Religious Liberties

Faith, Funds, and Freedom:

Restoring Religious Liberties for CARE Act Employers

*by James A. Sonne**

Introduction to a Charitable Dilemma

It is no secret that President Bush has made it a priority of his administration to increase the role of faith-based institutions in meeting the social service needs of the nation.[1] The major questions for such entities, however, are: 1) how much of a role will they play, and 2) what demands, if any, will be placed upon their beliefs in the process. The answer to the first question is that they have been offered a rather large role, whether one looks at the President's proposals or those in Congress, all of which provide potentially billions of dollars for charitable work.[2] The answer to the next question, though, is less clear. Certainly, President Bush has made efforts to reassure faith-based groups.[3] Yet, based on the latest Senate proposal,[4] which apart from more limited efforts presently underway (including executive orders)[5] reflects the most likely form the project will ultimately take, there is reason for these groups to hesitate. Indeed, such hesitation is particularly warranted in light of the proposal's potential impact on the ability of faith-based entities to make employment decisions in accord with their religious beliefs. Upon further reflection, however, there may be cause for hope - at least on some level.

CARE Act Challenges

In the most recent Congress, a bipartisan coalition of members of the United States Senate introduced the Charity Aid, Recovery, and Empowerment Act of 2002 (the "CARE Act" or "Act").[6] The CARE Act is a response to proposals by the President and legislation passed by the House of Representatives for expanding the role of faith-based institutions in providing secular social services such as child protection, drug and alcohol treatment, crime prevention, job training, hunger relief, assistance for unwed mothers, and care for the elderly.[7] Although the Act stalled at the close of last year's session, it is probably safe to say that, apart from the more limited executive orders and select programs mentioned above, its approach has the highest chance of success in guiding the course for faith-based and community initiatives through the new Congress, particularly as such initiatives affect the employment practices of participating service providers.[8]

The CARE Act provides many of the same resources as its executive and House counterpart proposals, including billions of dollars in tax incentives and assistance for needy families.[9] The Act also expands existing social service block grants and offers administrative assistance to smaller community organizations.[10] In its treatment of access for religious entities to these and other federal programs, however, the CARE Act differs significantly from its predecessors. The Act does protect religious symbols, names, and governance, and forbids rejecting a participant simply because it has "not previously been awarded" participation, which would, of course, include any such prior religious-based rejection.[11] However, as is most relevant for our present purposes, it may restrict the exercise by a participating religious organization of its beliefs when making relevant employment decisions.[12]

Admittedly, the Act does not explicitly revoke the exemptions from applicable discrimination laws that are otherwise available to religious employers, perhaps in an effort to avoid the issue altogether.[13] Yet, express revocation may come with the new Congress, particularly given the related grounds offered by those who opposed the Act in November 2002;[14] and, even if it does not, the Act still poses significant risks to these entities by failing to offer categorical protection. As Senator Santorum, one of its co-sponsors, concedes, "[w]e are not discriminating in the hiring" under the Act.[15] If the exemptions are left untouched, the harm may be limited, but given the lack of certainty on this, as well as the differences from the House bill (which expressly protected the exemptions)[16] and the implications from discrimination prohibitions already in effect for the delivery of services under certain other federal programs,[17] there are no guarantees.

In failing to safeguard the exemptions that faith-based employers presently enjoy or otherwise invoke "charitable choice" (which is the name given to these and other rights afforded to such groups under relevant federal programs), the Act may, contrary to the wishes of the President and the House, require them to "check their beliefs at the soup kitchen door." In its current form, the Act would place these employers in the unenviable position of choosing between, on the one hand, the risk of forfeiting the presently-protected religious liberty of mission-based employee selection and retention and, on the other, bearing the inevitable burdens (litigation or otherwise) of its continued pursuit in the face of silence. If the Act was amended and the revocation made express, such challenges, whether philosophical, legal, or practical, would naturally be even greater.

Imagine a Jewish shelter for abused women, a Muslim inner-city youth center, or a Christian hospice for the aged. Presumably, anyone familiar with the services provided at each of these places would conclude that such services are otherwise non-religious in nature and that they contribute to the public welfare, notwithstanding the motivations of their providers, which almost certainly include the idea that religious beliefs enhance the service to be provided. Yet, if these beliefs include ideas such as "hiring co-religionists produces a better or more authentic service," these pro-

viders may be prohibited from participating under the Act, regardless of the loss to the public or the chilling effect on religion in general. In fact, on this latter point, it would seem to be a necessary inference that the more seriously one takes religion, the greater this risk of being excluded. Thus, in a sense, the very content of belief may become the issue in determining access to an otherwise available program to provide otherwise valuable secular services. Among the dilemmas facing potential faith-based participants, this may be their most disconcerting.

RFRA Rays of Hope

Despite the risks to faith-based entities posed by the CARE Act approach, either in its present silence or through any express revocation of discrimination law exemptions, there may be a possible, if limited, savior in the Religious Freedom Restoration Act of 1993 ("RFRA").[18] Congress adopted RFRA in reaction to the 1990 decision by the Supreme Court in *Employment Division v. Smith*, which held that there is no "free exercise of religion" right under the First Amendment of the United States Constitution[19] to be excused from obeying neutral laws of general application (in that case, the violation of a state narcotics law in the religious use of peyote which resulted in the denial of unemployment compensation).[20] In response, RFRA provides that government cannot simply rely on a law's neutrality to religion, but must demonstrate a "compelling interest" for any "substantial burden" to "religious exercise" that may result from its enactment or enforcement, something that may prove rather difficult for it to demonstrate in regulating the heretofore-protected employment policies of providers in the faith-based initiative.[21]

RFRA suffered a tremendous blow in the Court's 1997 decision of *City of Boerne v. Flores*,[22] which held that in adopting the measure Congress overstepped its authority in protecting civil rights under the Fourteenth Amendment of the Constitution.[23] That case, however, involved the application of RFRA to state, not federal, law. Indeed, a fair reading of *Flores*, together with a consideration of relevant lower court rulings,[24] suggests that RFRA still applies to federal law. Thus, RFRA could quite possibly provide protection from at least *federal* discrimination laws by insulating faith-based entities regardless of what such laws otherwise provide. This certainly would go a long way in addressing the concerns of faith-based participants in the CARE Act or, for that matter, any other federal program.

