the plurality in *Mitchell* and the majority in *Zelman*. The program would fail because it does not have a secular legislative purpose, but serves primarily to advance the interests of religious organizations. Moreover, the WHOFBCI is not a neutral program if it is designed primarily to benefit religious organizations and not secular CBOs. In *Mitchell*, at least four justices found the constitution to require neutral program administration, and two others agreed in concurrence that neutrality was a highly important factor in establishment clause cases. The WHOFBCI itself is unconstitutional if it is not administered neutrally.

One might even argue that the WHOFBCI is simply supplanting funds that religious organizations should be using to advocate in their own interests. Perhaps religious organizations no longer need to employ government-relations specialists now that the FBCI Centers exist in every government agency to provide support to religious organizations. The money that FBOs would have spent on government relations is supplanted by the FBCIs, and may now be used to fund proselytization and inherently religious activities. As discussed above, the importance of

supplantation to constitutionality under the establishment clause has not been resolved by the Supreme Court. However, one might challenge the WHOFBCI's very existence on this ground.

## **VI. THE DIFFICULTY OF MAKING THE FAITH-BASED INITIATIVE CONSTITUTIONALLY ACCOUNTABLE**

In theory, one might challenge the programs of the faith-based initiative on grounds of unconstitutional divertibility or supplantation of funds, excessive entanglement, impermissible endorsement of religion, or lack of true private choice. Yet Professor DiIulio has noted, in response to constitutional questions about the faith-based initiative, that no one has brought a successful legal challenge to Charitable Choice.<sup>81</sup> As discussed below, mounting a legal challenge to Charitable Choice, the WHOFBCI or any other policy of the Faith-Based Initiative may be quite difficult, or even impossible. The Faith-Based Initiative is embedded in the administrative structure in a way that inhibits political or legal challenge.

### **A. Political Accountability**

President Bush created a separate White House office to direct the Faith-Based Initiative, an anomalous structure in the administrative system and in the organization of the White House itself. By choosing this venue in which to house the Initiative, President Bush has ensured that future presidents will have to make the politically sensitive choice whether to keep or abolish the Office. As Professor Amy Black notes: "A subsequent president who does not share Bush's passion for this issue will have few options: Make a media splash by abolishing a faith-based

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<sup>81</sup> *Id.*

office, or maintain the office while limiting or changing the focus of the office's work."<sup>82</sup> The Faith-Based Initiative is thus entrenched in the political system in a way that cannot be so easily repealed.

President Bush apparently intended to make the Initiative impermeable to lawsuit. President Bush's Executive Orders creating the WHOFBCI and its Centers, and his Executive Order for Equal Treatment, explicitly stated that they "did not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person."<sup>83</sup> Thus, no way exists for a private plaintiff in state or federal court to challenge the underlying policies of the Initiative, or the existence of the WHOFBCI itself. No other private or administrative check exists to ensure that the WHOFBCI is continually serving the public good and not just the interests of religious organizations. The President created the Faith-Based Initiative as a separate White House office. Many view such separate offices as step-children that are not part of the original family of eighteen well-oiled White House units.<sup>84</sup> The WHOFBCI operates entirely separately from the rest of the federal administrative process, and its inner workings are overseen only by the president. Without more legal or administrative checks on the Faith-Based Initiative, a fundamental constitutional right remains unguarded.

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<sup>82</sup> See AMY E. BLACK, DOUGLAS L. KOOPMAN, AND DAVID K. RYDEN, *OF LITTLE FAITH: THE POLITICS OF GEORGE W. BUSH'S FAITH-BASED PROPOSALS*, 215 (Georgetown University Press, forthcoming 2004), *draft, on file with author*.

<sup>83</sup> *Executive Order: Establishment of White House Office of Faith-Based and Community Initiatives*, January 29, 2001, available at <http://www.whitehouse.gov/news/releases/2001/01/20010129-2.html>; *Executive Order: Agency Responsibilities with Respect to Faith-Based and Community Initiatives*, January 29, 2001, available at <http://www.whitehouse.gov/news/releases/2001/01/20010129-3.html>; *Executive Order: Responsibilities of the Department of Agriculture and the Agency for International Development with Respect to Faith-based and Community Initiatives*, December 12, 2002, available at <http://www.whitehouse.gov/news/releases/2002/12/20021212-5.html>, accessed 28 December 2003.

