
ARTICLES

FAITH AND FUNDING: TOWARD AN EXPRESSIVIST MODEL OF THE ESTABLISHMENT CLAUSE

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Few issues are more divisive in American legal culture than government support of religion. Concern about official financing of religion dates back at least to James Madison's celebrated resistance to a proposed Virginia tax to subsidize the salaries and building costs of churches, a central precursor to the First Amendment's Religion Clauses.¹ For more than fifty years, government aid to parochial schools has been the single most recurrent issue in the Supreme Court's Establishment Clause jurisprudence. Today's debate over vouchers redeemable at parochial schools is only the latest manifestation of this long-running public dispute. Yet we are no closer to an acceptable resolution of how far the government may go in supporting religion today than we have ever been. The debate divides sharply between separationists, who are suspicious of virtually any aid to religion, and assimilationists, who argue that religious institutions should receive the same support that secular institutions do, even if that means raising tax dollars to subsidize the salaries and building costs of churches.

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1. JAMES MADISON, *Memorial & Remonstrance*, in 2 WRITINGS OF JAMES MADISON 183 (G. Hunt ed., 1901), reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 63-74 (1947).

The debate has been rekindled recently by President George W. Bush's initiative to expand federal funding to faith-based social service agencies, and by several recent bills that have enacted into law the concept of "charitable choice."² Church-state separationists and civil libertarians have warned that the faith-based initiative would forge a dangerous liaison fraught with difficulties for the state, for religion, and for nonbelievers alike.³ Proponents of the initiative have argued that it is simply designed to level the playing field by allowing religious entities to compete on an equal footing with secular providers for government funds.⁴

The faith-based initiative poses a novel question in the world of faith and funding: May the government aid religious entities where it does so precisely because of the religious character of their activities? Government support of religious *entities* is nothing new. Religious groups such as Catholic Charities already receive well over half their revenue from government sources, but under strict requirements that the money be used only for secular activities.⁵ Churches and synagogues receive substantial tax subsidies, as well as valuable general services such as fire and police protection, both of which have the effect of subsidizing core religious activity, but on equal terms with secular nonprofits. Strict separation of church and state is neither possible nor just in the modern era, where the state provides support to all sectors of society in one manner or another.

2. See, e.g., Exec. Order No. 13199, 66 Fed. Reg. 8499 (Jan. 29, 2001). See also 42 U.S.C. § 604a (Supp. III 1997) (setting forth a framework to permit "[s]tates to contract with religious organizations . . . on the same basis as any other nongovernmental provider").

3. See generally Steve Benen, *Leap of Faith*, CHURCH & STATE, Mar. 2001, at 4, 5 (quoting the Reverend Barry W. Lynn, executive director of Americans United for the Separation of Church and State, as saying "Bush's plan is the single greatest assault on church-state separation in modern American history"); Stuart Taylor Jr., *The Risk Is Not Establishing Religion, but Degrading It*, 33 NAT'L J. 320, 320-21 (2001) (fearing that the faith-based initiative could lead to divisive competition for funding and government regulation of religious programs); Mei-Ling Hopgood, *Bush Faith-Based Initiative Troubling*, DAYTON DAILY NEWS, Apr. 8, 2001, at 1 (reporting that gay rights advocates are concerned that faith-based funding will perpetuate hiring discrimination against gays).

4. See 66 Fed. Reg. 8499 (Jan. 29, 2001) (emphasizing need for all groups to compete on a "level playing field"). See also Leslie Lenkowsky, Commentary, *Funding the Faithful: Why Bush Is Right* (WCBS radio broadcast, June 1, 2001). Cf. STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY (1996) (advocating broader government support of religiously based nonprofits as a way of achieving "positive neutrality" toward all religious and secular groups); Carl H. Esbeck, *Equal Treatment: Its Constitutional Status*, in EQUAL TREATMENT OF RELIGION IN A PLURALIST SOCIETY 9 (Stephen V. Monsma & J. Christopher Soper eds., 1998) (hereinafter EQUAL TREATMENT) (arguing that "equal treatment" of religion requires broader support of religious nonprofits where secular nonprofits receive government support).

5. In 1993, government sources provided 65% of Catholic Charities' income, 75% of the Jewish Board of Family and Children's Services' income, and 92% of Lutheran Social Ministries' income. See MONSMA, *supra* note 4, at 1.

What is groundbreaking about the faith-based funding initiative, then, is not that it seeks to support religious entities, but that it seeks to do so *because* they are religious entities. The initiative is premised in significant part on the conviction that because of their faith, religious providers are better than their secular counterparts at delivering certain social services.⁶ President Bush credits his own recovery from alcoholism to finding faith in God.⁷ Teen Challenge, a fundamentalist Christian drug addiction treatment program championed as a leading example of successful faith-based social services, insists that there is no recovery without finding Jesus.⁸ While the provision of generally available support to religious entities on neutral terms and for wholly secular activities is relatively noncontroversial, the notion that government can support religion *because of its religious character* would appear to mark a radical departure from Establishment Clause jurisprudence.

The dispute over funding faith-based social services reflects a deeper divide in American culture, between those who believe that religion already plays too dominant a role in public life,⁹ and those who believe that religion has been improperly banished from the public square.¹⁰ Like so many difficult public policy issues, this issue tends to polarize the public, legal scholars, and judges. To separationists, virtually any state subsidy of religious activity offends the Establishment Clause. To assimilationists, virtually all aid to religious activity is permissible, so long as the funding serves a secular purpose and is distributed pursuant to criteria that treat religious and secular recipients equally.¹¹

6. See, e.g., Lenkowski, *supra* note 4 (observing the ubiquity of religious organizations that provide services to the needy and noting that there is evidence that such programs are particularly attractive to certain groups of recipients of social services); Joe Klein, *In God They Trust*, NEW YORKER, June 16, 1997, at 40, 42, 44 (reporting on views of those who support faith-based services).

7. Benjamin Soskis, *Act of Faith: What Religion Cannot Do*, NEW REPUBLIC, Feb. 26, 2001, at 20, 23.

8. CHARLES L. GLENN, THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH-BASED SCHOOLS AND SOCIAL AGENCIES 62 (Robert P. George ed., 2000).

9. See, e.g., Rogers M. Smith, "Equal" Treatment? A Liberal Separationist View, in EQUAL TREATMENT, *supra* note 4, at 179; Kathleen M. Sullivan, *Religious Participation in Public Programs: Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 204–06 (1992); Ellen Willis, *Freedom from Religion: What's at Stake in Faith-Based Politics*, NATION, Feb. 19, 2001, at 11, 11–16.

10. See generally STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 3 (1993); Esbeck, *supra* note 4, at 12.

11. I borrow the term "assimilationist" from Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243, 244–45 (1996). Assimilationists themselves prefer to characterize their position as advocating neutrality. See, e.g., MONSMA, *supra* note 4, at 173–97. That term, however, is also claimed by separationists, who maintain that a strict wall between church and state is the only way to remain neutral. As Steven D. Smith has pointed out, virtually everyone in the debate claims the mantle of "neutrality," but that

This divide is reflected on today's Supreme Court. Four justices—Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas—take a strict assimilationist view, approving of any aid to religion so long as it is administered in a formally neutral manner,¹² while three Justices—Souter, Ginsburg and Stevens—adopt a separationist stance, viewing most direct government support of religious activity as unconstitutional.¹³ Only Justices O'Connor and Breyer (and sometimes only O'Connor) have staked out the middle ground, where government support to religion pursuant to a neutral law of general applicability is sometimes but not invariably permissible.¹⁴

This Article seeks to provide an alternative to the polarization that so often characterizes debates about church and state. In Part I, I will suggest that there are good policy reasons for supporting faith-based initiatives, and that these reasons ought to be attractive to liberals and progressives, many of whom have opposed faith-based initiatives. Faith-based social services are, after all, social services, and are often the very types of welfare services that liberals and progressives tend to support. Core religious values—in particular, concern about the less fortunate, a belief in human dignity, and a commitment to the possibility of redemption—reinforce liberal values that appear to have lost ground in modern America. Religious institutions are an integral element of a vital civic society and have an independent normative authority that may permit them to succeed where secular institutions have not. The case for supporting faith-based services does not require proof that faith-based services are better for all; it only requires that they may be better for some. That seems likely, even though solid empirical evidence is not yet available.

Several important caveats should be noted. The faith-based initiative may simply be a cover for privatizing public services, and for reducing public support for the most needy. Faith-based institutions and their proponents often attribute problems of poverty to personal moral failings,

concept by itself is incapable of generating substantive principles to guide the doctrine. Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 313–16, 325–31 (1987). Because cultural meaning will be critical to the establishment analysis I propose herein, I seek to avoid rhetorically favoring either the separationists or the assimilationists with the label of "neutrality."

12. See *Mitchell v. Helms*, 530 U.S. 793 (2000).

13. See, e.g., *Mitchell*, 530 U.S. at 867–68 (Souter, J., dissenting); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 863 (1995) (Souter, J., dissenting).

14. *Mitchell*, 530 U.S. at 838–39 (O'Connor, J., concurring). See also *Good News Club v. Milford Cent. Sch.*, 121 S. Ct. 2093, 2111 (2001) (Breyer, J., concurring). In *Rosenberger*, where Justice Breyer sided with the separationists, Justice O'Connor was the lone voice in the middle. *Rosenberger*, 515 U.S. at 863–99.

minimizing the systemic and structural features of those problems. Religious institutions can be a fount of intolerance and prejudice toward nonbelievers generally and women and gays and lesbians in particular. And government support of religious institutions may itself undermine and dilute the effectiveness of religious institutions. Thus, the faith-based initiative is not without significant dangers. But its potential benefits nonetheless provide strong reasons for supporting the concept in principle.

In Part II, I will argue that the current constitutional polarization on public aid to religion is also unwarranted. Both the assimilationist and the separationist camps paint with too broad a brush. I suggest an expressivist approach to the Establishment Clause, built upon Justice Sandra Day O'Connor's endorsement test, as a mediating principle. The endorsement test asks whether a reasonable observer would interpret challenged government conduct as approving or disapproving religion. It provides that the government must avoid messages that make adherence to religion relevant to political standing in the community. While initially developed to assess government messages and displays, the endorsement test need not be limited to those confines, and in particular provides a critical tool for assessing the constitutionality of government funding. This is because once one acknowledges that some government support of religion is permissible under, and indeed required by, the Constitution, it is not enough to ask whether the government has aided religion. Nor is it sufficient to ask whether the government has been formally neutral, as the assimilationists do. The endorsement test focuses not on the mere fact of funding, but on what the funding *expresses*. Funding schemes should be invalidated only where they express official approval or disapproval of religion, and thereby send the message that religious adherence is relevant to citizens' standing vis-à-vis their government. The expressivist approach proposed here avoids formalism, pays attention to effects, and takes cognizance of the special status of religion.

The expressivist approach recognizes that, as Kenneth Karst and Ira Lupu have observed, Establishment Clause concerns are more sharply raised in the United States today by official religious messages than by government funding of religion.¹⁵ Government benefits can and in most settings must be distributed neutrally, without favoring particular religions or religion over nonreligion. Official religious messages, by contrast, are

15. KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* 148-49 (1993); Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 773 (2001).

not susceptible to neutrality, and therefore pose more immediate constitutional concerns. For this reason, it is relatively noncontroversial that school prayer, a form of government religious message, is unconstitutional, while the constitutionality of vouchers remains a hotly debated question. In my view, however, the line between government funding and government message is not a sharp one; the structure and distribution of a government funding program may itself express an impermissible government message regarding religion. And some government funding programs themselves constitute government speech. The expressivist approach seeks to distinguish permissible from impermissible aid by identifying when government funding becomes government speech.

While the endorsement test asks the right question by attempting to identify the message that government conduct expresses, it has been justly criticized as vague and indeterminate.¹⁶ Part III accordingly proposes three lines of inquiry that provide structure to the endorsement inquiry when government aid to religion is at issue. The first asks whether a government funding program constitutes government speech, an inquiry already undertaken in free speech jurisprudence. When the government hires a speaker to express the government's own message, the speaker is engaged in government speech. As a matter of free speech doctrine, such programs need not satisfy the general First Amendment obligation of content and viewpoint neutrality; the government may dictate what can and cannot be said. Precisely because the government exercises content control in those settings, however, any incorporation of religious content into the program should be strictly forbidden.