RFRA, however, is by no means a panacea for faith-based entities. Indeed, as far as state and local discrimination laws are concerned, *Smith* still poses a significant hurdle, except to the extent such states or localities have their own religious entity exemptions or their own RFRA-like statutes, either of which many states do,[25] and to the extent certain narrowly confined positions, like a priest, minister, imam, or rabbi, are otherwise insulated by the First Amendment (the "ministerial" exemption).[26] Of course, apart from any preemptive exemption of state or local law, something which was arguably included in House versions of the Act[27] but does not even exist under current federal law[28] (and may face some difficulty under *Flores* even if it did), faith-based entities would be no worse off than they are today in having to obey (or not) such state or local laws.

Perhaps a greater challenge to using RFRA in the CARE Act context, though, is less of a legal problem and more of a practical problem - namely, to obtain protection under RFRA, each faith-based provider would have to prove that it is covered by RFRA's terms. Thus, the price for each entity would certainly be higher than a blanket statutory protection given the burden to prove coverage on a case-by-case basis. Under RFRA, each provider would need to demonstrate why the CARE Act "substantially burdens" it in its "religious exercise," rather than merely showing that it is a religious entity. The former will surely not be as simple as the latter.

Notwithstanding the challenges to religious entities that may arise, however, by offering protection on the federal level RFRA provides significant solace in what might otherwise be a necessary political compromise to further the faith-based initiative project. State and local law may still apply, and certainly the litigation burdens on these entities will not be insignificant. Yet, in the face of opposition to categorical exemptions within the Act or through some other alternative such as "charitable choice," RFRA, and its attendant popularity in Congress (e.g., it passed almost unanimously),[29] may provide the best protection available. Of course, this assumes that such entities would otherwise elect to provide services under the Act, which is an issue outside the scope of this article.

Relevant Exemptions from Employment Discrimination Law

Exemptions from employment discrimination laws for religious entities, whether statutory, constitutional, or common law, are rooted in a theory of church-state relations providing that government should not involve itself in the internal affairs of religious institutions. Furthermore, under this theory, the more central the job or position in question is to a religion, the greater the reluctance to regulate. In any event, the overall purpose of these exemptions is to limit "governmental interference with the ability of religious organizations to define and carry out their religious missions."[30]

Federal Law

The general federal prohibition of discrimination in employment is found in Title VII of the Civil Rights Act of 1964, which provides, in pertinent part, that:

> [i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .[31]

In the face of this general pronouncement, however, there are statutory and constitutional "exemptions to the rule" for certain "religious" employers.

On a statutory level, there are three exemptions to the general prohibition against discrimination: 1) religious corporations, associations, or societies, 2) religious schools, and 3) religion as a "bona fide occupational qualification." The first provides that Title VII "shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities."[32] The second states that "it shall not be an unlawful employment practice" for an educational institution "to hire and employ employees of a particular religion if [it] is, in whole or substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious [entity] or if [its] curriculum is directed toward the propagation of a particular religion."[33] Both of these first two exemptions offer blanket protection from religious discrimination claims (but not others - e.g., race, sex) based on the nature of the employer - for example, dioceses, temples, or mosques, and, depending on their connection, related entities such as hospitals, shelters, and, in particular, schools. These exemptions ensure "that all religious institutions, including all church-affiliated schools, may use religious preferences in making employment decisions."[34] Typically, litigation focuses simply on the nature of the institution and, for the most part, such determinations are easily made.[35]

The third statutory exemption provides even more generally that "it shall not be an unlawful employment practice" for any employer to "hire and employ employees" on the basis of "religion, sex, or national origin . . . where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[36] Although this provision is available to all employers, not just religious ones, and it extends beyond religion to both gender and national origin, "the Supreme Court has cautioned that this exemption is to be read narrowly" in that "[b]usiness necessity, not convenience or preference, must be proved by the employer."[37] Cases concerning the religious "bona fide occupational qualification" (or BFOQ), which are rather scarce, reflect the narrowness of the exemption.[38] Examples include an otherwise non-exempt college maintaining tradition by reserving positions for Jesuits[39] and an employer in Saudi Arabia restricting helicopter pilot jobs to Muslims.[40]

In addition to statutory exemptions, the United States Constitution, as mentioned above, also provides protection, albeit on a more limited basis. In this regard, the so-called "ministerial" exemption, which is rooted in a non-entanglement view of the First Amendment, insulates churches and other institutions with "pastoral missions" (including groups such as the Salvation Army) from regulation of "ministerial or pastoral duties."[41] As the Fourth Circuit has opined, "[t]his constitutionally compelled limitation on civil authority ensures that no branch of secular government trespasses on the most spiritually intimate grounds of a religious community's existence."[42] Covered employees are those whose "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship."[43] Although the job range is narrow (e.g., rabbi, imam, minister, priest), this exemption extends beyond religion to any other status discrimination. Of course, the fact that CARE Act aid is limited to secular purposes[44] suggests that, in the absence of a "minister" who also provides aided secular functions, the implication of such positions would be limited in any event.[45]

The final "exemption" to federal discrimination law is less of a direct employment law exemption and more of an existing example of what the House bill would provide, namely "charitable choice."[46] Such protection, which is provided under both the Personal Responsibility and Work Reconciliation Act of 1996 (a welfare-reform bill signed by President Clinton that covers a much narrower group of participants than the CARE Act) and a December 2002 order signed by President Bush, allows religious groups to provide charitable services "without impairing the religious character of such organizations."[47] In so doing, the House bill, like the 1996 welfare-reform bill and unlike the CARE Act, also explicitly preserves the Title VII exemptions.[48]

