

Compassion Inaction: Why President Bush's Faith-Based Initiatives Violate the Establishment Clause

Martha A. Boden[†]

I. INTRODUCTION

Within a week of his 2001 inauguration, President George W. Bush launched an aggressive campaign to expand governmental funding for private religious groups to provide social services to the poor.¹ Although it is widely believed that the President's Faith-Based Initiatives died on the Senate floor, in fact, the Initiatives are a multi-billion dollar enterprise today.² Like presidents before him, President Bush circumvented Congress by invoking executive authority to override Congressional inaction; unlike his predecessors however, President Bush pushed his plan into action all the way down to the local level on a national scale.³ In a series of executive orders, President Bush shifted power from the legislature to the executive branch.⁴ Through these orders the Bush Administra-

[†] J.D., *magna cum laude*, Seattle Univ. School of Law, 2006; M.A., Anthropology, Univ. of New Mexico, 1990; B.A., Anthropology, Haverford College, 1986. The author wishes sincerely to thank Lisa Leone for convincing her that she could be a lawyer, Jeff Robinson and Amanda Lee for convincing her to accept a position on SEATTLE U. L. REV., and Elisa Scalise and Deena Ledger for patiently ushering this Comment to press. In addition, the author wishes to express deep gratitude to Dr. Richard E. Boden for inspiring her dedication to civil liberties, and to Richard and Mary-Ann Boden for giving generously to the author's education fund. This Comment is dedicated to the author's children, Isabel and Owen, who lovingly light her way; and to her husband, Ken Juell, who provides irreplaceable emotional support, unfaltering patience, and who graciously has accepted a lifetime of loan debt so that his wife could follow her dream.

1. See WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, EXECUTIVE ORDERS, available at <http://www.whitehouse.gov/government/fbci/executive-orders.html> (last visited Sept. 21, 2004) [hereinafter ORDERS].

2. See WHITE HOUSE FAITH-BASED AND COMMUNITY INITIATIVES, GRANTS TO FAITH-BASED ORGANIZATIONS, FY 2005, at 3 (2005) (\$2.15 billion dollars reported for FY 2004 from a survey of five federal agencies' non-formula grant funding) [hereinafter SELECT GRANTS FY05].

3. JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE RIGHT NATION: CONSERVATIVE POWER IN AMERICA*, 132-33 (2004).

4. Anne Farris, Richard P. Nathan, & David J. Wright, *The Expanding Administrative Presidency: George W. Bush and the Faith-Based Initiative*, The Roundtable on Religion and Social Welfare Policy, Aug. 2004, at 2, available at http://www.religionandsocialpolicy.org/docs/policy/FB_Administrative_Presidency_Report_10_08_04.pdf.

tion has built a new layer of federal bureaucracy dedicated to enabling religious groups to compete for federal grant dollars without compromising their religious character.⁵ The resulting agency rules have opened the floodgates for an unprecedented amount of government spending on religious social service programs.⁶

The newly intensified church-state partnership that has emerged raises a serious constitutional question. In crafting the amended rules, the Bush Administration has relied on an untested interpretation of First Amendment jurisprudence: the assumption that religious institutions can provide social and health services with direct governmental funding as long as the funded activities are not *inherently religious*.⁷ This interpretation of the Establishment Clause is not supported by Supreme Court precedent.⁸ Moreover, its implementation through the Initiatives threatens to weaken the protective wall between church and state that most Americans believe does and should exist.⁹

The Administration's Faith-Based Initiatives would fail a constitutional challenge under the Establishment Clause of the First Amendment. Applying the three-pronged test developed in *Lemon v. Kurtzman*¹⁰ and *Zelman v. Simmons-Harris*,¹¹ this Comment concludes that the Initiatives, (1) though purportedly secular, have been enacted for a sectarian purpose and are not neutral toward religion; (2) are coercive and fail to fulfill the condition of private choice because the rural poor, such as those in Franklin County, Washington, whom the Initiatives target, real-

5. *Id.*

6. See SELECT GRANTS FY05, *supra* note 2 ("Grants to faith-based organizations increase by 22% from FY04 to FY05, funding increased by 7%." Total funding for FY05 was estimated at \$2.15 billion, up \$1 billion from FY03). See WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, GRANTS TO FAITH-BASED ORGANIZATIONS, FY 2003, at 5 (2003) [hereinafter FY03]. Note that these figures do not reflect all federal funding of faith-based organizations, just funds from five agencies that award competitive grants to social service providers. *Id.*

7. See, e.g., Exec. Order No. 13,279, 67 Fed. Reg. 77,141-42 (Dec. 12, 2002); WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, GUIDANCE TO FAITH-BASED AND COMMUNITY ORGANIZATIONS ON PARTNERING WITH THE FEDERAL GOVERNMENT (2001) [hereinafter GUIDANCE]; see also Ira C. Lupu & Robert W. Tuttle, *Developments in the Faith-Based and Community Initiatives: Comments on Notices of Proposed Rulemaking and Guidance Document, The Roundtable on Religion and Social Welfare Policy*, Jan. 2003, available at http://www.religionandsocialpolicy.org/docs/legal/reports/1-9-2003_exec_order_analysis.pdf.

8. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); Lupu & Tuttle, *supra* note 7, at 7-10; *infra* Part IV.

9. See, e.g., PEW CHARITABLE TRUST, PEW FORUM ON RELIGION AND PUBLIC LIFE, PUBLIC DIVIDED ON ORIGINS OF LIFE (Aug. 30, 2005), available at <http://pewforum.org/docs/index.php?DocID=115#4>. The Pew Forum conducted a survey in July 2005, which showed that sixty-three percent of Americans polled believe that clergy should never discuss political candidates from the pulpit. *Id.*

10. 403 U.S. 602 (1971).

11. 536 U.S. 639 (2002).

istically cannot choose between non-religious and sectarian service providers; and (3) to the extent that Initiative funded programs can be kept separate from sectarian influence, they constitute impermissibly excessive entanglement between government and religion. Therefore, federal taxpayers, whose tax dollars fund Faith-Based Initiative programs such as the Compassion Capital Fund for Lourdes Hospital, a Catholic run facility in eastern Washington, have a cause of action under the First Amendment and should succeed in challenging the Initiatives under the Establishment Clause test.

Additionally, this Comment identifies serious problems with the Initiative program in light of public policy interests. That this complicated and expansive funding program provides inadequate guidance to religious service providers, lacks transparency in its operations, and contains no obvious oversight provisions, not only undermines the Administration's purported purposes, but also indicates that the program is ripe for abuse.¹² As it crosses the limit of permissible government entanglement with religion, the Bush Administration acknowledges that it is toying with a "delicate" constitutional balance of interests.¹³ Yet, it has not demonstrated the capacity to safeguard this balance. Today, as poor Americans become poorer¹⁴ and the national debt continues to rise,¹⁵ we must invoke the Constitution to prevent the Executive branch from oppressing the rural poor, America's most vulnerable demographic sector, with state-sponsored religious coercion that negatively impacts recipients' health and wellbeing. To allow such religious oppression undercuts the intent of the framers of the First Amendment.

Part II of this Comment describes one rural Washington community that is indicative of the population that the Initiatives purport to target: the poor and underserved. The policy and structure of the Initiatives are outlined in Part III, including funding streams that reach these rural Washington State residents through Catholic run healthcare programs in Franklin County. In Part IV this Comment briefly surveys the history of Supreme Court Establishment Clause jurisprudence and identifies the test applicable to this set of facts. Part V scrutinizes these Initiative programs

12. See *infra* Part V.B.

13. See e.g., Statement of Jim Towey, Ask the White House (2003), <http://www.whitehouse.gov/ask/20030912.html>; see also Mike Allen, *Bush Presses 'Faith-Based Agenda': President Proposes Regulation to Ease Federal Funding*, WASH. POST, Sept. 23, 2003, at A10, available at <http://www.washingtonpost.com/ac2/wp-dyn/A49355-2003Sep22?language=printer>.

14. See Denavas-Walt, Carmen, Bernadette D. Proctor & Robert J. Mills, U.S. Census Bureau, *Current Population Reports, 60-226, Income, Poverty, and Health Insurance Coverage in The United States: 2003*, U.S. Government Printing Office, Washington, D.C., 2004.

15. The federal deficit stands at \$8.35 trillion as of May 22, 2006. See UNITED STATES TREASURY DEP'T, *THE DEBT TO THE PENNY (MAY 22, 2006)*, available at <http://www.publicdebt.treas.gov/opd/podpenny/htm>.

under the combined *Lemon* and *Zelman* test, and Part VI concludes that the Initiatives entail a government establishment of religion and, therefore violate the First Amendment to the United States Constitution.

II. THE UNDERSERVED: A PROFILE OF THE RURAL POOR IN ONE WASHINGTON COUNTY

Our country is blessed with a long tradition of and honorable commitment to assisting individuals, families, and communities who have not fully shared in America's prosperity. But despite efforts by the federal and state governments to battle social distress, too many of our neighbors still suffer from poverty and despair. In every corner of America, people of all ages and walks of life are calling out for help.¹⁶

With this observation, the Administration has signaled its intention to assist the desperately poor and needy, many of whom live in rural areas like Franklin County, Washington. While eighty percent of Americans live in the one-quarter of United States counties that are classified as "metropolitan,"¹⁷ sixty million others live in rural areas and share socio-economic characteristics that greatly impact their health and well-being. As the Administration has noted, reaching the needy "in every corner of America" presents special challenges for service providers.¹⁸

Compared to their metropolitan counterparts, rural Americans tend to be poorer.¹⁹ Two potent forces, lack of access to jobs and lack of access to services, conspire in combination against the wellbeing of rural community residents.²⁰ The relationship between poverty and poor health is well-documented, and this impact is accentuated in out-lying communities where there are few doctors or hospitals within reach.²¹ For instance, hospitals in rural communities experience lower reimbursement rates than those operating in cities and tend to narrow their service offerings or to cease operating in response to such financial squeezing.²² Additionally, rural physicians are more likely to provide care outside their

16. White House Office of Faith-Based and Community Initiatives, President Bush's Faith-Based and Community Initiative, available at <http://www.whitehouse.gov/government/fbci/four-page-overview2005.pdf> (last visited Feb. 4, 2005) (on file with author).

17. Linda S. Loew, *Location, Location, Location: Rural Areas and Health*, in *POVERTY LAW MANUAL FOR THE NEW LAWYER*, at 74 (2002).

18. *Id.*

19. *See id.*

20. MARK S. EBERHARDT ET AL., NATIONAL CENTER FOR HEALTH STATISTICS, HHS HEALTH, UNITED STATES, 2001: URBAN AND RURAL HEALTH CHARTBOOK 208-09 (2001); *see also* Lisa C. Ikemoto, *When a Hospital Becomes Catholic*, 47 *MERCER. L. REV.* 1087, 1089 (1996).

21. EBERHARDT ET AL., *supra* note 20, at 75.

22. *Id.*

specialty areas, a practice that may compromise the quality of patient care, especially since rural doctors are less likely to have access to internet or library research services.²³

Consequently, rural Americans enjoy markedly poorer physical and mental health than their metropolitan counterparts.²⁴ Rural Americans are more obese, more likely to smoke, and less likely to carry health insurance than Americans as a whole.²⁵ Rural children and young adults are more likely to die from disease or suicide than if they lived in or near a city.²⁶ The chance of dying in car accidents is greater for those who live in sparsely populated communities as well,²⁷ possibly as a result of greater distance from emergency services.