The second inquiry, applicable to all non-government-speech programs, examines whether the *structure* of the funding program impermissibly endorses religion. When the government funds social services without dictating the content of speech, it usually can, and in some cases *must*, support both religious and nonreligious activity. In these settings, government support of religion is generally permissible as long as the government program as a whole has a secular purpose, applies neutral criteria in selecting funding recipients, and ensures that adequate secular alternatives are available for all who seek to receive government-supported services in a secular setting. Such programs do not send a message that adherence to religion is relevant to political standing, and therefore should

16. See, e.g., William P. Marshall, "We Know It When We See It": *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 533-37 (1986); Smith, *supra* note 11, at 276-301; Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 711 (1986).

be permissible even if they result in direct government funding of religious activity.

The third line of inquiry under the expressivist model distinguishes between direct and indirect support of religious practices. Contemporary Establishment Clause jurisprudence draws a sharp line between direct government aid, which generally may not support religious activity, and indirect aid routed through private individual choice, such as vouchers, which may generally support religious activity without creating a constitutional problem unless the private routing is a transparent fiction.¹⁷ Some have criticized the distinction as formalistic because whether government funds are put to religious uses directly or indirectly they are still supporting religious activity. The expressivist model insists that there is something to the distinction, however, because the two different types of aid *often express very different messages about religion*. When aid goes to private individuals without any directive as to where it can be spent, any support provided to religious activity will be the result of private rather than public initiative. A neutral program of aid to individuals expresses neither approval nor disapproval of religion; it simply leaves that choice to the private sphere. The direct-indirect distinction, however, has important limits, because government must often approve or disapprove of the institutions and practices to which private individuals can direct their government resources, and if that prior decision sends a message approving or disapproving religion, it will contravene the Establishment Clause.

The expressivist approach leads to decidedly mixed results for faith-based initiatives. On the one hand, it suggests that even direct government support of religious activity is sometimes permissible. Where the direct aid is part of a non-government-speech program that treats religious and secular entities equally while guaranteeing secular alternatives, the aid should often be acceptable, because it would not express an impermissible government message vis-à-vis religion. On this view, provisions in existing “charitable choice” statutes barring any use of direct government funds for religious proselytizing or indoctrination are constitutionally unnecessary.¹⁸ On the other hand, when the government is supporting the expression of an official government viewpoint, all government aid to religious activity should be strictly forbidden, even when the aid is neutrally available to secular and religious entities and is channeled through individuals. Government speech may not be religious.

17. *E.g.*, *Witters v. Wash. Dep’t of Serv. for the Blind*, 474 U.S. 481, 487 n.4 (1986).

18. *See, e.g.*, 42 U.S.C. § 604a(j) (Supp. III 1997) (barring expenditure of federal funds “for sectarian worship, instruction, or proselytization”).

This approach suggests that government support of religious drug treatment and rehabilitation programs generally should be forbidden, whereas government support of faith-based soup kitchens and sports leagues should be permitted. It disqualifies a substantial set of faith-based social services from government support, those that constitute government speech programs, but permits even direct aid to religious activity in settings that do not involve government speech. Both separationists and assimilationists will likely be dissatisfied with my approach, but I consider that a strength rather than a weakness. In this area, absolutes are rhetorically tempting but ultimately unsatisfactory.

The policy and constitutional sections of this Article are admittedly in some tension. The former proffers reasons for supporting faith-based initiatives, while the latter raises a potentially serious constitutional barrier to a significant subset of faith-based programs, specifically those properly understood as government speech. That tension may be inescapable, and reflects the necessarily ambivalent relation between democracy and religion in modern American society. The expressivist model proposed here acknowledges that tension, and seeks to provide a useful guide through the Scylla of separation and the Charybdis of assimilation.

I. THE CASE FOR SUPPORTING FAITH-BASED SOCIAL SERVICES

Liberals and progressives have been quick to criticize government funding of religious social services. Their opposition is not surprising, given liberals' longstanding insistence on a wall between church and state and condemnation of public aid to parochial schools. Thus, the ACLU and Americans United for Separation of Church and State have predictably opposed the faith-based initiative. In a reaction common to the left, Ellen Willis in *The Nation* characterized Bush's faith-based initiative as "a bold assault on the separation of church and state."¹⁹

But there are many good reasons why liberals and progressives ought to look favorably on government funding of faith-based social services. First, they are social services. If providing social services through faith-based institutions makes social welfare services more politically acceptable across the board, liberals ought not reject it out of hand. Faith-based social services hold the potential for uniting conservatives and liberals on social welfare and crime policy. Many conservatives approve of religious interventions because they see crime and poverty as rooted in lapsed moral

19. Willis, *supra* note 9, at 11. See also *supra* note 3 and accompanying text.

values, and consider religion to have been unfairly driven from the public domain.²⁰ Liberals are generally more inclined to emphasize the material and socioeconomic causes of crime and poverty, and to be suspicious of organized religion. But the types of social interventions in which religious entities tend to engage—provision of food and shelter, rehabilitation, community-building activities, and social reintegration—are precisely the kinds of responses to social problems that liberals have long preferred.²¹

American society has increasingly responded to social problems by investing in the criminal justice system rather than addressing them proactively. At the same time that we have “reformed” welfare and watched the gap between rich and poor grow, we have invested in an unprecedented expansion of police, prosecutors, and prisons. We have been far less eager to provide needed social support, such as job training, economic development, and quality education.²² Whatever else one might say about them, religious institutions do not have the authority to incarcerate. They intervene proactively, by sponsoring organized youth activities, fostering mentoring programs, and offering community-strengthening activities (such as church choirs, sports leagues, etc.). They provide basic assistance (such as food and shelter) and counseling to those in need. And they intervene at the rehabilitation stage, offering guidance, halfway housing, or drug treatment. All of these measures should be preferable, from a liberal standpoint, to our nation’s current reliance on incarceration as a response to social disintegration.

Second, religious institutions are often well situated to provide necessary social services in poverty-stricken areas. Criminologists assessing community-based interventions designed to decrease criminal behavior have found, for example, that institutions based in the community are more effective than outside institutions, that broad-based organizations are better than institutions narrowly focused on crime, and that

20. See, e.g., WILLIAM J. BENNETT, JOHN J. DIJULIO, JR. & JOHN P. WALTERS, *BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA’S WAR AGAINST CRIME AND DRUGS* (1996); PETER L. BERGER & RICHARD JOHN NEUHAUS, *TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY* (Michael Novak ed., 1996); MARVIN OLASKY, *RENEWING AMERICAN COMPASSION* 24 (1996) (“No bureaucracy, and no amount of money, can buy the reformation of morals that is desperately needed.”); Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 *EMORY L.J.* 1 (1997).

21. See, e.g., ELLIOTT CURRIE, *CONFRONTING CRIME: AN AMERICAN CHALLENGE* (1985) (arguing that crime will be reduced most effectively by providing work opportunities, promoting income equality, and investing in child care).

22. See *id.* at 140–41; David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy’s “Politics of Distinction,”* 83 *GEO. L.J.* 2547, 2567–70 (1995).

organizations that reinforce community ties are especially effective.²³ An organization need not be religious to meet these criteria, of course, but in many inner city neighborhoods, religious institutions are the only viable entities that do.²⁴ As Glenn Loury has observed, “reports of successful efforts at reconstruction in ghetto communities invariably reveal a religious institution, or set of devout believers, at the center of the effort.”²⁵

The story of the Ten Point Coalition in Boston, Massachusetts is illustrative.²⁶ In May 1992, a shootout and multiple stabbing during a funeral service in Boston’s Morning Star Baptist Church sparked a group of African-American clergy to form the Ten Point Coalition.²⁷ Although some of the clergy had been harsh critics of policing strategies in Boston, they began to work together with the police to respond to gang violence.²⁸ They engaged in street ministry, walking the streets of Boston’s most troubled neighborhoods, where they reached out to troubled youth and helped them get their lives in order.²⁹ They helped the police identify the few youth who were responsible for the most violence, and advocated harsh measures against them, while simultaneously urging leniency on behalf of many others.³⁰ Boston’s homicide rate plummeted, falling 80% from 1990 to 1999,³¹ and the police and scholars have both acknowledged the critical role of the Ten Point Coalition in that success story.³²

23. DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 206–07 (1999).

24. *Id.* See generally Jenny Berrien, Omar McRoberts & Christopher Winship, *Religion and the Boston Miracle: The Effect of Black Ministry on Youth Violence*, in WHO WILL PROVIDE?: THE CHANGING ROLE OF RELIGION IN AMERICAN SOCIAL WELFARE 266, 266–84 (Mary Jo Bane et. al. eds., 2000); John J. DiIulio, Jr., *Godly People in the Public Square*, PUB. INTEREST, Oct. 1, 2000, at 110.

25. Glenn C. Loury, *Professors and the Poor: Discussion at a Poverty Conference*, in ONE BY ONE FROM THE INSIDE OUT: ESSAYS AND REVIEWS ON RACE AND RESPONSIBILITY IN AMERICA 210, 213 (1995).

26. See Berrien et al., *supra* note 24, at 266.

27. *Id.* at 272–73.

28. *Id.*

29. *Id.*

30. *Id.* at 278–79.

31. *Id.* at 266.

32. *Id.* at 274–80. In an interview on National Public Radio about Boston’s crime prevention strategy, police commissioner Paul Evans stated, “The secret to our success has been the city’s success. When we talk about a comprehensive approach, we’re working with nonprofits, community-based groups; [and] the clergy in the area of prevention We’re more apt now to go out and say, ‘let’s get the street workers, let’s get the clergy, let’s get some non-profits.’” *Talk of the Nation* (National Public Radio broadcast, July 14, 1999). See also Klein, *supra* note 6, at 41 (quoting William J. Bratton, former Boston police commissioner, saying “You couldn’t function effectively without the ministers in Boston Those churches, and [religious] leaders like Gene Rivers, were a very significant reason for our success.”). But see Anthony Braga, David M. Kennedy, Anne M. Piehl & Elin J. Warins, *The Boston Gun Project: Impact Evaluation Findings* 14–15 (May 17, 2000) (research report submitted to

Third, religious values and commitments may facilitate the effective provision of social services. As a general matter, religions share basic tenets that can be critical to helping the disadvantaged and rehabilitating and reintegrating people who have violated community norms and expectations. At their best, religious communities are committed to the equal dignity of all human beings,³³ to the importance of community and the need to think beyond oneself,³⁴ and to the notion that all human beings make mistakes but deserve forgiveness and can be redeemed.³⁵ Each of these commitments is critically important in the fight against poverty and crime. None of these commitments is exclusively religious, and all of them have a place in secular society, but they arguably play a more central role in religious settings. In addition, moral teaching is more comfortably situated in religion than in many government or secular settings.³⁶ Government support of faith-based institutions offers the possibility of reinforcing these values throughout society.

Consider rehabilitation. Secular society has largely given up on the notion. We invest little in rehabilitating criminals in prison, or in seeking to reintegrate them into the community upon their release. It has not always been so. As late as 1968, 72% of Americans believed that rehabilitation should be prison's primary purpose.³⁷ But today

the U.S. Natl. Inst. of Just.), at <http://www.ksg.harvard.edu/urbanpoverty/sitepage/UrbanSeminar/Violence/Papers/BragaBGP%20report.pdf> (attributing the sharp decline in Boston youth homicides in 1996–97, a 63% decrease in monthly youth homicides, to Operation Ceasefire, a Boston Police Department initiative, and asserting that the Ten Point Coalition did not directly contribute to the decline).

33. The right to be treated with equal dignity and respect is recognized in Christianity. ROBERT TRAEER, *FAITH IN HUMAN RIGHTS* 88–89 (1991). It is also recognized in Judaism, *id.* at 101–03, Islam, *id.* at 112–19; and Buddhism, *id.* at 134–37.

34. Themes of the importance of community and charity are found in Judaism, Lenn E. Goodman, *The Individual and the Community in the Normative Traditions of Judaism*, in *RELIGIOUS DIVERSITY AND HUMAN RIGHTS* 18–19 (Irene Bloom et al. eds., 1996), Islam and Christianity, KEITH WARD, *RELIGION AND COMMUNITY* 31–52 (Islam), 131–210 (Christianity) (2000); *THE ENCYCLOPEDIA OF RELIGION* 224 (1987) (regarding “charity”), Hinduism, Joseph W. Elder, *Hindu Perspectives on the Individual and the Collectivity*, in *RELIGIOUS DIVERSITY AND HUMAN RIGHTS*, *supra* at 70–84, and Buddhism, Robert A. F. Thurman, *Human Rights and Human Responsibilities: Buddhist Views on Individualism and Altruism*, in *RELIGIOUS DIVERSITY AND HUMAN RIGHTS*, *supra* at 86, 96.