State and Local Law

As mentioned above, Title VII, although the best known, is not the only source of employment discrimination law. Indeed, almost every state (with Alabama, Georgia, and Mississippi being the exceptions)[49] has its own general prohibition of discrimination in private employment.[50] In fact, even some cities have their own such laws.[51] Although these laws often merely supplement Title VII (which applies only to those with 15 or more employees)[52] by extending its prohibitions to smaller employers,[53] they often have different applications and exemptions[54] and, thus, must be reckoned with in their own right.[55] Moreover, in aid situations where the state plays an active role, challenges may also arise under the discrimination provisions of relevant "public contractor" statutes.[56]

State discrimination law exemptions vary.[57] Although a majority of states provide both a "bona fide occupational qualification" exemption and an exemption to religious entities (or schools) for religious purposes, some provide one, some the other, and some neither.[58] As far as the "ministerial" exemption to such state laws is concerned, this exemption would apply as a matter of federal constitutional law in the same manner as under Title VII, in addition to any further "free exercise" or "establishment" applications under analogous state constitutional provisions.[59] Finally, a few states have adopted their own "religious freedom restoration" statutes, which, in the absence of state constitutional conflicts, would apply to state discrimination laws.[60]

The Impact of the CARE Act on the Exemptions

Although the House version of the faith-based initiative addresses the exemption issue directly in generally guaranteeing continued protection to religious entities in the employment arena, the Senate's CARE Act is virtually silent

on the matter. As a result, religious groups may face significant risks under the Act when seeking to participate in a manner consistent with their beliefs, at least upon review of the face of this legislation.

The House version, which is entitled the "Community Solutions Act of 2001," provides tax incentives for charitable contributions, expands the ability of faith-based organizations to provide secular services, and offers assistance to low-income families.[61] In so doing, it also addresses participation by religious entities in numerous ways. These include non-discrimination against providers or beneficiaries, secular use limitations, and character and autonomy protections, including internal governance and symbols of religious character.[62] More pertinently, the bill provides that "a religious organization's exemption" under Title VII (i.e., organizational, not necessarily educational or BFOQ) "regarding employment practices shall not be affected by its participation in, or receipt of funds from" programs under the bill.[63] By this provision, the House version expressly protects the first federal statutory exemption described above and, thus, a covered group would not be required to forfeit its right to maintain a workforce that reflected its beliefs in exchange for participation. The bill does not otherwise expressly address the other statutory or constitutional exemptions to discrimination laws, federal or state.

The Senate's CARE Act provides charitable incentives similar to the House bill, including the expansion of tax benefits for charitable giving and avenues for increased partnership between government and faith-based entities, but it addresses the rights (and/or duties) of participating entities in a much more limited fashion.[64] In this respect, the Act merely provides that a participating organization shall not be made to alter or remove religious symbols, otherwise permissible governing documents, or board membership standards, and that it shall not be denied participation based on any previous rejection.[65] Yet, as the Act's overview provides, it does "not relieve any applicant from meeting all other grant criteria or address the issues of preemption of civil rights laws."[66] Thus, the Act, apart from removing the express protections of the House version, offers no alternative statement concerning the continued viability of relevant exemptions under federal or state employment discrimination law. Senator Lieberman, a chief sponsor of the Act, stated that the employment discrimination issue "is not specifically within the parameters of this proposal" and that it "is an issue for another day."[67]

Given the relative silence of the CARE Act, therefore, it is unclear which, if any, discrimination exemptions would be at risk. Certainly, it appears that the "ministerial" exemption, if it applies, would survive due to its existence outside the Title VII context through notions of church autonomy and its heightened constitutional status.[68] Indeed, every court that has discussed this exemption in light of *Smith* has upheld it,[69] and, based on the strong language used by such courts in so doing (e.g., "a constitutional command cannot yield to even the noblest and most exigent of statutory mandates"),[70] there is no indication that the provision of relevant CARE Act aid would alter this analysis.

Notwithstanding the continued viability of the "ministerial" exemption, however, the remaining Title VII exemptions (i.e., organizational, educational, BFOQ), would be vulnerable in the absence of protections similar to the "charitable choice" provision of the 1996 welfare package or the House version of the bill. Indeed, Senator Lieberman confessed as much when he stated that the Act "contains none of the troubling charitable choice provisions that were in the House bill, H.R. 7, that undermined or preempted civil rights laws and raised constitutional concerns."[71] Thus, as the House bill implies, in the absence of express protection, religious groups will essentially be on their own in protecting their rights to be free from interference, either in the defense of discrimination suits brought in light of Act participation or in response to denials by the government of such participation based on restrictions otherwise applicable to existing programs set to be expanded by the Act. This would certainly have a chilling effect on the willingness of such groups to either exercise rights under current law or participate in Act objectives, and, obviously, any further express revocation would only deepen the freeze.

As far as state law is concerned, it is unlikely that the Act would have much of an impact one way or another. Neither the House version nor the CARE Act itself expressly addresses state law. In fact, the CARE Act overview explicitly disavows "preemption."[72] Indeed, in light of *Flores*, which limited the authority of Congress in "carving out" exceptions to neutral and generally applicable state laws to cases where a history of discrimination is addressed,[73] it is doubtful that the Act could preserve or discard such exemptions even it wanted to do so. Furthermore, some of the aid provided by the Act flows only to "community-based organizations" (defined as those having "not more than 6 full-time equivalent employees who are engaged in the provision of social services"),[74] which would most likely expose these groups only to state or local discrimination laws, if any, given that Title VII requires at least 15 employees for coverage.[75]

Based on the foregoing, religious entities are presented with a serious dilemma that seems to require them to bear the burden of preserving existing exemptions in the face of challenges either from employees (future or current) in the form of discrimination claims or, perhaps down the line, from agencies refusing to grant Act aid on a similar basis. Such challenges would be even greater if a further amendment expressly revokes the exemptions. As mentioned above, in seeking relief from this predicament, however, RFRA may offer some relief. Thus, it is to that law that we must now turn.

