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THE "PERVASIVELY SECTARIAN" STANDARD IN THEORY AND PRACTICE

STEPHEN V. MONSMA*

I. INTRODUCTION

The use of faith-based agencies to meet societal needs is *the* hot topic in public policy circles. Senator John Ashcroft's "Charitable Choice" amendment to the 1996 Welfare Reform bill passed by Congress, his 1998 amendment that extended "Charitable Choice" to the Community Block Grant Program, and Senator Dan Coats' "Project for American Renewal" all seek to use faith-based agencies in a renewed, but decentralized, de-bureaucratized struggle against besetting the social ills of poverty, drug-abuse, homelessness, teenage pregnancies, and more.¹ The Clinton administration has also spoken favorably of using faith-based agencies in the fight against social ills. *The New Yorker* recently ran an article by Joe Klein highlighting the effective work many faith-based agencies are doing in meeting pressing social needs.² The Brookings Institution devoted almost an entire issue to the question of the role that private institutions of civil society can play in meeting societal needs, and later published that issue in expanded, book form.³ Outside the Beltway, Governor George Bush of Texas in 1996 created a Task Force on Faith-Based Programs,⁴ and Governor John Engler of Michigan has touted the effectiveness of faith-based agencies in meeting basic needs of persons on welfare.⁵

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1. On Charitable Choice, see CENTER FOR PUB. JUSTICE & CENTER FOR LAW & RELIGIOUS FREEDOM, A GUIDE TO CHARITABLE CHOICE: THE RULES OF SECTION 104 OF THE 1996 FEDERAL WELFARE LAW GOVERNING STATE COOPERATION WITH FAITH-BASED SOCIAL-SERVICE PROVIDERS (1997). See also DAN COATS, PROJECT FOR AMERICAN RENEWAL.

2. Joe Klein, *In God They Trust*, NEW YORKER, June 16, 1997, at 40.

3. See BROOKINGS REV., Fall 1997; BROOKINGS INSTITUTION, THE REVIVAL OF CIVIL SOCIETY IN AMERICA (E.J. Dionne, Jr. ed., 1998).

4. See the report of this task force: GOVERNOR'S ADVISORY TASK FORCE ON FAITH-BASED COMMUNITY SERVICE GROUPS, STATE OF TEXAS, FAITH IN ACTION: A NEW VISION FOR CHURCH-STATE COOPERATION IN TEXAS (1996).

5. See the report on the success of a church-based initiative in a county in the western part of Michigan in Dan Coats & Spencer Abraham, *Liberalism's Mean Streets: How Conservatives Can Reverse Urban Decline*, POLICY REVIEW, July-Aug. 1998, at 36.

What is sometimes missed in this flurry of interest in using faith-based organizations to deliver public services is the fact that throughout American history there has been a lively, continuing partnership between government and nonprofit service organizations, including faith-based ones. Lester Salamon of Johns Hopkins University has noted, "Government support of voluntary organizations has roots deep in American history. Well before the American Revolution, for example, colonial governments had established a tradition of assistance to private educational institutions, and this tradition persisted into the nineteenth century."⁶ One scholar has reported that in the last quarter of the nineteenth century, government "subsidies became the prevailing method of financing most voluntary institutions."⁷ This government-nonprofit sector partnership has always included religiously based agencies as well as their secular counterparts. This pattern continues today. In 1993, 65 percent of Catholic Charities' revenues came from government sources, as did 75 percent of the Jewish Board of Family and Children's Services' revenues, and 55 percent of Lutheran Social Ministries' revenues.⁸ In 1996, Catholic Relief Services received \$128 million from the government, World Vision Relief and Development, a conservative Protestant agency, received \$38 million, and Adventist Development and Relief Agency International received \$37 million.⁹

In spite of the long-standing government-religious service agency partnership, and in spite of the renewed emphasis it is receiving today, the constitutional terms and conditions under which it exists have never been fully clarified. With American public policy launching into a renewed emphasis on making use of faith-based service agencies to deliver important public services, it is imperative to resolve certain key church-state uncertainties, both for the sake of the agencies and for the success of the new policy.

6. Lester M. Salamon, *Partners in Public Service: The Scope and Theory of Government Nonprofit Relations*, in *THE NONPROFIT SECTOR* 100 (Walter W. Powell ed., 1987).

7. RALPH M. KRAMER, *VOLUNTARY AGENCIES IN THE WELFARE STATE* 61 (1981).

8. On the first two of these organizations, see Sean Mehegan, *The Federal Connection: Nonprofits are Looking More and More to Washington*, *NONPROFIT TIMES*, Nov. 1994, at 43. On the third of these organizations see *DIVISION OF CHURCH & SOC'Y OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA, 1996 ANNUAL REPORT* (1996).

9. OFFICE OF PRIVATE AND VOLUNTARY COOPERATION, U.S. AGENCY FOR INT'L DEV., *VOLUNTARY FOREIGN AID PROGRAMS*, 84-105 (1998).