35. The themes of rehabilitation and redemption are found in Christianity, John Langan, *The Individual and the Collectivity in Christianity*, in *RELIGIOUS DIVERSITY AND HUMAN RIGHTS*, *supra* note 34, at 159–63, Judaism, *ENCYCLOPEDIA JUDAICA* 4–76 (1972) (on “teshuvah”), and Islam, *SINCERE REPENTANCE* 9 (Abu Maryam Majdi Fathi Al-Syed comp., Molana Mohammed Amin Kholwadia trans., 1995) (discussing Islamic concept of repentance for wrongdoing).

36. See NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* 74 (1998) (noting that religious associations are “universally viewed as depositories of moral values and scenes of moral education”).

37. MARC MAUER, *RACE TO INCARCERATE* 44 (1999).

rehabilitation is largely absent from our criminal justice policy, which instead emphasizes deterrence, incapacitation, and retribution.³⁸ As a result, over the last twenty-five years the prison population in America has skyrocketed. From 1925 to 1975, the per capita incarceration rate remained virtually constant, at about 110 incarcerated persons per 100,000.³⁹ In the last twenty-five years, however, the rate has quadrupled.⁴⁰ We now lead the world in per capita incarceration, and our incarceration rate is five times higher than that of any other Western nation.⁴¹ Without a belief in the possibility of rehabilitation, there is little to stop the imposition of longer and longer sentences on more and more people.

Religious interventions might help restore a societal commitment to rehabilitation. The concepts of forgiveness, mercy, and redemption are at the core of many faiths.⁴² When secular society abandoned rehabilitation programs in the nation's prisons, the job was left to religious organizations, like the Catholic Church, Charles Colson's Prison Fellowship, and the Nation of Islam. Anecdotal evidence indicates that these interventions can work.⁴³ But there are not nearly enough of them to meet the need. One consequence of the boom in incarceration over the last 25 years is a correlative boom in convicted felons returning to society for the foreseeable future. In 2001, approximately 600,000 inmates returned to the community, or 1600 per day.⁴⁴ Unless we support rehabilitation and reintegration for these inmates when they reenter society, we can expect more crime.⁴⁵ Faith-based organizations are uniquely situated both to provide prisoners and ex-convicts those services, and to remind all of us of the importance of rehabilitation and reintegration to a vibrant and caring community.

38. *Id.* at 71–78. *But see* Fox Butterfield, *Inmate Rehabilitation Returns As Prison Goal*, N.Y. TIMES, May 20, 2001, at 1 (noting that rehabilitation has long been discredited and largely abandoned, but suggesting that it is returning as a value in some state criminal justice systems).

39. MAUER, *supra* note 37, at 17, 83.

40. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 502 (1998).

41. MAUER, *supra* note 37, at 23; David Cole, *As Freedom Advances: The Paradox of Severity in American Criminal Justice*, 3 U. PA. J. CONST. L. 455, 457 (2001).

42. *See supra* note 35 and accompanying text.

43. *See, e.g.*, Jon Loconte, *The Bully and the Pulpit*, POL'Y REV., Nov. 1, 1998, at 28 (describing the success of Teen Turnaround, a faith-based juvenile rehabilitation program in Dallas, and the Ten Point Coalition's Fatherhood Program, which seeks to rehabilitate abusive and criminal parents).

44. Butterfield, *supra* note 38; Jeremy Travis, *But They All Come Back: Rethinking Prisoner Reentry*, in SENTENCING & CORRECTIONS, NO. 7, at 1, 1 (Nat'l Inst. of Justice, U.S. Dep't of Justice May 2000) (projecting from then-current trends that over 500,000 inmates would leave prison in 2000).

45. *See generally* Travis, *supra* note 44.

The religious commitment to charitable work may also contribute to the effectiveness of faith-based programs.⁴⁶ Through volunteers, religious entities may be able to achieve more for each dollar spent. And the notion that work for others is a central part of one's religious identity may contribute to the spirit in which the work is done; employees of religious entities may be less likely than employees of secular organizations and government agencies to treat their work as just a job. While this factor is difficult to measure, common sense suggests that those who are more committed to their work will be more productive.

Fourth, religion offers a source of normative authority and community identification independent from the state. As Michael McConnell has argued, the "essence of 'religion' is that it acknowledges a normative authority independent of the judgment of the individual or of the society as a whole."⁴⁷ This independent normative authority may be critical to the role religion plays in many social services. Criminologists have found, for example, that people who commit crimes are more likely to be independent, to lack community ties, and to view the state as illegitimate. The pervasive distrust that many poor and minority members of our society feel towards the criminal justice system may therefore contribute to the increased criminal behavior found in those communities.⁴⁸

Interventions that have the potential to restore legitimacy and build community are therefore critically needed. A religious community, because it has an independent locus of authority and a community not defined by the state, may be able to reach out to those who have rejected the authority of the state. Jenny Berrien, Omar McRoberts, and Christopher Winship, studying the Ten Point Coalition in Boston, concluded that the coalition did just that, affording an "umbrella of legitimacy to the police, an otherwise suspect force in the inner city." They further argue:

If one were looking for legitimacy through a relationship, there could perhaps be no better partner than a group of ministers. Throughout society ministers have unique moral standing. It is assumed that they are fair and that they will protect the interests of the less fortunate. In the inner city, ministers and their churches are among the last formal

46. See *supra* note 34 and accompanying text.

47. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 172-73 (1992). Stephen Carter has similarly argued: "Religions are in effect independent centers of power, with bona fide claims on the allegiance of their members, claims that exist alongside, are not identical to, and will sometimes trump the claims to obedience that the state makes." CARTER, *supra* note 10, at 35.

48. COLE, *supra* note 23, at 169-78.

institutions committed to the welfare of their neighborhoods. Within the black community, they often have been looked to for leadership.⁴⁹

Legitimacy without justice is necessarily fleeting, so unless the underlying problems of inequality are addressed, true and lasting legitimacy will not be attained. But as the Boston experience shows, religious institutions can be of significant assistance in a transition to a more just and effective order.

In addition to legitimacy, a religious organization may be able to offer important community support otherwise missing from a person's life. Alcoholics Anonymous, for example, a particularly successful faith-based treatment program, is emphatically independent, radically decentralized, religious (although nondenominational), and committed to community. Group members commit to support one another in their efforts to fight alcoholism. The twelve-step program requires participants to look beyond themselves to a "higher power" in order to be cured, and strongly encourages regular participation in meetings. A secular or governmental institution might well be able to incorporate similar obligations without a commitment to a "higher power," but the independent, religious character of the group provides an important bond.⁵⁰

The Nation of Islam's success in reforming felons in and out of prisons is a more controversial example. Its authority is self-consciously separate and distinct from that of the state and mainstream white culture, and it may well derive much of its power from that separate status. Founded in the 1930s by a Detroit door-to-door rug and silk salesman named Wallace Fard Muhammad, the Nation of Islam works extensively in prisons and the inner city, and most of its members are young black men, including many former addicts and criminals.⁵¹ James Baldwin observed:

Elijah Muhammad [then-leader of the Nation of Islam] has been able to do what generations of welfare workers . . . have failed to do: to heal and redeem drunkards and junkies, to convert people who have come out of prison, and to keep them out, and to make men chaste and women virtuous, and to invest [them] with a pride and a serenity that hang about them like an unfailing light.⁵²

49. Berrien et al., *supra* note 24, at 279.

50. On the role of faith and community support in Alcoholics Anonymous, see ALCOHOLICS ANONYMOUS WORLD SERVICES, INC., TWELVE STEPS AND TWELVE TRADITIONS (1953); MILTON A. MAXWELL, THE ALCOHOLICS ANONYMOUS EXPERIENCE: A CLOSE-UP VIEW FOR PROFESSIONALS (1984); Henry L. Hudson, *How and Why Alcoholics Anonymous Works for Blacks*, in TREATMENT OF BLACK ALCOHOLICS 11 (Frances Larry Brisbane & Maxine Womble eds., 1985).

51. C. ERIC LINCOLN, THE BLACK MUSLIMS IN AMERICA 22-24 (3d ed. 1994).

52. JAMES BALDWIN, THE FIRE NEXT TIME 72 (1963).

While hard data are not available, the Nation of Islam continues to enjoy a reputation for successfully rehabilitating many criminals.⁵³ The Nation provides a strong support network in and out of the prisons, enforces a strict religious code, and inculcates group solidarity and responsibility for oneself and others: members “are expected to live soberly and with dignity, to work hard, to devote themselves to their families’ welfare, and to deal honestly with all others.”⁵⁴ Central to the Nation’s solidarity and community, however, is its commitment to racial separatism. Members are taught that “[t]heir social tragedies are caused by the white devil’s tricknology, but truth and hard work will soon make them free.”⁵⁵ Thus, in this case religion’s independent normative authority is decidedly double-edged.

Finally, religious social services are an important feature of a vital civil society. Many have argued that religion is an important mediating institution that teaches people how to be citizens, by providing a community defined by concern for others, and by affording people space to develop and to express normative judgments that may differ from those of the mainstream. Alexis de Tocqueville considered religion particularly important to republican government because “[e]very religion also imposes on each man some obligations toward mankind, to be performed in common with the rest of mankind, and so draws him away, from time to time, from thinking about himself.”⁵⁶ George Washington agreed, contending in his Farewell Address that “[o]f all the dispositions and habits which lead to political prosperity, [r]eligion and morality are indispensable supports.”⁵⁷ Religion, in other words, is a training ground for citizenship, and particularly for the care and concern for others so central to social cohesion.

53. See *id.* at 109–10; Andrea Ford & Russell Chandler, *A Growing Force and Presence*, L.A. TIMES, Jan. 25, 1990, at A1 (“Community activists in Los Angeles and other major cities have voiced their belief that the Nation of Islam has proven many times that its doctrine can help turn around young men whose lives otherwise appear headed for self-destruction.”); Amy Kaslow, *Nation of Islam Extends Its Reach Behind Prison Walls*, CHRISTIAN SCI. MONITOR, May 20, 1996, at 9 (“Data are not available, but the organization’s zero-tolerance policy for criminality has earned it a reputation for being an effective reformer.”). Cf. James Brooke, *Million Man March Inspires Action in Denver Neighborhoods; Message Finds Fertile Ground Across U.S.*, DALLAS MORNING NEWS, Mar. 31, 1996, at 4A (noting effect of Million Man March, organized by Nation of Islam, on involvement in neighborhood watch groups and other anticrime initiatives).

54. LINCOLN, *supra* note 51, at 78.

55. *Id.* at 110.

56. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 444–45 (J.P. Mayer ed., 1969).

57. GEORGE WASHINGTON, *Farewell Address 1796*, in WRITINGS 962, 971 (John Rhodehamel ed., 1997). See also Tushnet, *supra* note 16, at 735–36 (discussing civic republicans’ view that religion was an important locus for inculcating public-regarding virtues).

Modern scholars have lamented the demise of associational activity in American society, including a drop in religious involvement, and have argued that we need to revive civil society.⁵⁸ If religion is a central mediating institution in civil society, it may provide benefits to the democracy as a whole that warrant its support, or at least argue against excluding religious institutions from equal eligibility for support otherwise available to similarly situated secular organizations.

In sum, there is reason to believe that at least for some individuals and some communities, faith-based social interventions may offer benefits that secular interventions cannot. To justify supporting faith-based services, one need not conclude that they are uniformly more effective than secular alternatives, but only that they may be more effective in some contexts and for some people. And although empirical evidence of the effectiveness of faith-based programs is thin,⁵⁹ the results of the few studies that have been conducted are promising. Studies of Catholic schools have found that all other things being equal, disadvantaged students fare better there than in public schools.⁶⁰ A National Institute for Healthcare Research study found that inmates in New York prisons who attended at least ten Bible studies classes a year were three times more likely to stay out of trouble after release.⁶¹ A 1995 review of criminology literature found that religious influences discourage crime and delinquency.⁶² Harvard economist Richard Freeman found in 1985 that children involved in churches were more likely to escape poverty, crime, drugs, and joblessness.⁶³ Teen Challenge, a Christian drug treatment program, has reportedly been found

58. See, e.g., BERGER & NEUHAUS, *supra* note 20; ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417 (2000).

59. See Soskis, *supra* note 7, at 20 (arguing that there is little sound empirical support for the proposition that faith-based social services are more effective than secular services, and that there is “not enough research into faith-based programs to arrive at any but the most preliminary conclusions” about their effectiveness).

