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Government Partnerships with Faith-Based Service Providers

The State of the Law
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Table of Contents:

Executive Summary

Rapid change and significant uncertainty are the most noteworthy features of the legal environment for participation by faith-based organizations ("FBOs") in government-financed social services. Developments in federal constitutional law, statutorily-based federal programs, and the administrative environment have altered the legal circumstances in which such opportunities may appear. In addition, the body of law (federal, state, and local) concerning the employment relation, an emerging focus on state constitutional law, and the existing pattern of contractual relations between government entities and FBOs, contribute to an atmosphere of legal complexity surrounding this field. These patterns of change and uncertainty play a crucial role in the decisions of FBOs on the value and risks involved in participating in such programs, as well as in decisions by government agencies concerning whether and how to undertake such programs.

The topics included are 1) the Establishment Clause of the First Amendment to the U.S. constitution, including recent cases involving the application of that Clause to FBOs in service partnerships with government; 2) state constitutional law as a source of impediments to state relationships with FBOs, and federal constitutional challenges to such impediments; 3) the law of employment discrimination – federal, state, and local – as it applies to FBOs in such partnerships; 4) federal programs that explicitly invite participation by FBOs; and 5) state social service contracts with FBOs, and the presence or absence of religion-specific provisions in such contracts.

MAJOR FINDINGS:

- Direct financial support to FBOs is now permitted by federal constitutional law, but that support must be limited to secular activity. FBOs may not be favored or disfavored as compared with their secular counterparts. Government must improve its ability and willingness to define with precision the scope of religious activity that the state may not subsidize, and government must monitor the conduct of FBOs to ensure that these limits are observed.

- Indirect financial support to FBOs (e.g., beneficiary choice programs, such as school or child care vouchers) is also permitted by federal constitutional law, so long as beneficiaries have genuine, independent choices among religious and secular options. Indirect support may

Existing contracts between states and FBOs are conspicuously silent about the particular rights and responsibilities that attach to FBOs in such contracts, and the absence of contractual guidance to FBOs about constitutional and statutory limits on their use of government funds invites confusion and legal controversy.

function to subsidize religious as well as secular activity, so long as the activity satisfies the secular purpose for which the government financed it. In such programs, government may not favor or disfavor FBOs as compared to their secular counterparts.

- Many state constitutions restrict financial support to FBOs, although state courts have sometimes interpreted those restrictions in permissive ways. Such restrictions may be vulnerable to challenge on federal constitutional grounds.

- FBOs are frequently exempt from the federal prohibition on religious discrimination in employment, but they are not so exempt in every federal program. States and cities vary in their laws on the subject, and a considerable number of states and cities do NOT extend that exemption to FBOs that are receiving state or city funds. Congress may pre-empt state and local law on this subject as it applies to federally funded programs, but has not done so thus far.

- Charitable choice provisions appear in a variety of federal programs, though far from all, and permit FBOs to retain their religious identity while participating in government social welfare programs. Important variations appear among federal programs. The White House and five federal agency offices of the Faith-Based and Community Initiatives have taken significant steps over the past year to increase the participation of FBOs in federal programs.

- With a few notable exceptions, the existing contracts between states and FBOs are conspicuously silent on the subject of the particular rights and responsibilities that attach to FBOs in such contracts. This contractual silence invites confusion and legal controversy, because FBOs are not provided contractual guidance with respect to constitutional and statutory limits on their use of government funds.

I. THE FIRST AMENDMENT, U.S. CONSTITUTION

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

A. Separationist Period (late 1940s through the 1970s):

- Total prohibition of direct financial relationships between government and "pervasively sectarian institutions" (that usually meant sectarian elementary and secondary schools; Lemon, 1971).

- Partial acceptance of indirect financial relationships (transportation subsidies, schoolbook loans to families with children at sectarian schools).

- Severe doubt about the validity of school voucher programs that include religious schools (Nyquist, 1973).

- Strong prohibition on official religious speech in public schools.

B. The Incomplete Move Toward Neutrality (1980-date):

- Equal access of private religious speech to government supplied speech fora.

- Widening prohibition on official religious speech, both in and out of public schools.

- Erosion of total exclusion of pervasively sectarian entities from direct financial support (Agostini, 1997; Mitchell, 2000) (the decisions dealt only with in-kind benefits, and leave unanswered the questions raised by cash payments).

- Direct financial support permissible for secular activities, but not for specifically religious activities (e.g., worship, proselytizing, religious instruction, faith-intensive social service) (Mitchell, 2000) – Key concepts: Segregation of private support for religious activity from government support for secular activity; concerns about government monitoring (entanglement).

- Indirect financial support, through beneficiary choice – Upheld in the Cleveland voucher decision (Zelman v. Simmons-Harris, 2002), without restrictions on use of the funds – Key concepts: Neutrality between religious and secular providers; genuine beneficiary choice.

C. The Faith-Based Initiative in the Lower Courts:

- Freedom from Religion Foundation, Inc. v. McCallum (I), 179 F. Supp. 2d 950 (WD Wisconsin 2002) (direct state

support of faith-intensive, residential treatment center for substance abuse held unconstitutional).

- ACLU of Louisiana v. Foster, 2002 U.S. Dist. LEXIS 13778 (ED Louisiana) (direct support to faith-intensive teen abstinence programs, and to pervasively sectarian institutions, held unconstitutional; court orders state monitoring of expenditures).

- Freedom from Religion Foundation, Inc. v. McCallum (II), 2002 U.S. Dist. LEXIS 14177 (WD Wisconsin) (indirect support, through beneficiary choice, of same faith-intensive treatment center as in McCallum I – upheld in light of Zelman).

- American Jewish Congress v. Bost, U.S. Dist. Ct., SD Texas (2002) (in taxpayer suit to enforce the Establishment Clause, court will not order FBO to reimburse state for public monies improperly spent on religious experience in job training program).