There are two lines of legal reasoning that have supported public funds flowing to faith-based organizations providing health, educational, and welfare services to the public. One is that public funds may flow to faith-based institutions as long as (1) they reach those institutions indirectly, not by way of the decision of government officials, but by way of the decision of individuals who have received some government benefit, and (2) the public funds are neutrally available to an entire class of institutions, religious and non-religious alike. This line of reasoning is illustrated by cases such as *Zobrest v. Catalina Foothills School District*,¹⁰ *Witters v. Washington Department of Services for the Blind*,¹¹ and *Rosenberger v. Rector & Visitors of the University of Virginia*.¹² It has never, however, been applied by the Supreme Court to instances where public funds were going directly to the faith-based organization by decision of the government. In such instances, the Court has relied on another, competing line of reasoning: the sacred-secular distinction, a distinction made possible by the recipient agencies not being pervasively sectarian. This line of reasoning accepts the no-funding-of-religion principle and argues that if the religious and secular aspects of the programs of an agency can be separated, then the government is free to fund the secular aspects. But this separation is only possible if the agency is not pervasively sectarian. In four decisions, the Supreme Court has, on this basis, approved funding for faith-based colleges and universities and the direct funding of a faith-based agency working to discourage teen pregnancies.¹³ Meanwhile, the Supreme Court has—in a well-known line of decisions—rejected almost all forms of subsidy for faith-based elementary and secondary schools, holding that they are pervasively sectarian.¹⁴

But how does one distinguish between a pervasively sectarian institution and one that is not? Justice Lewis Powell, in the majority opinion in *Hunt v. McNair*, indicated an institution is pervasively sectarian when “religion is so pervasive that a substan-

10. 509 U.S. 1 (1993) (holding constitutional the provision of an interpreter for a deaf student attending a religiously based high school).

11. 474 U.S. 481 (1986) (requiring a vocational rehabilitation program to fund the education of a blind student studying for the ministry at a religious college).

12. 515 U.S. 819 (1995) (allowing university funding of a religious student publication, with the funds going directly to the printer).

13. See *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

14. See *Aguilar v. Felton*, 473 U.S. 402 (1985); *School Dist. v. Ball*, 473 U.S. 373 (1984); *Wolman v. Walter*, 433 U.S. 229 (1977).

tial portion of its functions are subsumed in the religious mission [of the institution].”¹⁵ Justice Harry Blackman, in *Roemer v. Board of Public Works*, listed six characteristics of the four Catholic colleges whose receipt of public funds were being challenged in that case that persuaded him they were not pervasively sectarian, and were therefore eligible to receive public funds. The characteristics were (1) the colleges were institutionally autonomous (they were neither controlled by the church nor did they receive funds from it), (2) religious indoctrination was not common (there were no required religious exercises and spiritual development was not a goal of the colleges), (3) academic freedom prevailed, (4) normal academic standards were met (prayers at the beginning of some classes and religious symbols did not mean normal academic standards were not being met), (5) religion was not taken into account in hiring faculty, and (6) religion was not taken into account in admitting students.¹⁶ In *School District v. Ball*, Justice William Brennan, in a footnote, attempted to distinguish the K-12 schools whose receipt of aid was found unconstitutional in that case from colleges and universities whose receipt of aid in other cases had been found constitutional:

The elementary and secondary schools in this case differ substantially from the colleges that we refused to characterize as “pervasively sectarian” Many of the schools in this case include prayer and attendance at religious services as a part of their curriculum, are run by churches or other organizations whose members must subscribe to particular religious tenets, have faculties and student bodies composed largely of adherents of the particular denomination, and give preference in attendance to children belonging to the denomination.¹⁷

In summary, the Supreme Court seems to be saying that a faith-based organization is pervasively sectarian—and therefore constitutionally unable to receive direct public funds—when religion permeates the organization and all its programs, but it is less clear on exactly what to look for in determining whether or not that point has been reached. Questions such as formal institutional autonomy, the presence or absence of religious indoctrination, the meeting of normal academic standards, and whether or not religious criteria enter into selecting staff and clients or students are relevant, but any one or combination of such factors are not necessarily determinative. More on this shortly.

15. *Hunt*, 413 U.S. at 743 (1973).

16. *Roemer*, 426 U.S. at 755-59 (1976).

17. 473 U.S. at 384 n.6 (1985).

The basic thesis of this essay is that the sacred-secular distinction, combined with the pervasively sectarian standard, is an uncertain, wavering standard that in practice is applied in a sporadic, inconsistent manner, and is less satisfactory than the competing neutrality standard, which should be followed whether the funding is direct or indirect. I develop this thesis, first, by reporting on a recent study of mine of faith-based organizations and their receipt of funds under the pervasively sectarian standard. I argue my study helps demonstrate the arbitrary, uncertain nature of that standard and its application. Next, I present a case study of the uncertainties and unfairness of the pervasively sectarian standard, and then I argue that if the pervasively sectarian standard were ever broadly defined and strictly enforced, it would lead to the wholesale violation of governmental neutrality. In the conclusion, I argue that the Supreme Court ought to abandon its direct funding principle and pervasively sectarian distinction and, instead, judge programs of direct government funding of faith-based agencies on neutrality grounds, as it now does in cases of indirect funding programs.