60. GLENN, *supra* note 8, at 35; MONSMA, *supra* note 4, at 166–67.

61. Byron R. Johnson, David B. Larson & Timothy C. Pitts, *Religious Programs, Institutional Adjustment, and Recidivism Among Former Inmates in Prison Fellowship Programs*, 14 JUST. Q. 145, 161 (1997).

62. T. David Evans, Francis T. Cullen, R. Gregory Dunaway & Velmer S. Burton, Jr., *Religion and Crime Reexamined: The Impact of Religion, Secular Controls, and Social Ecology on Adult Criminality*, 33 CRIMINOLOGY 195, 208–09 (1995).

63. Richard B. Freeman, *Who Escapes? The Relation of Church-Going and Other Background Factors to the Socio-Economic Performance of Black Male Youths from Inner-City Poverty Tracts* (June 1985) (Nat'l Bureau of Econ. Research, Working Paper No. 1656), available at <http://papers.nber.org/papers/w1656.pdf>. See also Robert Worth, *Amazing Grace: Can Churches Save the Inner City?*, WASH. MONTHLY, Jan. 11, 1998, at 28.

to have a 95% success rate with heroin addicts, and an 83% success rate with alcoholics, far exceeding that of most secular drug and alcohol treatment programs.⁶⁴ And the longstanding success of Alcoholics Anonymous may well be attributable in part to its religious character.

Two recent studies sought to isolate the effects of religion by controlling for other factors. The first examined religion and drug use, and found that after controlling for attachment to school and family, religious commitment was correlated with lower usage of both marijuana and hard drugs.⁶⁵ The second study found that after controlling for attachment to family and attitudes toward deviant acts, religious involvement reduced the commission of serious crime by youth in high-crime neighborhoods.⁶⁶

At the same time, there are also many reasons to be skeptical about government support of faith-based social services. First, most of the studies noted above are flawed in one way or another, and therefore claims for the efficacy of faith-based services lack a solid empirical base.⁶⁷ The greatest flaw in many of the studies is that they show correlation rather than causation. It may be that the factors that make children more likely to escape poverty, crime, drugs and joblessness also make them more likely to attend religious services, but that does not mean that the religious services actually *cause* the positive behavior. The same is true of prisoners who attend Bible classes in prison. While the two more recent studies introduced some controls in an attempt to isolate causation, they by no means controlled for all possible alternative causal factors.

In addition, studies of Teen Challenge have been criticized for having a small sample size, overrelying on self-reporting, and failing to register dropouts accurately.⁶⁸ And Alcoholics Anonymous' high success rates are limited to its active, long-term members. Nearly half of initial attendees drop out after two months, and 90% leave within a year.⁶⁹ An eight-year survey conducted by the National Institute of Alcoholism and Alcohol

64. Worth, *supra* note 63, at 29. *But see* Randy Frame, *God in a Box? "Charitable Choice" Church-State Antipoverty Partnership*, CHRISTIANITY TODAY, Apr. 7, 1997, at 46 (citing a 70% success rate for Teen Challenge).

65. Byron R. Johnson, *A Better Kind of High: How Religious Commitment Reduces Drug Use Among Poor Urban Teens* (2000), at http://www.manhattan-institute.org/html/cr_12.htm.

66. Byron R. Johnson, *The Role of African-American Churches in Reducing Crime Among Black Youth* (2001), available at http://www.manhattan-institute.org/html/crrucs2001_2.htm.

67. *See* Eyal Press, *Lead Us Not into Temptation*, AM. PROSPECT, Apr. 9, 2001, at 20, 24; Soskis, *supra* note 7, at 20–23 (arguing that there is no empirical basis for the claim that faith-based social services are more effective than non faith-based services).

68. *See* Press, *supra* note 67, at 24; Soskis, *supra* note 7, at 20.

69. Soskis, *supra* note 7, at 22.

Abuse found no discernible difference in the effectiveness of religious twelve-step programs and secular alternatives.⁷⁰ As John DiIulio, the first head of the White House Office of Faith-Based and Community Initiatives, admitted shortly before taking that office, “[W]e do not really know whether these faith-based programs . . . outperform their secular counterparts, how they compare to one another, or whether, in any case, it is the ‘faith’ in ‘faith-based’ that mainly determines any observed difference.”⁷¹

Nonetheless, as the accounts above of the Ten Point Coalition, Alcoholics Anonymous, and the Nation of Islam illustrate, there is strong anecdotal evidence about the power of faith. Although no empirical research proves that faith-based programs are better than secular programs, certainly none proves that they are worse. And it is difficult to dismiss the many testimonials of those who believe they have been helped through religious intervention.

A second caveat is that the faith-based initiative may be an effort to privatize the provision of social services, without expanding the resources allocated to those services, and may indeed be designed to reduce those resources.⁷² The fact that faith-based initiatives’ biggest champions are often those who have long advocated tax cuts for the wealthy and reduced assistance for the poor is a serious cause for concern. It is possible that shifting caregiving to faith-based providers might diminish our collective sense of responsibility as a *political* community for those in need. Relatedly, for many of its supporters, the faith-based initiative reflects the view that social problems are caused by individual moral failure rather than structural inequities. Religious entities’ emphasis on “charity” sometimes reflects the same shortsightedness about the structural and systemic roots of personal problems.⁷³ At a minimum, we must ask whether the faith-based initiative substitutes charity for justice.

70. *Id.* at 23.

71. DiIulio, *supra* note 24, at 110.

72. *See, e.g.*, Wendy Kaminer, *Unholy Alliance*, AM. PROSPECT, Nov. 1, 1997, at 54 (“Faith-based social service programs . . . are giant steps toward privatization.”); Press, *supra* note 67, at 25 (arguing that faith-based initiative is part of the privatization movement and an effort by “the party that has spent the past few decades dismantling the social safety net to reclaim the mantle of compassion on the cheap”).

73. *See, e.g.*, Cathy J. Cohen, *The Church?*, BOSTON REV. Apr./May 2001, at 11, 12 (criticizing churches for focusing on charity rather than empowering the poor or fighting structural problems); Press, *supra* note 67, at 22 (discussing 1999 survey of 1,200 religious organizations that found that majority of their social service activities were “‘short-term, small-scale’ efforts, such as sending volunteers to help staff soup kitchens,” and that congregations devoted an average of 2–4% of their budgets to social services).

Third, as the Nation of Islam illustrates, religion's emphasis on community may entail intolerance for other communities. Religious division is renowned throughout history, from the Crusades to the Spanish Inquisition. Groups like the Nation of Islam and fundamentalist Christians too often unite their adherents by demonizing outsiders. While religion's independence may be a source of its strength, it is also a potential danger. Thus, Jean-Jacques Rousseau argued that religion threatens a democratic society because it gives people two legislative orders, two rulers, two homelands, and potentially two contradictory obligations.⁷⁴

Fourth, despite their professed belief in the equal dignity of all human beings, many religions remain deeply patriarchal and homophobic. Empowering such institutions, particularly when they may be serving women and gays and lesbians, raises serious concerns. These concerns are illustrated by existing "charitable choice provisions," which allow religious organizations to receive federal funding and to retain their immunity from antidiscrimination statutes that prohibit discrimination on the basis of religion.⁷⁵

Finally, government support of religion may paradoxically undermine some of the qualities that make religious services an attractive investment in the first place. Religion's commitment to charitable work, for example, might be eroded if religious institutions come to expect government funding. The normative and legitimating authority that religion can provide because of its independence from the state may be threatened if religion becomes too closely aligned with the state through government funding. The Nation of Islam brought to you by the White House Office of Faith-Based and Community Initiatives would not be the same Nation of Islam, for better or worse. And to the extent that public funding brings

74. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT*, 179, 181 (Maurice Cranston trans., Penguin Books 1968) (1727).

75. See 42 U.S.C. § 604a(f) (Supp. III 1997). See also Willis, *supra* note 9, at 16 (criticizing the patriarchal character of much organized religion); J. Phillip Thompson, *Whose Betrayal?*, BOSTON REV. Apr./May 2001, at 13, 14 (noting organized religion's dominance by men and its homophobia). Religious entities enjoy a general exemption from Title VII claims based on religious discrimination, 42 U.S.C. § 2000e-1(a), but the question whether they should retain that exemption when spending federal funds is beyond the scope of this Article. For an excellent discussion of the constitutional issues presented by extending the exemption in the government-funded setting, see Memorandum from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, U. S. Department of Justice, to William P. Marshall, Deputy Counsel to the President (Oct. 12, 2000) (on file with author). The existing Title VII exemption does not permit discrimination based on gender or race, but only on the basis of religion, and in the absence of funding, it has been held to constitute a permissible accommodation of religion. See *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987).

with its restrictions on religious activity, the funding may rob faith-based programs of their most effective tool.

While the potential costs associated with funding religious social services are considerable, so are the potential benefits. But even if one concludes, as I do, that on policy grounds support of faith-based initiatives is worth the risk, one must confront the constitutional question to which I will now turn: Is government funding of faith-based social services constitutional?

II. AN ESTABLISHMENT CLAUSE CONUNDRUM AND ITS SOLUTION

“Nothing in our previous cases prevents Congress from recognizing the important part that religion or religious organizations may play in resolving certain secular problems.”⁷⁶ So proclaimed the Supreme Court in *Bowen v. Kendrick*, upholding a law that permitted religious entities to apply on equal terms with secular entities for government funding to provide counseling on premarital adolescent sexual relations.⁷⁷ But at the same time, the Court insisted that the Establishment Clause bars the government from “funding a specifically religious activity in an otherwise substantially secular setting,”⁷⁸ and prohibits “government-financed . . . indoctrination into the beliefs of a particular religious faith.”⁷⁹ In other words, the Constitution allows the government to recognize the secular benefits of religious social services, but prohibits the government from funding precisely what the government may see as most beneficial about them. *Bowen* suggests that government may fund religious *entities*, but not religious *activities*.

In this section, I suggest that an expressivist understanding of the Establishment Clause offers the best way of approaching the constitutional questions presented. I first maintain that neither the separationist nor the assimilationist approach adequately resolves the conundrum of government support for religion. Separationism is neither possible nor desirable in the modern world of widespread government support, while the assimilationist’s formal neutrality misses the special concerns presented by relations between religion and the state. I then propose an expressivist

76. *Bowen v. Kendrick*, 487 U.S. 589, 607 (1988).

77. *Id.* at 593.

78. *Id.* at 613 (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)).

79. *Id.* at 611 (quoting *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985)).

analysis, built upon Justice O'Connor's endorsement test, as an alternative mediating principle.

A. THE CONUNDRUM OF GOVERNMENT SUPPORT OF RELIGION

The ambivalence reflected in the quotes from *Bowen* above is nowhere more evident than in the Court's convoluted decisions regarding public aid to parochial schools, the paradigmatic faith-based social service providers. Religious schools unquestionably perform a valuable secular service, educating hundreds of thousands of citizens each year at little cost to the government, and contributing to the foundations of a pluralist democracy by nourishing a range of independent normative communities. At the same time, religious activity and indoctrination are often integral parts of the parochial school curriculum, particularly at the primary and secondary levels, and therefore, public aid to parochial schools would seem to contravene the Establishment Clause's ban on "government-financed . . . indoctrination into the beliefs of a religious faith."⁸⁰ More than fifty years ago, in its first case addressing government aid to religious schools, the Court stated that the object of the Establishment Clause was "to create a complete and permanent separation of the spheres of religious activity and civil authority *by comprehensively forbidding every form of public aid or support for religion.*"⁸¹ Yet in that very case, the Court upheld government assistance to parochial schools in the form of bus transportation, prompting Justice Jackson in dissent to compare the majority to Byron's Julia, who whispering, "I will ne'er consent," consented.⁸² The school aid cases are notoriously contradictory, as the Court has permitted aid to parochial schools in the form of textbooks,⁸³ audiovisual equipment,⁸⁴ and remedial teachers,⁸⁵ but has ruled that the government may not support the construction costs of buildings that might someday be used for religious services,⁸⁶ or pay parochial school teachers to teach secular subjects or to administer essay exams.⁸⁷

The Court's ambivalence is understandable. While the Establishment Clause appears to have been directed in significant part at banning public

80. *Id.*

81. *Everson v. Bd. of Educ.*, 330 U.S. 1, 31–32 (1947) (emphasis added).