II. STATE CONSTITUTIONAL LAW

A. Many states have constitutional provisions that limit transfer of funds from the state to FBOs. These provisions fall into a number of categories (some state constitutions have more than one such provision):

- 10 states have constitutional provisions similar in language and effect to the First Amendment to the U.S. Constitution (Alaska Const. Art. I, § 4: "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof"). These provisions are frequently construed in accord with the Establishment Clause of the U.S. Constitution.

- 37 states have constitutional provisions that explicitly forbid state financing of religious organizations or places of worship (Illinois Const., Art. 10, § 3: "Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose...").

- 29 states have constitutional provisions that explicitly forbid state financing of religious schools (Washington

Const. Art. I § 11: "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence").

- 10 states have constitutional provisions that extend these limitations to both "direct" and "indirect" financing (Florida Const., Art. I § 3: "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.)

B. State courts have at times construed such provisions to be less hostile to state financing of FBOs than one might expect from the language of the provision.

- Arizona provides a good example. Its constitution seems to impose significant limits on state aid to FBOs. Arizona Const. Art. 2, § 12: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction"; Arizona Const. Art. 2 § 12: "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation." But the Arizona Supreme Court has permitted some forms of aid to religious organizations. Kotterman v. Killian, 193 Ariz. 273, 972 P.2d 606 (1999) (Upholding tuition tax credit programs); Community Council v. Jordan, 102 Ariz. 448, 432 P.2d 460 (Ariz. 1967) (Upholding a program in which sectarian organizations were being reimbursed for aid provided to families in need.)

III. EMPLOYMENT DISCRIMINATION

Except for clergy, the Constitution neither forbids nor requires exemption for FBOs from the statutory prohibition on religious discrimination in employment.

A. Employment of clergy – significant constitutional immunity from federal, state, and local antidiscrimination law.

B. All non-clergy hiring – Federal Law:

- Broad exemption for FBOs from prohibition on religious discrimination (exemption allows discrimination based on

religious identity, religious belief, and compliance with religious norms).

- Does receipt of government funds result in an automatic loss of the federal exemption? (Disputed question, to which most courts have said no – raised again in Bellmore v. United Methodist Children's Home, Fulton County, Georgia).

- Congress may explicitly provide that participation in particular federal funding programs results in loss of the exemption (see, e.g., the Child Care and Development Fund – FBOs receiving direct grants or contracts under the program may not discriminate in employment of caregivers).

C. All non-clergy hiring – State and Local Law:

- 43 states recognize some form of exemption for FBOs from state law prohibition on religious discrimination.

- Receipt of state or local funds – loss of automatic exemption not implied from fact that FBO has received public funds (same as IIIB above).

- 18 states explicitly provide that FBOs that enter into contracts with the State do NOT retain their exemption from state nondiscrimination law. Most major cities that we surveyed forbid all entities, including FBOs, that do business with the city from engaging in religious discrimination in employment decisions.

D. Relationship between State and Federal Law:

- Exemption from federal law does not create exemption from state or local law.

- Congress may displace state or local law, but must do so explicitly.

- If Congress is silent about state and local law, that law remains in effect.

- Congress has not preempted state and local law through Charitable Choice provisions.

IV. FEDERAL PROGRAMS

FBOs have long been recipients of government grants and contracts to provide social services. Through separately-incorporated affiliates, FBOs participate in a wide variety of public programs, ranging from health care and adoption services to refugee resettlement and soup kitchens. To the extent that legislation or regulations have specifically addressed FBOs, however, the purpose has traditionally been to prohibit any religious uses of public funds. This has often led to the exclusion of those organizations that could not (or would not) completely segregate their social services from their religious activities.

A. Charitable Choice

- Over the last decade, legislative and regulatory initiatives have shifted governmental attitudes toward FBOs from one of wariness to eager engagement. The Personal Responsibility and Work Opportunities Reconciliation Act (PRWORA), enacted in 1996, effected the most significant legislative changes to the relationship between government and FBOs. Congress included a "Charitable Choice" provision in this welfare reform legislation, which provided that:

- Where non-governmental entities participate in a social service program funded under the PRWORA, FBOs cannot be excluded from participating simply because of their religious character.

- FBOs participating in such programs may retain their religious identity:

- Unless state law requires otherwise, a religious organization need not establish a separate, secularized 501(c)3 to receive government funding.

- The religious character of the FBO's governance, including its mission statement and selection of officers and directors, may be maintained.

- Religious imagery need not be removed from locations used to deliver government-financed services.

- FBOs funded through PRWORA may retain their right under federal law to prefer co-religionists in employment

decisions, though such right may be limited by state law or local anti-discrimination rules.

- Participating FBOs may not use public funds to engage in religious worship, instruction, or proselytizing.

- Participating FBOs may not require beneficiaries of services to attend religious worship or instruction as a condition of receiving government-financed services, nor may such FBOs discriminate on religious grounds in the provision of benefits. Any beneficiary that objects to receiving services from an FBO must be provided with a secular alternative.

- Charitable Choice provisions apply to the following federal programs: Temporary Aid to Needy Families, Welfare-to-Work, Community Services Block Grants, Substance Abuse and Treatment Block Grants, Projects for Assistance in Transition from Homelessness, and other discretionary grant programs for substance abuse prevention and treatment that are administered by SAMHSA.

B. A number of other federal programs specifically invite FBOs to participate but do not contain all of the Charitable Choice provisions. For example, under the Child Care and Development Fund, an FBO financed through a direct government grant or contract may not prefer co-religionists in hiring caregivers.

C. Over the past year, the Administration has taken important steps to implement the President's Faith-Based and Community Initiatives (FBCI):

- Through two executive orders, the President created the White House Office of Faith-Based and Community Initiatives, along with FBCI offices in the Departments of Justice, Education, Health & Human Services, Housing & Urban Development, and Labor. These offices have been charged with identifying and, where appropriate, removing obstacles to the participation of faith-based and community organizations in public social welfare programs. Initial reports of these offices were published in the fall of 2001; progress reports from the offices are expected later this year.