II. THE Pervasively Sectarian Standard in Practice

In 1993-94, I conducted a large national survey of three types of religiously-based agencies and their receipt of public money: family and child service agencies, international aid and relief agencies, and colleges and universities.¹⁸ I developed and mailed out 1,606 questionnaires to nationwide lists of the heads of the three types of organizations, and received back a total of 766 completed questionnaires, for a return rate of 48 percent.¹⁹ I supplemented the questionnaire results with numerous personal and telephone interviews.²⁰

In spite of the Supreme Court's sometimes ringing words holding aid to religious organizations unconstitutional,²¹ the earlier-noted pattern of government dollars flowing to faith-based organizations was reconfirmed by the results of my study. Table I shows the three types of organizations studied divided into those that reported they were religiously based, those that said they once were religiously based and now are largely secular in

18. I report much more fully on the results of this study in STEPHEN V. MONSMA, *WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY* (1996).

19. *See id.* at 217-18.

20. *Id.*

21. *See* *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) ("No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called . . .").

TABLE I
NONPROFIT ORGANIZATIONS' SECULAR-RELIGIOUS NATURE AND RECEIPT OF PUBLIC FUNDS

	Child Service Agencies		Internat'l Aid Agencies		Colleges/Universities	
	Secular	Religious	Secular	Religious	Secular	Religious
All	33%	51%	48%	38%	13%	70%
Percent budget from public funds:						
None	5%	18%	29%	58%	0%	3%
1% to 19%	9%	19%	10%	33%	65%	69%
20% to 39%	4%	12%	17%	0%	26%	19%
40% to 59%	9%	9%	15%	8%	9%	5%
60% to 79%	22%	17%	17%	0%	0%	3%
80% to 100%	51%	25%	12%	0%	0%	1%
Total	100% (N=92)	100% (N=137)	100% (N=41)	99% (N=12)	100% (N=43)	100% (N=226)

SOURCE: STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX 68 (1996).

nature, and those that indicated they have always been secular in nature. Then it shows the percentages of their budgets that they reported came from public funds. The most significant finding is that in the case of all three types of agencies and all three types of faith orientations (with only one exception), most of the agencies reported receiving public funds. This held true whether or not the agencies were religiously based. Among the child and family service agencies, a majority of the faith-based agencies reported receiving over 40 percent of their budgets from government sources. The faith-based colleges and international aid agencies reported that smaller amounts of their budgets came from government sources, but the vast majority reported receiving some government funding.

One might suppose that the receipt of public funds would vary by religious tradition. After all, elementary and secondary schools within the Catholic and evangelical or conservative Protestant traditions have been denied most forms of public funds by Supreme Court First Amendment interpretations. Thus, one might suppose that their other educational, health, and social welfare organizations might also fare poorly in obtaining public funds, and that the more mainstream, less controversial, mainline Protestant and Jewish organizations would fare better. But Table II shows that this is not the case. The conservative Protestant and Catholic institutions fared as well or better at obtaining public funds than did the Jewish and mainline Protestant institutions. The one exception was the mainline Protestant child service agencies that obtained larger proportions of their budgets from public funding than did the conservative Protestant agencies.

A more important question, given the pervasively sectarian standard articulated by the Supreme Court, is what religiously-based practices do the agencies receiving public funds engage in. Especially relevant is the question of whether they engage in religious practices that would tend to permeate or color their entire programming, or whether they engage in religious practices that are separable and distinct from the rest of their programming. One might understandably suppose, given the Supreme Court's insistence on the pervasively sectarian standard in the case of K-12 schools, that agencies receiving public funds, no matter what their religious affiliation, would be marked by relatively few religiously based practices and by ones that are separable from the rest of their programming. Such was not the case. For each of the three types of faith-based agencies, the questionnaire listed a number of religiously based practices in which the organizations might engage, and then asked them to indicate in which ones

TABLE II
NONPROFIT ORGANIZATIONS' RELIGIOUS TRADITIONS
AND RECEIPT OF PUBLIC FUNDS

	Percentage of Annual Budgets from Public Funds*					N
	None	Low	Medium	High	Total	
Colleges/universities						
Catholic	1%	43%	33%	23%	100%	82
Conservative Prot.	1%	22%	42%	35%	100%	74
Mainline Prot.	2%	37%	37%	25%	101%	63
Child service agencies						
Jewish	38%	46%	17%	0%	101%	24
Catholic	5%	5%	24%	67%	101%	21
Conservative Prot.	27%	16%	18%	39%	100%	44
Mainline Prot.	5%	14%	23%	59%	101%	44
Internat'l aid agencies						
Jewish	0%	100%	0%	0%	100%	2
Catholic	0%	25%	0%	75%	100%	4
Conservative Prot.	25%	58%	0%	17%	100%	12
Mainline Prot.	50%	25%	8%	17%	100%	12

* In the case of the colleges and universities, low equals 1-9% of their budgets coming from public funds, medium equals 10-19% of their budgets coming from public funds, and high equals 20% or more coming from public funds. In the case of the child service agencies, low equals 1-19% of their budgets coming from public funds, medium equals 20-59% coming from public funds, and high equals 60% or more coming from public funds. In the case of the international aid agencies, low equals 1-19% coming from public funds, medium equals 20-39% coming from public funds, and high equals 40% or more coming from public funds.

