

*New Federal Initiatives Project*

**Does the Establishment Clause Require Broad  
Restrictions on Religious Expression as  
Recommended by President Obama's Faith-  
Based Advisory Council?**

**By  
Stuart J. Lark\***

**May 20, 2010**



*The Federalist Society  
for Law and Public Policy Studies*

*The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author or authors. We hope this and other publications will help foster discussion and a further exchange regarding current important issues.*

[www.fed-soc.org](http://www.fed-soc.org)

## **Does the Establishment Clause Require Broad Restrictions on Religious Expression As Recommended By President Obama's Faith-Based Advisory Council?**

During his presidential campaign, Barack Obama promised to reform the Faith-Based Initiative as conceived by President Bush, while at the same time expressing his support for the general concept. In a keynote address on the subject, Mr. Obama asserted that “[s]ecularists are wrong when they ask believers to leave their religion at the door before entering the public square.”<sup>1</sup> Upon taking office, President Obama established an Advisory Council on Faith-Based and Neighborhood Partnerships, which in turn created a Reform of the Office Taskforce to evaluate the Initiative and recommend reforms. The recommendations that have now been approved by the Taskforce and the Advisory Council include some widely supported measures, but several of the recommendations also have been interpreted by critics as going further than necessary in extricating religion from the public square.

This paper considers whether these particular recommendations, which effectively prohibit government funding of otherwise qualifying activities if they are too religious, are required by the Establishment Clause.<sup>2</sup> 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 a broad exclusion of religious content from otherwise qualifying activities supported by direct government funding.<sup>3</sup> Others have argued that in a program in which funded organizations are selected without regard to religion, the Establishment Clause accommodates their private religious expression, provided it furthers the purposes of the program.<sup>4</sup>

The Bush Administration prohibited the use of funds for “inherently religious activities,” an ambiguous phrase used by the U.S. Supreme Court to describe activities which cannot be directly funded even in a religion-neutral program.<sup>5</sup> Faced with this vague guidance, some faith-based organizations chose to forego the funds available to their secular counterparts so as to preserve their distinctive religious mission. Others chose to participate, sometimes to their legal detriment. In the absence of definitive guidance, a growing number of court cases have adopted the exclusionary view on religious content.<sup>6</sup>

The Taskforce's recommendations recognize that the phrase “inherently religious” is ambiguous and subject to varying interpretations. But in the process of attempting to provide more clarity, the recommendations adopt the view that a narrow restriction would “permit some things the Constitution prohibits.” Citing the work and views of Professors Lupu and Tuttle, the recommendations assert that a “fair reading” of the case law prohibits funding any activity containing “overt religious content.” Accordingly, the recommendations replace the phrase “inherently religious activities” with “explicitly religious activities.”<sup>7</sup>

This is indeed a fair and straightforward reading of both U.S. Supreme Court case law and recent lower court cases.<sup>8</sup> Perhaps most directly, the Court in *Bowen v. Kendrick* 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.”<sup>9</sup> The Taskforce recommendations closely track this language.

But does this reading place too much emphasis on a few short phrases while missing the larger principles developed by the Court, which suggest that the phrases in *Bowen* should be narrowly interpreted? As an initial matter, the *Bowen* 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.<sup>10</sup> But such general statutory constraints might not exclude integrated religious content in activities furthering the program’s purposes. Therefore, the Court’s analysis suggests that “specifically religious activities” include only those religious activities that do not also directly further the program’s secular purposes (such activities might be characterized as “exclusively religious activities”).

Similarly, 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.”<sup>11</sup> 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 Court intended the phrase “views of a particular faith” to apply only to views on exclusively religious subjects outside the scope of the program.

