Equal Treatment for Religious Expression after *Colorado Christian University v. Weaver*

*By Stuart J. Lark**

> We know that faith and values can be... the foundation of a new project of American renewal. And that's the kind of effort I intend to lead as president of the United States.
>
> President Barack Obama

The Bush Administration conceived the so-called "Faith-Based Initiative" to leverage the efforts of religious organizations in addressing various social and educational needs. The initiative reflects in part the principle that religious organizations, in exercising their call to serve others, often share with the government a common purpose. This principle resonates with President Obama and he is continuing the initiative, albeit with some changes.[1]

The initiative also reflects the principles of religious liberty underlying the First Amendment. These principles, unfortunately, are both more complex and more contentious than the "common purpose" principle. They have, for instance, generated substantial controversy regarding how much religious content faith-based organizations can include in the social or educational services they provide with government funds.[2]

There are essentially two views on religious expression as it pertains to direct grants to private organizations selected *without regard to religion.* Professors Ira C. Lupu and Robert W. Tuttle have written extensively on the faith-based initiative and have argued that the Establishment Clause does and should require the *exclusion* of religious content from otherwise qualifying activities, particularly if the content is "transformative" or "indoctrinating."[3]

Others (including this author) have argued that in a religiously neutral program, the Establishment Clause should *accommodate* private religious expression that furthers the purposes of the program.[4] Among other things, excluding such expression from government funded programs has the effect of marginalizing religious viewpoints, an effect which increases as the role of government increases.

The Bush Administration walked the line between these two positions, closely adhering to the ambiguity in the applicable U.S. Supreme Court precedents regarding the meaning of the phrase "inherently religious activities" (which the Court has held cannot be directly funded even in a religion-neutral program).[5] Faced with vague restrictions on religious expression, some faith-based organizations have chosen to forego the funds available to their secular counterparts so as to preserve their distinctive religious mission. Others have chosen to participate in the initiative and muddle through, sometimes to their legal detriment. In the absence of definitive guidance, a growing number of court cases have adopted the exclusionary position.[6]

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The Tenth Circuit's recent decision in *Colorado Christian University v. Weaver*,[7] however, strongly affirms the accommodation position. The decision effectively exposes and rejects the discrimination that results when government excludes religious perspectives and approaches from general educational or social service programs. And although the decision does not directly reject the exclusionary position as applied to direct funding, it does lay a foundation for future challenges to this position.

I. Integrated Religious Expression in *Colorado Christian*

Colorado Christian involved a challenge to a student aid program established by the State of Colorado. The program provided scholarships to in-state students attending an accredited institution of higher education in the state. However, the program excluded otherwise qualifying institutions which were "pervasively sectarian."[8] This exclusion reflected the Supreme Court's Establishment Clause doctrine at the time of the program's creation, which held that "no state aid at all may go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones."[9] The statute enumerated various criteria to determine whether an institution is "pervasively sectarian." Applying these criteria, the state permitted a Methodist university and a Catholic university to participate in the program, but denied participation to a Buddhist university and Colorado Christian University (CCU).[10]

The following three characteristics of CCU's educational program emphasize how the pervasively sectarian exclusion discriminated against religious viewpoints integrated into the program.

1. CCU Satisfied All of the Non-Religious Requirements of the Student Aid Program

CCU is a fully accredited higher educational institution which offers a comprehensive undergraduate and graduate program rooted in the arts and sciences.[11] Among other subjects typically taught at such institutions, CCU students learn the laws of science,[12] the techniques of educating, the theorems of mathematics, and the algorithms of computer science.[13] Upon graduation, these students hold degrees from an accredited institution and are fully qualified to begin their careers in their chosen professions. CCU graduates may pursue careers ranging from business to teaching to computer related occupations. In addition, such graduates may pursue post-graduate degrees in engineering, law, medicine, and other fields.

Based on these factors, the Colorado Commission on Higher Education (CCHE), the agency responsible for administering the program, expressly acknowledged that CCU qualified to participate in the student aid programs in every respect except for the restriction on "pervasively sectarian" institutions.

2. CCU's "Christ-Centered" Educational Program Teaches "Secular" Subjects from a Christian Perspective

CCU provides its educational program within a distinctly Christian environment which nurtures Christian spiritual maturity—the ability to live in accordance with what students understand to be reality. But CCU's concept of a "Christ-centered" education extends beyond a nurturing environment; it reaches to the philosophical underpinnings of knowledge and truth.

CCU's educational program seeks to integrate biblical concepts with the arts, sciences, and professional fields. This integration expands upon the "secular" aspects of these programs. CCU strives to produce graduates who are not only competent in their fields of study but equipped to analyze the knowledge they have gained from a Christian perspective. In this regard, CCU's programs are both "secular," in the sense that they produce graduates with the requisite knowledge and skills to contribute to society, and "religious," in the sense that they equip graduates to analyze knowledge and make life choices based on Christian principles.