SOURCE: STEPHEN V. MONSMA, *WHEN SACRED AND SECULAR MIX* 73 (1996).

they, in fact, did engage. The results, broken down by religious tradition, are given in Tables III, IV, and V. What is most striking about these tables is the large number of religious practices in which these organizations reported engaging. Also, they reported engaging in many practices that, according to the conceptualizations of pervasively sectarian put forward by Justices Powell, Blackmun, and Brennan, could be construed to make them "pervasively sectarian." Some 29 percent of the colleges reported only hiring faculty in agreement with their religious orientation, another 27 percent reported giving preference in hiring faculty to those in agreement with their religious orientation, 59 percent encouraged faculty to integrate religious concepts into their courses, 60 percent encouraged student religious commitments, 29 percent of the colleges had mandatory chapel services, and 18 percent either gave preference in admitting students or only admitted students in agreement with their religious orientation. These percentages were significantly higher for the conservative Protestant colleges.

Similarly, among the child service agencies, a majority reported having spoken prayers at meals and making informal

TABLE III
RELIGIOUS PRACTICES OF RELIGIOUSLY BASED COLLEGES
AND UNIVERSITIES

Religious Practices	Catholic (N=95)	Conservative Protestant (N=89)	Mainline Protestant (N=82)	All* (N=269)
1) Spirit of service/love	99%	99%	89%	96%
2) A chapel on campus	99%	93%	90%	94%
3) Voluntary religious exercises organized by the college or university	92%	96%	80%	89%
4) Taking religion in account in student behavior policies	85%	96%	68%	84%
5) Mandatory religion / theology courses	82%	93%	65%	80%
6) Religious symbols / pictures on campus	98%	74%	65%	80%
7) Voluntary chapel services	99%	40%	84%	74%
8) Encouraging student religious commitments	62%	82%	35%	60%
9) Encourage faculty to integrate rel. concepts & ideas into courses	53%	88%	34%	59%
10) Compulsory chapel services	2%	72%	15%	29%
11) Only hire faculty in agreement with religious orientation	8%	67%	11%	29%
12) Give preference in hiring faculty to those in agreement with rel. orientation	26%	40%	13%	27%
13) Give preference in admitting students to those in agreement with rel. orientation	4%	34%	9%	15%
14) Compulsory religious exercises org. by college or univ. (in addition to compulsory chapel services)	3%	19%	2%	9%
15) Admitting only students in agreement with rel. orientation	0%	10%	0%	3%

* Three institutions that fell in the "other" category in terms of religious tradition are included in the fourth "All" column.

Source: STEPHEN V. MONSMA, *WHEN SACRED AND SECULAR MIX* 74 (1996).

references to religion by staff to their clients. One-third—and 73 percent among conservative Protestant agencies—reported encouraging religious commitments by clients, and 44 percent reported either hiring only persons in agreement with their religious orientation or giving preference to those in religious agreement. The international relief agencies also reported similar types of religiously based practices.

In order to analyze more exactly the relationship between the receipt of public funds and the religious practices of faith-based organizations, I developed the religious practices scale (RPS), based on how many and in which religious practices the organizations reported engaging. Those organizations with

TABLE IV
RELIGIOUS PRACTICES OF RELIGIOUSLY BASED CHILD
SERVICE AGENCIES

Religious Practice	Jewish (N=28)	Catholic (N=22)	Conservative Protestant (N=44)	Mainline Protestant (N=47)	All (N=141)
1) Spirit of service/love	68%	95%	100%	91%	90%
2) Voluntary religious activities	57%	68%	80%	87%	77%
3) Rel. symbols / pictures in facilities	85%	77%	64%	66%	71%
4) Informal references to religious ideas by staff with clients	61%	50%	82%	74%	70%
5) Spoken prayers at meals	7%	41%	87%	85%	64%
6) Required rel. activities	0%	14%	57%	45%	35%
7) A paid chaplain on staff	4%	36%	39%	47%	34%
8) Encourage religious commitments by clients	4%	9%	73%	26%	33%
9) Taking rel. into account in making foster care or adoption placements	29%	32%	39%	21%	30%
10) Give preference in hiring staff to those in agree. with rel. orientation	43%	0%	45%	13%	27%
11) Only hire staff in agreement with rel. orientation	14%	9%	32%	9%	17%
12) A volunteer chaplain on staff	7%	32%	16%	13%	16%
13) Giving preference in accepting clients to those in agree. with rel. orientation	36%	0%	2%	2%	9%

Source: STEPHEN V. MONSMA, *WHEN SACRED AND SECULAR MIX* 75 (1996).