<sup>84</sup> See AMY E. BLACK, DOUGLAS L. KOOPMAN, AND DAVID K. RYDEN, *OF LITTLE FAITH: THE POLITICS OF GEORGE W. BUSH'S FAITH-BASED PROPOSALS*, 215 (Georgetown University Press, forthcoming 2004), *draft, on file with author*.

## B. Legal Accountability

Individual funding programs can be challenged by individual social service recipients who believe that their First Amendment rights have been violated by federal funding of faith-based providers. However, these atomistic challenges have not yet been successful. Only two cases have attempted to challenge Charitable Choice itself. *American Jewish Congress v. Bost*, a Fifth Circuit case, involved a challenge to a Texas state contract for welfare-to-work job training that was awarded to a non-profit consortium of business and churches.<sup>85</sup> Plaintiffs alleged that the consortium had used the contract funds to purchase Bibles as classroom materials and to supplement the salary of the program's executive director, who also served as a spiritual leader.<sup>86</sup> The Court found evidence in the record that "Biblical references were used, at least on one occasion, to teach subjects, and that some participants may have felt pressure to join the Church or change their beliefs."<sup>87</sup> Despite this, the Court found no live case or controversy over which it could exercise jurisdiction because no evidence existed of a state policy of funding religious indoctrination or of any similar recurring activity by the state.<sup>88</sup> The federal district court thus denied plaintiffs' requested declaratory and injunctive relief, and held that they had no standing to seek monetary damages.<sup>89</sup> *Bost* could be an isolated case. As an unpublished opinion, its precedential value is limited, and it is still possible that a better-organized establishment clause challenge might succeed. Yet *Bost* may still persuade future courts to deny plaintiffs standing to challenge Charitable Choice or Faith-Based Initiative programs. Without a grant of a private right of action for declaratory, injunctive, and monetary relief, authorized by Charitable Choice

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<sup>85</sup> *American Jewish Congress v. Bost*, 2002 WL 1022076 (5th Cir. 2002) (unpublished opinion) (affirming order of lower court hearing denying declaratory and injunctive relief and remanding for reconsideration of monetary damages). *on remand to* 2002 WL 31973707 (W.D. Tex.) (denying monetary damages).

<sup>86</sup> *American Jewish Congress v. Bost*, 2002 WL 31973707 (2002).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 2.

legislation, administrative rules governing Initiative programs, or the executive orders relating to Initiative programs, individual plaintiffs will have difficulty establishing the standing to succeed in court.

*Freedom from Religion Foundation v. McCallum*,<sup>90</sup> a case from the Western District of Wisconsin, was the second attempted challenge to the Charitable Choice law. *McCallum* involved a challenge to the constitutionality of Wisconsin's funding of Faithworks, a faith-based, long-term alcohol and drug addiction treatment program. The court held that the case did not reach the issue of the constitutionality of the Charitable Choice law.<sup>91</sup> The court then proceeded to uphold the funding of Faithworks even though the program did result in governmental indoctrination of religion in violation of the establishment clause. Relying on *Mitchell*, the court held that the funding was constitutional because all offenders participated in the treatment program of their own free choice.<sup>92</sup> Furthermore, the court ruled that the program's safeguards were adequate to ensure that true private choices were made. These safeguards included explicitly informing offenders about the religious nature of Faithworks before they agreed to participate, informing them of a secular treatment alternative, and requiring them to consent in writing to participating in a program with religious content.<sup>93</sup> *McCallum*'s broad reading of the *Mitchell* plurality opinion may serve as a disturbing model for future cases.