One such biblical concept is the relationship set forth in the Bible between God and the material world.[14] Applying this relationship, the president of another Christian college has described a "Christ-centered" chemistry course as follows:

> Chemicals... obviously behave the same for Christians as they do for non-Christians. At that level... there should be no difference at all [between a "Christ-centered" course and a nonreligious course]. But I want more for our students.... I want them not only to be fascinated and delighted by the intricacies of chemical behavior, but also to realize that what they're exploring is the handiwork of the Lord Jesus Christ.... I want them to delight in what they're learning about chemistry, but as Christians I also want them to see at every moment what these things are telling them about the One they know as their Savior, so that in the end they are lifted up to him, even in a chemistry course.[15]

As this example demonstrates, a Christ-centered education "...is marked by courses and curricula which are rooted in and are permeated by a Christian worldview, rather than a secular worldview (often disguised as a supposedly neutral worldview)."[16]

3. CCU's "Christ-centered" Educational Program is no more "Ideological" than any other Educational Program

Most colleges and universities have some kind of mission or institutional values statement. For instance, Regis University in Denver, a Catholic institution, describes its mission to "provide value-centered undergraduate and graduate education."[17] As part of this education, Regis students "examine and attempt to answer the question: 'How ought we to live?'"[18] Given that Regis states that its mission is consistent with Judeo-Christian principles, it appears that the values around which its educational programs are centered (and which presumably are used to answer the question of how one ought to live) reflect Regis' understanding of Christian values. By way of contrast, Colorado College in Colorado Springs identifies as its core values a shared commitment to: value all persons, live with integrity, nurture an ethic of environmental sustainability and encourage social responsibility.[19] These values appear to track those of modern secularism.

This country's earliest institutions of higher education were founded to teach from expressly Christian viewpoints.[20] However, the predominant defining values today are more likely to be "egalitarianism, environmentalism, self-esteem, and other products of modern secular liberal thought."[21] The important point about these differences is that there is no "neutral" reference point from which to evaluate them. With respect to the change in the predominant value system in education from Christianity to secularism, Professor (now Judge) McConnell has noted:

> It is essential to recognize that secularism is not a neutral stance. It is a partisan stance, no less "sectarian," in its way, than religion. In a country of many diverse traditions and perspectives—some religious, some secular—neutrality cannot be achieved by assuming that one set of beliefs is more publicly acceptable than another.[22]

The view or presupposition that chemicals are created by God is, of course, a religious and philosophical viewpoint. Indeed, it is a viewpoint that stands in sharp contrast to the presupposition that chemicals are derived from purely natural causes. However, the difference in presuppositions is simply that—a philosophical difference about the nature of reality. The state is not neutral when it chooses to fund the secular viewpoint and not fund the religious viewpoint.

The pluralism underlying the First Amendment supports a rich diversity of educational institutions offering different perspectives in the marketplace of ideas. To ensure the continued vitality of this marketplace, and to preserve this pluralism, no otherwise qualifying institution should be excluded from benefits offered to all solely because the content of its programs reflect religious convictions.

II. No Funding of Religious "Indoctrination" in Secular Education: The District Court's Exclusionary View of *Colorado Christian*

CCU's challenge asked whether the state could exclude CCU and its students from a student aid program for which they otherwise qualify solely because of the religious character of CCU and its educational program. The district court held not only that it could, but that it must.[23] The district court acknowledged that the "pervasively sectarian" exclusion in the student aid program was presumptively unconstitutional because it discriminated on the basis of religious character. However, the court determined that the exclusion survived strict scrutiny because it was narrowly tailored to a compelling state interest.

The court found this interest by interpreting Colorado constitution Article IX, § 7 to prohibit the funding of "religious education."[24] In addition, the court broadly defined "religious education" to include not only "exclusively religious" education such as religious vocational training, but also educational programs which, like CCU's, integrate religious viewpoints into the teaching of "secular" subjects. The court held that Art. IX, § 7 prohibits funding for institutions "whose purportedly 'secular' instruction is predominated over and inextricably entwined with religious indoctrination."[25] The exclusion turned not on whether CCU's educational program provided sufficient "secular" educational value—indeed the

state acknowledged that it did—but rather on whether it was otherwise too religious.