Recognizing this unmet need for social and health services, state legislators often direct state or federal funds to service providers willing to operate in remote areas.²⁸ In Washington, for example, rural healthcare centers receive the highest proportion of Medicare and Medicaid funding allocated statewide.²⁹ In 2002, Washington state and federal funding for rural medical care totaled an impressive one billion dollars.³⁰ Even so, twenty-four percent of residents in Franklin County, the poorest county in Washington, currently lack health insurance.³¹ Experts agree that the number of uninsured is rising faster than resources are made available to meet expanding need.³² Thus, the healthcare gap is widening in Washington.

Despite these governmental subsidy programs, Washington's Franklin County residents cope with a significant shortage of medical services.³³ Franklin County is served by only one hospital: Lourdes Medical Center located in Pasco.³⁴ Two private, non-profit outpatient clinics comprise the primary care option for most of Franklin County's

23. *Id.*

24. *Id.*; see also DEP'T. OF HEALTH AND HUMAN SERVICES, POVERTY AND HEALTH CHARTBOOK 209, tbl. 57 (2002) (on file with author).

25. Loew, *supra* note 17, at 74.

26. *Id.*

27. *Id.*

28. LAWRENCE HETTICK & RICHARD ORDOS, WASHINGTON STATE DEPARTMENT OF HEALTH, CENTER FOR HEALTH STATISTICS, WASHINGTON STATE 2002: CHARITY CARE IN WASHINGTON HOSPITALS 2 (2004).

29. *Id.*

30. *Id.*

31. See John Trumbo, *La Clinica Fills Vital Need in Community, But It's Struggling*, TRI-CITY HERALD, Sept. 20, 2004 [hereinafter Trumbo I].

32. *Id.*

33. See, e.g., Trumbo I, *supra* note 31; Press Release, Senator Patty Murray, Murray Announces 1.2 Million for Rural Healthcare: Funding Will Provide Healthcare to Underserved and At-risk Rural Communities (July 6, 2001), available at <http://murray.senate.gov/news.cfm?id=189471>.

34. See Trumbo I, *supra* at note 31.

poor.³⁵ La Clinica, the largest and only full-time clinic, handles the lion's share of charity outpatient care and reportedly writes off one quarter of its budget as uncompensated care or bad debt each year.³⁶ Lourdes, a Catholic hospital founded by the Sisters of St. Joseph, is the only option for inpatient and emergent care in Franklin County.³⁷ More expensive than La Clinica, Lourdes currently faces losing half of its licensed beds due to non-use.³⁸ In contrast, at La Clinica business is booming.³⁹ In particular, La Clinica recently has experienced an influx of new, uninsured patients who cannot afford to visit Lourdes and who have been turned away by other doctors.⁴⁰

Franklin County's healthcare situation is emblematic of rural communities nationwide, many of which are served by scattered handfuls of religious and secular non-profit caregivers like Lourdes and La Clinica.⁴¹ Attempting to capitalize on the longstanding presence of providers who are already operating in needy communities, in 2001 President George W. Bush founded the White House Office of Faith-Based and Community Initiatives.⁴² The program is designed to build on the private system already in place by infusing existing providers with additional resources so that their services can reach more people.⁴³

III. THE BUSH SOLUTION: FAITH-BASED AND COMMUNITY INITIATIVES

A. *The Bush Faith-Based Plan*

Faith-based and other community organizations are indispensable in meeting the needs of poor Americans and distressed neighborhoods. Government cannot be replaced by such organizations, but it can and should welcome them as partners. The paramount goal is compassionate results, and private and charitable community groups, including religious ones, should have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes This delivery of social services must be

35. *Id.*

36. *Id.*

37. John Trumbo, *Medical Center Expects to Lose 75 Beds*, TRI-CITY HERALD, June 15, 2004, available at 2004 WLNR 12381207 [hereinafter Trumbo II].

38. *Id.*

39. See Trumbo I, *supra* note 31.

40. *Id.*

41. See *supra* text accompanying notes 14–24.

42. Exec. Order No. 13,279, 67 Fed. Reg. 77,141–42 (Dec. 12, 2002).

43. Exec. Order No. 13,199, 66 Fed. Reg. 8,499 (Jan. 29, 2001).

results oriented and should value the bedrock principles of pluralism, nondiscrimination, evenhandedness, and neutrality.⁴⁴

With this proclamation George W. Bush unveiled his White House Office of Faith-Based and Community Initiatives just nine days after taking presidential office.⁴⁵ To anyone knowledgeable about Bush's Texas governorship, these actions came as no surprise.⁴⁶ President Bush had created a similar set of programs in Texas immediately upon passage of the so-called 1996 Welfare Reform Act.⁴⁷

The Initiative orders were different from President Bush's earlier Charitable Choice efforts in one important respect: at the federal level, President Bush's Faith-Based Initiatives never received the same mandate that they had enjoyed at the Texas state level. The Initiative Orders were crafted as a work-around after efforts to establish the Initiatives through Congressional legislation stalled on Capital Hill. Disenchanted with Congressional debates centering on process concerns, President Bush decided, instead, to instigate his Initiatives unilaterally.⁴⁸ He said, "I got a little frustrated in Washington 'cause I couldn't get the bill passed [Congress was] arguing process . . . so I signed an executive order—that means I did it on my own. It says we're going to open up billions of dollars in grant money competition to faith-based charities. And that's what's happening" ⁴⁹ In his own words, President Bush valued church-state partnership so highly that he was willing to implement it unilaterally despite legislators' desire to ensure the soundness and efficacy of the programs.

By the end of his first term, President Bush had issued four more Faith-Based Initiatives via Executive Order.⁵⁰ Together, this series established offices run by carefully selected directors and staff empowered to implement the President's faith-based policy across ten executive agen-

44. *Id.*

45. *Id.*; Farris et al., *supra* note 4, at 4.

46. See Scott S. Greenberger, *Putting Faith in Their Futures—With Nod from Bush, State and Religion Join Forces for Jobs*, AUSTIN-AM. STATESMAN, Dec. 26, 1999, at A1 (remarking about then governor Bush's encouragement of Texas social service agencies to contract with religious organizations).

47. Farris et al., *supra* note 4, at 4.

48. *Id.* at 4–5 (quoting George W. Bush's speech in Los Angeles, CA, Mar. 3, 2004).

49. *Id.*

50. Exec. Order No. 13,198, 66 Fed. Reg. 8,497 (Jan. 29, 2001); Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002); Exec. Order No. 13,280, 67 Fed. Reg. 77,145 (Dec. 12, 2002); Exec. Order No. 13,342, 69 Fed. Reg. (2004). For complete texts, see WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, EXECUTIVE ORDERS, at <http://www.whitehouse.gov/government/fbci/executive-orders.html> (last visited Mar. 26, 2006).

cies.⁵¹ These agency offices, in turn, connected centrally to the high-profile White House Office directed by Jim Towey, the new Assistant to the President.⁵²

The Administration also solicited state and local governments to advance the Initiative program.⁵³ To date, thirty-two states have created Initiative departments or liaisons at the Administration's urging.⁵⁴ These offices encourage participation in the program, educate and train contractors in the grant process, and facilitate distribution of federal block grants and formula grants to subcontractors within states.⁵⁵

Through one additional order, Number 13,279, announced in December of 2002, President Bush established guidelines to ensure what the Administration termed "equal protection" for religious organizations seeking partnership with the U.S. government.⁵⁶ Among these guidelines, designed to end what President Bush perceived to be historic "discrimination" against religious groups, were (1) to "level the playing field" so religious organizations could compete on equal footing for grant money; (2) to foster non-discrimination by prohibiting "inherently religious activity" with federal dollars; (3) to protect "maintenance of religious character" for grant recipients; and (4) to "prevent discrimination against recipients based on religious belief."⁵⁷ This Executive Order also rolled back a 1965 Lyndon Johnson order preventing federal funding to providers with discriminatory hiring practices.⁵⁸ In sum, President Bush intended to eliminate two major obstacles that had prevented religious grant-seekers from seeking federal aid: their religious character and their practice of hiring only those within their religious sect.⁵⁹

51. *Id.*; Lupu & Tuttle, *supra* note 7, at 4; Farris et al., *supra* note 4, at 2. Included are the departments of Agriculture, Commerce, Education, Health and Human Services, Housing and Urban Development, Justice, Labor, Veterans' Affairs, Aid for International Development, and Small Business Administration.

52. Press Release, The White House Office of the Press Secretary, Personnel Announcement (Jan. 13, 2005), available at <http://www.whitehouse.gov/news/releases/2005/01/20050113-8.html>; see Farris et al., *supra* note 4, at 2.

53. See WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, FEDERAL FUNDS FOR ORGANIZATIONS THAT HELP THOSE IN NEED (2004) [hereinafter FUNDS].

54. See WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, IMPORTANT CONTACT INFORMATION—STATE LIAISONS (2006), available at <http://www.whitehouse.gov/government/fbci/contact-states.html>.

55. Exec. Order No.13,279, 67 Fed. Reg. 77,141–42 (Dec. 12, 2002).

56. *Id.*; Lupu & Tuttle, *supra* note 7, at 4.

57. Exec. Order No.13,279, 67 Fed. Reg. 77,141–42 (Dec. 12, 2002); Lupu & Tuttle, *supra* note 7, at 4.

58. Farris et al., *supra* note 4, at 15.

59. Exec. Order No.13,279, 67 Fed. Reg. 77,141–42 (Dec. 12, 2002); Lupu & Tuttle, *supra* note 7, at 4–5.

To implement this vision of an expanded partnership between religious organizations and government, the Bush Administration immediately ordered internal audits of agency rules, policies, and practices.⁶⁰ Each agency was ordered to identify barriers preventing religious groups from competing for federal money on an equal footing with secular charity groups.⁶¹

Based on these audits, the President identified what he considered to be “unnecessary” practices that unfairly discriminated against and disadvantaged religious organizations. These practices were to be eliminated by rule changes within each agency.⁶² The Department of Health and Human Services (HHS) complied with the President’s ninety day deadline and proposed amendments to rules in three welfare-related healthcare programs.⁶³ Each of these proposed rules essentially parroted the language of President Bush’s Executive Orders.⁶⁴ Under the notice and comment process of the Administrative Procedure Act, these rules slid into place within months without Congressional action or debate.⁶⁵

The Bush Administration simultaneously launched a national advertising campaign to gain public support for the Initiatives and to educate church groups about the new funding opportunities. President Bush personally gave more than forty speeches dedicated to the Initiative program during the first three years of his presidency.⁶⁶ Meanwhile, a troupe of presenters embarked on a national whistle-stop tour, meeting with groups of religious leaders in fourteen cities to disseminate advice and to encourage participation in competitive grant writing.⁶⁷ The White House distributed a lengthy catalogue of federal grants totaling fifty billion dollars in funds available to religious and community groups.⁶⁸ The Administration also published a guide book for religious groups seeking federal grants and posted it on the White House internet webpage.⁶⁹ The new language instructed religious groups to comply with the following, ambiguously worded directive:

Accordingly, a faith-based organization that applies for or participates in a social service program supported with Federal financial assistance may retain its independence and may continue to carry

60. Farris et al., *supra* note 4, at 6.

61. *Id.*

62. Lupu & Tuttle, *supra* note 7, at 5.

63. Namely, TANF, CSBG, and SAMHSA. *See id.*

64. *Id.* at 6–11

65. Farris et al., *supra* note 4, at 6.

66. *Id.* at 5.

67. *Id.* at 15.