more religious practices and with religious practices that would tend to permeate the entire organization and all its services would rank high on the scale; those with fewer religious practices and with religious practices of a nature that would tend to be separable from its other activities would rank low on the scale.²² In other words, the high RPS organizations would appear to at least come close to meeting the Supreme Court's concept of pervasively sectarian. Table VI divides the organizations studied based on their being secular or low, medium, or high on the RPS and then reveals the percentage of their budget they reported was attributable to government money. The religious-nonreligious nature of the colleges and universities made almost no difference in the percentages of their budgets they received from

22. For details on this scale and how it was constructed see MONSMA, *supra* note 18, Appendix C, at 225-28.

TABLE V
RELIGIOUS PRACTICES OF RELIGIOUSLY BASED INTERNATIONAL
AID AGENCIES

Religious Practices	Jewish (N=2)	Catholic (N=4)	Conservative Protestant (N=12)	Mainline Protestant (N=12)	All* (N=33)
1) Spirit of service / love	0%	75%	92%	100%	85%
2) Religious affiliation reflected in name or logo	100%	100%	83%	67%	79%
3) Informal references to religious ideas by staff with persons served	0%	0%	58%	67%	52%
4) Voluntary rel. activities	0%	50%	58%	0%	30%
5) Give preference in hiring staff to those in agree. with rel. orientation	0%	0%	33%	17%	24%
6) Overt rel. activities by associated organization	50%	0%	33%	0%	21%
7) Only hire staff in agree. with rel. orientation	0%	0%	50%	8%	21%
8) Encourage religious commitments by persons being served	0%	25%	33%	8%	21%
9) Helping construct religious centers	50%	0%	25%	8%	15%

* Three agencies that fell in the "other" category in terms of religious tradition are included in the fourth, "All" column.

SOURCE: STEPHEN V. MONSMA, *WHEN SACRED AND SECULAR MIX* 76 (1996).

the government. If anything, the high RPS colleges received slightly more of their budgets from the government than did the less religious institutions. Among the child service agencies, the secular agencies received the most public money and the highly religious agencies received the least. But even among the most highly religious agencies, 28 percent received over 60 percent of their budgets from the government (46 percent received over 20 percent of their budgets from the government). Among the highly religious international aid agencies, 30 percent reported receiving over 20 percent of their budgets from the government.

Table VII offers a summary picture of what the data show in regard to the six criteria Justice Blackmun put forward in *Roemer* as determining the pervasively sectarian character of an organization and Justice Powell's summary description of a pervasively sectarian organization in *Hunt v. McNair*. Significant minorities of the organizations studied appear to be receiving public funds even though they, at least in some respects, appear to possess some characteristics of pervasively sectarian organizations. This is particularly significant in that most of the faith-based organizations studied received many of their public funds directly, rather

TABLE VI
THE RELIGIOUS PRACTICES SCALE AND RECEIPT OF PUBLIC FUNDS

	Percentage of Annual Budgets from Public Funds*					N
	None	Low	Medium	High	Total	
Colleges/universities						
Presently secular**	2%	42%	29%	27%	100%	104
Low RPS	0%	44%	28%	28%	100%	36
Medium RPS	2%	34%	36%	29%	101%	103
High RPS	3%	28%	42%	27%	100%	86
Child Service Agencies						
Presently secular**	4%	8%	14%	74%	100%	133
Low RPS	9%	31%	15%	44%	99%	32
Medium RPS	12%	11%	28%	49%	100%	65
High RPS	33%	23%	18%	28%	102%	40
Internat'l Aid Agencies						
Presently secular**	36%	15%	13%	36%	100%	53
Low RPS	30%	40%	0%	30%	100%	20
High RPS	31%	39%	15%	15%	100%	13

* As is the case in Table II, for the colleges and universities, low equals 1-9% of their budgets coming from public funds, medium equals 10-19% of their budgets coming from public funds, and high equals 20% or more coming from public funds. For the child service agencies, low equals 1-19% of their budgets coming from public funds, medium equals 20-59% coming from public funds, and high equals 60% or more coming from public funds. For the international aid agencies, low equals 1-19% coming from public funds, medium equals 20-39% coming from public funds, and high equals 40% or more coming from public funds.

** Includes organizations that indicated they always have been secular or once were religious but now are "largely secularly based."

SOURCE: STEPHEN V. MONSMA, *WHEN SACRED AND SECULAR MIX* 78 (1996).

than indirectly by student or client choice. Some 90 percent of the child service agencies that reported receiving public funds reported receiving funds under purchase of service contracts. The government—usually a unit of state or local government—signs a contract in which it agrees to purchase certain child or family services from the agency. Similarly, 87 percent of the international aid agencies receiving public funds reported they received direct program grants. Eighty-three percent of the colleges and universities reported receiving public funds indirectly by way of student scholarship grants, but 96 percent reporting receiving work-study funds for students. Since these latter funds go directly to the institutions who in turn distribute them to students, they presumably would be considered a form of direct funding.