It should be noted that this interpretation is certainly not obvious from the wording of Art. IX, § 7, which, on its face, speaks to *sectarian institutions*, not to *religious activity*.[26] In this regard, the district court appears to have been informed by the Colorado Supreme Court's analysis in *Americans United for Separation of Church and State v. Colorado*.[27] In that case, the court upheld the participation of Regis College, an admittedly sectarian institution, in the same student aid program. In the course of the opinion, the court claimed that, notwithstanding its plain language, Art. IX, § 7 allowed aid to sectarian institutions where there is limited "risk of religion intruding into the secular educational function of the institution" or where there is not "the type of ideological control over the secular educational function which Art. IX, § 7, at least in part, addresses."[28]

The district court also asserted that Art. IX, § 7 is essentially identical to the Washington constitutional provision at issue in *Locke v. Davey*.[29] But the Washington provision, which prohibits the use of government funds for "religious worship, exercise or instruction," addresses religious activity, not sectarian institutions. Also, the Court in *Locke* narrowly interpreted the Washington constitutional provision to apply only to the narrow state interest asserted in not funding the religious training of clergy.[30]

In any event, having identified a state interest in not funding secular education provided from a religious viewpoint, the district court concluded that the "pervasively sectarian" exclusion was narrowly tailored to this interest.[31] The district court noted that the pervasively sectarian exclusion does not "exclude all sectarian institutions, [but] only those in which religion intrudes upon secular instruction."[32] The district court noted also that by definition a pervasively sectarian institution is one in which the "religious mission predominates over its secular educational role."[33] Accordingly, as a pervasively sectarian institution,

> it is not just CCU's "courses in theology or Biblical studies" that raise the risk of public funding of religious indoctrination; by definition, religion influences and predominates over CCU's secular instruction as well. It is not simply a question of excluding Biblical studies or theology from funding—indeed, students at generally sectarian colleges can receive tuition assistance for such studies, *Americans United,* 648 P.2d at 1076—but rather, a question of excluding funding for all religious indoctrination, whether it be found in a theology lecture or in an accounting course.[34]

III. Impermissible Religious Discrimination and "Indoctrination" Quotients: The Tenth Circuit's Accommodating View of *Colorado Christian*

The Tenth Circuit, in an opinion fortuitously written by Judge Michael McConnell, reversed the district court and sided with CCU. The court's opinion helpfully prohibits both discrimination among religious institutions based on their religiosity and actions by government officials to discern the religious meaning in an organization's activities. However, by holding that the pervasively sectarian exclusion is not narrowly tailored to the state interest articulated by the district court, the decision leaves open the possibility that the state could, with appropriate revisions to the statute, exclude otherwise qualifying educational programs based on their religious character.

A. Government Cannot Favor Organizations Based on their Religiosity

The court concluded that the *pervasively sectarian* test violated the First Amendment because it "necessarily and explicitly discriminate[d] among religious institutions"[35] and "the discrimination is expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations, as defined by such things as the content of its curriculum and the religious composition of its governing board."[36]

The court rejected an argument that the discrimination was based not on religion but rather on the type of institution (e.g., between "moderately religious" and "primarily religious" institutions). The court observed that there is "no reason to think that the government may discriminate between 'types of institutions' on the basis of the nature of the religious practice these institutions are moved to engage in."[37]

In contrast to the district court, the Tenth Circuit held that this discrimination did not survive heightened scrutiny.[38] The court held that the district court's reliance on Art. IX, § 7 was "mistaken," and that, because the aid is indirect, the Colorado Supreme Court "would likely uphold the program even if CCU were admitted."[39] Although this analysis yielded a favorable result for CCU, it did so without evaluating the merits of the state's interest in not funding religious education.

In this regard, it should be noted that the court relied upon a somewhat incomplete and dismissive reading of *Americans United*. Specifically, the Tenth Circuit noted that in "*Americans United*, the court upheld the scholarship programs at issue here against state constitutional challenge on the basis of the indirect nature of the aid, the higher-education context, and the availability of the aid to students at both public and private institutions."[40] But the Tenth Circuit failed to note that the Colorado Supreme Court also included the pervasively-sectarian exclusion as a factor which ensured that the program complied with Art. IX, § 7.[41] In a footnote, the Tenth Circuit does acknowledge that the Colorado Supreme Court thought the exclusion was important specifically because it protected against ideological control over secular education addressed by Art. IX, § 7.[42] The Tenth Circuit summarily concluded, nevertheless, that the Colorado Supreme Court did not hold that the exclusion was necessary to protect this interest.[43]

It is true that in identifying a number of factors which ensured that the program complied with Art. IX, § 7, the Colorado Supreme Court did not expressly state that each of them was necessary. But neither did it state that any subset of them was sufficient.[44] Therefore, the Tenth Circuit potentially misreads the interest protected by Art. IX, § 7 as interpreted by the Colorado Supreme Court in two ways: (1) by holding that the interest is not implicated in a program providing indirect aid and (2) by holding that the pervasively sectarian exclusion is not necessary to protect the interest.

B. Government Cannot Determine the Indoctrination Quotient of Activities

As a second and independent basis for striking down the pervasively sectarian exclusion, the Tenth Circuit held that the statutory criteria used to determine the religious character of an institution required government officials to make unconstitutional "judgments regarding contested questions of religious belief or practice."[45] This portion of the decision may prove to have greater impact on the law.