68. *Id.*

69. *See* GUIDANCE, *supra* note 7; Lupu & Tuttle, *supra* note 7, at 4.

out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct Federal financial assistance to support any inherently religious activities, such as worship, religious instruction, or proselytization.⁷⁰

President Bush's aggressive plan quickly infused faith-based and community contractors with billions of dollars.⁷¹ The Administration reports that, in 2004 alone, it distributed \$2.15 billion through five federal agencies (This figure omits funding through half of the agencies and does not include formula and block grants, which are delivered via the states and, therefore, not tracked by the Administration).⁷² Grants to religious organizations increased within the Health Department almost fifty percent between 2003 and 2004; overall, the Administration reports that religious groups received eight percent of total Initiative funding within these programs.⁷³

B. The Initiatives Assume a Shaky Constitutional Premise

Presidential executive orders are only valid if they comply with federal law,⁷⁴ and the orders and ensuing regulatory amendments contain many references to supportive constitutional and statutory guidelines.⁷⁵ Irrespective of assertions such as seeking to build a partnership "to the extent permitted by law" and valuing "the bedrock principals of pluralism, nondiscrimination, evenhandedness, and neutrality," the President's language is vague about what religious characteristics may be retained legally and what activities would be unconstitutional. Only "inherently religious activities such as religious worship, religious instruction, and proselytization" are prohibited.⁷⁶

The Bush Administration legal department's interpretation of activity prohibited by the Establishment Clause, which they attribute in their Guidance Document to language from the Supreme Court, does not necessarily comport with accepted Establishment Clause jurisprudence.⁷⁷ The phrase "inherently religious activity" only appears in one Supreme Court majority decision, the 1988 case of *Bowen v. Kendrick*.⁷⁸ The Court reviewed *Bowen* as an Establishment Clause challenge to the Ad-

70. Exec. Order No.13,279, 67 Fed. Reg. 77,141-42 (Dec. 12, 2002).

71. SELECT GRANTS FY05, *supra* note 2.

72. *Id.*

73. *Id.*

74. Lupu & Tuttle, *supra* note 7, at 5.

75. *See, e.g.*, Exec. Order No. 13,199, 66 FR 8499 (Jan. 29, 2001).

76. *See* Lupu & Tuttle, *supra* note 7, at 6 (quoting the "Guidance" Document).

77. *Id.* at 6-9.

78. *Id.* at 8 (citing *Bowen v. Kendrick*, 487 U.S. 589, 590 (1988)).

lescent and Family Life Act, a program that granted federal funds to private groups providing sex education for young people.⁷⁹ In its decision the Court used the term “inherently religious” to demarcate activities that were *never* legitimate objects of government funding, such as worship, religious instruction, or proselytization.⁸⁰ The Court found the education and counseling programs in question not to be inherently religious.⁸¹ On this basis, the Court upheld their facial validity.⁸²

The *Bowen* decision stands for the proposition that the First Amendment *never* permits government support of inherently religious activities but should not be interpreted to mean that the First Amendment permits *all other activities* undertaken by religious social service providers.⁸³ To evaluate the constitutionality of the Initiatives under the Establishment Clause, it is necessary to look at modern Supreme Court jurisprudence as controlling precedent. The following section provides a brief historic overview of the Establishment Clause, discusses the recent trend in Supreme Court opinions, and presents the two landmark decisions—*Lemon* and *Zelman*—in which the Court has developed its framework for analyzing the constitutionality of government programs that interface with religion.

IV. THE DEVELOPMENT OF ESTABLISHMENT CLAUSE DOCTRINE

A. The Early Debates: The Thorny Problem with Establishment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.⁸⁴

The Establishment and Free Exercise Clauses of the First Amendment, drafted in 1789, were essentially a compromise among leaders seeking to create the right to freedom from religious oppression.⁸⁵ Ironically, although many of the colonists had fled Europe to escape forcible support of state-favored churches, the reality in eighteenth century America was that this oppressive practice had been rekindled and was gaining momentum within some states.⁸⁶ Whether the First Congress intended to

79. *Bowen*, 487 U.S. at 589.

80. *Id.* at 591, 605.

81. *Id.*

82. *Id.* at 623.

83. Lupu & Tuttle, *supra* note 7, at 9.

84. U.S. CONST. amend. I.

85. *Wallace v. Jaffree*, 472 U.S. 38, 92–103 (1985) (Rehnquist, C.J., dissenting).

86. *Everson v. Bd. of Educ.*, 330 U.S. 1, 8–10 (1947); LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 25–62 (1986); Philip B. Kurland,

abolish state-sponsored churches, to prevent the federal government from overpowering the state churches, or to offer the Establishment Clause as a political token to appease disgruntled constituents is unclear.⁸⁷ What the Establishment Clause appears to represent is an imperfect Congressional solution to a pressing political problem that created far-reaching issues of its own.

Legal scholars generally agree that the First Congress intended the Establishment Clause to prohibit forcible allegiance to government-endorsed (Protestant) religious sects.⁸⁸ There has never been consensus about how to apply this cryptic but potent passage to challenge laws that threaten to establish religion.⁸⁹ The Clause's vague language has provided little guidance and has resulted in heated and enduring debate between those who believe it to stand for freedom from government preference of one religion over others and those who maintain, instead that the clause forbids government support of *any* religious activity or sect.⁹⁰ The words of Justice Black epitomize the latter, separationist view: that the Establishment Clause represented America's "conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group."⁹¹ This reading of the Establishment Clause comports with the position of Thomas Jefferson, who is widely, and perhaps misleadingly, cited as its original interpreter fourteen years after its adoption.⁹² In his famous 1802 letter to a group of Connecticut Baptists, Thomas Jefferson declared that through the First Amendment the American people had built an impermeable and protective "wall of separation between church and state."⁹³

Despite the clarity and conviction of his words, however, Jefferson's perspective has by no means been accepted universally as indicative of the Framers' intent.⁹⁴ Some argue that James Madison's original

The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court, 24 VILL. L. REV. 3, 4-5 (1979).

87. See generally LEVY, *supra* note 85.

88. *Id.* at 75-89.

89. See generally *id.*

90. *Id.*

91. *Everson*, 330 U.S. at 11.

92. For commentary critical of Jefferson's role in shaping Establishment Clause interpretation see *Wallace v. Jaffree*, 472 U.S. 38, 91-92 (1985) (Rehnquist, C.J., dissenting) and John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 292-305 (2001).

93. THOMAS JEFFERSON, WRITINGS 510 (Merrill D. Peterson ed., Library of America 1984).

94. See, e.g., *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting); see generally LEVY, *supra* note 85.

proposal, which included the phrase “national religion,” signaled his intention only to prevent establishment of one federally sanctioned religion at the expense of all others, and not to separate church and state categorically.⁹⁵ Chief Justice Rehnquist, notable modern proponent of this non-preferentialist position, recently has written that the Establishment Clause does not require government neutrality between religion and irreligion; nor, in his opinion, does it prohibit the Federal Government from providing nondiscriminatory aid to religion.⁹⁶ Clearly, the debate that the First Congress initiated over two hundred years ago still resonates today. The impact of this philosophical struggle has both shaped and been impacted by Supreme Court jurisprudence throughout American history.⁹⁷

B. The Modern Cases: Trending Away from Separationism

The 1947 landmark *Everson* decision is widely regarded as the beginning of modern Establishment Clause jurisprudence.⁹⁸ In this case, *Everson*, a New Jersey taxpayer brought suit against the Board of Education of Ewing Township for reimbursing the parents of parochial school students for city bus fare used to transport their children to Catholic schools.⁹⁹ *Everson*’s claim challenged the constitutionality of the New Jersey statute that authorized this reimbursement for private, non-profit school transportation in districts where similarly situated public school students received free bus service.¹⁰⁰

In an opinion written by Justice Black and quoted above, the Supreme Court revitalized the Jeffersonian separationist language.¹⁰¹ According to the *Everson* Court, not only does the First Amendment erect a protective wall between church and state, but this wall “must be kept high and impregnable . . . not approv[ing] the slightest breach.”¹⁰² Justice Black continued, “The [Establishment Clause] means at least this: [n]either a state nor the Federal government can set up a church. Neither can pass laws that aid one religion, aid all religions, or prefer one religion over another.”¹⁰³

95. LEVY, *supra* note 85, at 91–93.

96. *Wallace*, 472 U.S. at 106.

97. *See infra* Part IV.B–D.

98. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 686–87 (2002) (Souter, J., dissenting); Aaron Cain, *Faith-Based Initiative Proponents Beware: The Key in Zelman is not Just Neutrality, but Private Choice*, 31 PEPP. L. REV. 979, 991 (2004). The case was *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

99. *Everson*, 330 U.S. at 3.

100. *Id.* The statute at issue was N.J. Rev. Stat § 18:14-8 (1941).

101. *See Everson*, 330 U.S. at 18.

102. *Id.*

103. *Id.* at 15.

In tension with this language, the *Everson* decision also laid the foundation for subsequent Court treatment of Establishment Clause cases that culminated in the more recent “neutrality” doctrine.¹⁰⁴ The *Everson* Court concluded that, although the state cannot contribute tax dollars to support religious schools, neither can it constitutionally hamper its citizens’ free exercise of religion.¹⁰⁵ Because it decided that the New Jersey law merely extended general state benefits to all children, irrespective of religious affiliation, the Supreme Court upheld the constitutionality of the state law.¹⁰⁶ In passing, one member of the Court noted the statute’s laudable public purpose of transporting rural children to school.¹⁰⁷ In sum, the *Everson* decision, replete with separationist language, actually turned on the implicit presumption that government programs that treat religious and secular participants *the same* do not amount to impermissible establishment of religion.

Legal scholars generally equate “equal treatment” with the concept labeled “formal neutrality.”¹⁰⁸ Formal neutrality eschews classifications based on religion.¹⁰⁹ An example of formal neutrality concept is the law against peyote use, which prohibits peyote ingestion whether or not the user is a Native American engaged in a spiritual ceremony.

Formal neutrality is distinguishable from “substantive” neutrality, which refers to religious accommodation.¹¹⁰ A substantively neutral law would, for example, exempt passivist Quakers from the military draft. It is critical to note that, when jurists write that a program is “neutral” it is often unclear which definition is operating.¹¹¹ Regarding the Faith-Based Initiatives, this Comment argues, below, that the Bush Administration appears to intend the program to achieve both formal and substantive neutrality simultaneously.¹¹²

Though flawed and ambiguous, the notion of “neutrality” has become standard in Supreme Court jurisprudence in the wake of *Everson*,¹¹³ and represents the outcome of sixty years of gradual erosion of separationist language since *Everson* was decided.¹¹⁴ The intervening

104. Cain, *supra* note 97, at 997.

105. *Everson*, 330 U.S. at 16.

106. *Id.* at 16–17.

107. *Id.* at 24 (Jackson, J., dissenting).

108. *Zelman v. Simmons-Harris*, 536 U.S. 639, 696 (2002) (Souter, J., dissenting); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999–1000 (1990).

109. Laycock, *supra* note 109, at 999–1000.

110. *Id.* at 1000–01.

111. *Id.* at 994.

112. *See infra* Part V.

113. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

114. *Zelman v. Simmons-Harris*, 536 U.S. 639, 688 (2002) (Souter, J., dissenting).

series of cases suggests that the Court has acknowledged how impractical it has been to apply such a rigorous standard when, in reality there has always been some interconnection between religion and government in America.¹¹⁵ With this reality in mind, the Justices have struggled to adopt a workable Establishment Clause paradigm, but most decisions have been supported by a plurality of Justices or, at most, five members of the Court.¹¹⁶ The Court has adopted a fact-intensive approach to the Establishment Clause controversies, while observing with humility that “we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.”¹¹⁷

Approximately thirty years after deciding *Everson*, the Supreme Court attempted to clarify the constitutional boundaries of government aid to religious institutions in another landmark case: *Lemon v. Kurtzman*.¹¹⁸ Though not consistently followed and not universally accepted by the Justices,¹¹⁹ elements of the three-pronged *Lemon* test have persisted since this opinion was written in 1971.¹²⁰ For this reason, it is appropriate to analyze the Initiatives in light of the *Lemon* test, outlined in the following discussion.

C. The Lemon Test: Emphasis on Excessive Entanglement

As in *Everson*, the controversy giving rise to *Lemon v. Kurtzman* arose in the context of aid to parochial schools.¹²¹ The Court consolidated appeals to Establishment Clause challenges to statutes enacted in Rhode Island and Pennsylvania.¹²² The Rhode Island law supplemented parochial school teacher salaries by up to fifteen percent to bring their compensation to parity with secular school teachers.¹²³ The salary supplements were earmarked specifically for secular subjects taught at private, sectarian schools with lower per capita budgets for non-religious education than their public counterparts.¹²⁴ To participate in the program, parochial schools were required to submit financial records to Department of Education personnel, and the teachers were required to complete a contract agreeing not to use the state portion of their salaries for religious

115. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (citing *Zorach v. Clauson*, 343 U.S. 306, 312 (1952)); see also Cain, *supra* note 97, at 992.

116. Cain, *supra* note 97, at 991–1006.

117. *Lemon*, 403 U.S. at 612.

118. See generally *id.*

119. See Cain, *supra* note 97, at 995 n.149, for an exhaustive list of subsequent Supreme Court cases criticizing or neglecting elements of the *Lemon* test.

120. See *id.* at 995 n.148 (listing Supreme Court cases applying elements of the *Lemon* test).

121. *Lemon*, 403 U.S. at 607–11.

122. *Id.* at 602.

123. *Id.* at 607.

124. *Id.*

instruction.¹²⁵ The Pennsylvania law at issue was similar to Rhode Island's, except that Pennsylvania State funded sectarian schools rather than paying teachers directly, and schools were also reimbursed for textbooks and supplies used in secular subjects.¹²⁶ Alton Lemon, plaintiff/appellant, was a Pennsylvania citizen, taxpayer, and parent of a child attending a state-run public school.¹²⁷

In rendering its decision, the *Lemon* Court borrowed heavily from *Everson* as well as opinions it had written in the interim. Writing for the majority, Chief Justice Berger observed, "we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"¹²⁸ To fulfill this directive, Chief Justice Berger identified what he termed "the cumulative criteria developed by the Court over many years": (1) secular legislative purpose, (2) primary effect that neither advances nor inhibits religion, and (3) prohibition against excessive government entanglement with religion.¹²⁹

Regarding both programs, the Court did not question that the goal of providing adequate education in secular subjects was a valid secular purpose. Chief Justice Berger seemed to agree with the *Everson* Court that educating young students was a laudable objective.¹³⁰ He stated, "[W]e find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference."¹³¹

Chief Justice Berger never reached the effects prong of his three-part test, because he found both statutes unconstitutional based on the third, so-called "entanglement" element.¹³² He found that the state aid programs each resulted in excessive entanglement between the government and the Catholic Church based on his examination of (1) the character and purposes of the parochial schools, (2) the nature of the aid provided, and (3) the resulting relationship between the government and the church.¹³³

First, Chief Justice Berger found that the parochial schools could not be meaningfully segregated from the parish churches that sponsored

125. *Id.* at 608.

126. *Id.* at 609–10.

127. *Id.* at 611.

128. *Id.* at 612 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)). One wonders whether the Chief Justice appreciated the irony in his repeated reference throughout his opinion to the avoidance of the "evil" of religious establishment.

129. *Id.* at 612–13.

130. *Id.* at 613.

131. *Id.*

132. *Id.* at 613–14.

133. *Id.* at 615.

them. Schools were located close to affiliated churches, the majority of teachers were nuns, and the class facilities were decorated with Catholic iconography such as crucifixes, statues of biblical figures, and religious paintings.¹³⁴ Instruction in faith and morals were part of the total educational mission.¹³⁵ Therefore, Chief Justice Berger concluded that the schools were religious in character and purpose.¹³⁶

Second, the Court found it significant that the state aid flowed to teachers. It distinguished governmental provision of textbooks from funding instruction, because teaching involved greater potential for inserting aspects of faith or religious morality than did textbooks on secular subjects.¹³⁷ The Court observed that parochial teachers were bound by the Handbook of School Regulations, which provided that “religious formation is not . . . restricted to a single subject area,” and that teachers should stimulate interest in religious vocations and charity.¹³⁸ Berger noted: “The conflict of functions inheres in the situation.”¹³⁹

Last, the Court was highly concerned with the resulting relationship between the government and the church once these laws were implemented. Though reassured by language in both statutes safeguarding separation of religious and secular teaching, Chief Justice Berger concluded that ongoing surveillance to ensure avoidance of conflicts would entail “excessive and enduring entanglement between state and church.”¹⁴⁰ Sectarian schools would be forced to provide the state with periodic financial reports,¹⁴¹ and these reports would inevitably lead to ever increasing government subsidies as the population grew and the schools’ financial crises deepened as expected.¹⁴²

Chief Justice Berger’s holding foreshadows Court interest in the element of “private choice” that became a central tenet of subsequent Establishment Clause doctrine.¹⁴³ Finding that the Rhode Island and Pennsylvania statutes violated the Establishment Clause, Chief Justice Berger held, “The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevita-

134. *Id.*

135. *Id.*

136. *Id.* at 616.

137. *Id.* at 617.

138. *Id.* at 618.

139. *Id.*

140. *Id.* at 619.

141. *Id.* at 620.

142. *Id.* at 623.

143. See e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000).

ble, lines must be drawn.”¹⁴⁴ In the *Lemon* Court’s opinion, subsidy of sectarian educational budgets had crossed that line.

Of course, through history, Supreme Court justices have never unanimously agreed where the constitutional line should be drawn. Moreover, opinions of the justices appear to be based more on politics than the Constitution.¹⁴⁵ For example, of the Supreme Court Justices deciding the most recent cases, four have advocated an interpretation of the Establishment Clause that relies on the principle of neutrality or non-preferentialism, while four others have urged a more separationist interpretation.¹⁴⁶ Hanging in the balance until her recent retirement has been Justice Sandra Day O’Connor, whose Establishment Clause opinions have incorporated Chief Justice Berger’s belief in the need for private choice: Justice O’Connor has stressed that recipients of governmental aid must be given genuine choices between secular and sectarian services for programs to survive a First Amendment challenge.¹⁴⁷ For this reason, in 2002, when the Court decided its most recent Establishment Clause case, Justice O’Connor signed onto the five-to-four opinion, which relied heavily on the protection of individual private choice.¹⁴⁸ While *Lemon* focused its concentration on the danger of excessive entanglement,¹⁴⁹ the *Zelman* opinion turned on the necessity of a non-coercive effect.¹⁵⁰ Together with *Lemon*, this *Zelman* test, discussed in the following section, will govern the next Establishment Clause controversy.

D. *Zelman v. Simmons-Harris: Requirement of Non-Coercive Effect*

Like many of the landmark Supreme Court Establishment Clause decisions, the *Zelman* lawsuit concerned governmental aid to parochial schools.¹⁵¹ Here, a group of Ohio taxpayers sued to enjoin a state scholarship program that provided financial assistance to families in any demonstrably “failing” school district who chose to remove their children to other area schools.¹⁵² Under the program, parents were free to choose any private or public school that was located within the geographic boundaries of the covered district and that met statewide educational

144. *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

145. See generally Jeffries & Ryan, *supra* note 92, at 281.

146. The four justices in the latter group are Souter, Stephens, Ginsberg, and Breyer. Cain, *supra* note 97, at 1006 n.243 (citing *Mitchell*, 530 U.S. 793).

147. See, e.g., *Zelman*, 536 U.S. at 651 (O’Connor, J., concurring); *Mitchell*, 530 U.S. at 837 (O’Connor, J., concurring).

148. See *Zelman*, 536 U.S. at 639.

149. See *supra* Part IV.C.

150. See *infra* Part IV.D.

151. *Zelman*, 536 U.S. at 639.; Jeffries & Ryan, *supra* note 92, at 287.

152. *Zelman*, 536 U.S. at 645.

standards.¹⁵³ Parents who chose to send their children to private schools received a tuition check that they endorsed over to their chosen school for payment.¹⁵⁴ In practice, ninety-six percent of the 3700 students who participated in the program enrolled in religiously affiliated schools.¹⁵⁵

In a five to four opinion, Chief Justice Rehnquist identified two primary areas of inquiry: (1) the purpose of the legislation, and (2) its effect.¹⁵⁶ The Establishment Clause, he explained, prohibited states from enacting laws for the purpose of advancing or inhibiting religion; likewise, laws that had the effect of advancing or inhibiting religion were impermissible.¹⁵⁷

The Court dismissed the first issue, stating that it was beyond dispute that the challenged program was enacted for the valid secular purpose of providing education to poor children in a failing public school system.¹⁵⁸ Therefore, the sole issue that the Court identified was whether the scholarship program had the forbidden effect of advancing or inhibiting religion.¹⁵⁹ In dictum, Chief Justice Rehnquist did enumerate four aspects of the Ohio program that ensured its neutral purpose: (1) the program provided educational opportunity; (2) the recipients of the program represented a broad class of individuals; (3) the program permitted the participation of all schools, irrespective of religious or non-religious character; and (4) the program allocated funding neutrally.¹⁶⁰ The first two aspects align with the *Lemon* “stated legislative intent” inquiry; and the third and fourth, together, comprise the “neutrality” factor.

On the primary issue of religious impact the Court concluded that, despite the high incidence of parochial school participation in Ohio’s program, since there was no evidence that the State deliberately skewed incentives toward religious schools, the program entailed sufficient private choice to withstand Establishment Clause scrutiny.¹⁶¹ Chief Justice Rehnquist framed the question in terms of government coercion, which he answered by evaluating all options that the state provided to the program participants.¹⁶² Since only one option entailed obtaining a scholarship and choosing a religious school, the Court concluded the voucher program was not coercive in its impact.¹⁶³

153. *Id.*

154. *Id.* at 646.

155. *Id.* at 647.

156. *Id.* at 648–49 (citing *Agostini v. Felton*, 521 U.S. 203, 222–23 (1997)).

157. *Id.*

158. *Id.* at 649.

159. *Id.*

160. *Id.* at 649–53.

161. *Id.* at 650.

162. *Id.* at 656.

163. *Id.*

Since the Ohio program satisfied both the prongs of the test, the Court reinstated the enjoined program, holding:

Where a government program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.¹⁶⁴

The *Zelman* opinion thus distinguishes between government programs that aid religions directly and those that aid such groups indirectly through recipient choice; the latter, “incidental” advancement comports with the First Amendment requirement that the government refrain from establishing religion.¹⁶⁵

Together, *Lemon* and *Zelman* provide the modern framework for analyzing government funding programs that interface with religious organizations. To fulfill the constitutional mandate that they not establish religion, government funding programs must (1) have a purpose that neither advances nor inhibits religion,¹⁶⁶ which the Court interprets by analyzing the government’s stated purpose¹⁶⁷ and the neutrality of the funding program based on the third and fourth *Zelman* factors requiring that (i) religious and non-religious recipients be treated alike, and that (ii) funding is allocated neutrally,¹⁶⁸ (2) have an effect that neither advances nor inhibits religion,¹⁶⁹ which the Court construes as protecting private choice and freedom from coercion;¹⁷⁰ and (3) have freedom from excessive entanglement between government and religious organizations, which the Court interprets by analyzing the character and purpose of the recipients, the nature of aid provided, and the resulting relationship between church and State.¹⁷¹ The following discussion applies the *Lemon* and *Zelman* test to the Bush Administration’s Faith-Based Initiative

164. *Id.* at 652.