82. *Id.* at 19 (Jackson, J., dissenting).

83. *Bd. of Educ. v. Allen*, 392 U.S. 236, 238–39 (1968).

84. *Mitchell v. Helms*, 530 U.S. 793, 834 n.17 (2000).

85. *Agostini v. Felton*, 521 U.S. 203 (1997).

86. *Tilton v. Richardson*, 403 U.S. 672, 674–75 (1971).

87. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 380–81 (1985); *Levitt v. Comm. for Public Educ.*, 413 U.S. 472, 482 (1973).

aid to religion,⁸⁸ a ban on all such aid, when similarly situated secular entities receive substantial government support, seems neither fair nor necessary to achieve the goals of the Establishment Clause. Indeed, it arguably would penalize religion to deny it benefits otherwise generally available.⁸⁹ Accordingly, religious institutions routinely receive governmental assistance also enjoyed by the rest of society. It is not controversial that religions, along with all other nonprofit groups, receive substantial tax subsidies, both directly, through nonprofit tax exemptions, and indirectly, through charitable deductions taken by their donors.⁹⁰ And few object to the fact that churches, mosques, and synagogues receive general government services, such as police and fire protection, garbage collection, and mail delivery.⁹¹

Once one accepts that the baseline of broad government support justifies some assistance to religion on equal terms with similarly situated secular entities, it becomes difficult to articulate why any aid that is truly evenhanded as between religion and nonreligion is problematic. Separationists contend that public aid to religion raises at least three problems: it may violate freedom of conscience by compelling citizens to support religion through their tax dollars, it may co-opt religion, and it may create religious division over access to government resources.⁹² But none of these rationales is fully satisfactory. The freedom of conscience claim fails because we do not recognize a religious person's right to object to her tax dollars paying for military procurement or secular public education, even though these expenditures might equally offend her deepest convictions. Democracy would grind to a halt if the minority could opt out of supporting any majority-supported programs to which the minority deeply objects. Similarly, while religious conflict over government resources is always a potential danger, the mandate of evenhandedness, if

88. See *Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring) (noting that there are "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions"); *Everson v. Bd. of Educ.*, 330 U.S. 1, 13, 63–74 (noting that Thomas Jefferson considered "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical" and reprinting James Madison's *Memorial and Remonstrance* warning against any tax to support religion).

89. *Everson*, 330 U.S. at 18 ("State power is no more to be used so as to handicap religions, than it is to favor them.").

90. *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (upholding tax exemptions for religious institutions). Cf. Marci Hamilton, *Free? Exercise*, 42 WM. & MARY L. REV. 823, 858–66 (2001) (exploring the myriad tax exemptions that religious organizations receive).

91. See *Mitchell*, 530 U.S. at 875 (Souter, J., dissenting) (articulating separationist position, but noting that providing religion with the same "universal general service[s]" that are available to all does not violate bar on aid to religion).

92. See, e.g., *Mitchell*, 530 U.S. at 870–72 (Souter, J., dissenting).

strictly enforced, ought to be responsive to that concern. Moreover, the refusal to support religious institutions mandated by separationists might itself be divisive.⁹³

The concern about co-opting religious autonomy is more substantial. Government money may come with explicit and implicit strings attached, and the lure of the funds may tempt religious institutions to alter their practices.⁹⁴ The Establishment Clause is, after all, as much about protecting religion from government as it is about protecting government from religion. But Stephen Monsma's comprehensive survey of religious institutions that receive government assistance found that very few reported experiencing pressure to curtail their religious practices.⁹⁵ Monsma concluded that "religious nonprofits receiving public funds [were] relatively free to pursue religiously based practices without governmental interference."⁹⁶ In addition, depriving religious institutions of support offered to their secular counterparts may itself undermine their autonomy. It is not clear why autonomy must come at the cost of equality.

Assimilationists accordingly conclude that the Establishment Clause is satisfied as long as the government acts with a secular purpose and is formally neutral. On this view, so long as the funding program is neutral, it is permissible to fund religious activity and pervasively sectarian institutions. Neutral funding does not constitute favoritism toward or establishment of religion, but equal treatment. Indeed, many assimilationists view the current constitutional regime, in which religious entities are sometimes barred from receiving the same support as their secular counterparts, as violative of the Establishment Clause, because it favors and establishes nonreligion.⁹⁷

Although its proponents are unwilling to admit it, this view of the Establishment Clause is the mirror image of the modern Free Exercise Clause approach set forth in *Employment Division v. Smith*.⁹⁸ There, the Court held that a neutral law of general applicability does not trigger Free Exercise Clause review simply because it has a disparate effect on

93. See Smith, *supra* note 11, at 304–05.

94. See GLENN, *supra* note 8, at 89; Pat Robertson, *Mr. Bush's Faith-Based Initiative Is Flawed*, WALL ST. J., Mar. 12, 2001, at A22 (arguing that the initiative could undermine the effectiveness of religious programs).

95. MONSMA, *supra* note 4, at 81–99.

96. *Id.* at 98.

97. Michael W. McConnell, *Equal Treatment and Religious Discrimination*, in EQUAL TREATMENT, *supra* note 4, at 30–54 (arguing that Supreme Court doctrine limiting public aid to religion discriminates against religion).

98. 494 U.S. 872, 877–79 (1990).

adherents of a particular religion.⁹⁹ Under *Smith*, free exercise jurisprudence requires only formal neutrality, and is uninterested in effects, except to the extent that they reveal an improper purpose. The formal neutrality approach to the Establishment Clause also parallels the Court's treatment of the Equal Protection Clause, which the Court interprets to prohibit only intentional discrimination, rendering disparate effects irrelevant except as evidence of illicit intent.¹⁰⁰

The assimilationists' formal neutrality approach is relatively simple to apply, but like the formal approaches that govern Free Exercise and Equal Protection doctrine, it may achieve ease of administration by ignoring the lion's share of the problem. Where a formally neutral program has the foreseeable effect of supporting almost exclusively religious entities, for example, as in government funding of private schools, the vast majority of which are parochial, formal neutrality does not adequately identify the threat to Establishment Clause values.¹⁰¹ Even if one were to conclude at the end of the day that such funding were constitutionally permissible, it would not be a sufficient justification that the program is formally neutral. Given the Establishment Clause's concern about the special dangers of intermingling religion and the state, some consideration of effects is warranted. In the funding context, in other words, formal neutrality may be necessary, but ought not be sufficient, to satisfy constitutional concerns.

The Court has undoubtedly moved toward the assimilationist position in recent years. It has interpreted the Constitution not only to permit but to *require* the government to support an explicitly proselytizing religious magazine,¹⁰² to display on government property a private religious symbol,¹⁰³ and to afford religious groups access to school property after school hours,¹⁰⁴ in each case because the government had permitted other private speakers to use government resources to express secular messages.¹⁰⁵ And the Court has overruled several earlier decisions barring

99. *Id.* at 877–79.

100. *E.g.*, *McClesky v. Kemp*, 481 U.S. 279, 292–93 (1987); *Pers. Adm'r v. Feeney*, 442 U.S. 256, 272–73 (1979); *Washington v. Davis*, 426 U.S. 224, 238–44 (1976).

101. *See Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000) (striking down a formally neutral voucher program that had the effect of financing almost exclusively students attending religious schools), *cert. granted*, 122 S. Ct. 23 (2001).

102. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

103. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 759 (1995).

104. *Good News Club v. Milford Cent. Sch.*, 121 S. Ct. 2093 (2001); *Lamb's Chapel v. Cent. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–95 (1993).

105. *Good News Club*, 121 S. Ct. at 2100–02; *Rosenberger*, 515 U.S. at 829–30; *Pinette*, 515 U.S. at 759; *Lamb's Chapel*, 508 U.S. at 393–95.

certain forms of aid to parochial schools—specifically, educational materials and remedial educational services.¹⁰⁶

But while the Court increasingly has tolerated broader government support of religion, the assimilationists' formal neutrality view has never garnered a majority. It came closest to doing so in *Mitchell v. Helms*,¹⁰⁷ where four Justices adopted that view. But the decisive opinion in *Mitchell* was Justice O'Connor's concurrence, joined by Justice Breyer, in which she expressly rejected the plurality's view that neutrality was sufficient to satisfy the Establishment Clause.¹⁰⁸ The inability of either the separationist or the assimilationist view to attract a majority on today's Court constitutes a kind of de facto recognition that this issue *requires* compromise.

Neither separationism nor assimilationism adequately resolves the conundrum presented by government support of religion in modern-day America. Separationism, strictly construed, leads to discrimination against religion, and therefore even the most devout no-aid separationists accept the provision of some general aid to religious institutions.¹⁰⁹ At the same time, formal neutrality misses the fact that potential religious funding recipients may not be truly similarly situated to potential secular recipients, precisely because they are religious. A mediating principle is needed.

B. WHEN GOVERNMENT FUNDING BECOMES GOVERNMENT EXPRESSION: ENDORSEMENT AS A MEDIATING PRINCIPLE

I propose an expressivist approach to the Establishment Clause as a mediating principle. This approach builds upon Justice O'Connor's endorsement test. It focuses on how government funding will be perceived in the community, and asks whether a reasonable observer would interpret the program as endorsing or disapproving religion. Where government is reasonably perceived to have endorsed religion, Justice O'Connor has written, it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to believers that they are insiders, favored members of the political

106. *Mitchell v. Helms*, 530 U.S. 793, 835 (2000), *overruling* *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 433 U.S. 229 (1977); *Agostini v. Felton*, 521 U.S. 203, 203 (1997), *overruling* *Aguilar v. Felton*, 473 U.S. 402 (1985)).

107. *Mitchell*, 530 U.S. at 809–10.

108. *Id.* at 836–45 (O'Connor, J., concurring in the judgment).

109. *See, e.g., id.* at 874–79 (Souter, J., dissenting) (acknowledging that general government services may be provided to religion without contravening the Establishment Clause).

community.”¹¹⁰ From this perspective, government programs that are neutral as between similarly situated religious and secular institutions should often (although not always) be upheld, because an informed reasonable observer would not perceive equal treatment of secular and religious entities as endorsing religion. But formal neutrality is not *sufficient* to satisfy the endorsement test; one must also look to effects.¹¹¹

The advantage of the endorsement test is that it avoids formalism and pays attention to the effects of various government programs. But its avoidance of formalism is simultaneously the endorsement test’s greatest weakness. As many have pointed out, the test provides few clear guidelines, and appears to turn on judges’ inevitably subjective assessments of a hypothetical reasonable observer’s perceptions about the cultural significance of state practices.¹¹² Consider, for example, the Court’s divided vote over whether Pawtucket, Rhode Island’s display of a nativity scene along with various secular symbols of Christmas contravened the Establishment Clause.¹¹³ Five Justices characterized the display as acknowledging the historical event of Christmas without any resulting endorsement of Christianity, while the four dissenters, applying the same test to the display, saw it as placing an imprimatur of approval on Christian faith.¹¹⁴ Endorsement is ultimately a matter of interpretation, and interpretation is an art, not a science. Because it leaves legislators and the citizenry in doubt as to where the constitutional line is drawn, the endorsement test may deter some forms of permissible support of religion,

110. Lynch v. Donnelly, 465 U.S. 668, 688 (1984).

111. Justice O’Connor is particularly concerned about any program that renders direct monetary aid to religious activities. See, e.g., *Mitchell*, 530 U.S. at 836–45. In her view, for example, a formally neutral program that resulted in direct government support of religious activities would send the impermissible message that the government endorsed the religious activity and should for that reason be invalid. *Id.* at 842–43. While I do not share Justice O’Connor’s strict antipathy to direct funding of religious activity, I agree that one must consider effects in assessing how government programs will be reasonably perceived.

112. See *supra* note 16 and accompanying text.

113. Lynch v. Donnelly, 465 U.S. 668 (1984). See also *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (holding that a city’s display of a crèche violates the Establishment Clause, but that a simultaneous display of a menorah, a Christmas tree, and a sign saluting liberty does not).