Among other things, the *pervasively sectarian* test required government officials to determine whether an institution's curriculum required religion courses that tended to indoctrinate or proselytize.[46] The court observed that the line "between 'indoctrination' and mere education is highly subjective and susceptible to abuse."[47] Indeed, "whether an outsider will deem [CCU's] efforts to be 'indoctrination' or mere 'education' depends as much on the observer's point of view as on any objective evaluation of the educational activity.... Many courses in secular universities are regarded by their critics as excessively indoctrinating, and are as vehemently defended by those who think the content is beneficial."[48] Based on these observations, the court concluded in what is perhaps the money line of the opinion that "[t]he First Amendment does not permit government officials to sit as judges of the '*indoctrination' quotient* of theology classes."[49]

The *pervasively sectarian* test also required government officials to inquire into whether any policy of an institution's governing board has the image or likeness of a particular religion.[50] The court held that government officials could not evaluate this factor because "[i]t is not for the state to decide what Catholic—or evangelical, or Jewish—'policy' is on education issues."[51] A third factor was whether the students, faculty, trustees or funding sources of an institution are "primarily" of a "particular religion."[52] The court noted that identifying a "particular religion" required a definition of ecclesiology and that "the government is not permitted to have an ecclesiology, or to second-guess the ecclesiology espoused by our citizens."[53]

IV. The Improved Prospects for Equal Funding of Religious Expression after *Colorado Christian*

Colorado Christian puts one or two more nails in the coffin of the pervasively sectarian doctrine. The decision prohibits government officials from excluding religious educational institutions from government programs for which they otherwise qualify based solely on their *institutional* religious character, particularly where other religious institutions are participating. But as discussed above, the decision evaded the merits of the state interest which was articulated in *Americans United* and relied upon by the district court. Specifically, the Tenth Circuit left unchallenged the proposition that the State could establish a funding program that excludes otherwise qualifying educational *activities* based on their religious character (i.e., where there is "ideological control over the secular educational function").

If such a program is permitted, it will effectively turn the demise of the pervasively sectarian doctrine into a hollow victory. For the defining characteristic of a pervasively sectarian institution such as CCU is that its religious convictions permeate all of its activities. Therefore, an exclusion of activities which are too religious is no better for CCU than an exclusion of institutions which are pervasively sectarian.

In the terminology used in the case law, the core issue unresolved by *Colorado Christian* is whether the phrase "inherently religious activities" (or "religious education" or "religious indoctrination") should be construed broadly to encompass religious viewpoints on or approaches to secular activities, or narrowly to apply only to exclusively religious activities. Although the Tenth Circuit did not reach this issue, its decision strengthens the position that a broad exclusion of religious expression is presumptively unconstitutional under the Free Exercise Clause, and that it is not required to comply with the Establishment Clause.

A. Colorado Christian Limits the Application of Locke in Constitutional Challenges to Religious Discrimination in Government Programs.

As discussed below, a broad religious exclusion is not neutral with respect to religion and is therefore presumptively unconstitutional under the Free Exercise Clause.[54] Generally, a law that is not neutral is subject to strict scrutiny and must be narrowly tailored to advance a compelling governmental interest.[55] However, whether this standard applies to government funding was called into question in *Locke v. Davey*, a case in which the U.S. Supreme Court held that a state may exclude clergy training from a general scholarship program.[56]

Noting that the only interest upheld in *Locke* was a state interest in not funding the religious training of clergy,[57] the Tenth Circuit declined to extend *Locke* to all decisions regarding government funding of religious education.[58] The court held that *Locke* "does not imply that states are free to discriminate in funding against religious institutions however they wish, subject only to a rational basis test."[59] Indeed, the court observed that the restriction in *Locke* applied only to a "distinct category of instruction" and not to an entire program of education, and that students were permitted to attend pervasively religious schools.[60]

The Tenth Circuit's reading of *Locke* indicates that general First Amendment principles would apply to the exclusion of religious expression from religion-neutral programs. These principles point to the conclusion that a broad exclusion is unconstitutional.

1. A Broad Exclusion Results in Religious Discrimination

A long line of cases establish that when the government excludes private religious expression that is otherwise within the scope of a government program (e.g., by denying government resources for such expression), it engages in religious viewpoint discrimination. In *Good News Club v. Milford Central School*, a Bible club challenged a school policy pursuant to which "any group that promotes the moral and character development of children was eligible to use the school building."[61] Nevertheless, the club was denied access to the school because the policy prohibited use "by any individual or organization for religious purposes."[62]

The Court held that the exclusion of the club based on its religious nature "constitutes unconstitutional viewpoint discrimination" because "the [club] seeks to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint."[63] The Court rejected the argument "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."[64] Indeed, the Court observed, there is "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."[65]

Several years earlier, in *Rosenberger v. Rectors of the Univ. of Virginia*, the Court held that a public university student club funding policy engaged in viewpoint discrimination when it excluded religious publications.[66] The Court characterized the discrimination as follows:

> [The policy] does not exclude religion as a subject matter, but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. 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. The prohibited perspective, not the general subject matter, resulted in the refusal to make... payments, for the subjects discussed were otherwise within the approved category of publications.[67]

This discrimination is precisely what results under a broad exclusion of religious expression. For instance, even if CCU's "Christ-centered" education program is an "essentially religious endeavor," as the district court asserted,[68] it is still the teaching of secular subjects from a particular viewpoint (just as the "quintessentially religious" Bible club activities in *Good News Club* were characterized by the Court "as the teaching of morals and character development from a particular viewpoint"[69]). Indeed, just as Colorado College extends its viewpoints regarding the value of all people and environmental sustainability into its educational programs, so CCU extends its viewpoints regarding God's role in nature into its educational programs.