What can one conclude from these data? And what do they say in regard to church-state law as it applies to faith-based organizations and their partnership with government? In brief, I believe they help demonstrate that the pervasively sectarian standard is an uncertain, wavering standard that does not serve us

TABLE VII
RELIGIOUS ORGANIZATIONS RECEIVING PUBLIC FUNDS MARKED BY
"Pervasively Sectarian" Characteristics*

	Child Service Agencies (N=122)	Colleges & Universities (N=267)	Internat'l Aid Agencies (N=23)
1) Formal ties with a church	unknown	unknown	unknown
2) Religious indoctrination common**	16%	25%	13%
3) A lack of academic freedom	none	none	none
4) A lack of normal academic standards	none	none	none
5) Religion a factor in hiring***	38%	49%	36%
6) Religion a factor in student / client admission****	8%	18%	unknown
7) If a substantial portion of functions are subsumed in its religious mission*****	23%	36%	39%

* The first six characterizations are taken from Justice Blackmun's opinion in *Roemer v. Maryland Public Works Board*, 426 U.S. at 736, 755-59 (1976), and the seventh is taken from Justice Powell's summary description of a "pervasively sectarian" organization in *Hunt v. McNair*, 413 U.S. 734, 743 (1972).

** The percentage of the religious organizations receiving public funds that, in the case of the child service agencies and the colleges and universities, reported they encourage religious commitments by their clients or students and have some required religious exercises; and, in the case of the international aid agencies, reported they encourage religious commitments by their clients and have some voluntary religious exercises.

*** The percentage of the religious organizations receiving public funds that reported they either only hire staff in agreement with their religious orientation or give preference in hiring to those in agreement with their religious orientation.

**** In the case of child service agencies the percentage of agencies receiving public funds that reported they give preference in accepting clients to those in agreement with their religious orientation, and in the case of colleges and universities the percentage of institutions receiving public funds that reported they only accept students in agreement with their religious orientation or give preference in accepting students to those in agreement with their religious orientation.

***** The percentages of the religious organizations receiving public funds that rank high on the Religious Practices Scale.

Source: STEPHEN V. MONSMA, *WHEN SACRED AND SECULAR MIX* 123 (1996).

well. In light of the previously cited attempts to define pervasively sectarian and to distinguish pervasively sectarian from non-sectarian organizations, it is noteworthy that the picture of many of the faith-based colleges, child service agencies, and international aid agencies included in my study is a picture of organizations that have prayer and other religious observances as a regular part of their activities, take religion into account in hiring staff, and sometimes—in the case of colleges—in admitting students, seek to integrate religious ideas and concepts into the services they provide, encourage religious commitments by those they serve, and frequently have religious symbols in their facilities. Table VI shows that 97 percent of the colleges ranking high on the religious practices scale receive some public funding, as do two-thirds of the child services agencies ranking high on the same scale, and 69 percent of the international aid agencies.

Table VII is especially instructive on this score. Justice Blackmun suggested the existence of "religious indoctrination" would in part be signaled by the presence of required religious exercises.²³ This table reveals that significant minorities of the faith-based organizations receiving public funding practice "religious indoctrination" as thus conceived by Blackmun. From 15 to 25 percent of the faith-based organizations receiving public funds indicated they seek to affect the religious views of those receiving their services *and* have certain required religious exercises (or voluntary religious exercises in the case of international aid agencies).

Significant minorities of the religious institutions and agencies that receive public funds, and almost a majority of the colleges and universities, take religion into account in hiring their professional staff members, or, to put it into the lower courts' pejorative terms quoted by Blackmun, "stack" their staffs "with members of a particular group."²⁴ Religion is a factor in admitting students in only a small percentage of the religious colleges and in religious child service agencies accepting clients, although even here almost one in five of the religiously based colleges that receive government funds give preference in admitting students to persons from their own religious tradition.

This means that when one gives a broad definition to pervasively sectarian, many seemingly pervasively sectarian organizations are receiving public funding; when one gives a narrow definition to pervasively sectarian, it is hard to make the case that most K-12 faith-based schools are pervasively sectarian. There is a dilemma here that the courts and scholars of constitutional law need to face up to. The pervasively sectarian standard is neither well-defined nor consistently applied. That these are not merely theoretical questions with little practical policy import is illustrated by a recent court case that arose in Maryland. The next section of this paper explores that case.

III. *COLUMBIA UNION COLLEGE V. CLARKE*

Maryland's Sellinger program provides state-funded grants to private colleges, with the funding amount based on the number of full-time students in attendance at the colleges qualifying under the terms of the program.²⁵ In 1990, Columbia Union College—a Seventh Day Adventist College in Takoma

23. See *Roemer v. Board of Pub. Works*, 426 U.S. 735, 755 (1976).

24. *Id.* at 757.