- The Department of Labor's Employment and Training Administration has awarded grants to faith-based and community organizations to encourage their participation in One Stop employment centers.

- The Compassion Capital Fund (CCF), administered by HHS, has provided nearly $30 million to support increased involvement of faith-based and community organizations in providing a broad range of government services, from aid to the homeless and at-risk children to substance abuse treatment and employment training. While the majority of CCF funding is directed to intermediate organizations that provide technical assistance to grassroots service providers, CCF also permits the intermediate organizations to make sub-grants of program funds to faith-based and community service providers.

V. STATE SOCIAL SERVICE CONTRACTS

A. We have so far collected current examples of such contracts from 36 states.

B. Many of these contracts have employment discrimination provisions (sometimes merely requiring compliance with existing state and federal law, but frequently going beyond that law by failing to provide any FBO exemption for discrimination based on religion – see part III above).

C. Very few of these contracts have any FBO-specific provisions. The only such provisions we have found thus far appear in social service contracts in Oklahoma, Texas, Wisconsin:

- Oklahoma – Specifies that FBOs may compete on an equal basis with others; protects the religious character and appearance of FBOs; prohibits religious discrimination against, and religious coercion of, beneficiaries (Department of Human Services, Solicitation for Faith-Based Intermediary Services, section 6.3.3).

- Texas - This is by far the most elaborate FBO-specific provision. It preserves employment discrimination exemptions; specifies that FBOs may compete on an equal basis with others; protects the religious character and appearance of FBOs; suggests segregation of public and private funds and limits audits to public funds; disclaims state endorsement of religious practices or expression;

denies that state objectives include "the funding of sectarian worship, instruction, or proselytization"; requires disclosure to "assisted individuals" of their right to be free of religious discrimination, and their right to choose a different provider if they object to a provider's religious character (Department of Human Services, Contract for Community Care Program, Provider Agreement, Section H).

- Wisconsin - In a section of its contract with field agencies that supervise workforce development services (welfare-to-work), a provision governing subcontracts with FBOs specifies that FBOs may compete on an equal basis with others; forbids discrimination by the prime contractor against FBOs; protects the religious character and appearance of FBOs; prohibits religious discrimination against applicants for assistance; requires the prime contractor to provide "an alternate provider of the same services, worth the same value," to participants who object to the religious character of a provider; and requires that FBO subcontractors be held to the same fiscal and accounting standards as any other provider. (Wisconsin Works and Related Program Contract, Department of Workforce Development, Par. 13.5-13.8).

D. The contractual silence in most states on many matters of special concern to FBOs is a problem area. This silence permits ambiguity and evasiveness, but also may lead FBOs and state agencies into legal trouble (see the McCallum and Foster decisions, Part I above). The questions such contracts might constructively address include:

- Preserving religious character of the FBO (symbols, icons, etc.).
- Selecting beneficiaries (religious discrimination).
- Alerting beneficiaries to secular options.
- Specifying with particularity the religious activities for which the state is constitutionally forbidden to pay.
- Segregating private support for religious activity from public support for secular service, and accounting properly for these segregated activities.

APPENDICES

Appendix A contains detailed information about state constitutional restrictions on funding of FBOs.

Appendix B contains detailed information about state and local antidiscrimination law as it applies to FBOs.

Appendix C contains model provisions for government contracts with FBOs, along with sample state provisions.

Introduction

Partnerships between government and faith-based organizations in America are hardly new. In one form or another, such partnerships have existed for hundreds of years. Indeed, so much of the history of charitable work in the U.S. recounts the activities of faith-based organizations that we are tempted to say that government is doing religious work when it helps the poor or otherwise tries to better the situation of those in need. There are, of course, secular justifications for such efforts, on which the state appropriately relies when it undertakes them.

So much of the history of charitable work in the U.S. recounts the activities of faith-based organizations that we are tempted to say that government is doing religious work when it helps the poor or otherwise tries to better the situation of those in need. However, our constitutional law, at varying times and in varying degrees, has imposed limits on the government's authority to finance the delivery of social services by sectarian institutions, or the delivery of services with a sectarian character.

Tension exists, however, between this pattern of partnerships and various aspects of our legal and constitutional tradition. Our constitutional law, at varying times and in varying degrees, has imposed limits on the government's authority to finance the delivery of social services by sectarian institutions, or the delivery of services with a sectarian character. Federal employment law ordinarily permits FBOs engaged in such services to limit their hiring to co-religionists, but specific federal programs occasionally outlaw such hiring preferences.

When our view shifts to the states, similar questions arise, and they are complicated by the phenomena of the division of power in the federal system and non-uniformity among the states. States have their own constitutional arrangements respecting relations between FBOs and the government, but these arrangements are subject to federal constitutional limitations. Likewise, states and units of local government may have their own rules on the subject of employment discrimination, and these rules frequently are more stringent in situations in which government is paying for the delivery of service. These rules of state and local government, whether they arise from constitution, statute, or contract, are also subject to being preempted by federal authority, especially in situations in which states and local government are depending upon federal financial support.

In what follows, we systematically address questions identified in this Introduction. Part I discusses the development of federal constitutional law on the relations between religion and the state, focusing in particular on government financial support for

delivery of services by FBOs. Part I-A analyzes the evolution of Supreme Court precedent in the field. Part I-B provides an in-depth look at several very important cases, all involving government grants to FBOs, that have been decided in the lower federal and state courts in the past 12 months. Part II focuses on state constitutional law, and includes analysis of the impediments that various state provisions may create to state or local partnerships with FBOs, and of the groundswell of federal constitutional objection to this body of state constitutional law. Part III focuses on the politically charged subject of employment discrimination by FBOs. The emphasis of Part III-A is federal law; Part III-B canvasses state and local law, and Part III-C briefly discusses the relationships, actual and potential, between federal and state law on the subject. Part IV describes the recent history of federal programs that have specifically included FBOs, and then provides a close analysis of selected federal social welfare programs. Finally, Part V discusses the oft-overlooked topic of government contracts with FBOs, and brings this report full circle by connecting these contractual concerns with matters of federal constitutional law discussed in Part I.