Although *Good News Club* and *Rosenberger* analyzed the legality of the discrimination under the Free Speech Clause, the discriminatory character of the exclusions also raises Free Exercise concerns. Specifically, denying funding to a "Christ-centered" education in this context, as required under a broad exclusion, constitutes religious discrimination and violates the neutrality required by the Free Exercise Clause.[70]

2. Private Religious Expression in furtherance of a Religion-Neutral Program is not attributed to the Government

The Establishment Clause analysis in this context turns on whether the student aid results in governmental indoctrination.[71] The U.S. Supreme Court has consistently held that indirect aid does not implicate the Establishment Clause because the choices of recipients of indirect aid to use the funds for religious activities are not attributable to the government.[72] With respect to direct aid, the Court's precedents suggest that private religious expression, even if it in some sense constitutes religious indoctrination, is not attributable to the government if it is conducted in furtherance of the objectives of a religiously neutral program. In such a program, only a narrow exclusion, one which applies only to exclusively religious activity that does not further the secular purposes of the program, is necessary to satisfy Establishment Clause requirements.

In its most recent case involving direct aid to religious schools, a four-justice plurality of the Court held that

> the question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action.[73]

The plurality further stated that "[i]n distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion."[74]

In applying the neutrality principle to the question of attribution, the plurality explained that

> If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination.[75]

On this basis, the plurality concluded that if "eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern."[76]

The Court has required neutrality to avoid attribution in other cases involving aid to private organizations. Most recently, in *University of Wisconsin v. Southworth*, the Court rejected a challenge to a fee collected from students at a public university and used to fund student organizations on a viewpoint neutral basis.[77] The Court noted that in *Rosenberger* it had rejected the argument "that any association with a student newspaper advancing religious viewpoints would violate the Establishment Clause."[78] Instead, the Court had held "that the school's adherence to a rule of viewpoint neutrality in administering its student fee program would prevent 'any mistaken impression that the student newspapers speak for the University.'"[79] Applying this rationale, the Court concluded that "[v]iewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected."[80]

Because a narrow construction of religious education can be applied in a religion-neutral manner (by analyzing whether the activity furthers the secular purposes of the government program), it is sufficient to satisfy the Establishment Clause. By way of contrast, a broad construction actually undermines the neutrality that the Court has held is necessary to avoid attribution because it requires the use of religious criteria to distinguish among permitted and prohibited activities.

Professors Lupu and Tuttle have argued that attribution

for Establishment Clause purposes should turn not on neutrality but on predictability. That is, religious expression by a private grant recipient should be attributed to the government if a government official could reasonably foresee that the recipient would engage in such expression.[81] They argue that this broader standard for attribution is necessary because the Establishment Clause uniquely constrains government action.[82] It does not follow, however, that the unique character of the Establishment Clause necessarily makes the government responsible for private religious expression it can reasonably foresee when the recipient is selected without regard to religion. In fact, a majority of the Court has arguably held at least twice, *Rosenberger* and *Southworth*, that neutrality is sufficient to avoid attribution for Establishment Clause purposes.[83]

Finally, Professors Lupu and Tuttle argue that indirect aid is the *only* type of program in which religious expression can be integrated into a government funded activity.[84] But if indirect aid were the only means by which attribution could be avoided with respect to religious activities, then a governmental entity could intentionally disfavor religious viewpoints with impunity by incorporating a direct aid component into a program and then hiding behind the Establishment Clause. This result, facilitated by a broad exclusion, turns the Establishment Clause on its head.

3. The Court's Decisions have Never Clearly Described the Religious Activities that must be Excluded from a Religion-Neutral Government Program

In contrast with the *Mitchell* plurality, Justice O'Connor held that in addition to neutrality, the Establishment Clause prohibits actual diversion of government aid to religious indoctrination.[85] However, Justice O'Connor did not identify precisely what activities would constitute impermissible religious indoctrination in a neutral aid program. Noting that the school aid program challenged in the case prohibited the use of the aid for "religious worship or instruction," Justice O'Connor simply held that this restriction was sufficient to avoid Establishment Clause violations.[86]

The case that described prohibited activities most closely is *Bowen v. Kendrick*.[87] In *Bowen*, the Court held that a government aid program may violate the Establishment Clause if the funds are expended on "specifically religious activities" or for "materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith."[88] The Court did not, however, define these terms.