25. The following information is taken from *Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998).

Park, Maryland—applied for funds under the Sellinger program and was turned down by the state because it was held to be pervasively sectarian. Maryland ruled that, because of its pervasively sectarian nature, granting it funding would violate the Establishment Clause of the First Amendment.²⁶ Its pervasively sectarian nature was revealed by the fact that it was not institutionally autonomous “from the Seventh Day Adventist Church, it required religious worship by its students, its religion department sought to ‘set the tone’ for college life, religion influenced non-theology courses, and a large percentage of the students and faculty were church members.”²⁷ Thus Maryland concluded that “the college’s religious mission permeated even its assertedly secular educational functions.”²⁸ Following the Supreme Court’s *Rosenberger* decision, the college requested that Maryland reconsider its earlier decision, but in 1996 was again turned down. The college brought action in federal District Court. The District Court held for the state, and the college appealed to the Court of Appeals. In a split 2-1 decision the court rejected the college’s reasoning under the *Rosenberger* decision. It concluded the *Roemer* precedent was binding in this case and that *Roemer* teaches “that when a college is so pervasively sectarian that its religious mission ‘permeates’ its educational functions, the government cannot provide direct money grants even to fund the college’s secular subjects because ‘religious and secular functions [are] inseparable.’”²⁹ The court then went on to hold, however, there was insufficient evidence in the record to rule on whether or not Columbia Union College is in fact pervasively sectarian, and therefore remanded the case back to the District Court to develop a more complete record on the pervasively sectarian nature of the college.³⁰ The minority opinion opined that there was sufficient evidence to rule the college was pervasively sectarian and stated that it would have held for the state of Maryland.³¹

Especially helpful for our purposes here is the able dissent written by Chief Judge Wilkinson. He begins by concluding that “Maryland has thus denied funding to Columbia Union College for one reason only—its sectarian character. By denying Columbia Union funding on the basis of its sectarian approach to education, Maryland has impermissibly discriminated against the

26. See *id.* at 154.

27. *Id.* ○

28. *Id.*

29. *Id.* at 161 (quoting *Roemer*, 426 U.S. at 750).

30. See *id.* at 169.

31. See *id.* at 170, 177.

college on the basis of its religious point of view."³² Judge Wilkinson goes on to discuss the neutrality principle as seen in such cases as *Witters*, *Zobrest*, *Rosenberger*, and *Agostini*, and concludes:

Just as all private institutions should be treated neutrally, so should all religious viewpoints be treated similarly. Maryland's program now does neither of these things. Because the Sellinger Program violates the Supreme Court's recent neutrality principle in two respects, I would unhesitatingly find Columbia Union's pervasively sectarian character irrelevant and reverse the judgment of the district court.³³

But then he goes on to state that the Supreme Court's "funding prohibition principle is hanging on, if only by its fingernails,"³⁴ and thus that he felt duty-bound to follow Supreme Court precedent and rule that since Columbia Union is pervasively sectarian it is ineligible for direct funding from the state.

This case speaks eloquently—even if depressingly—to the basic thesis of this essay: that the pervasively sectarian standard in practice is an uncertain, arbitrary one. The majority, for example, argues that because in practice only about one-half the student body is required to attend weekly chapel services, Columbia Union may in fact not be pervasively sectarian.³⁵ It further argues that while the overwhelming majority of full-time faculty are Seventh Day Adventist, many of the adjunct faculty are not.³⁶ What does this say about its pervasively sectarian nature? This leads Judge Wilkinson to note in his opinion that there are three Catholic colleges that receive funding under the Sellinger program and to raise the question of at what point might they be held to be pervasively sectarian:

For example, Mount Saint Mary's appoints the Archbishop of Baltimore as an automatic trustee and requires that at least one-fourth of its trustees, including the Archbishop, be ordained priests. Notre Dame requires that just under one-third of its trustees be nuns. And Loyola's president must be a member of the Society of Jesus. May Mount Saint Mary's raise its requirement to one-half? May Notre Dame increase its to more than one-third? May Loyola include the same prerequisite in its search for a vice president? How are these colleges to know? It will be impossi-

32. *Id.* at 170 (Wilkinson, J., dissenting).

33. *Id.* at 172.

34. *Id.*

35. *See id.* at 164.

36. *See id.* at 166.

ble for them to predict at what point sectarian influences of this type will tip the scales.³⁷

The conclusion concerning the uncertain nature of the pervasively sectarian standard that is documented and highlighted by my study is placed in specific, concrete terms by this case.

IV. NEUTRALITY VS. THE NO-DIRECT-FUNDING/PERVASIVELY SECTARIAN STANDARD

One way in which the uncertain nature of the pervasively sectarian standard could be resolved would be for the courts to continue to insist on the no-direct-funding principle and to adopt a strict, broad definition of pervasively sectarian. Many current programs and the long American tradition of partnership between governmental units and faith-based educational, health, and social service organizations would thereby be ended, and the rapidly developing reemphasis on that partnership would be cut short, but conceptual and legal clarity would be attained. Most would judge that is too high a price to pay. Some of the neediest among us would find their needs unmet, and governmental bureaucracies would have to expand to meet those needs.