I. Federal Constitutional Law

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." (U.S. Constitution, Amendment I).

MAJOR FINDINGS:

- Direct financial support to FBOs is now permitted by federal constitutional law, but that support must be limited to secular activity. FBOs may not be favored or disfavored as compared with their secular counterparts. Government must improve its ability and willingness to define with precision the scope of religious activity that the state may not subsidize, and government must monitor the conduct of FBOs to ensure that these limits are observed.

- Indirect financial support to FBOs (e.g., beneficiary choice programs, such as school or child care vouchers) is also permitted by federal constitutional law, so long as beneficiaries have genuine, independent choices among religious and secular options. Indirect support may function to subsidize religious as well as secular activity, so long as the activity satisfies the secular purpose for which the government financed it. In such programs, government may not favor or disfavor FBOs as compared to their secular counterparts.

A. The Evolution of Establishment Clause Norms.

Legal principles in all fields change over time, but Establishment Clause law has exhibited an unusually rapid rate of transformation. Twenty years ago, informed and disinterested commentators would have said that direct financing by government of social services delivered by faith-intensive organizations is unconstitutional,[1] even if the services themselves have a secular character (e.g., food or shelter). The same commentators would have said that indirect financing (by way of vouchers, tax credits, etc., in which beneficiaries mediate between the state and faith-intensive organizations) is deeply questionable on constitutional grounds.

[1] Some major, faith-affiliated charitable organizations, like Catholic Charities, Lutheran Social Services, and Jewish Family Services, have received government contracts and grants for many years, but these organizations are secularized and professional rather than faith-intensive in their character.

Although current law still forbids direct government support of specifically religious activities, such as worship or religious counseling, the law no longer forbids the provision of direct aid to religious organizations for their secular activities.

By the summer of 2002, disinterested commentators would have a different story to tell. Although current law still forbids direct government support of specifically religious activities, such as worship or religious counseling, the law no longer forbids the provision of direct aid to religious organizations for their secular activities. In addition, and so long as certain key conditions are met, it quite clearly permits indirect financing of any of their activities.

This tale of evolution can be told in many ways, including elaborate description of relevant Supreme Court decisions, recounting of cultural and political history, and analysis of key changes in Supreme Court personnel. Our effort will be thematic and brief, emphasizing key moments, important doctrines, and, most of all, significant trends. The story can best be understood through the prism of education; fully three-fourths of all Establishment Clause decisions in the Supreme Court have involved either public financing of education in religiously affiliated institutions, or religious expression in public schools. Nevertheless, the principles that have been articulated and applied in the context of education also apply, modified at times by considerations of context, in other service settings as well.

1. The Rise of the Separationist Paradigm (1947-1980)

Prior to the middle of the 20th century, there were very few Supreme Court decisions involving the Establishment Clause of the First Amendment. Beginning in 1947, however, the Court became increasingly involved in policing the boundaries of government support for religion and religious institutions. In Everson v. Board of Education,[2] the Court interpreted the 14th Amendment to limit states and localities as well as the federal government by the prohibitions of the Clause. Although Everson upheld a program of reimbursement of families for the costs of public transportation to schools, public or private (including religious schools), the Court announced a strong Separationist philosophy. A bare majority upheld the transportation program, saying it went to the verge of state power to support education in religious schools; four dissenting Justices took an even stronger Separationist line, and would have invalidated the program. The Court opinions explicitly take note of the phenomenon that Roman Catholic schools would be the principal beneficiary of programs to

[2] 330 U.S. 1 (1947).

aid private education, and a number of scholars have argued that anti-Catholic sentiment – hardly unheard of in the U.S. in its first century and one-half – animated the Separationist content reflected in the Everson opinions.

The themes and tensions reflected in Everson remained on the surface for the next thirty years. Separationism as a philosophy entailed the constitutionally distinctive treatment of religion, either by conferring special privileges upon it (by way of the Free Exercise Clause) or by imposing certain disability from government benefits upon it (by way of the Establishment Clause). Nonestablishment themes certainly predominated over Free Exercise themes, however, in this era.[3] In a series of decisions, heavily concentrated in the 1970's, the Supreme Court ruled that states could not provide any substantial financial assistance, in cash or in kind, directly to sectarian elementary schools. The group of schools involved in these decisions tended to be Catholic schools, and the Court's rulings followed a predictable pattern. The Court characterized such schools as "pervasively sectarian" – a label that would thereafter grow in importance and may still carry some legal significance – and consistently held that aid to these schools was unconstitutional. The judicial formula that grew out of these cases crystallized in the oft-cited decision in Lemon v. Kurtzman.[4] To survive constitutional review, aid programs must have a secular purpose and primarily secular effects, and must not excessively entangle religious institutions with the state. In Lemon itself, the Court used the formula to invalidate a program of salary supplements for teachers of secular subjects (e.g., mathematics, modern foreign languages) in private secondary schools. Such a program, the Court concluded, would inevitably have a primary effect of advancing religion because of the schools' heavily sectarian character, or would excessively entangle religious schools and the state as a result of the need to monitor the secularity of the classes taught by the subsidized teachers.

Separationism as a philosophy entailed the constitutionally distinctive treatment of religion, either by conferring special privileges upon it (by way of the Free Exercise Clause) or by imposing certain disability from government benefits upon it (by way of the Establishment Clause).

The Court soon extended the methodology of Lemon to virtually all programs of direct assistance to the educational programs of sectarian schools.[5] There were, however, several

[3] The cases in which courts refused to resolve disputes that arise within religious organizations concerning property or personnel, involve both nonestablishment and free exercise themes of Separationism. See, e.g., Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

[4] 403 U.S. 602 (1971).