Thus, the two attempts to challenge the Charitable Choice laws have been unsuccessful. In *Bost* and *McCallum*, federal courts refused to reach the broader question of constitutionality of the overarching Charitable Choice laws. *Bost* and *McCallum* also reveal the difficulty of

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<sup>90</sup> *Freedom From Religion Foundation v. McCallum*, 179 F.Supp.2d 950 (W.D.Wisc., Jan. 7, 2002) (granting partial summary judgment); *Freedom From Religion Foundation v. McCallum*, 214 F.Supp.2d 905 (W.D. Wisc., July 26, 2002).

<sup>91</sup> *Freedom From Religion Foundation v. McCallum*, 179 F.Supp.2d. at 954.

<sup>92</sup> *Id.* at 915.

<sup>93</sup> *Id.* at 919.

challenging individual government-funded faith-based programs. *McCallum* illustrates the problematic effects of *Mitchell* on establishment clause jurisprudence in lower courts. Under *McCallum*'s rationale, true private choice would trump all other potential establishment clause concerns with the Faith-Based Initiative. Such a rationale might open the door to federal funding of faith-based programs that involved nominal true private choice and other problematic elements, such as religious coercion.

Standing issues similar to those in *Bost* allow courts to avoid broader establishment clause questions involving government funding of FBOs. Actually creating legal standing to challenge the Initiative or WHOFBCI is tricky. The Supreme Court has granted taxpayers standing to sue for monetary damages in cases like *Bowen v. Kendrick*<sup>94</sup> under the standard announced in *Flast v. Cohen*.<sup>95</sup> Under *Flast*, taxpayers have standing to sue if a logical nexus exists between the taxpayer's status and 1) the type of legislative enactment attacked, and 2) the precise nature of the constitutional infringement alleged.<sup>96</sup> However, the Court greatly attenuated the *Flast* doctrine in *Valley Forge Christian College v. Americans United for Separation of Church and State*.<sup>97</sup> In *Valley Forge*, the Court ruled that taxpayers did not have standing to challenge a decision by the Secretary of Health, Education, and Welfare to dispose of certain property pursuant to a legislative act. The Court rejected the taxpayers' claim of standing because the source of their complaint was not a Congressional action, but an administrative decision, and the property transfer was not an exercise of authority conferred by the Taxing and Spending Clause of Article I, §8 of the Constitution. Under the doctrine announced in *Valley*

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<sup>94</sup> *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988).

<sup>95</sup> *Flast v. Cohen*, 392 U.S. 83 (1968) (granting monetary damages to federal taxpayers claiming that a federal statute violated the Establishment Clause by providing financial support for educational programs in religious schools).

<sup>96</sup> *Id.* at 101-02.

<sup>97</sup> *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 482-83 (1982) (holding that taxpayer standing could not be based on the claim of a "shared individuated right to a government that 'shall make no law respecting the establishment of religion'").

*Forge*, taxpayers are unlikely to have standing against any of the Initiative programs, since they were created by executive orders and not Congressional action. Without an explicitly granted right of action, taxpayers also might not even have standing for establishment clause violations resulting from the Charitable Choice Act of 1996.

Also, the Court has generally frowned upon general public standing requirements.<sup>98</sup> Congress or the President might consider creating a qui tam provision under which private citizens would be authorized to challenge Initiative programs or the WHOFCI as private attorney generals. However, the Supreme Court has also left open the question of whether qui tam provisions are constitutional.<sup>99</sup> Congress or the President might consider granting standing to a particular administrative body, or even a particular private organization, but these grants also might not be constitutional scrutiny because they fall outside Article III standing requirements. Thus creating broader standing for private plaintiffs to challenge federal faith-based funding programs might be difficult.

### C. Will Effective Policy Trump the Establishment Clause?

Even if a legal challenge were brought to an Initiative program, *Zelman* reveals that the Supreme Court may be reluctant to intervene in a program involving serious First Amendment questions – or even constitutional violations – if the program addresses a pressing social need. The majority opinion discusses at length the Cleveland school system’s “crisis of magnitude,”<sup>100</sup>

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<sup>98</sup> See, e.g. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>99</sup> Qui tam actions are authorized to enforce the False Claims Act, and the Supreme Court held unanimously that a relator in a qui tam action had standing in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000). However, the Supreme Court left open the question as to whether qui tam suits violated the appointments clause and take care clause of Art. II §2 & §3 of the Constitution.