165. *Id.* at 649.

166. *Id.* at 648–49.

167. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

168. *Zelman*, 536 U.S. at 652.

169. *Id.* at 648–49.

170. *Id.* at 650, 656.

171. *Lemon*, 403 U.S. at 615.

funding program, and argues that the Initiatives should fail to satisfy any of the three elements.

V. PUTTING FAITH-BASED INITIATIVES TO THE TEST

A. The Initiatives Would Likely Fail the Secular Purpose Test

One of the Bush Administration's two stated purposes is a valid secular goal. According to the executive order establishing the program, the Initiatives are designed to meet the social and health needs of the poor, thus "curbing crime, conquering addiction, strengthening families and neighborhoods, and overcoming poverty."¹⁷² Unlike the facts in *Lemon* and *Zelman*, however, which did not provide the Court with any reason to question the purported secular, educational goal of either program, the words of President Bush and the totality of the factual circumstances surrounding the Initiatives undermine these stated secular intentions. Lack of program oversight and measurement of program achievement solely in terms of year-over-year increase in grant dollars awarded to religious groups rather than statistical reduction in crime, addiction, and poverty indicate that these stated goals are not the real focus of the Bush Administration.

President Bush's second purpose of ending federal funding discrimination against faith-based organizations could also be a valid public goal, since the United States Constitution prohibits discrimination based on exercise of religion.¹⁷³ However, available facts, discussed below, indicate that religious service providers have not been discriminated against historically because there has always been governmental funding of religious organizations in America.

In the following sub-sections, this comment applies the *Lemon* and *Zelman* factors of (1) stated legislative purpose, (2) like treatment of religious and non-religious providers, and (3) neutral allocation of funding. The Court should not accept as valid the Administration's official intentions, since the evidence contradicts what President Bush and the Office of Faith-Based Initiatives have represented to the American public. Moreover, the religious nature and mission of sectarian organizations have rightfully prevented them from entering into certain social service contracts with the government. The Bush plan to allow religious groups to run federally funded anti-poverty programs while maintaining their religious character amounts to an accommodation of religion that results

172. Exec. Order No.13,199, 66 Fed. Reg. 8,499 (Jan. 29, 2001).

173. U.S. CONST. amend. I.

in proselytization instead of a “level playing field” for faith-based organizations as President Bush has asserted.

1. The Goals of the Initiative Program are Facially Valid, Secular Purposes

On their face, the executive orders establishing the Initiatives appear to have been enacted to achieve a “valid secular purpose.” Therefore, the Initiatives would satisfy both the *Lemon* “stated legislative intent” inquiry and the *Zelman* requirement that the program be intended to provide valid public services to a broad class of individuals. Just as in *Zelman*, where Ohio intended its school voucher program to provide educational opportunity to Cleveland students, the Initiatives’ mission is to improve communities by meeting social and healthcare needs of the rural poor and underserved communities.¹⁷⁴ Deciding *Zelman*, Chief Justice Rehnquist also noted with approval that the Ohio program neutrally distributed vouchers to a broad class of individuals identified as those in any demonstrably failing school district.¹⁷⁵ Here, the Initiative grants are targeted to assist low-income, needy populations such as those in Franklin County, Washington.¹⁷⁶ Socioeconomic status should satisfy the requirement of a “broad” spectrum of groups not defined by its religious affiliation.

In both earlier Supreme Court decisions, the justices raised and dismissed the issue that the stated government purpose might be a proxy for an impermissible purpose. In *Lemon*, Chief Justice Berger declined to second-guess the states’ legislative intent because he found no contradictory facts.¹⁷⁷ Likewise, in *Zelman*, Chief Justice Rehnquist declined to consider whether education was a proxy for a sectarian purpose of Catholic indoctrination.¹⁷⁸ Unlike in *Lemon* and *Zelman*, the facts in the present case tend to contradict the neutral purpose espoused in the Presidential Orders that instituted the Faith-Based Initiatives.

2. The Structure and Implementation of the Initiatives Strongly Suggest that Eradicating Poverty-Related Problems is Not the Administration’s Primary Purpose

I hope that Congress does not get caught up in stale, old, process argument of the legalisms involved with encouraging organizations of

174. See *supra* Part III.A.

175. *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002).

176. See *supra*, Section III.A.

177. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

178. *Zelman*, 536 U.S. at 649.

faith to help people in need . . . The[ir] argument is, let us focus on the process. We're saying, let us focus on the results.¹⁷⁹

The President's eschewing "process" in favor of "results" creates a false dichotomy. His devaluation of process interests translates into inadequate infrastructure, which translates, in kind, into an inability to quantify program results. Merriam-Webster defines faith as a firm belief in something for which there is no proof; complete trust.¹⁸⁰ When it comes to President Bush's Faith-Based Initiatives the title is eerily appropriate since the lack of transparency in the granting process and lack of administrative oversight on religious organization expenditures and practices leave Americans with nothing to do *but* trust that the government is abiding by the Constitution with this program. At the time of this writing the Initiative program is alarmingly fragmented, de-centralized, and too poorly monitored to produce tangible and meaningful performance data.¹⁸¹

Transparency is hindered by the fact that the states, not the federal government, allocate most of the money awarded to these groups.¹⁸² The structure of American federalism gives state and local government flexibility to disburse federal funds they receive through formula and block grants.¹⁸³ But few state agencies keep record of which contractors are sectarian versus secular in nature.¹⁸⁴ In practice, at least one state has conceded that the faith-friendly environment at the federal level and tightening state budgets have allowed state officials not to be vigilant in monitoring religious service providers under contract.¹⁸⁵

The Initiatives also lack centralized documentation about direct contract recipients. Although the government maintains lists of awardees, it does not keep accurate records of which groups are faith-based as opposed to secular.¹⁸⁶ In fact, when the President asked the Department of Housing and Urban Development to conduct an internal audit, the de-

179. Remarks by President George W. Bush to the National Leadership of the Hispanic Faith-Based Organizations, (May 22, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/05/20010523-1.html>.

180. MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.m-w.com/dictionary/faith>.

181. LISA M. MONTIEL, *THE USE OF PUBLIC FUNDS FOR THE DELIVERY OF FAITH-BASED SERVICES: A REVIEW OF THE RESEARCH LITERATURE FOCUSING ON THE PUBLIC FUNDING OF FAITH-BASED ORGANIZATIONS IN THE DELIVERY OF SOCIAL SERVICES*, THE ROUNDTABLE ON RELIGION AND SOCIAL WELFARE POLICY 25 (2003).

182. GUIDANCE, *supra* note 7, at 2.

183. MONTIEL, *supra* note 181, at 1.

184. Farris et al., *supra* note 4, at 4.

185. MONTIEL, *supra* note 181, at 22.

186. *Id.* at 25.

partment reported having no faith-based liaisons because they mistakenly categorized Habitat for Humanity as a non-religious service provider.¹⁸⁷

Data collection is also hampered by the structure of religious groups, which may operate more informally than secular service providers.¹⁸⁸ These groups may not be organized optimally to produce budget reports.¹⁸⁹

These issues have concerned Congress greatly. At the request of Congress, in 2002 the Government Accounting Office (GAO) produced a report documenting accountability problems with Federal faith-based contracts.¹⁹⁰ The GAO conducted research across five states and learned that state and local officials varied significantly in their understanding of safeguards such as the prohibition on the use of federal funds for religious worship or instruction.¹⁹¹ Despite this alarming inconsistency of state implementation, neither the Administration nor the state agencies had kept record of any incidents of safeguard violations.¹⁹² Based on its findings, the GAO has issued a formal recommendation that one Federal agency issue guidance to state and local governments to clarify for them what activities religious groups are legally prohibited from supporting with federal funds.¹⁹³ At that time, the agency agreed to begin developing such a program, but at the time of this writing, none has been published.¹⁹⁴

Because of the transparency problems discussed above, it is difficult to conclude with certainty that the Initiatives satisfy the third or fourth neutrality prongs of *Zelman*: participation of all service providers, irrespective of religious or non-religious character; and neutral allocation of government funding.¹⁹⁵

Addressing the participation issue in *Zelman*, Chief Justice Rehnquist reviewed the list of Cleveland schools eligible to receive vouchers and deemed the Ohio program to be neutral because it permitted the participation of all schools, irrespective of religious or non-religious character.¹⁹⁶ Similarly, President Bush has stated that he intends

187. Farris et al., *supra* note 4, at 7.

188. MONTIEL, *supra* note 181, at 1.

189. *Id.*; see also discussion *infra* Part V.A.4.

190. See UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, FEDERAL GUIDANCE ON STATUTORY PROVISIONS COULD IMPROVE CONSISTENCY OF IMPLEMENTATION (2002) [hereinafter GAO REPORT].

191. *Id.* at 4.

192. *Id.*

193. *Id.* at 5.

194. *Id.*

195. *Zelman v. Simmons-Harris*, 536 U.S. 639, 651 (2002).

196. *Id.* at 654.

the Initiatives to level the playing field for faith-based, grass-roots, and small community groups.¹⁹⁷

Despite the President's neutral terminology, however, it is not clear what selection criteria the Administration uses for making award offers. The White House has announced several criteria for evaluating grant proposals, including need for the program and quality of the proposal.¹⁹⁸ However, the only indicator of relative participation is the White House data sheet, which states simply that federal dollars directed to religious grant recipients increased by forty-three percent from 2002 to 2004.¹⁹⁹ Religious groups' proportion of total available funding has also increased dramatically during this time.²⁰⁰

Indeed, one enduring theme in White House oversight has been the measurement of the Initiatives' success *solely* in terms of year-over-year increases in absolute dollars granted to religious groups.²⁰¹ A policy that equates growth with progress deemphasizes serving recipients in favor of the interests of the intermediary organizations. Describing himself as a "results-oriented" person responsible for Initiative accountability, President Bush has declared that he has overseen substantial progress toward his goal of "a hopeful America for every person."²⁰² His progress report, however, only addresses achievement of the goal "to make sure people feel comfortable accessing the grant-making process, and/or that the bureaucracy itself is fair in enabling faith-based organizations to apply . . . we have to make sure that faith-based bidders are not being unfairly shut out of the competition for federal money."²⁰³ The President appears to have eclipsed the goal of improving lives of the poor through enhanced delivery of social and health services with fulfilling the hope of religious organizations that wish to receive federal grant money. Whatever the reason for the discrepancy, his statement suggests a disturbingly non-neutral purpose of advancing religious organizations at the expense of secular non-profit caregivers.

197. *See generally*, Press Release, The White House, Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs (Aug. 2001) available at <http://www.whitehouse.gov/news/releases/2001/08/unlevelfield.html>.

198. DAVID J. DOWNEY, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, DEVELOPING QUALITY GRANT PROPOSALS, available at http://www.whitehouse.gov/government/fbci/quality_proposal.pdf (last visited on Mar. 22, 2005).