Following *Bowen*, the Court restated the Establishment Clause requirement as prohibiting funding which results in governmental indoctrination of religion.<sup>12</sup> In applying this test, the Court has focused less on assessing whether the character of an activity is too religious and more on assessing whether any religious content may be attributable to the government. Even prior to *Bowen*, the Court had held that indirect aid does not implicate the Establishment Clause because the choices of individual recipients of indirect aid to use the funds for religious activities are not attributable to the government.<sup>13</sup> In its most recent case involving direct aid to religious schools, a four-justice plurality of the Court built on this analysis, observing 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.<sup>14</sup>

The plurality went on to state 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.”<sup>15</sup> 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.<sup>16</sup>

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.”<sup>17</sup>

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.<sup>18</sup> The Court noted that in *Rosenberger v. University of Virginia* it had rejected the argument “that any association with a student newspaper advancing religious viewpoints would violate the Establishment Clause.”<sup>19</sup> 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.’”<sup>20</sup> 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.”<sup>21</sup>

By way of contrast, 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.<sup>22</sup> They argue that this broader standard for attribution is necessary because the Establishment Clause uniquely constrains government action.<sup>23</sup> They have also argued that “when government finances a service program with systematic and frequent religious content, especially in a context that involves the potential for significant human transformation, it becomes responsible for religious indoctrination.”<sup>24</sup> These are certainly plausible standards for attribution, but they are not necessarily the only plausible standards. Indeed, it is not evident 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.<sup>25</sup> Further, excluding any activities with “systematic and frequent religious content” appears to be inconsistent with the holdings in *Rosenberger* and *Southworth* that religious neutrality is required to avoid attribution for Establishment Clause purposes.

The Court’s focus on neutrality also avoids the need for government officials to make unconstitutional religious determinations. In *New York v. Cathedral Academy*,<sup>26</sup> 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*.”<sup>27</sup> 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.”<sup>28</sup> 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.”<sup>29</sup> 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.”<sup>30</sup> This is no easy task. Further, the extent of such religious content in a particular activity is not a reliable indicator of the activity’s religious character. Bible reading is a religious activity if performed out of a desire to know and obey God, but it is not if performed merely as a study of literature. Eating bread and drinking wine is a religious activity if performed as part of a communion service, but it is not if performed merely to satisfy physical needs or desires. Ingesting peyote and killing chickens are generally not religious activities, but they become so when conducted as a sacrament in certain religions. *Employment Division v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993).<sup>31</sup>

As the government increasingly underwrites the activities constituting the public square, the exclusion of all religious expression from government funded programs could lead to a *pervasively secular* public square in which religious voices are marginalized. The question for the Obama Administration (and others) is whether the Establishment Clause actually requires this result, and one fair reading of the Clause is that it does.

But the context in *Bowen*, the more recent focus on attribution and neutrality in *Mitchell v. Helms*, *Agostini v. Felton*, and *Southworth*, and the deference required in cases such as *Cathedral Academy* collectively suggest that it may not. Instead, the Establishment Clause may require only that activities be selected without regard to religion. Under this interpretation, an exclusion would apply only to those religious activities that do not sufficiently advance the program’s secular objectives. Such activities can be identified using secular standards; no search for religious meaning is required. Given the continuing (and perhaps expanding) partnership between government and private sector entities (including faith-based entities), it seems the Court eventually will have to decide which reading is not only fair, but also correct.

*\*Stuart J. Lark is a partner in the Colorado Springs office of Holme Roberts & Owen LLP. He concentrates on corporate, tax, constitutional and transactional matters for nonprofit organizations.*

---

<sup>1</sup> Call to Renewal address, available at [http://www.barackobama.com/20006/06/28/call\\_to\\_renewal\\_keynote\\_address.php](http://www.barackobama.com/20006/06/28/call_to_renewal_keynote_address.php).

<sup>2</sup> Substantial portions of this paper are adopted from Stuart J. Lark, *Equal Treatment for Religious Expression After Colorado Christian University v. Weaver*, 10 Engage 110 (Spring 2009).

<sup>3</sup> See, e.g., 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\\_of\\_the\\_law\\_2008.pdf](http://www.religionandsocialpolicy.org/docs/legal/state_of_the_law_2008.pdf), at 5-6, 17-24; see also Ira C. Lupu and Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1 (2005) (“Faith-Based Initiative”) (religious content should be excluded if it is “transformative” or “indoctrinating.”)

<sup>4</sup> See generally, Stuart J. Lark, *Religious Expression, Government Funds and the First Amendment*, 105 W.VA. L. REV. 317 (2003) (“Religious Expression”) (arguing that a broad

---

exclusion violates the Free Speech and Free Exercise Clauses and is not required under current Establishment Clause case law).