<sup>100</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639 at 643 (2002).

and presents the voucher program as an innovative solution to these problems.<sup>101</sup> The opinion can be interpreted to mean that effective policies that cure great societal ills may be excused from the establishment clause's requirements. Indeed, in their dissenting opinions, Justices Stevens<sup>102</sup> and Souter<sup>103</sup> interpret the majority holding in this way. Justice Souter clearly states this as the reason he thinks that the majority holding goes too far:

The record indicates that the schools are failing to serve their objective, and the vouchers at issue here are said to be needed to provide adequate alternatives to them. If there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here. But there is no excuse.<sup>104</sup>

A broad reading of *Zelman* means that all successful FBOs, regardless of their sectarian character, are eligible to receive government money. FBOs can even use government funds to support inherently religious activities, as long as the FBOs achieve their social service goals. One can envision a scenario in which an FBO is successful at drug rehabilitation in a crime-ridden inner-city. This FBO might mingle its funds for social service provision with its money for inherently religious activities. Under *Zelman*, the Supreme Court might let the program continue because of the deep crisis that the FBO is helping to resolve. The Court would thereby allow federal funding of the organization's inherently religious activities, and would open the door for other successful FBOs to fund religious activities with federal money. Under *Zelman*, the establishment clause may not apply in areas afflicted by vast social ills, and program participants and community residents will lose fundamental constitutional protections against the establishment of religion.

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<sup>101</sup> *Id.* at 680.

<sup>102</sup> *Id.* at 683 (Stevens, J., dissenting).

<sup>103</sup> *Id.* at 686 (Souter, J., dissenting).

<sup>104</sup> *Id.*

## VII. CONSTITUTIONALLY INSULATING THE FAITH-BASED INITIATIVE

The Faith-Based Initiative exemplifies the difficulty of administrative rulemaking in the face of an ambiguous constitutional standard. Until the Supreme Court clarifies its establishment clause jurisprudence, the Initiative will remain embroiled in controversy over its constitutionality. Yet neither the President nor Initiative administrators have chosen to allay the controversy and safeguard Initiative programs by responding to the tentative constitutional guidelines announced in *Mitchell* and *Zelman*. Instead, the President has situated the Initiative's programs in ways that have no administrative oversight and are nearly impossible to challenge in the courts, leaving a fundamental constitutional right unchecked by governmental or private means.

The refusal of the President and Initiative rulemakers to constitutionally insulate the WHOFBCI is a mistake both in terms of adequate social service provision and safeguarding constitutional rights. If the Supreme Court changes its establishment clause standards, many of the WHOFBCI-supervised programs may be forced to shut down, leaving many without vital social services. Social services programs that are voucher programs are more likely to withstand constitutional scrutiny and provide enduring care to those in need while protecting the constitutional rights of individuals.

The only way to constitutionally insulate such programs after *Zelman* may be to change their administrative structure so that all programs involve individual private choice. Faith-based organizations might only be allowed to participate in government programs where individuals bring vouchers to them. Where programs cannot be repackaged into voucher programs, *Mitchell* suggests that government might fund FBOs solely through secular intermediaries who then distribute the funds to faith-based providers. Redesigning programs may be expensive, but this

is a necessary and important price to pay for increased safeguarding of constitutional rights. Programs that cannot be redesigned to involve true private choice should not allow participation by FBOs. While this may mean an “unlevel playing field” for FBOs in some programs, unequal treatment of religious organizations in limited circumstances may be necessary to balance proper social service provision and protection of constitutional liberties.

### VIII. A CALL FOR PUBLIC ACCOUNTABILITY

Besides a repackaging of Initiative programs into voucher programs, greater public accountability should be built into the administrative structure. By creating better administrative and judicial checks on the Initiative, the Bush administration can avoid the specter of unconstitutionality. Greater public involvement in monitoring the Initiative will quell public accusations of corruption and religious coercion that have plagued the Initiative’s effectiveness. More broadly, by inviting the public to help enforce constitutional rights, the Faith-Based Initiative can help to ensure that this privatized program reflects public and constitutional values.