[5] See, e.g., Meek v. Pittenger, 421 U.S. 349 (1975), overruled, Mitchell v. Helms, 530 U.S. 793 (2000).

important exceptions to this pattern. First, the Court treated higher education in a manner quite distinct from elementary and secondary education. Although the Court continued to insist that the state not pay for specifically religious instruction or worship, it was willing to presume that religiously affiliated colleges and universities did not engage in the sort of systematic indoctrination associated with religious education of the young.[6] Second, the Court occasionally upheld programs of indirect, in-kind assistance to families with children in sectarian schools. The best example of this is Board of Education v. Allen,[7] in which the Court approved of New York's program of loaning schoolbooks to such families, so long as the books were used or approved for use in the public schools (i.e., the books were secular in content).

When, however, New York State attempted to rely on this device of indirect transmission of aid to sectarian schools in a scheme of cash grants and tax credits for low to middle income families with children in private school, the Court, in Committee for Public Education v. Nyquist,[8] refused to extend the rationale of Allen. Seeing the program as a thinly veiled device to bail out the financially troubled Catholic schools in the State, the Court concluded that its primary effects included aid to sectarian teaching as well as what the Court described as "political divisiveness" along sectarian lines, and held it to be unconstitutional.

Decisions limiting religious compulsion of children, state competition with families over religious training, and state assumption of a religious voice of its own have grown in stature and importance as the years have gone by.

The other major development in the law of the Establishment Clause occurring in this period involved religious speech by the government or its agents. In the early 1960's, the Court ruled that public schools could not sponsor religious exercises, such as official prayer or Bible reading.[9] The concerns reflected in these decisions – religious compulsion of children, state competition with families over religious training, and state assumption of a religious voice of its own – have grown in stature and importance as the years have gone by. Indeed, they have moved outside of the realm of schools to a more general prohibition on state expression of religious themes.

[6] See, e.g., Tilton v. Richardson, 403 U.S. 672 (1971). Even in institutions of higher learning, the Court insisted that state aid finance only secular functions.

[7] 392 U.S. 236 (1968).

[8] 413 U.S. 756 (1973).

[9] Engel v. Vitale, 370 U.S. 421 (1962); Abington Sch. Dist. v. Schemmp, 374 U.S. 203 (1963).

2. The Rise of the Competing Paradigm of Neutrality (1980-1999)

Beginning in the early 1980's, the constitutional law of religion began to change. In a number of contexts, the paradigm of Separation – pursuant to which religion received constitutionally distinctive treatment – receded, and the paradigm of Neutrality – pursuant to which religion is to be treated identically with its secular counterparts – expanded. The context in which Neutrality arguments have had the most influence is that of equal access by private speakers to public facilities made available in support of speech – access to public property,[10] for example, or printing subsidies for student groups.[11] In decision after decision, from the early 1980's to date, the Court has ruled that, when government creates a forum for speech, it must afford private religious speech the same rights of access and support that government is providing to private secular speech.

Beginning in the early 1980's, the paradigm of Neutrality – pursuant to which religion is to be treated identically with its secular counterparts – expanded.

The second context in which Neutrality made significant gains in this period concerns state financing of services provided by FBOs. Several decisions involved government subsidies of individuals or families in ways that operated to benefit religious institutions or causes. In Mueller v. Allen,[12] the Court upheld an income tax deduction for private school tuition in Minnesota's state income tax, despite the fact that the great bulk of the deductions arose from tuition payments at sectarian schools. This cast doubt on the Nyquist decision, which had invalidated analogous state income tax credits. A few years later, in Witters v. Washington Department of Services for the Blind,[13] the Court approved, over Establishment Clause objection, the use of a state vocational scholarship for the blind by a student at a Bible college that specialized in training students for careers at religious institutions. In both Mueller and Witters, the Court emphasized the role of intervening beneficiary choice and religious neutrality. Both cases involved private, not governmental, decisions, to use the services of religious organizations; and both permitted beneficiaries to choose freely between religious and secular providers.

[10] Widmar v. Vincent, 454 U.S. 263 (1981); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995).
[11] Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819 (1995).
[12] 463 U.S. 388 (1983).
[13] 474 U.S. 481 (1986).

With respect to direct financing, this period did not produce dramatic alteration of the law declared during the Separationist period, but several important decisions did signal changes on the horizon. The most important of these for the charitable choice movement is Bowen v. Kendrick,[14] in which the Court upheld against facial attack the Adolescent Family Life Act (discussed in more detail in Part IV below). The Act was aimed at educating adolescents on matters of sexuality and reproduction, and it required prospective state and local grantees of funds to include religious organizations, among others, as subgrantees in their grant proposals.[15] In a significant departure from prior practice, the Court ruled that such a program, which treated religious and secular organizations neutrally, could not be challenged on its face for its overall tendency to advance religion. The Court suggested that if challengers proved that the implementation of specific grants involved distinctively religious activities, such as worship or proselytizing, or that grants were being distributed to "pervasively sectarian organizations," courts would enjoin those particular grants. By requiring, as a predicate of constitutional violation, proof of religious uses of particular grants, and by refusing to enjoin the entire program based on proof of episodic violations, Bowen rendered constitutional attack on federal programs that include FBOs considerably more expensive and difficult than prior litigation against state aid to sectarian schools.

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The other major development in this period with respect to matters of direct financing of aid to FBOs is the Court's abrupt about-face in the litigation over federal support for state and local programs of remedial education. In 1985, in Aguilar v. Felton,[16] the Court upheld an injunction against the provision of public employees to sectarian schools (included among a broad class of public and private schools in educationally deprived areas) for a remedial program in reading and arithmetic. The Aguilar majority asserted that such a program would inevitably and excessively entangle these public employees in the religious education of

[14] 487 U.S. 589 (1988).

[15] The Court divided 5-4 in *Bowen*, but every Justice treated the case as if there were absolutely no constitutional distinctions between grantees and subgrantees; to the extent they were recipients of federal funds, the Establishment Clause applied with full force to the actions of both. This has important implications for the Compassion Capital Fund, see part IV below, and its use of private, intermediary organizations to make grants to FBOs. There is no reason to believe that the structure of grant and subgrant somehow liberates the subgrants from constitutional limitations.