The "Trinity"(*Smith*, RFRA, and *Flores*) and Beyond

The RFRA story begins in 1990 with the Court's *Smith* decision.[76] As mentioned above, *Smith* involved a constitutional challenge under the federal Free Exercise Clause to Oregon's denial of unemployment benefits based on violations of its drug laws. The challengers argued that the violation, smoking peyote, was a religious practice and, thus, its proscription must be supported by "a compelling state interest," something which they said was absent. They based

their claim on *Sherbert v. Verner*,[77] which involved the denial of unemployment benefits for not working the Sabbath, and *Wisconsin v. Yoder*,[78] which involved compulsory schooling, where the Court had applied this strict standard to burdens on religion. The Court in *Smith*, however, rejected heightened scrutiny, holding that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'"[79] According to the Court, as long as a law does not target religion, the Free Exercise Clause offers no exemption beyond what a state might wish to adopt. Interestingly, the Court distinguished cases involving a "hybrid" of free exercise and other constitutional rights (which may require exemption).[80] The Court indicated further that such a hybrid may be formed from "controversies over religious authority or dogma,"[81] - a strong sign of continued support for a "ministerial" exemption, whether on association or entanglement (i.e., establishment)[82] grounds.

The Congressional response to *Smith* was rapid and overwhelmingly negative. In 1993, RFRA passed "almost without opposition."[83] In its findings, RFRA expressly criticizes the holding in *Smith* and asserts that its purpose is "to restore the compelling interest test as set forth in [*Sherbert*] and [*Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened."[84] In pursuing this objective, RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the burden "is in furtherance of a compelling governmental interest [and] is the least restrictive means of furthering that compelling governmental interest."[85]

From the language of RFRA (and pre-*Smith* jurisprudence), one discerns a three-part test. First, a party seeking RFRA protection must show a substantial burden to a religious exercise. This exercise must be "motivated" (not necessarily compelled) by a "sincerely held" religious (not merely philosophical) belief,[86] and the burden imposed must "significantly inhibit or constrain" the exercise.[87] Current examples of exercise include tithing, worship, grooming, and, in the employment context, selecting ministers,[88] while substantial burdens range from conditioning a "benefit or privilege" to outright prohibition.[89] Second, if a burden is imposed, the government must have a "compelling interest." Examples include health and safety, prison security, environmental concerns, and, perhaps, compliance with the Establishment Clause (the "other half" of the First Amendment's treatment of religion).[90] Finally, if a burden is imposed for a compelling interest, it must be the least religiously invasive alternative in serving that interest. This, of course, would be determined under the circumstances given the options available.

Four years after RFRA's passage, the Court decided *Flores*.[91] That case involved a RFRA challenge to a denial of a building permit to a church under a city ordinance. In rejecting the claim, the Court held RFRA unconstitutional as applied to state or local law. Specifically, the Court stated that the sole source of authority to apply RFRA to such law is the "enforcement clause" of the Fourteenth Amendment, which allows Congress to correct, by "appropriate legislation," state deprivations of "life, liberty, or property, without due process of law."[92] The Court held that RFRA, as applied to states or localities, did not serve to remedy any such deprivations of rights, but rather attempted "a substantive change in constitutional protections" (i.e., "free exercise") and, in so doing, intruded upon the "States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[93]

Although the Supreme Court did not address the issue in *Flores*, most lower courts have held that its ruling has no effect on applying RFRA to federal law.[94] As the Ninth Circuit has held, "[c]ourts have interpreted RFRA as an amendment of existing federal statutes and thus a constitutional exercise of Congressional authority."[95] In *Flores*, the Court expressed hostility to what it saw as Congress' attempt to violate the "separation of powers" by amending *Smith*.[96] Yet, it is unlikely that this hostility extends to RFRA for federal law, which is, in essence, only a self-imposed limit on otherwise valid legislative power. As one scholar has noted, Congress has simply "denied itself the option of legislating burdens on religious exercise unless it can overcome the extrinsic political inertia imposed by the RFRA."[97] Constitutionally, any facial challenge to RFRA under the Establishment Clause should likewise fail based on its secular purpose ("protect First Amendment values"), limited risk of indoctrination (protection only if "substantial burden" to a valid religious exercise), and avoidance of any religious entanglement.[98]

RFRA and the CARE Act: Obstacles and Opportunities

Based on the foregoing, there is a strong argument for RFRA protection of CARE Act providers under federal law, despite any present or future elimination of Title VII exemptions. If the Act prohibits or, at a minimum, chills the ability of religious charities to discriminate on the basis of religion (or any other basis, for that matter), these groups could invoke RFRA, at least on the federal level. Of course, the Act could be amended to remove RFRA protection, but given the latter's popularity, that seems unlikely. In any event, there remain two major challenges, both of which are rooted in RFRA itself. The first is the argument that elimination of the religious exemptions reflects a "compelling interest" and, thus, even if RFRA applies it offers no "discrimination" relief to Act participants. The second, which does not exist under the categorical approach of Title VII (where one may discriminate because of religion simply because one is a religious entity), is demonstrating that the Act "substantially burdens" the religiously motivated practice of discrimination. As described below, this latter challenge will, at least from a practical perspective, probably prove a greater hurdle than the former.

Compelling Interests?

The "compelling interest" challenge to applying RFRA is the argument that eliminating the exemptions, implicitly or explicitly, meets the standard, notwithstanding the

admonition in *Flores* that "compelling interest," along with the "least restrictive means" requirement, "is the most demanding test known to constitutional law."[99] In support, the "interests" typically offered, and those which should ultimately fail, are eliminating discrimination and avoiding establishment of religion.