To protect the constitutional rights of both individuals and faith-based organizations, better constitutional safeguards must be built into the administrative infrastructure. Professor Martha Minow has called for a better public accountability structure for all such programs involving public/private partnerships.<sup>105</sup> For Professor Minow, a public framework for accountability would involve public input into the contracting process itself, including disclosure of all of the facts surrounding the contracting process and the opportunity for concerned citizens to contribute to the terms of those contracts.<sup>106</sup> The goal of such a public framework would be:

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<sup>105</sup> Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229.

<sup>106</sup> *Id.* at 1267.

[to] ensure that the government does not enter into any contracts that undermine constitutional or legislative commitments, absent public decisions to change those overarching rules. And it would create and maintain a viable process for enforcing the contracts, including substantive terms, procedures for resolving disputes, and mechanisms for terminating contracts.

Professor Minow also suggests that the government must become constitutionally accountable for its public/private partnerships.<sup>107</sup> In the context of the Faith-Based Initiative, public accountability means that President Bush or Congress should grant both administrative and legal checks against Initiative programs and the WHOFBCI itself so that corrupt central policies may be challenged directly by private plaintiffs.

### A. Administrative Checks

Administrative checks should be built into Initiative programs. Random, regular audits of faith-based funding programs should be conducted by a private organization to ensure that federal funds are not diverted for religious purposes and that impermissible endorsement does not occur. Using a private organization to conduct the audits should avoid an excessive entanglement problem, under *Mitchell*. The original Charitable Choice legislation in the Welfare Reform Act of 1996 provided that religious organizations would be subject to the same regulations as other contractors to account in accordance with generally accepted auditing principles for the use of such funds.<sup>108</sup> Charitable Choice does not require that recipient FBOs segregate federal funds into separate accounts, and states that organizations that segregate federal funds into separate accounts would only have “the financial assistance provided with such funds” subject to audit.<sup>109</sup> While this latter provision is ostensibly meant to protect religious

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<sup>107</sup> *Id.*

<sup>108</sup> 42 U.S.C.A. 604a(h)(1).

<sup>109</sup> 42 U.S.C.A. 604a(h)(2).

organizations from excessive government intrusion, not requiring organizations to segregate funds invites diversion of funding. Also, not allowing access to an organization's complete accounts might prevent adequate assessment of diversion or supplantation of funds if not all accounts are subject to audit. Thus, current auditing standards of federal programs permitting funding of FBOs are constitutionally insufficient.

Rules governing improved auditing programs should be established by executive order or congressional legislation to make them consistent between agencies. This will ensure that small organizations that deal with more than one agency for various projects will face identical regulations, thereby minimizing administrative costs for both the FBOs and the government. The WHOFBCI is already well-positioned to coordinate its various departmental centers to ensure rulemaking consistency. To ensure further consistency and accessibility of records, all FBOs participating in government programs should be required to keep their financial records in an easily accessible manner. For example, all participating religious organizations might be required to form 501(c)(3) not-for-profit organizations for their social service arms to assist with financial audits. The departmental centers might assist participating FBOs in forming 501(c)(3)s and preparing for financial audits by outside organizations.

Any administrative checks on the Initiative must be carefully designed to ensure that the audits do not constitute excessive entanglement between government and religion, do not interfere with the free religious exercise of FBOs, and do not violate principles of equal protection. Faith-based social service providers should not be allowed to escape monitoring because they are religious organizations, but they must not be required to undergo more rigorous monitoring than their secular counterparts.<sup>110</sup> However, equal protection should not require that

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<sup>110</sup> John J. DiIulio Jr., *Response Government by Proxy: A Faithful Perspective*, 116 HARV. L. REV. 1271, 1284 (2003).

FBOs undergo monitoring *identical* to that of their secular counterparts. FBOs face different financial issues from CBOs as a result of their religious affiliation, including tax-exempt status, not-for-profit status, and funding from their denominational bodies. FBOs should be monitored accordingly as long as the monitoring program does not constitute excessive entanglement.