<sup>5</sup> Lupu and Tuttle, *State of the Law*, at 18-24.

<sup>6</sup> *Id.* at 24-25.

<sup>7</sup> Taskforce Recommendation 5. The proposed recommendations also include general adoption of “safeguards” which incorporate this broad exclusion and which were previously issued by the Department of Health and Human Services in settlement of a particular case. Recommendation 6. Several other recommendations (e.g., 7 (promoting the distinction between direct and indirect aid), 10 (protecting service recipients from religious expression) and 11 (promoting the use by churches of separate nonprofit entities)) also rely at least implicitly on a broad exclusion theory. See <http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf>.

<sup>8</sup> See *supra* note 6.

<sup>9</sup> 487 U.S. 589, 621 (1988). For a discussion of other cases, see Lark, *Religious Expression*, at 344-50.

<sup>10</sup> *Id.* at 614.

<sup>11</sup> *Id.* at 621.

<sup>12</sup> *Agostini v. Felton*, 521 U.S. 203, 234 (1997).

<sup>13</sup> *Witters v. Wash. Dept. of Servs.*, 474 U.S. 481 (1986); see also *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); .

<sup>14</sup> *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality).

<sup>15</sup> *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).

<sup>16</sup> *Id.* at 809-810.

<sup>17</sup> *Id.* at 820 (plurality).

<sup>18</sup> 529 U.S. 217, 233 (2000).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (citing *Rosenberger*, 515 U.S. at 841). See also *Agostini*, 521 U.S. 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.

<sup>21</sup> *Id.*

<sup>22</sup> Lupu and Tuttle, *Faith-Based Initiative*, at 64-65.

<sup>23</sup> *Id.*

<sup>24</sup> Ira C. Lupu and Robert W. Tuttle, *Developments in the Faith-Based and Community Initiatives: Comments on Notices of Proposed Rulemaking and Guidance Document, The Roundtable on Religion and Social Welfare Policy*, Jan. 2003, p. 10.

<sup>25</sup> 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.

<sup>26</sup> 434 U.S. 125 (1977).

<sup>27</sup> *Id.* at 132 (emphasis added).

<sup>28</sup> *Id.* at 132-33 (emphasis added).

<sup>29</sup> *Id.* at 133.

<sup>30</sup> Cf. *Bowen*, 487 U.S. at 621, with *Cathedral Academy*, 434 U.S. at 132-33.

---

<sup>31</sup> Further, even if there were consistent standards for government officials to identify explicitly religious content, religious organizations could easily comply with such standards by using “code” words.

## **Related Links**

“A New Era of Partnerships: Report of Recommendations to the President,” President’s Advisory Council on Faith-Based and Neighborhood Partnerships, March 2010  
<http://m.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf>

*The State of the Law-2008, A Cumulative Report on Legal Developments Affecting Government Partnerships with Faith-Based Organizations* by Professors Ira C. Lupu and Robert W. Tuttle, The Roundtable on Religion and Social Welfare Policy, Dec. 2008, ii-iii  
[www.religionandsocialpolicy.org/docs/legal/state\\_ofthe\\_law\\_2008.pdf](http://www.religionandsocialpolicy.org/docs/legal/state_ofthe_law_2008.pdf)

*New York v. Cathedral Academy*, 434 U.S. 125 (1977)  
<http://supreme.justia.com/us/434/125/case.html>

*Bowen v. Kendrick*, 487 U.S. 589 (1988)  
<http://supreme.justia.com/us/487/589/case.html>

*Rosenberger v. University of Virginia*, 515 U.S. 819 (1995)  
<http://www.law.cornell.edu/supct/html/94-329.ZO.html>

*Agostini v. Felton*, 521 U.S. 203, 234 (1997)  
<http://www.law.cornell.edu/supct/html/96-552.ZS.html>

*Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000)  
<http://www.law.cornell.edu/supct/html/98-1189.ZO.html>

*Mitchell v. Helms*, 530 U.S. 793 (2000)  
<http://www.law.cornell.edu/supct/html/98-1648.ZS.html>