The former "compelling interest" argument posits that an end to employment discrimination, particularly if "funded by the government,"[100] is a goal worthy of placing strings on CARE Act aid. The response, however, is that not only do existing exemptions for religious entities reflect the opposite policy judgment, but RFRA itself (reflecting a principle from *Sherbert*) extends protection not simply to laws concerning conduct, but also to denials of "funding, benefits, or exemptions."[101] In fact, in one of the few cases applying RFRA to current exemptions (admittedly there, the constitutional "ministerial" exemption without any funding issues), the D.C. Circuit held that "the Government's interest in eliminating employment discrimination is insufficient to overcome a religious institution's interest in being able to employ the ministers of its choice."[102]

The Establishment Clause "compelling interest" argument, which has been advanced in other contexts by members of both the House and Senate, is that eliminating the relevant exemptions is necessary to avoid a violation of the First Amendment through "public funding" of religion.[103] This is the constitutional challenge to RFRA *as applied* (rather that on its face, as described above). The first response is that the Supreme Court has unanimously upheld existing exemptions under the Establishment Clause,[104] and such exemptions have generally been upheld by lower courts even when coupled with public funds.[105] The second response is that the aid provided through the Act to faith-based groups is valid under relevant Supreme Court jurisprudence, most recently articulated in *Agostini v. Felton* (1997),[106] which approved placing public teachers in parochial schools, in *Mitchell v. Helms* (2000),[107] which approved federal and state educational materials and equipment for "pervasively sectarian" schools, and in *Zelman v. Simmons-Harris* (2002),[108] which authorized religious school participation in a state voucher program.[109]

Although *Zelman* emphasized that voucher aid is ultimately provided to religious entities through the "private choice" of parents[110] and *Mitchell* noted that the aid there was not money but hardware and other materials,[111] these distinctions are not dispositive. First, most of the "aid" ultimately provided to religious entities under the Act comes in the form of tax incentives to individuals, something which is both justified by *Zelman* and expressly authorized by the 1970 case of *Walz v. Tax Commissioner of the City of New York*, where the Court held that "there is no genuine nexus between tax-exemption and establishment of religion."[112] Second, given the secular purpose and religiously neutral nature of any other aid provided under (or contemplated by) the Act, it is unlikely that RFRA alone would upset the balance. Indeed, under *Mitchell*, "indirect" aid (e.g., vouchers, tax exemption) is permissible regardless. Third, even if the aid were "direct" (e.g., a money grant), the religious nature of recipients may be a factor,[113] but it would be this overall nature (a subject outside the scope of this article), not employment policy alone, that would, if at all, render participation suspect.[114]

Finally, although the argument is perhaps weakened by the fact that any relevant discrimination prohibitions under the Act would presumably apply to religious and non-religious entities alike, there may also exist some independent constitutional protection under the Free Exercise or Equal Protection Clauses through the Court's 1995 decision in *Rosenberger v. Rector and Visitors of the University of Virginia*.[115] In that case, the Court struck down a public university's refusal to provide funds to a student magazine under an otherwise available program because of the magazine's religious viewpoint. The *Rosenberger* argument, however, would seem to turn on whether or not religious viewpoints are expressly selected for special treatment, something that is not apparent under the current version of the Act. Nevertheless, it would not be wholly unreasonable for a future Act provider to protest limitations on its ability to adopt religiously motivated employment practices as something which, at least from a practical perspective, targets only those who care about such things - namely, groups with a religious viewpoint.

Substantial Burdens?

The second, and perhaps greater, challenge in applying RFRA to Act participants is the need for each individual entity to show that any relevant prohibition of religious discrimination is, in fact, a substantial burden to a religious exercise. Certainly the most efficient and secure means of guaranteeing relevant exemptions is an express codification in the Act itself - an approach taken by the President and the House.[116] In this way, relevant issues would likely be decided once and for all through appropriate litigation in a manner similar to the Court's handling of existing exemptions in *Amos*. Instead, the approach taken by the Act, implicitly or explicitly, leaves the matter to participants, either in defending discrimination or in challenging a denial of participation, to show RFRA coverage. Admittedly, the burden is not insurmountable. In fact, as the Court in *Smith* posited, "[w]hat principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?"[117] Yet, in any event, the practical price will certainly be higher than at present, and given case-by-case litigation risks, a chilling effect might still prove inevitable.

Where Does RFRA Leave Us?

The CARE Act, either in its present silence or through future amendments that may be necessary for its passage, poses significant risks to employment practices that are presently protected as a matter of religious liberty. Although the "ministerial" exemption should survive, the statutory exemptions are vulnerable. Despite these risks, however, there is a sound argument that RFRA may limit the

exposure, at least on the federal level. Logistical problems for faith-based institutions may remain in proving RFRA coverage, and state and local law may still apply, but RFRA offers much solace to such entities that wish to participate in the Act's effort. Although these groups would surely prefer blanket protections, RFRA should lower the risk that they will need to trade their beliefs to lend a hand. Thus, in this arena, one can safely say that RFRA is "not dead, but sleeping."[118]

Postscript

The Federalist Society first published this article on its website on February 20, 2003. Since then, the Senate approved a narrower version of the CARE Act. This bill (S. 476), which the Senate passed on April 9, 2003, contains many of the same tax incentive, social service grant, low-income, and administrative provisions as its 2002 counterpart. Yet, it lacks even the limited faith-based protections that the former bill provided. These included a protection of symbols, names, and governance, and a prohibition of aid denials based on prior treatment (perhaps on a basis inconsistent with intervening constitutional jurisprudence). In any event, the analysis provided by this article, although it targets an earlier version of the bill, is still both timely and relevant given the silence of both that version and the one that ultimately passed the Senate on the protection of discrimination exemptions for faith-based employers. In fact, it is arguably even more relevant based on the latter's elimination of what little protection the former contained. As President Bush stated upon passage of the 2003 bill, "I look forward to continuing to work with Congress to improve the CARE Act legislation, and I continue to urge Congress to take additional steps to end discrimination against faith-based organizations that have a proven record of helping people in need realize a better life." As one can see, the issue is far from settled.

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Footnotes

[1] *See* Establishment of Office of Faith Based and Community Initiatives, Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001). *See also* Jim VandeHei, *GOP Looks To Move Its Social Agenda*, WASH. POST, Nov. 25, 2002, at A01.

[2] Veronique Pluviose-Fenton, *Bush Backs Compromise Faith-Based Initiative*, NATION'S CITIES WEEKLY, Feb. 11, 2002, at 1.

[3] As President Bush stated on April 4, 2002 when discussing relevant legislation, "people should be allowed to access that money without having to lose their mission or change their mission." *President Promotes Faith-Based Initiative,* White House Press Release, (Apr. 4, 2002), at http://www.whitehouse.gov/news/releases/2002/04/20020411-5.html. On December 12, 2002, the President stated, "faith-based programs should not be forced to change their character or compromise their mission." *President Bush Implements Key Elements of his Faith-Based Initiative*, White House Press Release (Dec. 12, 2002), at http://www.whitehouse.gov/news/releases/2002/12/20021212-3.html.