[16] 473 U.S. 402 (1985), overruled, Agostini v. Felton, 521 U.S. 203 (1997).

children in sectarian schools. A dozen years later, however, in Agostini v. Felton,[17] the Court overruled Aguilar, holding that the provision of public employees as remedial teachers did not violate the Constitution. Agostini communicated a new message about the Court's attitude toward such programs; the key question, the majority said, was no longer whether the program had a "primary effect" of advancing religion in some general way. Instead, the Court focused on the more precise question of whether the state was responsible for the religious indoctrination of students. In answering this question, the Court refused to presume that public employees, teaching secular subjects, would be co-opted into participation in religious education. Moreover, there was no mention in the Agostini opinion about the pervasively sectarian character of some of the aided schools, although there was every reason to believe that some of the schools aided were of the character that had once earned this appellation. This silence about the "character" of the schools, and the emphasis on whether the aid itself would lead to government-subsidized religious activity, revealed an important trend in cases involving direct government support of FBOs.

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The only pro-Separationist developments in this period concerned government speech on religious matters. For the first time, the Court extended that concern beyond the walls of public schoolhouses. Although the Court upheld a state legislative chaplaincy,[18] and upheld government support for a Christmas Creche surrounded by other, more secular seasonal symbols,[19] it ruled unconstitutional the government's display of an unadorned Creche in a county courthouse.[20] The requirement that government not act to endorse a religious belief emerged from this line of decisions, and that requirement has been tremendously influential in the lower courts' efforts to grapple with cases involving the Ten Commandments and other state-sponsored display of religious symbols or texts. Within public schools, the Court deepened its commitment to excluding publicly sponsored faith messages – first, in a case involving Alabama's moment of silence for "prayer or meditation,"[21] and then in the widely noticed decision in Lee v.

[17] 521 U.S. 203 (1997).
[18] Marsh v. Chambers, 463 U.S. 783 (1983).
[19] Lynch v. Donnelly, 465 U.S. 668 (1984).
[20] Allegheny County v. ACLU, 492 U.S. 573 (1989).
[21] Wallace v. Jaffree, 472 U.S. 38 (1985).

Weisman,[22] forbidding officially-sponsored prayers at public school commencements.

The Establishment Clause trends in the last two decades of the twentieth century can be succinctly summarized: equal access for religious speech to public fora in which private speech is welcome; expansion of aid possibilities, both direct and indirect, so long as recipient institutions are defined in a religion-neutral way and the aid is given for a secular purpose; and an accelerating concern that government not speak in a religious voice. These trends have helped to foster religious pluralism by including non-governmental religious views in public debates, permitting religious institutions to play a role in public programs, and disabling the state from either discriminating against religious views or adopting such views as its own.

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3. Dramatic Recent Developments (2000–present)

The trends previously described have crystallized in several major decisions in the last several years. First, in June of 2000, the Supreme Court ruled that public school systems may not sponsor student-delivered religious messages at high school sporting events. This decision, in Santa Fe Independent School District v. Doe,[23] sharpened the distinction between cases of private speech – in which equal access to public fora for religious variants is required – and publicly sponsored speech, in which the state machinery selects the relevant subject matter and speakers to address it. Because the school system sponsored the pre-game prayer, the Constitution forbade it.

The Supreme Court's most recent decisions about state financing of FBOs are path breaking for the faith-based initiative. In Mitchell v. Helms,[24] the Court upheld a program that provided direct aid to public and private schools, both religious and nonreligious. More recently, in Zelman v. Simmons-Harris,[25] the Court

[22] 505 U.S. 577 (1992).
[23] 530 U.S. 290 (2000).
[24] 530 U.S. 793 (2000).
[25] 536 U.S. ___ (2002).

upheld a school voucher program that permitted students to redeem the vouchers at private schools, both religious and nonreligious.

Mitchell v. Helms overruled several of the decisions from the Separationist era in upholding a federal-state cooperative program that loaned educational materials, including books, computers, software, and video players, to schools in educationally disadvantaged neighborhoods.[26] The Court in Mitchell splintered into three groups. A plurality of four Justices adopted an explicit policy of Neutralism with respect to direct financing of FBOs. For this group, any program that pursues secular ends and treats secular and religious organizations equally is consistent with the Establishment Clause, even if the program directly subsidizes religious activity. These Justices also emphatically repudiated the idea that some entities are so "pervasively sectarian" that they are permanently disqualified from partnerships with government. Deriding this notion as a product of anti-Catholic animus originating in 18th and 19th century America and carrying over into the Separationist period, they called for its explicit repudiation from our constitutional law.

Three Justices dissented in Mitchell, and hewed to the conventional Separationist line. They insisted that government may not transfer to FBOs anything of value that is "reasonably divertible" to religious use, a category that would include all instructional material and equipment.

As articulated by the plurality decision in Mitchell v. Helms, the law on direct financing of FBOs focuses entirely on the content of the aid and restrictions on its use, rather than on the character of the aid-receiving institutions.

Mitchell was resolved on the votes and concurring opinion of Justices O'Connor and Breyer, whose middle-ground position now represents the law on direct financing of FBOs. Although they did not join in the explicit rejection of the concept of "pervasively sectarian institutions" as forbidden beneficiaries, they focused entirely on the content of the aid and restrictions on its use, rather than on the character of the aid-receiving institutions. Thus, their opinion can only be understood as supporting an activity-based, rather than institution-based, limit on direct financing of FBOs.[27] For Justices O'Connor and Breyer, the key question is whether government is responsible for religious indoctrination. Explicitly

[26] The court in *Mitchell* expressly overruled Meek v. Pittenger, 421 U.S. 349 (1975), and Wolman v. Walter, 433 U.S. 229 (1977).