114. Similar difficulties with the endorsement test are illustrated by *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995), in which Justice O’Connor found no endorsement, applying the endorsement test from the perspective of a well-informed “hypothetical observer who is presumed to possess a certain level of information that all citizens might not share,” *id.* at 780 (O’Connor, J., concurring), while Justice Stevens dissented, finding endorsement when the government conduct was viewed from the perspective of a reasonable but less omniscient passerby. *Id.* at 779–801 & n.5 (Stevens, J., dissenting).

will subject other government initiatives to costly litigation, and generates inconsistent results.¹¹⁵

Still, the endorsement inquiry asks the right question: Does the government's conduct express a message approving or condemning religion? This is the proper inquiry in part because, as Kenneth Karst and Ira Lupu have observed, Establishment Clause concerns are most acutely presented in modern America by official religious messages.¹¹⁶ Karst and Lupu both argue that government religious messages are more problematic than government funding of religion.¹¹⁷ As Karst puts it:

Today the risk of religious polarization does seem to have lessened in the resource-allocation context, where the issues can be seen as part of the everyday grist of the political mill Issues concerning governmental deployments of the symbols of religion, however, have a greater capacity to polarize [One reason is that] they are not the subject of multilateral negotiation and they do not invite compromise¹¹⁸

Lupu concurs, although he maintains that in the early days of the Republic, the opposite was true: government messages invoking religion were commonplace and not thought to raise significant Establishment Clause concerns, in large part because the political/religious culture was relatively homogenous (read Protestant).¹¹⁹ Government funding of religion was considered more problematic because of the concern that it would lead to factional disputes among competing Protestant sects.

Lupu argues that as religious and cultural diversity have increased and as government funding of a wide array of private activities has expanded, Establishment Clause concerns have flipped. Today, Lupu maintains, funding religion is less problematic, as long as it is done neutrally, because government funding has become an accepted baseline, the support can be spread widely, and government funds can be parceled out to religious and secular entities evenhandedly. At the same time, government messages incorporating religion have become more problematic, because it is now not possible (if indeed it ever was) for a message to encompass and respect all of the diverse religions that coexist in the United States. These features, Lupu argues, explain the Supreme Court's increasing tolerance of government funding of religious institutions, and its continuing strict scrutiny of situations in which the government might be seen as expressing

115. See McConnell, *supra* note 97, at 38–48.

116. See *supra* note 15 and accompanying text.

117. See *supra* note 15 and accompanying text.

118. KARST, *supra* note 15, at 149.

119. Lupu, *supra* note 15, at 775–79.

a religious message.¹²⁰ The Court's consistent rejection of public school prayer is a testament to its concern about official religious messages.¹²¹

Karst and Lupu are correct to point to the particular dangers posed by official religious speech. But the distinction that they draw between government message and government funding is not as clearcut as they imply. As free speech doctrine has long recognized, conduct can be expressive.¹²² This is true of both private and public conduct. Government funding therefore can express a government message. When funding expresses a message that approves or condemns religion, it should fall within the Establishment Clause's prohibition on official religious speech. In the funding area, therefore, the expressivist approach asks what the government funding program *expresses vis-à-vis* religion to a reasonable observer, and invalidates those programs that express approval or disapproval of religion.¹²³

III. DEFINING ENDORSEMENT

If the endorsement test asks the right question from an expressivist understanding of the Establishment Clause, the challenge is to identify principles that help provide more determinate answers. The tension

120. *Id.* at 807–15 (comparing Court's rejection of student prayer at football game in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), to its acceptance of government funding of religious education in *Mitchell v. Helms*, 530 U.S. 793 (2000)).

121. *See, e.g., Santa Fe Indep. Sch. Dist.*, 530 U.S. 290 (holding student-initiated prayer before football games is unconstitutional); *Lee v. Weisman*, 505 U.S. 577 (1992) (holding prayer at school graduation is unconstitutional); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding moment of silence for "meditation, or voluntary prayer" is unconstitutional); *Stone v. Graham*, 449 U.S. 39 (1980) (holding posting of Ten Commandments on walls of public school classrooms is unconstitutional); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203 (1963) (holding Bible reading or reciting the Lord's Prayer in public schools is unconstitutional).

122. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (protecting flag burning as expressive conduct).

123. In an excellent article, William Marshall has advocated a similar "symbolic" approach to establishment issues, also drawing upon Justice O'Connor's endorsement test. Marshall, *supra* note 16, at 498. Marshall argues, as do I, that an approach focused on the symbolic meaning of government actions vis-à-vis religion rather than on their substantive effects provides a more coherent foundation for establishment jurisprudence. However, I offer a different set of principles for rendering the expressivist inquiry less indeterminate. Marshall proposes the adoption of three different "perspectives" for different categories of issues—a separationist view for public school prayer, an accommodationist view for government regulations, and a "qualified neutrality" view for aid to parochial education. *Id.* at 541–49. The particular subject of this Article—government funding of faith-based social services—would presumably fall within Marshall's third category, but Marshall's "qualified neutrality" perspective does not offer much guidance as to how to resolve these issues except to acknowledge that they are difficult. Thus, in some ways this Article takes up where Marshall leaves off.

identified above precludes bright lines and simple answers, but further guidance is both desirable and possible. I propose three inquiries for assessing the constitutionality of government aid to religion.

A. GOVERNMENT SPEECH VERSUS PRIVATE SPEECH

The first inquiry, drawn from free speech doctrine, asks whether the aid program is itself a form of government speech. Where the government funds individuals or organizations to express an official message, it should be barred from funding religious activity altogether. Where, by contrast, the government funds private speech, it may, and in some cases, *must* support religious activity. Thus, the distinction between private speech and government speech demarcates a critical first line between permissible and impermissible public aid to religion.

In a string of cases, the Court has upheld the provision of government benefits to religious entities for religious activities, notwithstanding the general notion that direct aid to religious activity violates the Establishment Clause. In *Rosenberger v. Rector and Visitors of the University of Virginia*,¹²⁴ the Court found that the Establishment Clause permitted direct payment of the printing costs of a religious student group's proselytizing magazine. In *Capital Square Review & Advisory Board v. Pinette*,¹²⁵ the Court held that a city could provide space on its public property to a private organization, the Ku Klux Klan, to display a religious cross. In *Good News Club v. Milford Central School*¹²⁶ and *Lamb's Chapel v. Center Moriches Union Free School District*,¹²⁷ the Court ruled that the Establishment Clause permitted the government to allow religious groups to use school meeting rooms for explicitly religious activities after school. And in *Widmar v. Vincent*,¹²⁸ the Court held that a state university could support a religious student group by allowing it to conduct worship services in university meeting rooms without contravening the religion clauses.

In each case, the Court took pains to distinguish the particular government assistance at issue from direct monetary aid. Thus, in *Rosenberger*, the Court stressed that the aid was not given directly to the student group, but instead to the printing press to pay the group's printing costs, and that the student group, while religious in character, was not a

124. 515 U.S. 819 (1995).

125. 515 U.S. 753 (1995).

126. 533 U.S. 98 (2001).

127. 508 U.S. 384 (1993).

128. 454 U.S. 263 (1981).

religious institution as such.¹²⁹ But as the dissent properly pointed out, these distinctions are formalistic and unpersuasive.¹³⁰ Ultimately, government funds paid for the production of an explicitly religious magazine. Similarly, in the school access cases, the Court emphasized that no direct monetary aid had been provided.¹³¹ But property use is a valuable benefit; without the free use of the spaces, the groups would have to spend money on rent. The provision of access to scarce property resources cannot meaningfully be distinguished from direct aid.

More importantly, the form of the aid in these cases would not have saved the programs from Establishment Clause challenges had the aid not been neutrally distributed. If the University of Virginia paid the printing costs for religious student magazines *only*, for example, the Establishment Clause would plainly be violated, even though the aid would still not, in the Court's view, be "direct monetary aid." The principle that unites and explains these cases is not that the government actors formally avoided providing direct aid, but rather that they all involved *evenhanded* government support of *private* speech in *public forums*. In that context, the First Amendment's free speech guarantee compels evenhandedness. Thus, not only could the state support religious speakers; it was constitutionally required to do so. In *Widmar* and *Rosenberger*, the Court held that state universities that broadly supported private student organizations' speech had created a public forum and could not deny similar support to religious private student organizations.¹³² In *Pinette*, the Court applied the same free speech analysis to grant the Ku Klux Klan access to a public forum for the display of a cross.¹³³ And in *Good News Club* and *Lamb's Chapel*, the Court required public schools that had opened their classrooms after hours to non-religious community groups to permit access to religious groups on equal terms.¹³⁴ The constitutional mandate of neutrality, founded on the Free Speech Clause, was in turn critical to the Establishment Clause inquiry, because it meant that the government support of religious practices was attributable to private initiative (and constitutional compulsion), and not to a political judgment by the government itself. The Free Speech Clause required the government to remain neutral, and the Establishment

129. *Rosenberger*, 515 U.S. at 843–44.

130. *Id.* at 886–89 (Souter, J., dissenting).

131. See *Lamb's Chapel*, 508 U.S. at 395 (characterizing benefit to religion as "no more than incidental"); *Widmar*, 454 U.S. at 274 (characterizing benefit to religion as "incidental," not direct).

132. *Rosenberger*, 515 U.S. at 829–31; *Widmar*, 454 U.S. at 267–69.

133. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (2000).

134. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel*, 508 U.S. 384, 391–94 (1993).

Clause was not violated when private speakers used that neutral support for religious ends.

But the government is not always required to remain neutral when it funds speech. Where the government contracts with private speakers to express its own message, the government may discriminate on the basis of both content and viewpoint. Thus, a state “Say No to Drugs” campaign may commission artists to create posters, and may insist that those posters express an anti-drug message. From a free speech perspective, government speech need not be neutral.¹³⁵

The distinction between government speech and private speech proved critical in *Rosenberger*. There, the University of Virginia, relying on *Rust v. Sullivan*,¹³⁶ argued that because it was simply declining to fund student speech, rather than prohibiting speech altogether, it “must have substantial discretion in determining how to allocate scarce resources to accomplish its educational mission.”¹³⁷ In *Rust*, the Court had rejected a free speech challenge to regulations requiring government-funded family planning centers to counsel pregnant women about childbirth but not abortion, reasoning that the government had a relatively free hand in allocating its funds for speech purposes. The *Rosenberger* Court explained that the leeway accorded the government in *Rust* does not apply to all government funding of speech, but only to “government speech,” that is, only where the government is hiring others to express an official message.¹³⁸ In that setting, government control of content and viewpoint is necessary; the government cannot effectively counsel women to avoid abortions unless it can require its recipients to use its money to express that particular message. Where, by contrast, the state does not seek to express an official message, but rather to support a wide range of private expression, as in *Rosenberger*, the state is governed by much more stringent speech standards, and must maintain viewpoint neutrality.¹³⁹

The distinction between government speech and private speech is also critical to the Establishment Clause inquiry, although here it works in the opposite direction. Under the Free Speech Clause, the government is

135. See David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 702–04 (1992).

136. 500 U.S. 173 (1991).

137. *Rosenberger*, 515 U.S. at 832.

138. *Id.* at 833–34.

139. *Id.* at 834. I have criticized the *Rust* decision on the ground that certain spheres of expression demand neutrality even when they are funded by the government, but that critique is limited to particular spheres, and acknowledges that government must be permitted to deviate from neutrality in many government speech settings. See Cole, *supra* note 135, at 702–04.

relatively unconstrained by the Constitution with respect to government speech, but bound to strict neutrality when it supports a broad range of private speech. Under the Establishment Clause, by contrast, the government has more leeway to support religion, constitutionally speaking, when it is simultaneously supporting a broad range of private speech than when it engages in government speech. Where, as in the public forum cases discussed above, the government supports a multiplicity of private voices, its neutral support of religious voices among the many does not contravene the Establishment Clause. As long as the government remains neutral in its support, as *required* by the Free Speech Clause, the government does not endorse or impermissibly advance religion, because any support of religion that results is by definition privately initiated; the government exercises no content control. Where, by contrast, the government funds an entity to express the government's message, as in *Rust v. Sullivan*, it must avoid support of religious messages, because the government itself would then be engaged in the official advancement of religion.¹⁴⁰ Thus, the *Rosenberger* Court noted that the student activity funding program "respects the critical difference 'between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'"¹⁴¹

The government speech-private speech distinction also explains the apparent tension between *Bowen v. Kendrick*¹⁴² and the public forum cases described above. In *Bowen*, the Court rejected a facial challenge to the Adolescent Family Life Act (AFLA), which authorized federal grants to nonprofit institutions, including religious institutions, for counseling on premarital adolescent sexual relations. The Court held that the statute was valid on its face because it neutrally supported religious and secular

140. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 577–78 (1992) (holding that the Establishment Clause prohibits prayer at public school commencement ceremony, in part because public school dictates content of prayer); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (holding that the Establishment Clause invalidates state law requiring the posting of Ten Commandments in public school classrooms). See also Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 72 (1997) (noting "government speech . . . can neither praise religion nor condemn it").