More importantly, there is also a religious freedom, or fairness, issue at stake. In its famous 1947 decision in *Everson v. Board of Education*, the Supreme Court called for governmental neutrality on matters of religion.³⁸ "[T]he state [is] to be a neutral in its relations with groups of religious believers and non-believers State power is no more to be used as to handicap religions than it is to favor them."³⁹ It has reiterated this call many times over the past fifty years. For government to create a program of assistance to a particular type of social service agency, and then to say that assistance is available to secular agencies or to faith-based agencies that have reduced their faith commitment to a few, carefully segregated practices, but is not available to other faith-based agencies whose religious beliefs have led them to take a more holistic approach to providing social services, is to be anything but neutral. It is to favor the secular and one type of religious approach to another type of religious approach.⁴⁰ This is to discriminate against religion.

37. *Id.* at 176.

38. 330 U.S. 1 (1947)

39. *Id.* at 18.

40. I and others have sought to make this point at length elsewhere, so I will not develop this point as fully here as it could be developed. See STEPHEN V.

Judge Wilkinson in the *Columbia Union* case clearly makes the point that to the extent that there continue to be attempts to follow the pervasively sectarian standard as a means to deny aid or to threaten to deny aid to faith-based service organizations, governmental neutrality towards religion is violated.

Despite the fact that it has met all neutral criteria for state aid, and despite the fact that other religious institutions are receiving funding, Columbia Union has yet to receive so much as a penny in state assistance. The only way it could receive such aid is by compromising or abandoning its religious views. That to me is impermissible inhibition of religion, impermissible discrimination under our Constitution's religion clauses, and a violation of the First Amendment right to express religious beliefs. 'That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.' The Supreme Court in its recent enunciation of the neutrality principle has affirmed as much. But . . . the Court has not expressly overruled the funding prohibition principle in its First Amendment jurisprudence . . .⁴¹

In short, not only is the pervasively sectarian standard an uncertain, arbitrary standard, it is also—if it were ever strictly followed—one that would support practices that discriminate against faith-based organizations as compared to their secular counterparts that are offering similar or parallel services.

V. CONCLUSIONS

I believe the results of my study, as well as the concrete instance of Columbia Union College and its discriminatory treatment by the state of Maryland, indicate that the no-direct-funding principle and the pervasively sectarian principle to which it is linked form a weak basis for First Amendment interpretation. There are no good constitutional reasons why the neutrality principle the Supreme Court has developed to deal with questions of indirect funding should not also be applied to questions of direct funding. The distinction is one of form, not substance. In both cases money is flowing from public coffers to private, faith-based organizations; in both cases no money is going to support faith-based groups in their remembrance and celebration of their core

MONSMA, POSITIVE NEUTRALITY 40-51, 245-47 (1993); MONSMA, *supra* note 18, at 111-27.

41. *Columbia Union*, 159 F.3d at 177 (quoting *Everson v. Board of Education*, 330 U.S. 1, 18 (1947)) (citation omitted).

religious beliefs, but only to support services that non-religious organizations are also providing and that policy makers have judged to be of public benefit to society at large. There may be prudential public policy reasons why indirect forms of government funding of public services by private organizations—whether or not faith-based—are preferable to direct ones, but that is different than saying there are legal, First Amendment reasons for holding one constitutional and other not.

While awaiting court rulings removing the distinction between direct and indirect forms of public funding of health, educational, and social services, policy makers can reshape direct aid programs to make them into programs of indirect assistance. Maryland, for example, could recast its Sellinger program into a voucher-type program with the per student subsidy going to individual students who then sign them over to whatever private college they choose to attend. It thereby would operate more like the old GI Bill program or the current Pell grant program. Similarly, what are now purchase of service contracts—in which a state or locality purchases certain services from a faith-based health or social service agency—could be turned into voucher-type programs, with the funds being attached to the persons in need of services and those funds going to the agencies those persons select.

But there are limits to the extent to which current direct aid programs can be transferred into indirect aid programs, especially when the persons receiving the funds are especially young or for other reasons are unable to make their own choice of provider. The very fact, however, that most direct aid programs can be easily turned into indirect aid programs suggest that the direct-indirect distinction is more form than substance. Thus the preferred way to go is for the Supreme Court to abandon its standard of no direct funding of pervasively sectarian organizations, and substitute a neutrality standard.⁴² Then the way will be opened for a host of new public policy initiatives, featuring active partnerships between governmental units and faith-based educational, health, and social service organizations. In so doing, the greater flexibility, more personal touch, and faith-based motiva-

42. It is important to note that the neutrality for which I am calling is not a formal or legal neutrality, but a substantive or positive neutrality. See MONSMA, *supra* note 18, at ch. 6; Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990); Stephen V. Monsma, *Substantive Neutrality as a Basis for Free Exercise—No Establishment Common Ground* (1998) (paper prepared for delivery at the 1998 annual meeting of American Political Science Association, Boston, Sept. 3-6, 1998) (on file with author).

tions of the religious agencies will be more fully brought to bear on persistent social ills, and they will be able to do so without having to abandon or water-down the very faith dimension that often makes their programs so very effective. The American people—and especially those who are the most needy among us—will be the greatest beneficiaries.