[4] The Charity Aid, Recovery, and Empowerment Act, S. 1924, 107th Cong. (2002).

[5] *See* Responsibilities of the Department of Agriculture and the Agency for International Development with Respect to Faith-Based and Community Initiatives, Exec. Order No. 13280, 67 Fed. Reg. 77,145 (Dec. 12, 2002); Equal Protection of the Laws for Faith-Based and Community Organizations, Exec. Order No. 13279, 67 Fed. Reg. 77,141 (Dec. 12, 2002). Other limited efforts include provisions in the Personal Responsibility and Work Reconciliation Act of 1996, 42 U.S.C. § 604a, the Community Services Block Grant Program of 1998, 42 U.S.C. § 9920, and appropriations for programs for Departments of Justice, Commerce, State, and Health and Human Services (*see generally*, David Ackerman, *Public Aid to Faith-Based Organizations in the 107th Congress (Charitable Choice): Background and Selected Legal Issues*, CRS Report RL31043 (Dec. 3, 2002) at CRS-8-9).

[6] *See* 148 Cong. Rec. S546-01 at S546 (daily ed. Feb. 8, 2002) (statement of Sen. Lieberman). The Act is co-sponsored by Sens. Santorum, Bayh, Brownback, Nelson, Cochran, Carnahan, Lugar, Clinton, and Hatch.

[7] *See* S. 1924 § 301.

[8] *See* Larry Witham, *Amendments Kill CARE in Senate; Democrats Fear Faith-Based Abuses*, WASH. TIMES, Nov. 12, 2002, at A10. As one commentator described the last (107th) Congress, "[g]iven the negative press . . . over the issue and the widespread concern among Senate Democrats about employment discrimination, it is unlikely that this Congress would approve a version that [authorized discrimination by religious organizations]." Scott Michelman, *Faith-Based Initiatives*, 39 HARV. J. ON LEGIS. 475, 498 (2002).

[9] *Compare* S. 1924 §§ 101-108 and §§ 201-212 *with* the Community Solutions Act of 2001, H.R. 7, 107th Cong. §§ 101-108 and §§ 301-307 (2001).

[10] *See* S. 1924 §§ 601-603 and §§ 501-505.

[11] *See* S. 1924 § 301. *See also* Ben Canada, *Faith-Based Organizations and Their Relationship with State and Local Governments: An Analysis of the Potential Impact of Current Legislation*, CRS Report RL31099 (Feb. 27, 2002) at CRS-8.

[12] *Compare* S. 1924 at § 301 *with* H.R. 7 at § 201(c)(1)(A), (e).

[13] *See* S. 1924 § 301. *See also* 148 Cong. Rec. S10993-01 at S10994 (daily ed. Nov. 14, 2002) (statement of Sen. Lieberman).

[14] *See* Witham, *supra* note 9.

[15] 148 Cong. Rec. S10993-01 at S10993 (daily ed. Nov. 14, 2002).

[16] *See* H.R. 7 § 201(c)(1)(A), (e).

[17] The following statutes bar discrimination when accepting federal funds: Title VI of the Civil Rights Act of 1964 (race, color, origin), Title IX of the Education Amendments of 1972 (gender), the Rehabilitation Act of 1973 (handicap), and the Age Discrimination Act of 1975. Individual programs, like Head Start, also prohibit discrimination on the basis of religion, although there is no such funding-based (e.g., not Title VII) prohibition generally. It should be noted that only Title IX affects employment (unless the purpose of a program is providing employment), although it contains an exemption for religious educational institutions. For a discussion of the foregoing, *see* Ackerman, *supra* note 6, at CRS-20-22.

[18] 42 U.S.C. § 2000bb (1993).

[19] The First Amendment provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

[20] 494 U.S. 872, 890 (1990).

[21] 42 U.S.C. § 2000bb(a). These standards are taken from the pre-*Smith* jurisprudence of *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

[22] 521 U.S. 507 (1997).

[23] The Fourteenth Amendment provides, in pertinent part, that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article," which include rights to "privileges or immunities," "due process," and "equal protection." U.S. CONST. amend. XIV, §§ 5 and 1.

[24] *See, e.g., Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002); *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001); *United States v. Ramon*, 86 F.Supp.2d 665 (W.D. Tex. 2000); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826 (9th Cir. 1999); *In re Young*, 141 F.3d 854 (8th Cir. 1998).

[25] These exemptions can exist as express provisions in the state or local employment discrimination laws themselves (*see, e.g.*, Maryland (MD. CODE ANN. 49B, § 18 (2001)); Texas (TEX. LAB. CODE. ANN. § 21.109(a)-(b) (1996)) or can be state versions of RFRA (*see, e.g.*, South Carolina's Religious Freedom Act, S.C. CODE ANN. § 1-32-40 (2001)).

[26] *See Higgins v. Maher*, 210 Cal. App. 3d 1168 (1989); *Williams v. Episcopal Diocese of Mass.*, 766 N.E.2d 820 (Mass. 2002) applying "ministerial" exemption to state law.

[27] *See* H.R. 7, 107th Cong. §§ 201(d) and (e) (2001).

[28] *See, e.g.*, 42 U.S.C. § 2000e-1(a) *and* § 2000e-2(e) (federal exemptions only).

[29] As noted by Gregory P. Magarian in *How to Apply the RFRA to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1911 (2001), RFRA "passed both Houses of Congress almost without opposition." (Citations omitted).

[30] *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987) (upholding Title VII exemptions for religious entities against Establishment Clause challenge).

[31] 42 U.S.C. § 2000e-2(a).

[32] 42 U.S.C. § 2000e-1(a). Note that the Americans with Disabilities Act of 1990 also provides an exception for religious institutions. *See* 42 U.S.C. § 12113(c).

[33] 42 U.S.C. § 2000e-2(e)(2).