199. SELECT GRANTS FY05, *supra* note 2.

200. *Id.*

201. *Id.*; *see also supra* Part IV.B.

202. Press Release, White House Office of the Press Secretary, President Highlights Faith-Based Initiative at Leadership Conference (Mar. 1, 2005), available at <http://www.whitehouse.gov/news/releases/2005/03/20050301-4.html>.

203. *Id.*

Addressing the fourth prong of the neutrality test developed in *Zelman*, Chief Justice Rehnquist validated the purpose of the Ohio voucher program because there were no financial incentives to skew the program toward religious organizations; therefore, he concluded that the program allocated financial incentives evenly.²⁰⁴ In contrast, the Bush Administration openly has pursued a policy to incentivize administrative agencies to fund religious groups and to empower such groups to compete for money successfully.²⁰⁵ In practice the President has dedicated significant resources to garnering more religiously affiliated partners; his affirmative actions seem to target them, in particular. The Administration's heavy investment in directing its promotion activity selectively toward religious groups indicates that the grants may have been skewed to favor sectarian contractors.²⁰⁶

Another modern Supreme Court decision, *Agostini v. Feldman*,²⁰⁷ in which the Court focused directly on the purpose of challenged government programs, adds a helpful evidentiary example to the neutral purpose analysis discussed only briefly in *Zelman*.²⁰⁸ In *Agostini v. Feldman*, the Court upheld a statute against an Establishment Clause challenge that permitted the New York City Board of Education to send public school teachers into parochial schools to provide remedial education to disadvantaged children.²⁰⁹ Central to the Court's ruling was its observation that the program was carefully "constrained" by a detailed set of written and oral instructions emphasizing the secular purpose of Title I and setting out the rules to be followed to ensure that this purpose was not compromised.²¹⁰ The Faith-Based Initiative program is antithetical to the New York statute in this respect. As the foregoing discussion makes clear, the Initiatives not only lack detailed instruction to religious service providers, they appear to lack "constraint" of any meaningful kind.²¹¹

The Administration's failure to make clear rules for the Initiative programs has one significant exception: its rule that allows religious organizations to hire based on religious affiliation. Excepting religious grant recipients from federally mandated employment practices amounts to religious accommodation. Although such accommodation can be permissible under specific situations, the Bush Administration's decision to

204. *Zelman v. Simmons-Harris*, 536 U.S. 639, 651 (2002).

205. *See supra* Part III.A.

206. *See id.*

207. 521 U.S. 203 (1997).

208. *Zelman*, 536 U.S. at 655–56.

209. *Agostini*, 521 U.S. at 234–35.

210. *Id.*

211. *See infra* Part V.B.

allow employment discrimination for only its sectarian social service contractors appears more like favoritism than neutrality, and further undermines the stated purpose of the programs.

3. President Bush's Intent to End Discrimination Belies Our Rich History of Church-State Partnership

The days of discrimination against religious groups just because they are religious is coming to an end . . . Welfare policy will not solve the deepest problems of the spirit . . . No government policy can put hope in people's hearts or a sense of purpose in people's lives.²¹²

This presumption that federal law has oppressed religious groups permeates the President's language in support of the Initiatives; but a brief review of the history of American religious institutions paints a different picture. In fact, significant government financial support for religious public service providers dates back to colonial times.²¹³ Large religious institutions, most notably the Catholic Church, enjoy a very lucrative government partnership today.²¹⁴ Promoting his Initiative program, President Bush has greatly under-represented this long-standing relationship.

As the Administration rightly has observed, government financial support for religious organizations performing public services is not new.²¹⁵ Early in American history, colonial governments subsidized individuals to provide care to others in the community.²¹⁶ This partnership expanded by the nineteenth century to include federal funding of private, religiously affiliated orphanages and hospitals.²¹⁷ Funding for large evangelical and Christian organizations like the Salvation Army, Good Will Industries, and Habitat for Humanity increased during the twentieth century along with increased hospital expenditures legislated by Congress.²¹⁸

212. George W. Bush, December, 2002 Speech to Philadelphia Religious Leaders (quoted in Farris et al., *supra* note 4, at 5).

213. Susanna Dokupil, *A Sunny Dome with Caves of Ice: The Illusion of Charitable Choice*, 5 TEX. REV. L. & POL. 149, 170 (2000).

214. See, e.g., Susan Berke Fogel & Lourdes A. Rivera, *Saving Roe is not Enough: When Religion Controls Healthcare*, 31 FORDHAM URB. L.J. 725 (2004).

215. GUIDANCE, *supra* note 7, at 2; Dokupil, *supra* note 213, at 169–70.

216. Dokupil, *supra* note 213, at 170.

217. *Id.*

218. *Id.*; LOIS UTTLEY & RONNIE PAWELKO, *PUBLIC FUNDING OF RELIGIOUS HOSPITALS IN THE UNITED STATES*, A PUBLICATION OF THE EDUCATION FUND OF FAMILY PLANNING ADVOCATES OF NEW YORK STATE 4–5 (2002).

In 1996, drafters of welfare reform legislation leaned heavily on this tradition.²¹⁹ Congress was desperate to cut dollars from anti-poverty programs and the public, cynical about apparent hand-outs for the unemployed, was pushing for change.²²⁰ Again, private contractors were the attractive solution. Under the aegis of then Senator John Ashcroft, Charitable Choice provisions of the new welfare policy encouraged states to contract with religious organizations to fill the gap created by the demise of welfare cash entitlements.²²¹

Through Charitable Choice, a product of the efforts of the Christian Right, welfare dollars poured into the budgets of religious social and health service providers.²²² By 1998, the federal government was providing forty-eight million dollars to religiously affiliated hospitals through programs such as Medicaid each year.²²³ In Washington State, twenty-three percent of over thirty-three million TANF (“Temporary Assistance to Needy Families”, the program that replaced welfare) dollars were spent on religious organizations in 2001.²²⁴

In the past several years, as state fiscal crises mount, legislators such as those in Washington State are increasingly anxious to privatize social and health service delivery systems to cut expenses further.²²⁵ For example, Washington legislators proposed House Bill 1464 in 2003, which mandated appointment of administrators in the Department of Social and Health Services (DSHS) to serve as faith-based liaisons.²²⁶ The hope was to be ready to compete successfully for Initiative dollars if the Administration later set more money aside for state use.²²⁷

In 2004, The White House did direct Initiative dollars to a Washington facility. The Office of Faith-Based and Community Initiatives awarded Lourdes Healthcare a grant from its Compassion Capital Fund (CCF).²²⁸ The CCF is a four year old Health Department fund that allo-

219. Dokupil, *supra* note 214, at 155.

220. See, e.g., David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV 633 (2004).

221. See Wendy Pollack, National Center on Poverty Law, *An Introduction for The Temporary Assistance to Needy Families Program*, Poverty Law Manual for the New Lawyer 26–41 (2002) (on file with author); Farris et al., *supra* note 4, at 4.

222. Fogel & Rivera, *supra* note 215, at 729.

223. GUIDANCE, *supra* note 7, at 2.

224. *Id.* Temporary Assistance for Needy Families, one type of social assistance available to states through Charitable Choice.

225. Don Jenkins, *Backers Praise Washington State Bill to Promote Faith-Based Aid*, THE COLUMBIAN, Feb. 6, 2003, at c1.

226. *Id.*

227. *Id.*

228. Press Release, The United States Department of Health and Human Services, President Announces 43 Million in Grants from Compassion Capital Fund (Aug. 3, 2004) [hereinafter CCF Grants] (on file with author).

cates money to intermediary organizations that provide training, technical assistance and sub-awards to religious service providers.²²⁹ Since the program's inception, nearly one hundred million dollars has been awarded to 1906 organizations.²³⁰ One subset of CCF grants totals \$4.9 million under the CCF Targeted Capacity Building Program. Through this program the government has awarded grants to one hundred organizations that work on issues such as at-risk youth, homelessness, healthy marriages and rural community assistance.²³¹ Lourdes got one of these grants in August 2004, for \$50,000.²³²

Through thousands of grants such as these, President Bush has purported to "level the playing field" for religious organizations to compete with secular providers for federal funding. However, history shows that religious groups have not been discriminated against by the federal government. In fact, sectarian organizations like Lourdes have long received substantial government assistance. However, the Administration has implemented this policy of "formal neutrality" at the same time that it has exempted religious groups from hiring discrimination and separation of religious character from government funded social and health programs. The religious nature of faith-based organizations is best understood as a factor that inhibits such groups' ability to deliver the quality of human services that the Federal government requires.

4. Religious Character Hampers Sectarian Providers' Ability to Fulfill Government Contracts

What faith-based programs say, time after time, is that miracles are possible. When somebody puts their arm around a neighbor and says, God loves you, I love you, and you can count on us both. Faith-based programs work. They are able to address the deepest needs of our heart.²³³

Another major premise upon which President Bush has justified the Faith-Based Initiatives is the presupposed superlative performance of religious groups providing charitable care. His belief that religious organizations are optimal social and health service providers is appealing,

229. U.S. Dep't. of Health & Human Serv., Administration for Children & Families, About the Compassion Capital Fund (CCF), http://www.acf.dhhs.gov/programs/ccf/about_ccf/index.html (last visited Mar. 26, 2006).

230. CCF Grants, *supra* note 229.

231. *Id.*

232. *Id.*

233. President George W. Bush, Remarks at the Dedication to the Oak Cliff Bible Fellowship Youth Education Center (Oct. 29, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/10/20031029-10.html>.

and his claim tracks with the mission statements of many religious groups.²³⁴ However, available evidence does not support the contention that religious groups are *in fact* the backbone of charity care.²³⁵

Factors unique to religious organizations may inhibit their ability to deliver public social service programs optimally. Compared to their secular counterparts, sectarian institutions (1) lack the staff qualified to provide specialized services,²³⁶ (2) lack the organizational infrastructure suited for government contracts,²³⁷ and (3) lack a core mission consistent with government goals.²³⁸

Religious groups may experience difficulty meeting the regulatory requirement of staff with specialized training for some types of social services.²³⁹ Religious groups tend to hire more lay volunteers and staff with degrees from divinity schools.²⁴⁰ They are less likely to employ licensed social workers, drug treatment counselors, or psychologists than secular agencies.²⁴¹ Therefore, they may be less qualified than secular agencies to respond to the needs of the underserved. This distribution of resources appears to place religiously affiliated organizations at a competitive disadvantage than the more streamlined and specialized non-profit service providers. In contrast to public and private non-profits, President Bush's Armies of Compassion, unfortunately, are likely not armed with necessary credentials to meet modern governmental compliance standards.

Additionally, religious organizations are guided by principles that may conflict with government goals. While the government mission focuses on delivery of services, faith-based programs focus more on transformation of the spirit and the values of recipients.²⁴² Recognizing this potential conflict, some religious group leaders fear that by engaging in

234. See, e.g., LOURDES HEALTH NETWORK, ABOUT US: OUR HISTORY (2006), available at <http://www.lourdeshealth.net/about/history.htm> [hereinafter LOURDES 2006]; LEWIS D. SOLOMON & MATTHEW J. VLISSIDES, JR., IN GOD WE TRUST? ASSESSING THE POTENTIAL OF FAITH-BASED SOCIAL SERVICES, 2001 PROGRESSIVE POLICY INSTITUTE 3, available at http://www.ppionline.org/documents/FBOs_v2.pdf. The President is not alone in this belief; a 1990 New York Times poll found that sixty-eight percent of Americans believe that churches are better able to fight poverty than government. *Id.*

235. UTTLEY & PAWELKO, *supra* note 219, at 5; SOLOMON & VLISSIDES, *supra* note 234, at 4–6.

236. MONTIEL, *supra* note 181, at 22.

237. *Id.* at 24.