141. *Rosenberger*, 515 U.S. at 841 (emphasis in original) (quoting *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (O'Connor, J., concurring)). The plurality opinion in *Pinette* quoted the same passage. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 765–66 (1995). See also *Sullivan*, *supra* note 11, at 244 (arguing that *Rosenberger* and *Pinette* suggest that public support of parochial schools is unconstitutional because public education is government speech, and therefore may not be religious in content).

142. 487 U.S. 589 (1988).

institutions, reasoning that “[r]eligious institutions need not be quarantined from public benefits that are neutrally available to all.”¹⁴³

At the same time, however, the Court suggested that if plaintiffs could show that federal funds under AFLA actually supported any religious *activity*, or any “pervasively sectarian institutions (in which secular and religious activity are by definition inextricably intertwined), the Establishment Clause would be violated.”¹⁴⁴ At first glance, *Bowen* seems difficult to reconcile with *Rosenberger*, *Widmar*, and the like, where the Court held that government support of religious activities did not violate the Establishment Clause. But there is a critical difference: the *Bowen* program, like the Title X program in *Rust v. Sullivan*, was a *government speech* program. The government was funding institutions to counsel youth about premarital sex, and it had a particular message to express; it was not creating a public forum to promote private speech irrespective of its message. In that setting, the Court held, the government may fund neither religious activity nor “pervasively sectarian institutions,” even where the program as a whole has a secular purpose and is neutrally administered.¹⁴⁵ When Title X or AFLA counselors speak, they speak for the government. If a counselor expressing the government’s message does so through religious proselytization, it is akin to the government proselytizing, a paradigmatic violation of the Establishment Clause.

By contrast, when a private student group speaking for itself proselytizes, it is the student group that is expressing a religious message, not the government. If the only government support the student group

143. *Id.* at 608 (quoting *Roemer v. Md. Bd. of Pub. Works*, 426 U.S. 736, 746 (1976)).

144. The majority opinion is admittedly less than entirely clear on this point. It states that the Establishment Clause bars “funding a specifically religious activity in an otherwise substantially secular setting.” *Id.* at 613 (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)). It also prohibits “government-financed . . . indoctrination into the beliefs of a particular religious faith.” *Id.* at 611 (quoting *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985)). Those passages suggest that *any* funding of religious activity or a pervasively sectarian institution would be prohibited. But in another passage, the Court implies that *some* funding of “pervasively sectarian” institutions might be permissible when it notes that there is no evidence that a “*significant proportion* of the federal funds will be disbursed to ‘pervasively sectarian’ institutions.” *Id.* at 610 (emphasis added). The Court was probably ambiguous because it was addressing a facial challenge. The fact that some aid is going to pervasively sectarian institutions may not justify facial invalidation of a statute, even if those particular instances of aid might constitute “as applied” violations of the Establishment Clause. Thus, when the majority discusses the nature of the “as applied” challenge to be addressed on remand, it suggests that any funding of a pervasively sectarian institution would be permissible. *Id.* at 621. Justices Kennedy and Scalia write separately to state their view, apparently not shared by the majority, that a showing that aid goes to pervasively sectarian institution “will not alone be enough, in an as-applied challenge, to make out a violation of the Establishment Clause.” *Id.* at 624 (Kennedy, J., concurring).

145. *Id.* at 621.

receives is pursuant to a program that is designed and required to provide support to similarly situated speakers on a viewpoint-neutral basis, government support cannot be attributed to government favoritism toward religion just because the religious viewpoint is espoused with government support. Under *Rosenberger*, *Wide Awake* magazine was entitled to receive government support to engage in religious indoctrination, yet the support did not violate the Establishment Clause because the source of the indoctrination was the students, not the government, and the government was not involved in regulating the content of the magazine's message in any way. The government's neutral support, required by the Free Speech Clause, expressed no message favoring or disfavoring religion.

Where a program expresses an official message—such as “say no to drugs”—the government is speaking, albeit through a hired voice. When the government funds a drug treatment counseling program, therefore, it is engaged in government speech. Such programs must discourage drug use. If an applicant for funding sought to encourage drug use, the government would properly deny funding. If the applicant then sued on free speech grounds, its suit would be dismissed on the ground that when the government hires people to express its own message, it is free to discriminate on the basis of content and viewpoint. But by the same token, if a group engages in religious instruction or practice as an integral part of its drug treatment, as *Teen Challenge* does, the government cannot support it without violating the Establishment Clause. Because the government dictates—albeit in broad outlines—the drug treatment's message, the government would be inextricably intertwined with the religious message. Just as the government must avoid any religious content in its own speech, it must avoid supporting any religious content in programs it funds to express a government message.

In theory, one might distinguish between the *message* the government dictates—for example, “say no to drugs”—and the *method* by which that message is communicated. Thus, one might argue that even in a drug treatment program the government may be neutral as between religious and secular methods of expressing its message, so that if some recipients choose to use religious activity to express the message, that choice is a matter of private initiative not attributable to the government. I do not believe one can parse government speech so finely, however. In a very real sense, medium and message are linked. If the message is officially sanctioned, a reasonable observer seeing it expressed with government funding through religious activity would perceive the government as endorsing the religious method of communication. While in theory one

might disentangle the religious and state-sanctioned strands of the speech, such parsing is unlikely in practice, and does not sufficiently ameliorate the establishment concerns presented by joint religious-state expression. Thus, in my view, once a program is deemed to be government speech, no religious activity is permissible.

It will not always be easy to characterize a program as involving government speech. One might argue, for example, that a drug treatment program does not express a message, but treats a medical condition. The condition can be treated medically as well as through counseling. But when drug addiction is treated through counseling, at least part of the message is plainly mandated by the purpose of the program—"say no to drugs." And when that message is communicated through express religious practice and religious invocations, as is the case in Teen Challenge, the Establishment Clause problem is manifest. Thus, if a free speech challenge would fail on the ground that the program constitutes government speech, an Establishment Clause challenge should prevail if the program supports religious activity.

Where government funding is *designed* to express an official message, then, funding a religious activity to express that message raises the same concerns that explicit government religious messages raise. Although Karst and Lupu are correct that government messages raise Establishment Clause concerns more sharply than does aid to religion, the distinction disappears where aid programs are government speech programs; in those situations, government aid to religion is equivalent to an official religious message.

B. STRUCTURAL ENDORSEMENT

The taxonomy of government funding programs is not exhausted by government speech programs on the one hand and programs that support a broad range of private expression on the other. Many government funding programs do not support speech at all. Programs that fund youth sports leagues or soup kitchens, for example, involve neither government speech nor private speech. For Establishment Clause purposes, then, there are at least three types of programs in which faith-based entities might potentially receive government funding: government speech programs; public forum programs; and nonspeech programs. Only in the first category is funding of religious activity *per se* prohibited. In the other settings, government funding of religious activity should generally be permissible as long as the program's structure does not express approval or disapproval of religion.

The distinction between speech and nonspeech programs helps to explain the intuition, noted by both Justices O'Connor and Blackmun in *Bowen*, that government funding of a soup kitchen operated by a church poses fewer concerns than government funding of sexual counseling provided by a church.¹⁴⁶ The soup kitchen is less problematic not simply because it is easier to avoid religious indoctrination in that setting, but because if the entity were to engage in religious indoctrination, the indoctrination would be privately initiated, not government sanctioned. In subsidizing a soup kitchen, the government generally does not dictate anything about message. If a soup ladler wants to talk politics, sports, weather, or religion, she is free to do so, and the government should not be seen as endorsing the ladler's views.

Government funding can express a message endorsing religion, however, even when it is not funding government speech as such. If the *structure* of the program itself endorses or disapproves of religion the Establishment Clause will be violated. A program's structure can endorse religion in a variety of ways. Perhaps the most straightforward example would be a program that explicitly favors religious recipients. A government funding program that favored faith-based soup kitchens would be reasonably perceived as endorsing religion, even if no speech were involved in the program itself. If the program were to favor soup kitchens of a particular religious denomination, the violation would be even more manifest. Accordingly, an expressivist understanding of the Establishment Clause requires courts to ask not only whether the program funds government speech, but also whether the structure of the program itself expresses an impermissible message vis-à-vis religion that renders nonadherents or adherents outsiders.

This does not mean, however, that any funding program that funds religious entities because they are religious is invalid *for that reason*. By its very nature, President Bush's faith-based initiative seeks to support certain institutions and services because they are faith-based. Proponents of the initiative, however, maintain that religious providers in the past have been unfairly and unnecessarily excluded from the government-funded social services circuit, and that the initiative merely seeks to place religious

146. *Bowen*, 487 U.S. at 623 (O'Connor, J., concurring) ("Using religious organizations to advance the secular goals of the AFLA, without thereby permitting religious indoctrination, is inevitably more difficult than in other projects, such as ministering to the poor and the sick."); *id.* at 641 (Blackmun, J., dissenting) ("There is a very real and important difference between running a soup kitchen or a hospital, and counseling pregnant teenagers on how to make the difficult decisions facing them.").

institutions on an equal playing field with secular providers.¹⁴⁷ To assess whether the initiative improperly endorses religion, therefore, would require examination of the structure and effects of the initiative as it is implemented. If it is implemented in a scrupulously neutral manner as between religious and secular service providers, the mere fact that the initiative stems from a desire to fund entities because they are religious should not be fatal. The message of the initiative would not be to endorse religion as an end in itself, but to ensure that religious and secular entities were treated equally, a permissible goal.

The examples of programs expressly favoring religious providers illustrate the necessity of both a secular purpose and the application of neutral criteria in choosing among religious and secular providers. But formal neutrality in this sense is not sufficient, even in the non-government-speech context. Imagine a government program that used neutral criteria to contract with independent entities to provide basic housing and subsistence to the poor, but which, despite its neutral criteria, funded almost exclusively religious providers that included some measure of religious activity in their provision of services. This might happen if religious providers were the predominant applicants for funding, or if the religious providers were, on neutral terms, better qualified to provide the services in question. Such a program would presumably satisfy the assimilationists because it would have a secular purpose, the provision of food and shelter, and would be governed by neutral selection criteria.

From an expressivist perspective, however, such a program would raise a distinct Establishment Clause problem. Citizens who did not share the providers' religious faith would effectively be required to engage in religious activity in order to receive government support. Such a scheme would not be coercive in the strictest sense, because in theory one could avoid the religious activity by forgoing the government benefit. But it would place an unconstitutional condition on a government benefit because it would imply that adherence to religion is relevant to one's political standing in the community: those comfortable with engaging in religious activity are eligible for government support, but those who object are not. Thus, to avoid an Establishment Clause problem, any government contracting scheme for providing social services to citizens must not only have a secular purpose and be allocated according to neutral criteria, but also must ensure that there are alternative secular providers of comparable

147. See *supra* note 4 and accompanying text.

quality available for any citizen who objects to receiving services in a religious setting.¹⁴⁸

A more difficult question is whether a formally neutral program that in effect overwhelmingly benefited religious recipients might reasonably be perceived as endorsing religion, even where secular alternatives are available to all who seek them. Thus, it is for now an open question whether a school voucher program in a community where virtually all the private schools were religious might be invalid for endorsing religion, even though every child would retain the option of attending a secular public school.¹⁴⁹

Requiring something like “proportionate funding” of religious providers, however, raises potentially insurmountable difficulties. First, while a reasonable observer might consider a program that predominantly supported religious providers to have endorsed religion, a fully informed observer who understood that this was simply the result of applying a truly neutral set of criteria might not perceive any endorsement, particularly if the state has provided comparable secular alternatives. Moreover, application of an “effects test” would require the courts to assess what constitutes “disproportionate funding of religious providers”—an inquiry that, if answerable at all, would itself be deeply divisive. Indeed, its very resolution by a court might well lead adherents or nonadherents to consider themselves outsiders, no matter how it were decided. In addition, a requirement of “proportional funding of secular and religious providers” would in practice require government to *violate* the mandate of neutrality in some settings, because in order to avoid disproportionate results, it would need to deviate from neutral criteria. For example, when religious providers are better qualified according to neutral criteria, a departure from neutrality would be required to achieve proportionate results. Given the potential morass of problems posed by requiring proportionate funding, the

148. Existing charitable choice provisions recognize this obligation and guarantee that all objecting citizens will have access to secular providers. 42 U.S.C. § 604a(e)(1). Some have suggested that this requirement will necessarily lead to an expansion in government-funded social services, as the effort to expand funding of religious providers will trigger a correlative need for expanded secular alternatives as well. Marcia Yablon, *Growth Spurt*, NEW REPUBLIC, Feb. 26, 2001, at 18.