[34] MICHAEL WOLF ET AL., RELIGION IN THE WORKPLACE: A COMPREHENSIVE GUIDE TO LEGAL RIGHTS AND RESPONSIBILITIES 21 (1998).

[35] *See id.* at 21-23.

[36] 42 U.S.C. § 2000e-2(e)(1).

[37] WOLF, *supra* note 35, at 24 *citing International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991).

[38] *See id.* at 23-26.

[39] *Pime v. Loyola University of Chicago*, 803 F.2d 351 (7th Cir. 1986).

[40] *Kern v. Dynalectron Corp.*, 577 F.Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984).

[41] WOLF, *supra* note 35, at 12-13.

[42] *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 800 (4th Cir. 2000).

[43] *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461 (D.C. Cir. 1996) *citing Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985).

[44] *See* S. 1924, 107th Cong. § 301(e)(2) (2002) (defining "social service programs").

[45] *See* Laura Mutterperl, Note, *Employment at (God's) Will: The Constitutionality of Antidiscrimination Exemptions in Charitable Choice Legislation*, 37 HARV. C.R.-C.L. L. REV. 389, 420-21 (2002).

[46] *See* H.R. 7, 107th Cong. § 201 (2001).

[47] Mutterperl, *supra* note 46, at 398 *citing* 42 U.S.C. § 604a(b). *See also* Equal Protection of the Laws for Faith-Based Community Organizations, 67 Fed. Reg. 77,141 (Dec. 12, 2001).

[48] *See* 42 U.S.C. § 604(f).

[49] *See* Castegnera et al., Termination of Employment (West) at 20,101 (Aug. 1999) (Alabama), 22,101 (Apr. 2001) (Georgia), and 24,901 (Oct. 2000) (Mississippi).

[50] *See, e.g.*, state provisions in California (CAL. GOV'T. CODE § 12940 (1992)), Illinois (775 ILL. COMP. STAT. ANN. §§ 5/1-102 & 5/2-102 (2001)), Pennsylvania (43 PA. CONS. STAT. ANN. §§ 951-963 (1991)), and Texas (TEX. LAB. CODE ANN. § 21.101 (1996)).

[51] *See, e.g.*, New York City provisions (NEW YORK, NY ADMIN. CODE § 8-102 (1997)).

[52] *See* 42 U.S.C. § 2000e(b).

[53] *See, e.g.*, California's Fair Employment and Housing Act, CAL. GOV'T. CODE §§ 12926(d), 12940(a) (1992), which extends the protections of Title VII, among other laws, to employers with five or more employees (*see Robinson v. Fair Emp. & Hous. Comm'n*, 825 P.2d 767 (Cal. 1992)).

[54] *See, e.g.*, Connecticut's Fair Employment Practices Act, CONN. GEN. STAT. §§ 46a-51 to 46a-125 (1995), which, unlike federal law, extends to sexual orientation and marital status, or Ohio's Civil Rights Act, OHIO REV. CODE ANN. §§ 4112.01 to 4112.02 (2002), which has a limited exception for BFOQ, but, unlike federal law, offers no *per se* protection of religious employers.

[55] As Title VII itself provides, "nothing [herein] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State . . . ." 42 U.S.C. § 2000e-7.

[56] *See, e.g.*, Pennsylvania's "state contractor" non-discrimination requirements (including religion), 16 PA. CODE § 49.101 (1974). Under federal law, it is unlikely that Act participants would be "state actors" for "public contract" or constitutional purposes, at least as far as faith-based employment is concerned. *See* Michelman, *supra* note 9, at 497-500 (discussing weakness of "state actor" argument) *and* Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (funded program protections only for race, color, origin).

[57] For a study of relevant state discrimination law, *see* PETER PANKEN, A STATE-BY-STATE SURVEY OF THE LAW ON RELIGION IN THE WORKPLACE (2001).

[58] *See, e.g.*, West Virginia's Human Rights Act, W. VA. CODE §§ 5-11-1 to 5-11-4 (1967) which provides a BFOQ, but no religious organization exemption; Arkansas' Civil Rights Act of 1993, ARK. CODE ANN. §§ 16-123-101 to 16-123-103 (1993) which provides a religious organization exemption, but no BFOQ; Virginia's Human Rights Act, VA. CODE ANN. § 2.2-3901 (2002), which, on its face, provides neither exemption.

[59] *See* state cases cited *supra* note 27.

[60] *See, e.g.*, South Carolina's Religious Freedom Act, S.C. CODE ANN. § 1-32-40 (1999), and similar provisions in Arizona, ARIZ. REV. STAT. ANN. § 41-1493.01 (1999), Florida, FLA. STAT. ANN. § 761.01; Alabama, ALA. CONST. AMEND. NO. 622 (1999) (although Alabama has no express state employment discrimination statute).

[61] *See generally*, H.R. 7, 107th Cong. (2001).

[62] *See* H.R. 7 § 201.

[63] *See id.* at § 201(e).

[64] *See generally*, S. 1924, 107th Cong. (2002).

[65] *See id.* at § 301(a), (b). Remarkably, the Senate Finance Committee's last reported version did not even contain most of these modest protections. *See* Ackerman, *supra* note 6, at CRS-12 (*citing* S. REPT. NO. 107-211 (July 16, 2002)).

[66] 148 Cong. Rec. S546-01 at S555 (daily ed. Feb. 8, 2002).

[67] 148 Cong. Rec. S10993-01 at S10994 (daily ed. Nov. 14, 2002) (statement of Sen. Lieberman).

[68] *See Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648 (10th Cir. 2002).

[69] *See id.* at 656 (*citing Roman Catholic Diocese*, 213 F.3d at 800; *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1302-04 (11th Cir. 2000); *Combs v. Central Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343, 348-50 (5th Cir. 1999); *Catholic Univ. of Am.*, 83 F.3d at 461-63). Indeed, even *Smith* distin-

guished the religious "acts" there from "controversies over religious authority or dogma." *Id*., 494 U.S. at 877.

[70] *Roman Catholic Diocese*, 213 F.3d at 801.

[71] 148 Cong. Rec. S546-01 at S546 (daily ed. Feb. 8, 2002) (statement of Sen. Lieberman).