## B. Judicial Checks

The Faith-Based Initiative would also benefit from greater public accountability through the judicial system. Charitable Choice 1996 does provide that “any party which seeks to enforce its rights under this section may assert a civil action for injunctive relief exclusively in an appropriate State court against the entity or agency that allegedly commits such violation.”<sup>111</sup> The Charitable Choice Provisions of the Community Solutions Act of 2001 contain similar monitoring provisions, but require segregation of accounts.<sup>112</sup> Yet while the C.S.A. languishes in committee, no such checks, administrative or legal, exist to ensure the constitutional application of the Executive Orders that created most of the Faith-Based Initiative Programs. And no Charitable Choice statute creates any private right of action for taxpayers who wish to ensure that their tax dollars are not unconstitutionally diverted for religious use. While creating a private right of action to an executive order might not be usual policy, the executive orders relating to the Initiative implicate fundamental constitutional rights in a way that most executive orders do not, and thus requires special protections. However, as discussed above, actually creating standing to challenge the Faith-Based Initiative may be difficult.

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<sup>111</sup> 42 U.S.C.A. 604a(i).

<sup>112</sup> See 42 U.S.C.A. §300x-65(g)(2). All federal programs involving financial assistance to nonprofit institutions in receipt of more than \$300,000 in total federal awards require annual audits by a certified public accountant. The independent audit includes a review for complete program compliance. See Executive Office of the President of the United States, Office of Management and Budget, Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations, 7 C.F.R. §3052.200 (2001).

### C. Additional Public Checks

Professor Minow further suggests that public/private partnerships be infused with democratic values.<sup>113</sup> She suggests a public commission to periodically review the cumulative effects of privatization decisions, or hearings on the effects of privatization by a legislative or administrative body.<sup>114</sup> Minow believes that the very existence of such a commission would “provide a focal point for reporting by private, nongovernmental groups as well as an occasion for media attention, public education and debate, and citizen action,” thereby improving democratic accountability.<sup>115</sup> The 9-11 Commission, with its public proceedings and report, exemplifies the type of public accountability mechanism described by Minow. Applied to the Initiative, such measures could improve public perceptions of the program and foster greater public understanding of the proper constitutional relationship between FBOs and government. A public commission of experts and interested citizens would root out corruption within the Initiative and help safeguard against religious coercion. Such a commission might regularly audit the WHOFBCI’s activities to ensure that they equally promote the participation of both FBOs and secular CBOs in social service provision.

### D. Conclusion

The Faith-Based Initiative has the power to harness the zeal of religious social service organizations to serve needy Americans while protecting religion and government from interfering with each other. Yet reconciling the Faith-Based Initiative with the First Amendment

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<sup>113</sup> Minow, 116 HARV. L. REV. at 1268.

<sup>114</sup> *Id.* at 1269.

<sup>115</sup> *Id.* at 1269.

is a task fraught with administrative and constitutional difficulties. The Supreme Court's failure to delineate a rule for the proper relationship between religion and government has left lawmakers to operate in constitutional chaos. Implementing administrative, judicial, or other public checks on the Initiative will be expensive and time-consuming. Any checks that are implemented may ironically result in the "excessive entanglement" that the constitution seeks to avoid, or may violate an establishment clause test that the Court will develop in the near future. In the face of this constitutional uncertainty, the President and Congress must allow the public to check and challenge the Faith-Based Initiative. Permitting taxpayers and other citizens to challenge the Initiative and its programs in court will eventually force the Supreme Court to clarify its position on the establishment clause and give better guidelines to rulemakers. Additional public checks outside of the legal system will ensure that Initiative-related constitutional abuses are promptly found and corrected if standing and other preliminary issues delay court challenges. Bringing public accountability to the faith-based initiative will safeguard the right of program participants, religious groups, and all American taxpayers to be free from governmental establishment of religion. Whatever the establishment clause may mean, faith in American government belongs in the public eye, not up the President's sleeve.