Some differences in quality between programs are inevitable, of course, but substantial differences would render the requirement that a secular provider be available a mere formality. On this view, for example, a voucher program for education that funded excellent parochial schools would not be saved by the mere existence of a public school option if that option were not substantially similar in quality to the state-subsidized parochial schools.

149. The question is likely to be resolved in the Supreme Court’s review of *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000), *cert. granted*, 122 S. Ct. 23 (2001), addressing the constitutionality of a voucher program in Cleveland, Ohio.

prophylactic requirement that secular providers be made available for any objecting citizen may be a better mechanism for ensuring a reasonable mix of funding recipients.

In non-government-speech settings, in other words, support of express religious activity should be permissible as long as the government has a secular purpose, distributes its funds evenhandedly without regard to an entity's religious identity or activities, and ensures that comparable secular service providers are available for all who desire them. If the government is permitted (and indeed *required*) to support religious activity when it neutrally supports all speech in the public forum context, it should be permitted to support religious activity in nonspeech programs wherever it is scrupulously neutral, maintains no control over the content of speech within the funded program, and provides sufficient secular alternatives.

C. DIRECT AID VERSUS INDIRECT AID

The third line of inquiry important to an expressivist model of the Establishment Clause focuses on whether funding is direct or indirect. The Court has repeatedly found direct aid to religion much more problematic than indirect aid. Outside the public forum cases, the Court has virtually always held that direct aid to religious activity is unconstitutional. But where the government allocates money to private individuals, and the private individuals make independent decisions to spend it on religious activity, the government does not establish religion as long as it has not done anything to encourage private individuals to make religious expenditures; here, formal neutrality is generally sufficient. The classic example of permissible indirect aid is the tax deduction for charitable donations. The deduction amounts to a substantial and foreseeable subsidy to religious institutions (and other nonprofit groups), and there is no constitutional limitation on its use for religious activities. But nothing about the nature of the deduction, which is available to all for a wide range of charitable donations, encourages people to donate to religious as opposed to secular nonprofit organizations. Accordingly, the deduction does not present Establishment Clause concerns, even though it results in substantial government subsidies to religious activity.¹⁵⁰

150. See, e.g., *Mueller v. Allen*, 463 U.S. 388, 388–89 (1983) (upholding income tax deduction for educational expenses, no matter where those expenses are incurred); *Walz v. Tax Comm.*, 397 U.S. 664 (1970) (upholding property tax exemption for real or personal property used exclusively for religious, educational, or charitable purposes).

The same analysis explains cases that have upheld government aid to individuals that the individual recipients have then spent on religious education. In *Witters v. Washington Department of Services for the Blind*, the Court upheld a statute that subsidized vocational rehabilitation services for the visually handicapped, as applied to a blind student who used government funds to pay tuition at a Christian college for pastoral training.¹⁵¹ And in *Zobrest v. Catalina Foothills School District*, the Court upheld a state program that paid the salary of a sign language interpreter for a deaf student to attend parochial school, even though the interpreter would be interpreting, among other things, religious services.¹⁵² Critical to the Court's analysis in both cases was the fact that the government did not direct the funding to the religious schools, but extended benefits to eligible private citizens, without regard to religion, who then independently chose to spend the resources in religious settings. Such situations, the Court reasoned, are little different from paying public employees' salaries with government funds, which the employees are then free to spend on religious and secular organizations and activities alike.¹⁵³ When the state directs money to an individual with no attempt to influence where he or she spends it, and the individual remains free to make her own private choices with the money she receives, the *government* has not chosen to support religion. As the Court stated in *Zobrest*, because the statute "creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking."¹⁵⁴ In expressivist terms, a system of broad governmental support directed to private citizens generally will not be reasonably perceived as endorsing religion so long as private citizens independently decide to direct that support to religion. The indirect structure of the aid helps to ensure that its expressive character is neutral as between religious and secular uses.

The distinction between direct and indirect aid is not purely formalistic. The Court will not sanction indirect aid where it is a "transparent fiction" for directing aid to religious entities.¹⁵⁵ Some cases are undoubtedly easier than others. Where the government merely pays its employees' salaries, it truly plays no role in deciding where they will spend their income. But in most programs of indirect aid, the government is not so agnostic. In social service settings, the government generally does not

151. 474 U.S. 481, 483, 489 (1986).

152. 509 U.S. 1, 1-2 (1993).

153. *Witters*, 474 U.S. at 486-87.

154. *Zobrest*, 509 U.S. at 10.

155. *Witters*, 474 U.S. at 487 n.4.

hand out cash that can be spent for anything, but vouchers or reimbursement agreements that can be redeemed only for specified purposes with approved providers. The government must often determine *where* and *for what purposes* the vouchers can be redeemed, and to that extent cannot avoid the business of approving or disapproving expenditures. If, for example, the government were to establish a voucher program for homeless shelters, it would likely specify the programs in which the vouchers could be redeemed, to ensure that its money was spent on adequate shelters. The government would then have to decide whether a religiously based shelter that incorporates religious practices is eligible to redeem government vouchers. Unless it is guided by wholly secular criteria and shows no favoritism toward particular religions or faith-based providers generally, that decision might well be seen as endorsing or establishing religion. In such a setting, even if the government is not dictating where each individual voucher will be spent, it is deciding where vouchers *generally* may go, and the latter decision could present Establishment Clause problems if it expresses approval or disapproval of religion. Thus, the more selective voucher programs are in specifying eligible redeeming institutions, the more likely they are to appear to endorse religion where religious entities are approved providers.

While the indirect character of aid will generally reduce the likelihood that a government program will be seen as endorsing religion, aid need not be indirect to withstand constitutional scrutiny. As noted above, even direct aid to religious activity is permissible where government speech is not involved, so long as it is pursuant to a general aid program that utilizes neutral criteria that neither favor nor disfavor religion, and ensures adequate secular alternatives. Where aid is structured indirectly, however, it may be easier to establish that the program is neutral vis-à-vis religion.

To summarize, the Constitution permits government to provide funding to religion for secular purposes as long as in doing so it does not express approval or disapproval of religion. Where government provides aid to private citizens and allows them to choose whether to spend it for religious or secular activities, it generally should not be seen as expressing approval or disapproval of religion, and therefore the government program should pass muster under the Establishment Clause. The significance of the structure of the aid is that, like the free-speech mandate in the public forum setting, it ensures that any resulting religious activity will be attributable to private rather than governmental decisionmaking. In the indirect aid setting, however, the criteria by which the government decides

what institutions are eligible to redeem vouchers or apply for reimbursement must themselves be scrupulously secular.

Perhaps the most difficult question posed by the faith-based initiative is whether a system of indirect funding, such as a voucher program, would permit the support of religious activity even in an otherwise impermissible government speech setting. One can imagine a drug treatment counseling program in which addicts obtain certificates at a central government office, redeemable at any of a wide range of sectarian and secular drug treatment programs. It is plausible, on the strength of cases like *Witters* and *Zobrest*, that even if the program as a whole constitutes government speech, the recipient's intervening private choice to redeem the certificate at a religious drug treatment center would effectively insulate the government from an Establishment Clause challenge. In such a situation, one might argue, the religious practice would be the result of private initiative, not government encouragement or direction.

But a drug treatment voucher program is different from the government benefits upheld in *Witters* and *Zobrest*. In *Witters* and *Zobrest*, the government made no attempt to control the content of expression supported by its grant. Students were free to use the services at any educational institution. By contrast, a drug treatment program has a very specific message to express. Were an addict to seek to use the certificate at a medical marijuana center that sought to encourage and normalize drug use, for example, the certificate presumably would not be redeemable. Thus, the government must approve of the treatment provided by the recipient institution, and if that treatment has an express religious component, it must endorse, in some respect, the religious method of expressing its "say no to drugs" message. The question is a close one, but in such a setting, indirect funding probably ought not insulate the program from an Establishment Clause challenge.¹⁵⁶

156. Kathleen Sullivan has argued that a similar analysis invalidates school voucher programs that support parochial schools. See Sullivan, *supra* note 11, at 258. But while Sullivan is correct that public education is government speech, it is not so clear that parochial school education becomes government speech merely because it receives some government support. Depending on how it is structured, a school voucher program might be more closely analogous to a limited public forum in which the state supports a wide range of diverse private expression and does not seek to dictate content. If government sought to dictate the content of education wherever its funds were used, then the program might well constitute government speech and preclude support of religious activity, but it is not clear that all voucher programs are so structured.

IV. CONCLUSION

Government support of religion presents a fundamental paradox. On the one hand, religion would find it difficult if not impossible to survive in modern America without access to the government subsidies generally available to nonprofit entities; strict separation of church and state is neither fair nor possible in modern-day America. And it seems likely, as de Tocqueville and George Washington famously noted, that the health of our democratic system depends at least in some measure on religion and the values it fosters. On the other hand, religion's vitality depends in large measure on its independence, and institutionalized state support threatens that independence. What is needed is an intermediate position between separation and assimilation, in which religion maintains its independence but is neither driven from the public square nor disadvantaged by its religious character.

My own essay illustrates this tension. Although I contend that there are strong policy arguments in favor of government support for faith-based interventions, I also find that much of that support presents substantial constitutional concerns. The expressivist understanding of the Establishment Clause proposed here seeks to acknowledge the reality and significance of the tension and to avoid the extremes of both separationism and assimilationism. I suggest that Justice O'Connor's endorsement test be conceived as an attempt to identify when government practices express approval or disapproval of religion, building on the insights of Karst and Lupu that official messages present more acute establishment problems than does government funding.

Under an expressivist approach to the Establishment Clause, government aid to religious activity should be permissible in three settings. First, such aid is permissible where it results from programs neutrally supporting *private* speech in a public forum setting. Second, aid is generally valid where the government directs resources to *private citizens* and allows them free choice as to where to spend them. And third, direct aid to religious activity should be allowed where the government neutrally supports *nonspeech* programs for secular purposes, without regard to their religious character, and ensures that comparable secular alternatives are available for all who seek access to government services from nonreligious providers. In each of these settings, financial support of religious activity should not be understood to express approval of religion because any religious activity that results will be attributable to private initiative.

By contrast, when the funded program is designed to express a particular message, it constitutes government speech, which may not be religious, no matter how the funding is structured. Here, a reasonable observer would perceive the government to be endorsing religion by funding entities to spread an official message by religious means. Thus, an absolute ban on funding religious activity is justified where government speech is involved.

So understood, the Establishment Clause disables government from supporting faith-based interventions in many settings where a distinctly religious voice may be most useful—where religious messages reinforce governmental messages. Entities through which the government seeks to express a particular message may not receive *direct* government support if the message is expressed through religious activities. And I conclude that even *indirect* funding of such programs would offend the Establishment Clause because it would require government approval of a religious method for expressing the government's message. This is not a trivial constraint. Most rehabilitation programs, for example, seek to express a particular message, namely that the offender should forgo a life of crime and pursue a law-abiding life. As we have seen, that message might be particularly effective coming from a religious institution that has independent and untainted normative authority, that is structured to address those who break the rules with understanding and compassion, that has an established community support structure, and that can appeal to a higher sense of moral duty and obligation. But the government is disabled from supporting the delivery of such a message.

At the same time, the constitutional rules I advocate here may help to reinforce and preserve the power of religion. In their study of the Ten Point Coalition's success in Boston, Jenny Berrien, Omar McRoberts, and Christopher Winship observed:

By providing an umbrella of legitimacy for police work, the ministers help legitimize the whole system. But this also makes their own legitimacy more precarious. If the ministers are too supportive of the police then they are vulnerable to being accused of selling out. . . . It is critical that their relationship with the police be seen as being at arm's length.¹⁵⁷

My approach recognizes that religious activity can and should receive government support in some settings, but at the same time insists on an arms' length relationship that strictly respects religious independence

157. Berrien et al., *supra* note 24, at 280.

where the government *speaks*. If religious interventions derive their power in some fundamental way from their independence from the state, these rules may help to preserve faith's force for good in our society.