[27] As the concurring opinion put it, "To establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes." *Mitchell*, 530 U.S. at 857. Because the Court divided 4-2-3 in *Mitchell*, and the law now rests on the position of the middle two Justices, this position is quite unstable. Changes in Supreme Court personnel in the near future may have considerable impact upon the content of Establishment Clause norms.

rejecting both the full-fledged Neutralism of the plurality and the test of "reasonable divertibility" of the dissent, they concluded that the loan of materials at issue in Mitchell was constitutionally acceptable, because the government had legally restricted those materials to secular uses and the challengers had not demonstrated that the recipient schools had significantly breached those restrictions. Thus, the controlling principle in cases of direct assistance to FBOs is that such assistance may not be given for, or diverted to, activities that promote religious indoctrination.

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As evidenced in lower court decisions concerning the Charitable Choice movement, described later in Part I-B, the O'Connor-Breyer opinion in Mitchell explains the constitutional necessity of excluding religious methods of service and instruction from the ambit of government-supported programs. It does not, however, purport to answer more subtle questions, such as whether programs that distribute funds instead of in-kind materials to FBOs are more constitutionally problematic,[28] or (a related question) whether the combination of government monitoring and FBO efforts to account for the secular deployment of such funds will create the sort of church-state entanglements that might have been viewed as constitutionally troublesome at the height of the Separationist period.

The last and most widely noted development in this field occurred in June of 2002, when the Supreme Court upheld the Ohio Scholarship plan, which offered education vouchers to some 3000 students in the Cleveland public schools, in Zelman v. Simmons-Harris. The Court in Zelman did not splinter into three non-majority factions, as it had in Mitchell. The Court's opinion was joined by five Justices – those from the Mitchell plurality, plus Justice O'Connor, who many observers had thought might concur separately, or perhaps even join with those who had dissented in Mitchell (along with Justice Breyer) to produce a contrary result.

The Zelman opinion relies heavily on several key decisions from the 1980's, in which choice by a private beneficiary severs the connection between the state and the religious entities that

[28] *Mitchell* itself involved in-kind benefits, not cash, and the concurring opinion hints at the possibility of greater concern over cash programs, ostensibly on the ground that the problems of diversion and monitoring may be greater in such programs. But the concurring opinion nowhere proclaims that cash transfers are prohibited per se. Such a per se rule would be inconsistent with the opinion's overarching principle, which is that First Amendment violations depend upon proof "that the aid in question actually is, or has been, used for religious purposes." Presumably, cash transfers require the clearest possible safeguards against diversion, safeguards which must be designed to avoid entanglement concerns.

receive state benefits as a result of those choices. In so doing, it breaks sharply from the Nyquist precedent, in which the substantiality of the aid conferred upon FBOs appeared to be a crucial consideration. In Zelman, the Court's only concerns appear to be 1) whether the state was neutral between secular and religious private schools, and 2) whether beneficiaries enjoyed "genuine and independent choice" among the various educational options available to them. Because the Court majority considers among those choices all of the educational options, private and public, open to parents of children in the Cleveland public schools, it is satisfied that voucher-supported children end up in sectarian schools only through the independent choices of their parents. The State, therefore, is not deemed to be responsible for any religious indoctrination that voucher students might receive in those schools.

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Justice O'Connor's separate concurring opinion, which emphasizes the subjective qualities of the choices made by Cleveland parents, suggests the possibility that Zelman is not quite as broad a validation of voucher programs as it seems. In contexts other than education, for example, publicly provided options may be many fewer than was the case in Zelman, and the question of genuine private choice may be more difficult. For now, however, Zelman has opened wide the federal constitutional doors for beneficiary-choice financing of FBOs, as is demonstrated in the discussion of the McCallum case, which follows. Most significantly, the restriction on government support of specifically religious activities, such as worship or religious instruction, does not operate in the universe of beneficiary choice programs. If properly designed and implemented, such programs represent an important solution to the federal constitutional problems posed by government relationships with faith-intensive private entities.[29]

B. The Application of Current Establishment Clause Norms in Cases Involving the Faith-Based Initiative

The themes and trends highlighted previously in Part I-A., have already appeared in sharp relief in a series of decisions in the lower courts involving government service partnerships with FBOs. In particular, the continuing prohibition on direct financing of religious experience has played a significant part in several

[29] State constitutional law may, however, remain an impediment in a number of states, in which the prohibition on church-state financial relationships is broader than that contained in the federal constitution as currently construed. See Part II, below.

decisions, and Zelman's broad approval of beneficiary choice plans has led to an important victory for the faith-based initiative. Other questions that have arisen include the crucial remedial question of whether FBOs may be forced to make restitution of funds improperly spent on religious experience; whether the ban on direct financing of "pervasively sectarian institutions" retains any vitality; and the highly significant question of the extent to which government should and may monitor expenditures by FBOs to ensure that government is paying for secular experience only.

LEADING CASES:[30]

1. Freedom from Religion Foundation, Inc. v. McCallum (W.D. Wisconsin, 2002).

This case involves two separate programs (and two discrete judicial decisions) involving the State of Wisconsin and Faith Works, Inc, a faith-intensive, long-term residential treatment center for substance abuse. Faith Works – which had formerly employed Robert Polito, now head of the FBCI Office at HHS, as its Executive Director – describes its approach as a "faith-enhanced" version of the 12-Step Program (AA), coupled with individual counseling. The organization employs full-time counselors, who devote approximately 20% of their 40-hour work weeks to addressing matters of faith and spirituality.

In one of the programs considered in the case, the State's Department of Workforce Development ("DWD") entered into a direct financing arrangement with Faith Works, pursuant to which the state would pay the provider a fixed sum per year to deliver long-term treatment for substance abuse to a group of men referred because of their status as welfare recipients. In the other, the State's Department of Corrections ("DOC") offered men in trouble under the state's drug laws the option of drug treatment in lieu of incarceration. Faith Works was among the providers for such treatment; indeed, it was the only long-term provider among the options offered. Under the DOC program, Faith Works received payment only as a result of offender selection of, and participation in, the program.