While it is anyone's guess what the Court thought these terms meant, the logic of the opinion supports a narrow interpretation. For instance, the Court held that no "express provision preventing the use of federal funds for religious purposes" was required because the general statutory constraints on the use of the funds were sufficient.[89] Since such general statutory constraints would not exclude integrated religious content in activities furthering the program's purposes, the restricted religious expression must include only exclusively religious activities.

In addition, the Court stated that "evidence that the views espoused on questions such as premarital sex, abortion, and the like happen to coincide with the religious views of the program grantees would not be sufficient to show that the grant funds are being used in such a way as to have a primary effect of advancing religion."[90] On this basis, the "views of a particular faith," which the Court held could not be funded, do not include religious views on the subject matter of the program. Put differently, the phrase "views of a particular faith" is intended to be defined narrowly to apply only to views on exclusively religious subjects outside the scope of the program.

B. Colorado Christian Constrains the Authority of Government Officials to Administer a Broad Exclusion of Religious Viewpoints in Otherwise Qualifying Activities

The holding in *Colorado Christian* that the religious determinations required in the pervasively sectarian test are unconstitutional applies with equal force to similar determinations regarding the religious character of activities. The Tenth Circuit based its holding in part on the fact that the Court in *Rosenberger* had rejected an argument, put forth by the dissent, the government officials could distinguish between materials containing religious indoctrination and evangelism and materials containing a descriptive examination of religious doctrine.[91]

The Tenth Circuit also relied on *New York v. Cathedral Academy*,[92] a case in which the Court struck down a statute which allowed religious schools to obtain reimbursements for costs incurred with respect to certain examinations, provided the examinations were not too religious. The statute required government officials to "review in detail all expenditures for which reimbursement is claimed, including all teacher-prepared tests, in order to assure that state funds are not given for sectarian activities."[93] The Court rejected this audit, noting that it would place religious schools "in the position of trying to disprove any religious content in various classroom materials" while at the same time requiring the state "to undertake a *search for religious meaning* in every classroom examination offered in support of a claim."[94] The Court concluded that "[t]he prospect of church and state litigating in Court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment."[95]

These cases call into question the government's authority to parse out religious indoctrination from otherwise qualifying activities. They also provide additional support for a narrow reading of the religious activity restrictions in *Bowen.* Taken together, *Bowen* and *Cathedral Academy* require government officials to identify "specifically religious activities" or "explicitly religious content" or activities "designed to inculcate the views of a particular faith" without also engaging in a "search for religious meaning."[96] The only way that the *Bowen* standards can be implemented in a manner consistent with *Cathedral Academy* (and *Rosenberger*) is if they are narrowly defined to apply only to exclusively religious activities. As narrowly defined, government officials need only determine whether funded activities lack appropriate secular content.

In a similar manner, determining whether any activity expresses the views of a particular religion on a subject requires both an ecclesiology as to what a particular religion is and a determination as to what the views of that religion are on the

subject. However, "the government is not permitted to have an ecclesiology" or "to decide what Catholic—or evangelical, or Jewish—'policy' is" on a subject.[97]

Further, these cases undermine the distinction Professors Lupu and Tuttle have proposed between religious indoctrination, which may not be funded, and other religious expression which may be funded. They have argued that a health program which "promotes the integration of religious spirituality and faith as inherent components of public health delivery systems" and which "brings together health care professionals, clergy [and] students... in a 'transformative educational process'" may not constitute religious indoctrination.[98] The critical issue, they argue, is "whether the program merely teaches participants about the importance of spirituality in many patients' lives, or engages in forbidden religious indoctrination of participants."[99] Such a determination, however, appears inconsistent with *Colorado Christian* since it will effectively require a judgment regarding the "indoctrination quotient" in the activities.[100]

In short, a broad exclusion requires government officials (and private citizens) to answer questions about religion that have eluded philosophers and theologians for centuries. Even if government officials possessed the requisite wisdom, they lack the institutional authority to make such religious determinations. A narrow exclusion, by contrast, only requires government officials to do precisely what they are trained to do—assess whether an activity furthers the government's purposes."

Religious Expression in the Public Square

In articulating his views on religion in society, President Obama has asserted that "[s]ecularists are wrong when they ask believers to leave their religion at the door before entering the public square."[101] Nevertheless, his initial statements regarding religious expression in government funded programs suggest that this is precisely what he intends to require.[102]

Of course, the position of any one administration does not affect the underlying constitutional standards. Private individuals should be permitted to integrate religious expression into religion neutral government funded programs because the First Amendment protects such expression. As the government increasingly underwrites the activities constituting the public square, the protection of private religious expression in such activities will become increasingly important. Otherwise, the result will be a *pervasively secular* public square in which religious voices are marginalized and genuine pluralism is lost.