238. *Id.*; SOLOMON & VLISSIDES, JR., *supra* note 235 at 10–11.

239. SOLOMON & VLISSIDES, JR., *supra* note 235, at 13.

240. See *id.*; see also UTTLEY & PAWELKO, *supra* note 219, at 21.

241. SOLOMON & VLISSIDES, JR., *supra* note 235, at 13.

242. MONTIEL, *supra* note 181, at 24.

government contracts they will be “captured by the appropriations process” and will lose their sectarian identity.²⁴³

These factors may make religious organizations either unwilling or unable to match the performance of their secular non-profit counterparts, and may account for the fact that religious organizations report less charity care than non-sectarian service providers.²⁴⁴ A recent comparison has demonstrated that religiously affiliated hospitals treat half as many poor patients as do public hospitals in the same states, based on percentage of revenue from Medicaid reimbursement.²⁴⁵ A parallel study reviewing reports of non-reimbursed charity care recently has uncovered the same discrepancy: religious hospitals provide significantly less charity care than all other hospitals with the exception of private, for-profit entities.²⁴⁶

This phenomenon pertains to Franklin County, Washington, where secular La Clinica outperforms Catholic Lourdes Medical Center. Lourdes is currently licensed for 132 beds, of which it uses only twenty-three on an average day.²⁴⁷ Of Acension Healthcare’s \$6.9 billion operating budget, less than \$4.5 million was spent on charity care compared to \$5 million out of \$20 million at La Clinica. In a recent year, outpatient visits at Lourdes dropped by several thousand.²⁴⁸ La Clinica, in contrast, experienced a large increase in outpatients during the same period.²⁴⁹

These trends indicate that, despite heavy federal government subsidy, sectarian facilities like Lourdes are not the best positioned to provide public charity care. The observation that the sectarian character of religious organizations is central to their mission to heal the sick and needy through personal transformation²⁵⁰ is of critical concern to the constitutionality of the Initiative programs. The following section expands on this issue in the context of Catholic hospitals such as Lourdes.

5. Religious Character is Inseparable from Catholic Healthcare Policy and Should Disqualify Catholic Hospitals from Federal Grants

The most impressive example of a publicly funded sectarian enterprise is the Catholic Church. In particular, Catholic Church owned and

243. SOLOMON & VLISSIDES, *supra* note 235, at 13.

244. UTTLEY & PAWELKO, *supra* note 219, at 16–20.

245. *Id.* at 17.

246. *Id.* at 19.

247. *See* Trumbo II, *supra* note 37.

248. LOURDES HEALTH NETWORK, ANNUAL REPORT 9 (2003) (on file with the author) [hereinafter LOURDES 2003].

249. Trumbo I, *supra* note 31.

250. MONTIEL, *supra* note 181, at 24.

operated hospital facilities have benefited from government contracts.²⁵¹ Today, of the nearly one-fifth of all hospital beds owned by religiously affiliated hospitals in America, seventy percent are Catholic.²⁵² While religious in name and official sponsorship, nearly all of these hospitals' operating budgets are funded with government money.²⁵³

Lourdes Medical Center, the sole hospital provider in Franklin County, Washington, is illustrative of large-scale Catholic health conglomerates.²⁵⁴ Founded nearly one hundred years ago by the Sisters of St. Joseph, the Lourdes mission is "a commitment to excellence, serving all persons in a Christian spirit . . . offered by professionals who are committed to the delivery of holistic healthcare as an extension of the healing ministry of Jesus."²⁵⁵ In 2002, Lourdes was purchased by Ascension Healthcare, the largest healthcare network in the country.²⁵⁶ The merger brought the total number of Ascension hospitals to eighty.²⁵⁷ Boasting 80,000 employees, Ascension reportedly owned \$8.9 billion in assets at the time of the Lourdes acquisition.²⁵⁸

Like all healthcare institutions affiliated with the Roman Catholic Church, Ascension (and Lourdes) policy is governed by the Ethical and Religious Directives for Catholic Healthcare Services promulgated by the United States Conference of Catholic Bishops.²⁵⁹ All Catholic healthcare institutions, their employees, contractors, and those granted medical privilege to practice in them, are required to adhere to the Directives.²⁶⁰

The Directives comprise rules that the Church leadership has issued to resolve conflicts between Catholic doctrine and medical science, and, together the Directives form a dynamic, evolving statement of ethical principles updated continually by the Conference. A panel of Bishops regularly reviews technological developments in medical treatment and, in consultation with medical professionals, judge innovative techniques "according to the principles of right reason and the ultimate standard of revealed truth, and offer[s] authoritative teaching and guidance about the

251. Fogel & Rivera, *supra* note 215, at 742-43; Ikemoto, *supra* note 20, at 1091; GUIDANCE, *supra* note 7, at 2.

252. LOIS UTTLEY & RONNIE PAWELKO, NO STRINGS ATTACHED: PUBLIC FUNDING OF RELIGIOUSLY SPONSORED HOSPITALS IN THE UNITED STATES, MERGERWATCH, A PUBLICATION OF THE EDUCATION FUND OF FAMILY PLANNING ADVOCATES OF N.Y. STATE 4 (2002).

253. *Id.* at 15.

254. *See* Trumbo I, *supra* note 31.

255. LOURDES 2006, *supra* note 235.

256. LOURDES 2003, *supra* note 249.

257. *Id.*

258. Annette Cary, *Lourdes to Join Health Network*, TRI-CITY HERALD, June 20, 2002, available at <http://www.tri-cityherald.com/news/2002/0620/story2.html>.

259. *See* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTHCARE SERVICES, (4th ed. 2001) [hereinafter DIRECTIVES].

260. *Id.* at 7.

moral and pastoral responsibilities entailed by the Christian faith.”²⁶¹ In practice, the Church puts each new medical procedure through a moral litmus test: those that fail to support the Catholic belief in sanctity of human life are deemed unethical and may not be practiced in a Catholic facility. According to the Bishops, the Directives assure the result that “each person must form a *correct conscience* based on the moral norms for proper health care.”²⁶²

Not surprisingly, many of the Directives expressly forbid gynecological procedures designed to prevent, terminate, or induce pregnancy.²⁶³ For example, most infertility treatments, sterilization, and abortion are banned.²⁶⁴ Contraception other than “natural family planning” is also prohibited.²⁶⁵ The Directives do not provide exceptions for rape, incest, or to protect the life or health of the woman, so the use of abortifacients is prohibited to treat ectopic pregnancy, which almost always endangers the health or life of the woman.²⁶⁶

The Catholic notion of “correct conscience,” through which the Church judges the efficacy of such gynecological procedures, can and does conflict with standards of care established by the American Medical Association (AMA). For example, the AMA states: “Physicians are obligated to ensure that sexual assault patients are properly informed of all risks and interventions to prevent conception as a result of sexual assault.”²⁶⁷ In direct conflict, Ethical Directive Number 45 provides that “Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation. In this context, Catholic healthcare institutions need to be concerned about the danger of scandal in any association with abortion services.”²⁶⁸ Catholic hospital doctors thus avoid the “scandal” of violating Catholic doctrine by declining to advise their female patients about abortion or emergency contraception. However, they do so in violation of their ethical promises to be honest and to make patient care their paramount concern.²⁶⁹

261. *Id.* at 5.

262. *Id.* (emphasis added).

263. *Id.* at 13–16.

264. *Id.*

265. *Id.* at 16.

266. *Id.* at 15.

267. AMERICAN MEDICAL ASS’N, STRATEGIES FOR THE TREATMENT AND PREVENTION OF SEXUAL ASSAULT (1995).

268. DIRECTIVES, *supra* note 260, at 15.

269. AMERICAN MEDICAL ASS’N, PRINCIPLES OF MEDICAL ETHICS (2001), available at <http://www.ama-assn.org/ama/pub/category/2512.html>.

The Directives also violate Washington State Law.²⁷⁰ In Washington, every hospital that provides care for survivors of sexual assault is required to provide patients with accurate information about emergency contraception, and to prescribe such medication immediately upon request.²⁷¹ Nevertheless, out of eighteen Catholic hospital emergency rooms surveyed recently in Washington, only two reported providing emergency contraception upon the patient's request.²⁷² Only four would refer patients to other providers willing to dispense emergency contraception.²⁷³ Of those, three referrals resulted in dead ends; only one referred patient eventually received the prescription she sought.²⁷⁴

Under this scenario, Catholic hospital doctors follow the directives at the expense of the wellbeing of their female patients. Women or girls who have been raped or whose embryos have implanted dangerously in their fallopian tubes and who seek treatment in a Catholic hospital emergency room will receive substandard care compared to what the medical community identifies as the best demonstrated practice. As a result, some of these women and girls may give birth unwillingly to children borne of rape; and worse, some of these women and girls may die.

Contrary to the President's representations, the federal funding market historically is rich with examples of large, well-financed religious health conglomerates exemplified by networks like Ascension Health.²⁷⁵ Despite President Bush's apologetic verbiage to faith-based groups, we should query whether patients such as female rape survivors are the true victims of discrimination. The Initiatives have earmarked federal grants for hospitals that opt out of legally mandated, medically indicated treatments. Instead of "leveling the playing field" for religious groups, President Bush appears to be pushing a mountain of dollars their way while leaving patient's rights, as well as those facilities respecting patients' rights, in the ditch.

In promoting his agenda, President Bush has taken the results of religiously run government social and health service providers for granted. This assumption is not proven and available studies suggest that it is false.²⁷⁶ The Initiatives have provided what some policy analysts con-

270. See CATHOLICS FOR A FREE CHOICE, SECOND CHANCE DENIED: EMERGENCY CONTRACEPTION IN CATHOLIC HOSPITAL EMERGENCY ROOMS 12 (2002) [hereinafter SECOND CHANCE DENIED], available at http://www.catholicsforchoice.org/topics/healthcare/documents/2002secondchancedenied_001.pdf.

271. WASH. REV. CODE § 70.41.350.

272. SECOND CHANCE DENIED, *supra* note 271, at 18.

273. *Id.*

274. *Id.*

275. See *supra* Part V.B.1.

276. See, e.g., UTTLEY & PAWELKO, *supra* note 219, at 5; SOLOMAN & VLISSIDES, *supra* note 235.

sider to be a valuable opportunity to test the presumption President Bush has advanced.²⁷⁷ This opportunity may be squandered without the desire and means to monitor these groups' success.²⁷⁸ The Bush Administration has thus far failed to track performance for faith-based and community organizations.²⁷⁹ This failure prevents us from knowing with certainty how effectively faith-based groups are in meeting the social and health service needs of the poor and underserved. More importantly to this comment, the Administration's failure to measure its success in reducing poverty-related social and health problems is powerful evidence that these are not the Administration's primary objectives.

I recognize that government can hand out money, but what it cannot do is put hope in people's hearts or a sense of purpose in people's lives. What I want to do is unleash the great compassion of America, by changing America one heart, one soul, one conscience at a time.²⁸⁰

Such language espousing the desire to impact the souls and conscience of individual Americans is strongly suggestive of a sectarian purpose. Although President Bush's executive orders creating the Initiatives purport to fulfill the valid public objective of providing social and health services for the poor and needy,²⁸¹ his personal characterization of the Initiatives creates the image of an evangelical mission. Analyzed using both the *Lemon* and *Zelman* neutral purpose tests²⁸² the Faith-Based Initiatives appear to serve a primarily religious purpose: to heal the souls of America's desperately poor and needy with federal dollars.