[72] *Id.* at S555.

[73] *See Flores*, 521 U.S. at 529-532.

[74] *See, e.g.,* S. 1924, 107th Cong. § 501 (2002).

[75] *See* 42 U.S.C. §2000e(b).

[76] 494 U.S. 872.

[77] 374 U.S. 403 (1963).

[78] 406 U.S. 205 (1972).

[79] 494 U.S. at 879.

[80] *Id.* at 881.

[81] *Id.* at 877 (citations omitted).

[82] *See Catholic Univ. of Am.*, 83 F.3d at 467 (regarding "hybrid" ministerial exemption).

[83] *See* Magarian, *supra* note 30, at 1911 (citations omitted).

[84] 42 U.S.C. § 2000bb(b)(1).

[85] 42 U.S.C. § 2000bb-1.

[86] *See Yoder*, 406 U.S. at 215-219; *see also* 42 U.S.C. § 2000bb-2(4).

[87] *In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996) (*citing Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995)).

[88] *See In re Young*, 82 F.3d 1407 (tithing); *Weir v. Nix*, 890 F.Supp. 769 (S.D. Iowa 1995) (liturgy); *Gartrell v. Ashcroft*, 191 F.Supp.2d 23 (D.D.C. 2002) (grooming); *Catholic Univ. of Am.*, 83 F.3d 455 (employment of "ministers").

[89] *See Sherbert*, 374 U.S. at 404 (condition of unemployment benefit); *Sasnett v. Sullivan*, 908 F.Supp. 1429 (W.D. Wis. 1995) (prohibition of wearing crosses).

[90] *See Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996) (health and safety); *Fawaad v. Jones*, 81 F.3d 1084 (11th Cir. 1996) (prison security); *U.S. v. Hugs*, 109 F.3d 1375 (9th Cir. 1997) (endangered species protection); *Haff v. Cooke*, 923 F.Supp. 1104 (E.D. Wis. 1996) (Establishment Clause); *Good News Club v. Milford Central School*, 533 U.S. 98, 113 (2001) (saluting "suggestion" of Establishment Clause as a "compelling interest").

[91] 521 U.S. 507.

[92] *Id.* at 517.

[93] *Id.* at 532, 534.

[94] *See Guerrero*, 290 F.3d at 1219; *Kikumura*, 242 F.3d at 958; *Sutton*, 192 F.3d at 832; *In re Young*, 141 F.3d at 858-59; *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1120 (9th Cir. 2000). *But see La Voz Radio de la Communidad v. FCC*, 223 F.3d 313, 319 (6th Cir. 2000) ("doubting" constitutionality); *Saleem v. Helman*, No. 96-2502, 1997 U.S. App. LEXIS 22572 at *4 (7th Cir. Aug. 21, 1997) (assuming without discussion).

[95] *Worldwide Church of God*, 227 F.3d at 1120.

[96] *See Flores*, 521 U.S. at 535-36.

[97] Magarian, *supra* note 30, at 1921-22.

[98] *In re Young*, 141 F.3d at 862-63.

[99] *Flores*, 521 U.S. at 534.

[100] *See* 147 Cong. Rec. H4102-01 at H4102-03 (daily ed. July 17, 2001) (statement of Rep. Edwards) and H4222-05 at H4229 (daily ed. July 19, 2001) (statement of Rep. Lee), alleging the "funding" of discrimination.

[101] 42 U.S.C. § 2000bb-4; *see also Sherbert*, 374 U.S. 398, which involved the denial of unemployment compensation benefits (as did *Smith*, 494 U.S. 872).

[102] *Catholic Univ. of Am.*, 83 F.3d at 467-68.

[103] *See* 147 Cong. Rec. H4102-01 at H4102-03 (daily ed. July 17, 2001) (statement of Rep. Edwards) and H4222-05 at H4228 (daily ed. July 19, 2001) (statement of Rep. Pelosi); *see also* 148 Cong. Rec. S546-01 at S546 (daily ed. Feb. 8, 2002) (statement of Sen. Lieberman).

[104] *See Amos*, 483 U.S. 327 (1987).

[105] *See* Ackerman, *supra* note 6, at CRS-24 (*citing*, *inter alia*, *Hall v. Baptist Mem. Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000); *Siegal v. Truett-McConnell College*, 13 F.Supp.2d 1335 (N.D. Ga. 1994); *and Young v. Shawnee Mission Medical Center*, No. 88-2321-S, 1988 U.S. Dist. LEXIS 12248 (D. Kan. Oct. 21, 1988).

[106] 521 U.S. 203 (1997).

[107] 530 U.S. 793 (2000).

[108] 122 S.Ct. 2460 (2002).

[109] *See also* recent lower federal and state cases in the tax-exempt bond arena (e.g., *Steele v. Ind. Dev. Bd. of Metro. Nashville*, 301 F.3d 401 (6th Cir. 2002); *Virginia College Bldg. Auth'y. v. Lynn*, 538 S.E.2d 632 (Va. 2000)) approving the grant of such aid to religious institutions based on notions of "neutrality" and "private choice."

[110] *Id*. at 2467.

[111] 530 U.S. at 818-20 (noting the "special Establishment Clause dangers" of money).

[112] 397 U.S. 664, 675 (1970).

[113] *See* 530 U.S. at 844 (O'Connor, J., concurring), where O'Connor, to form a majority, posited that the religious nature of participants may matter, depending on the aid at issue.

[114] *See* Michelman, *supra* note 9, at 476, 497-502, concluding that discrimination might be one factor, but in itself "is a policy concern rather than a constitutional one." *See also* Ackerman at CRS-35, citing pre-*Mitchell* cases, including *Tilton v. Richardson*, 403 U.S. 672 (1971) for the proposition that "religious discrimination in employment, by itself, might not [be] enough to render a direct aid program unconstitutional."

[115] 515 U.S. 819 (1995).

[116] *See* H.R. 7, 107th Cong. § 201(c)(1)(A), (e) (2001).

[117] 494 U.S. at 887.

[118] *Luke* 8:52 (New American Bible).