Further, even if the sole motivation for a faith-based initiative is utilitarian (i.e., certain faith-based organizations may just get better results), prohibiting religious expression in the delivery of services is counterproductive. Such prohibition removes from the faith-based providers that which makes them most effective. As the author C.S. Lewis observed in a similar context:

> In a sort of ghastly simplicity, we remove the organ and demand the function. We make men without chests and expect of them virtue and enterprise. We laugh at honor and are shocked to find traitors in our midst. We castrate and bid the gelding be fruitful.[103]

Endnotes

1 Partnering with Communities of Faith, available at http://www.religionandsocialpolicy.org/docs/general/FS_PCF_FINAL.pdf.

2 Ira C. Lupu and Robert W Tuttle, The State of the Law-2008, A Cumulative Report on Legal Developments Affecting Government Partnerships with Faith-Based Organizations, The Roundtable on Religion and Social Welfare Policy, Dec. 2008, ii-iii, available at www.religionandsocialpolicy.org/docs/legal/state_ofthe_law_2008.pdf.

3 *See, e.g.,* Lupu and Tuttle, State of the Law, at 5-6, 17-24; Ira C. Lupu and Robert W Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DePaul L. Rev. 1 (2005), at 75-89 ("Faith-Based Initiative").

4 *See generally,* Stuart J. Lark, Religious Expression, *Religious Expression, Government Funds and the First Amendment*, 105 W.Va. L. Rev. 317 (2003) ("Religious Expression"). This argument is often made in connection with the related argument that excluding such expression violates the Free Speech and Free Exercise Clauses and, at least arguably, is not required under current Establishment Clause case law.

5 Lupu and Tuttle, State of the Law, at 18-24.

6 *Id*. at 24-25.

7 Colorado Christian University v. Weaver, 534 F.3d 1245 (10th Cir. 2008).

8 *Id*. at 1250.

9 *Id*. at 1251 (quoting Roemer v. Bd. of Pub. Works, 426 U.S. 736, 755 (1976).

10 *Id.*

11 CCU currently offers over 20 majors, which include accounting, biology, computer information systems, education, English and mathematics. CCU Profile, *available at* http://www.ccu.edu/friends/press.pdf.

12 For example, CCU's general chemistry class covers atomic structure, stoichiometry, chemical bonding, and gas and solution chemistry. Academic Catalog 2007-2008, *available at* http://www.ccu.edu/catalog/2007-08/courses/chm.asp.

13 CCU strives to sustain a community of faculty, administrators and staff who exemplify excellence in their professional fields. More than three-fourths of CCU's faculty has earned post-graduate degrees. CCU Profile, *available at* http://www.ccu.edu/friends/press.pdf. CCU's faculty includes professors holding doctorate degrees from the following institutions: the University of California-Berkeley, Harvard University, the University of Wisconsin-Madison, the University of Colorado, the University of Denver, Colorado State University and Oxford University (among others). Academic Catalog, *available at* http://www.ccu.edu/catalog/2007-08/faculty/faculty.asp.

14 Although there are obviously many different views of this relationship, one description is as follows:

Only God is truly independent; all created things, including the chemical elements chemists study, are utterly contingent upon him. They depend for their existence and their properties upon him in every instance, at all points and at every moment. Thus the very chemicals we study are Christ's handiwork and, if we allow them, they will declare to us his glory (Psalm 19:1).

Duane Litfin, Conceiving the Christian College 160 (Wm. B. Eerdmans Publg. Co. 2004).

15 Litfin, Conceiving the Christian College at 76-77.

16 *Id*. at 83 (quoting Stephen V. Monsma, Christian Worldview in Academia, Faculty Dialogue 21 (Spring-Summer 1994): 146).

17 Our Mission, *available at* http://www.regis.edu/regis.asp?sctn=abt.

18 *Id*.

19 CC Mission and Core Values, *available at* www.coloradocollege.edu/welcom/mission

20 *See* The Christian College: A History of Protestant Higher Education in America 40 (Baker Academic 2nd ed. 2006) (describing the religious affiliations of the initial higher educational institutions in this country, including Harvard, Yale and Princeton). *See generally,* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.G.

43 (1997) (discussing the history of Protestant values in public education).

21 Michael W. McConnell, *Why is Religious Liberty the "First Freedom"?* 21 Cardozo L. Rev. 1243, 1264 (2000).

22 *Id*. at 1264.

23 Colo. Christian Univ. v Baker, 2007 U.S. Dist. LEXIS 36531 (D. Colo. May 18, 2007).

24 *Id*. at *4, *51.

25 *Id*. at *53.

26 The district court quotes the relevant portions as follows:

Neither the general assembly, nor [other governmental bodies] shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any... college [or] university... controlled by any church or sectarian denomination whatsoever.

Id. at *30.

27 648 P.2d 1072 (Colo. 1982).