B. The Initiatives Would Fail the Effects Test Because They Deny Individual Private Choice

Supreme Court decisions have consistently distinguished between government programs that provide aid directly to religious schools and those that are based on "true private choice," defined as "genuine and independent choices of private individuals."²⁸³ The *Zelman* case addressed an Establishment Clause challenge in the context of "neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of

277. David A. Sherwood, *Testing Time for Christianity: Can we Turn Good Goals into Good Practice?*, SOCIAL WORK AND CHRISTIANITY 28:1, at 105 (2001).

278. *Id.*

279. *See infra* Part IV.C.

280. GUIDANCE, *supra* note 7, at 2.

281. *See* ORDERS, *supra* note 1.

282. *Zelman v. Simmons-Harris*, 536 U.S. 639, 649–53 (2002).

283. *Id.* at 649.

their own choosing.”²⁸⁴ Focusing on the issue of coercion, the *Zelman* court decided that question “must be answered by evaluating all options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school.”²⁸⁵

Unlike the Ohio voucher program, the federal government awards Initiative grants directly to church-run hospitals through programs such as CCF.²⁸⁶ (Block or formula grants go indirectly to church-run hospitals via intermediary state governments and religious organizations, but the recipients do not get direct aid under these programs).²⁸⁷ Under this scheme, targeted groups in underserved and needy communities are not assured the independent choice of healthcare providers.

The individual recipients have been denied private choice where, as in the situation of the residents of Franklin County, Washington, Catholic Church hospitals are their only option for services such as outpatient emergent care and their medical services are truncated by religious restrictions like the Ethical Directives.²⁸⁸ Eighty-five percent of women expect that they can get a full range of gynecological services at their local hospital.²⁸⁹ However, patients are not given a true choice when, even if they are able to travel to another facility that will provide the care they seek, the Initiatives neither require the hospital to disclose its restrictions at the outset, nor to report its performance to the federal government agency. Lourdes Healthcare is, unfortunately, not an isolated case: 48 of 585 Catholic hospitals in a recent study report that they are the only provider in the area.²⁹⁰ Nationally, over one hundred counties contain a single, Catholic affiliated hospital today.²⁹¹

Under the *Zelman* test, rural Catholic hospitals are coercive if they offer no alternatives to poor clients seeking gynecological service offerings that fall below best demonstrated standards promulgated by the American Medical Association. This concern is supported by evidence that, the extent to which religious social service programs are successful may be *attributable to* the transforming nature of the missionary approach. The testimony of two of Lourdes Counseling Center’s former patients tells this story:

When I was twenty years old my husband was killed in a car accident. Part of me wanted to die. I attempted suicide three times. I

284. *Id.*

285. *Id.* at 655–56.

286. GUIDANCE, *supra* note 7, at 4.

287. *Id.* at 3.

288. *See supra* Parts II, V.A.1.

289. SECOND CHANCE DENIED, *supra* note 271.

290. UTTLEY & PAWELKO, *supra* note 219, at 4.

291. SECOND CHANCE DENIED, *supra* note 271.

was headed for my fourth when Lourdes Counseling Center found me. I met angels that night . . . gentle, honest, kind people from Lourdes. I must have had a spiritual experience at Lourdes because it changed everything.²⁹²

Lourdes Counseling Center literally saved my life. Not only did Lourdes teach me how to change my life for the better, but they supported me while I transitioned to becoming part of their family. I have a deep respect for the people who work here, and now that I am no longer a client but an employee, I look forward to coming to work each day.²⁹³

C. The Initiatives Excessively Entangle Government and Religion

The third prong of the *Lemon* test (not addressed directly in *Zelman*)²⁹⁴ is the requirement that government programs not excessively entangle government with religion.²⁹⁵ To determine whether the Initiatives satisfy this test, this Comment will evaluate (1) the character and purpose of the faith-based grant recipients, (2) the nature of the aid provided, and (3) the resulting relationship between government and church.²⁹⁶ The Initiatives will fail each of these evaluations, because (1) the Initiatives expressly provide that faith-based grant recipients can retain their religious character, (2) the aid flows directly to the organizations, which are guided by the Catholic Directives, and (3) there is already an intertwined relationship between the government and the religious organizations. Moreover, to the extent that the White House could improve its reporting and accountability over the Initiative programs, existing entanglement would become increasingly excessive in the future.

The Initiatives fail to satisfy the requirement that they fund activities that can be kept distinct from religious indoctrination. Like the parochial school aid challenged in *Lemon*, the Initiative grants flow to organizations that are intrinsically religious entities. Lourdes Hospital, for example, may retain its religious iconography,²⁹⁷ may hire employees

292. Personal testimonial from Trish Segerdel, Lourdes Health Fact Sheet at 13 (on file with author).

293. Personal testimonial from John Smith, Lourdes Health Fact Sheet at 11(on file with author).

294. See generally *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

295. *Lemon v. Kurtzman*, 403 U.S. 602, 613–15 (1971).

296. *Id.* at 615.

297. Exec. Order No.13,279, 67 Fed. Reg. 77,141–42 (Dec. 12, 2002); Lupu & Tuttle, *supra* note 7, at 4.

discriminatorily,²⁹⁸ and is permitted to follow the Ethical Directives of the Catholic Church.²⁹⁹ As was the case in *Lemon*, Lourdes' healthcare program cannot be meaningfully separated from its Catholic ideology. Although Catholic hospitals provide a secular service—healthcare—it is provided in the context and constraints of Catholic doctrine.

The Initiatives also fail to fulfill the second requirement that the nature of aid provided avoid the risk of inserting religion into the social service program. In *Lemon*, Chief Justice Berger distinguished funding for textbooks, which he believed had little potential for proselytization, with funding for teacher compensation, which was highly problematic in his opinion.³⁰⁰ Particularly worrisome to Chief Justice Berger was the fact that parochial school teachers were bound by a Catholic handbook of education policy.³⁰¹ Similarly, Lourdes medical staff must follow the Ethical Directives of the Catholic Church.³⁰² As in *Lemon*, the nature of the aid the Initiatives provide to Lourdes Healthcare creates strong potential for religious morality to intermingle with health services offered to poor Franklin County residents seeking procedures at odds with the Catholic faith. Therefore, the initiatives would fail the second part of the entanglement test.

Today, the Initiatives excessively entangle the government with religion, and the relationship would only become more heavily intertwined if the White House were to implement structural changes recommended by the GAO and to improve its reporting system.³⁰³ As it stands today, there is an unacceptably interwoven relationship between the government and religious grant recipients. Religious grant applicants must submit proposals to the White House Office of Faith-Based Initiatives. The White House provides agency resources to assist religious groups through the grant-writing process.³⁰⁴ To varying degrees, the granting agencies require that faith-based groups follow federal guidelines for spending caps, allowable expenses, and specific staffing mandates³⁰⁵ The Office of Faith-Based Initiatives assigns a federal employee to each grant recipient as a consultant.³⁰⁶ Grant recipients are also required to maintain financial records and to conduct and report periodic self-audits.³⁰⁷ In ad-

298. Exec. Order No.13,279, 67 Fed. Reg. 77,141–42 (Dec. 12, 2002); Lupu & Tuttle, *supra* note 7, at 4.

299. *See supra* Part V.A.5.

300. 403 U.S. at 617–18.

301. *Id.* at 618.

302. *See supra* Part V.A.5.

303. As argued *supra* Part IV.A.2.

304. GUIDANCE, *supra* note 7, at 4.

305. *Id.* at 5.

306. *Id.* at 6.

307. *Id.* at 7.

dition, recipients are required to provide the federal regulatory agency with regular financial reports, which the government has committed to scrutinize to determine whether the organization has complied with all of the agency's rules.³⁰⁸ All of these entanglements will increase the church-state partnership as the Administration continuously increases the amount of dollars earmarked for religious poverty programs.

VII. CONCLUSION

I believe in the power of faith in people's lives. Our government should not fear programs that exist because a church or a synagogue or a mosque has decided to start one. We should not discriminate against programs based upon faith in America. We should enable them to access federal money, because faith-based programs can change people's lives, and America will be better off for it.³⁰⁹

Whether America will be better off once the needy have been transformed by faith is an open question. Nevertheless, the President has acted methodically to reverse federal policy on this issue and to build a new layer of federal bureaucracy dedicated to disseminating his personal belief in transformational healing.³¹⁰ With individual religious identity again at the forefront of American discourse, what does seem certain, however, is that the timeless issue of the relationship between church and state is as relevant and contentious today as it was in 1789. In recent history, governmental support of religion has gained momentum from the Charitable Choice provisions of the 1996 Welfare Reform Act.³¹¹ President Bush has capitalized on this trend, crossing the boundary of government sponsored religion by creating a huge, privately run and federally funded welfare system that places his vision of religion into the everyday lives of the American poor. The official language, focused on equality and non-discrimination, seems neutral on the surface because it commits to safeguard the religious nature of providers while protecting the free choice of recipients. But the President's verbiage is simplistic, vague, and, based on the totality of the surrounding circumstances, disturbingly disingenuous.

President Bush's faith-based programs would fail a First Amendment Establishment Clause challenge. The Initiatives would fail the combined *Lemon* and *Zelman* test, which holds that sectarian programs pass Constitutional muster only by demonstrating a neutral purpose, neu-

308. *Id.* at 6.

309. FUNDS, *supra* note 53, at 83.

310. Farris et al., *supra* note 4, at 4.

311. See GAO REPORT, *supra* note 190.

tral impact, protection of true, private choice, and freedom from excessive entanglement between government and religion.

Since neither the President nor his Administration has built oversight or transparency into the Faith-Based Initiatives, and since the President's own words are at odds with the neutral language espoused in the Executive Orders, the laudable goal of fighting poverty-related social and health problems is suspect. The Administration's failure to manage or publish the Initiatives' impact on welfare of the poor strongly suggests that the American public should be suspicious about its stated goals.

Additionally, it is clear the Initiatives fail to safeguard individual recipients against religious coercion. The Administration's funding of religious service providers forces rural and poor healthcare recipients like those in Franklin County, Washington, to rely on Catholic Hospitals that follow the Ethical Directives of the Catholic Church, not the best practices promulgated by the American Medical Association. American taxpayers would have a cause of action against the Initiatives program because the Initiatives, through federal tax dollars, fund programs such as the Compassion Capital Fund, which sponsors social service programs at Lourdes Healthcare, a Catholic facility that advances a religious agenda and which coercively limits rural patient programs to those that comport with the Catholic faith.

Third, the Administration's dual policies to treat religious social service grant recipients the same as secular providers while allowing the religious organizations to maintain their religious mission and nature creates an obvious and ever-increasing entanglement problem. The Initiatives effectively force the federal government to supervise the administration of pervasively sectarian organizations. Moreover, this relationship will only intensify as the Administration achieves its stated goal to steadily increase the number of federal grant dollars awarded to sectarian social service providers.

Unfortunately, the recent retirement of Justice Sandra Day O'Connor and the arrival of Justice Samuel Alito to the Supreme Court makes the outcome of such litigation less certain than it would have been just one year ago. While Justice O'Connor persistently has voted to protect true private choice, it is not yet clear how Justice Alito would decide this issue. Whatever the ultimate outcome in the Court, as stewards of the Bill of Rights we must strive to halt the incremental erosion of freedom from religious coercion exemplified by the President's Faith-Based Initiatives. Today we, as citizens of the United States have the opportunity, and, under the United States Constitution we have the obligation.