28 *Id*. at 1084.

29 *CCU*, 2007 U.S. Dist. LEXIS 36531 at *30 (citing Locke v. Davey, 540 U.S. 712 (2004)).

30 *Locke*, 540 U.S. at 723 n.5.

31 *CCU,* 2007 U.S. Dist. LEXIS 36531 at *53.

32 *Id*.

33 *Id*. at *54 (quoting *Americans United*, 648 P.2d at 1082).

34 *Id*. (footnote omitted).

35 *CCU*, 534 F.3d at 1258.

36 *Id*. at 1259.

37 *Id*.

38 *Id*. at 1267-68.

39 *Id*. at 1268.

40 *Id*. at 1268 (citing *Americans United*, 648 P.2d at 1083-1084).

41 *Americans United*, 648 P.2d at 1084.

42 CCU, 534 F.3d at 1268 n.10.

43 *Id*.

44 *Id*.

45 *Id*. at 1261.

46 *Id*. at 1262.

47 *Id*.

48 *Id*.

49 *Id*. at 1263 (emphasis added).

50 *Id*.

51 *Id*.

52 *Id*. at 1264.

53 *Id*. at 1265.

54 Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing Employment Div., Ore. Dept. of Human Res. v. Smith, 494 U.S. 872 (1990)).

55 *Id*. at 531–32.

56 540 U.S. 712 (2004).

57 *Id*. at 723 n5.

58 *CCU*, 534 F.3d at 1254-55.

59 *Id*. at 1256.

60 *Id*. at 1255, 1257 n.4.

61 533 U.S. 98, 108 (2001) (internal quotation omitted).

62 *Id*. at 103.

63 *Id*. at 109.

64 *Id*. at 111.

65 *Id*.

66 515 U.S. 819 (1995).

67 *Id*. at 831.

68 CCU, 2007 U.S. Dist. LEXIS 36531 at *26.

69 *Good News Club*, 533 U.S. at 111.

70 See, e.g., Lark, Religious Expression, at 330-335, 338-342; *Hartmann v. Stone,* 68 F.3d 973 (6th Cir. 1995).

71 Agostini v. Felton, 521 U.S. 203, 234 (1997).

72 Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Witters v. Wash. Dept. of Servs., 474 U.S. 481 (1986).

73 Mitchell v. Helms, 530 U.S. 793, 809 (2000) (plurality).

74 *Id*.; *see also id.* at 838 (O'Connor, J., concurring) ("[N]eutrality is an important reason for upholding government-aid programs against Establishment Clause challenges).

75 *Id*. at 809-810.

76 *Id*. at 820 (plurality).

77 529 U.S. 217, 233 (2000).

78 *Id.*

79 *Id*. (citing *Rosenberger*, 515 U.S. at 841). *See also Agostini*, 521 U.S. at 230 ("the criteria by which an aid program identifies its beneficiaries [is relevant to assessing] whether any use of that aid to indoctrinate religion could be attributed to the State"). For further discussion of the attribution principle, see Lark, Religious Expression, at 350-352.

80 *Id.*

81 Lupu and Tuttle, Faith-Based Initiative, at 64-65.

82 *Id*.

83 *Supra*, notes 78-80. Further, a predictability standard would seem to extend to indirect aid (e.g., voucher) programs, since in such programs the recipient's use of the aid for religious activity may be just as foreseeable.

84 Lupu and Tuttle, Faith-Based Initiative, at 74.

85 Mitchell, 530 U.S. at 840-42 (O'Connor, J., concurring).

86 *Id*. at 849.

87 487 U.S. 589, 621 (1988). For a discussion of other cases, see Lark, Religious Expression, at 344-50.

88 *Id*. at 621.

89 *Id*. at 614.

90 *Id*. at 621.

91 *CCU*, 534 F.3d at 1262 (citing Rosenberger, 515 U.S. at 867, 876, 877 (Souter, J., dissenting)).

92 434 U.S. 125 (1977).

93 *Id*. at 132.

94 *Id*. at 132-33 (emphasis added).

95 *Id*. at 133.

96 Cf. *Bowen*, 487 U.S. at 621, with *Cathedral Academy*, 434 U.S. at 132-33.

97 *CCU*, 534 F.3d at 1265.

98 Lupu and Tuttle, Faith-Based Initiative, at 87-88.

99 *Id*.

100 It also imposes a chilling effect on the program participants who risk losing funding if they cross the line. This effect would be increased if they

were required to certify that their activities did not constitute religious indoctrination. Further, such certification would not solve the constitutional issue since government officials would still be required to monitor such compliance with such certification.

101 Call to Renewal address, available at http://www.barackobama.com/20006/06/28/call_to_renewal_keynote_address.php.

102 Partnering with Communities of Faith, *supra*, note 1.

103 C.S. Lewis, The Abolition of Man 35 (Macmillan Publg. Co. 1947).