The two programs are thus excellent examples of direct financing (the DWD program) and indirect financing (the DOC program) of FBOs by the government. In two opinions, issued six months apart, the federal district court for the Western District of

[30] More detailed descriptions and analyses of each of these cases, as well as others, are available at the Roundtable website (www.religionandsocialpolicy.org, click on "Legal" at the top of the home page).

Wisconsin (Crabb, J.) astutely tracked the changing arc of Establishment Clause law previously described in this report. In Freedom from Religion Foundation, Inc. v. McCallum (McCallum I),[31] decided in January, 2002, the Court ruled that the direct grant from DWD to Faith Works violated the Establishment Clause. The opinion in McCallum I, likely to become a model for other cases in this field, recognizes that the law that governs direct financing of FBOs permits government contracts with such organizations, but requires those contractual arrangements to be limited to the financially segregated, secular activities of such organizations.

Because the organization commingled its public and private funds, the court found that the state bore responsibility for directly financing the religious experience of program participants.

In reaching this conclusion, the court analyzed the leading Supreme Court decisions in the field of direct government assistance to faith-based providers of social services. Synthesizing the decisions in Bowen v. Kendrick, Agostini v. Felton, and Mitchell v. Helms (all previously discussed in Part I-A), the court concluded that the enterprise of Charitable Choice, as reflected in the welfare reform enactments of 1996 pursuant to which the DWD grant had been made, was constitutional on its face. The court identified the central question raised by this grant as whether any religious indoctrination that occurred in the DWD-financed program was "attributable to the state." It then examined closely the details of the program, including what the grant paid for and the degree of religious experience that was included in the program. With respect to the particulars of the program, the court found that state funds were supporting counselor salaries as well as other program expenses. Counselors were participating in, among other things, faith-enhanced AA meetings[32] at which attendance by participants was mandatory, and counselors were always available "to facilitate transformation of mind and soul of participants." Accordingly, the court found that the state bore responsibility for directly financing the religious experience of program participants.

The court rejected the argument by Faith Works that only 20% of counselor time was devoted to spiritual counseling, and that Faith Works raised non-governmental funds sufficient to support that 20%. Because the organization commingled its public

[31] 179 F. Supp. 2d 950 (WD Wisc. 2002).

[32] A mounting series of lower court decisions has repeatedly concluded that 12-Step programs such as Alcoholics Anonymous, even without the faith-enhancement added by Faith Works, are religious in content and may not be subsidized by the state, see DiStefano v. Emergency Housing Group, Inc., 247 F.3d 397 (2d Cir. 2001), or made an unavoidable obligation of parole or probation, see Warner v. Orange County Department of Probation, 115 F.3d 1068 (3d Cir. 1999).

and private funds, and expected that spiritual activities would be integrated into all of the counselors' responsibilities, the government was effectively paying for religious experience for participants. Although the court noted that the documents governing the grant specified that "grant monies may not be used to attempt to support either religious or antireligious activities," the court also observed that the DWD's agents ignored the faith components of the program (obvious from the organization's mission statement, employee handbook, and its proposal to DWD) and never communicated to Faith Works that state funds should not be allocated to religious activities. The court ruled that the state must show that it has an adequate system in place to safeguard against direct state financial support for religious activity, and that unenforced, boilerplate language in the contract would not be sufficient for this purpose. The court ruled that the DWD funding of Faith Works violates the Establishment Clause and ordered the state "to cease all funding of Faith Works through the [DWD] discretionary grant as it is currently implemented."

At the time of its ruling on the DWD grant, the court withheld an opinion on the DOC program, which it perceived as different because of the beneficiary choice feature. The Court held a hearing focused on the qualities of that choice, and then, in July, 2002, ruled that the DOC program did not offend the Establishment Clause of the federal Constitution. In Freedom from Religion Foundation, Inc. v. McCallum (McCallum II),[33] the district court drew heavily from the Supreme Court's recent decision in Zelman v. Simmons-Harris. Judge Crabb said that the chief question to be resolved was "whether offenders under the supervision of the department who participate in the Faith Works program do so of their own independent, private choice." To resolve this issue, Judge Crabb focused on the DOC's referral process, and based her decision on two considerations. First, she determined that the DOC's policy required its agents to offer a secular treatment alternative to offenders, and to inform them that they were not required to attend Faith Works if they objected to its religious content. DOC was able to document not only its general policy, but the specific steps its agents had taken to inform the offenders referred to Faith Works of their options, and the fact that these offenders had affirmatively selected Faith Works. Second, the judge found that "there is no evidence suggesting that offenders who reject a particular program are punished in any way." Following Zelman, Judge Crabb declined to presume that the state

In 'McCallum II,' the burden was on plaintiffs to show that the offenders' apparent freedom of choice of a residential drug treatment program was illusory, and the plaintiffs did not meet this burden.

[33] 2002 U.S. Dist. LEXIS 14177 (W.D. Wisc.).

had limited offenders' choices to religious providers. Instead, she placed the burden on plaintiffs to show that the offenders' apparent freedom of choice was illusory, and the plaintiffs did not meet this burden.[34] The plaintiffs have appealed the decision to the U.S. Court of Appeals for the Seventh Circuit.

2. American Civil Liberties Union of Louisiana v. Foster, 2002 U.S. Dist LEXIS 13778 (E.D. Louisiana 2002).

This decision, rendered in June 2002, represents intriguing variations on the themes of McCallum I. The case arose out of the Governor's Program on Abstinence ("GPA"), which made a series of grants for the education of teen-age youth on matters of sexual abstinence. The ACLU of Louisiana filed suit, alleging that a number of these grants had been used to finance religiously based abstinence messages and that some grants had been made to "pervasively sectarian" organizations. The ACLU documented its allegations with copies of reports, some of which listed highly sectarian activities,[35] from grantees to the GPA.

In ACLU v. Foster, the court ordered the state contracting agency to install an oversight program, visit funded programs, and provide written notification of constitutional violations to grantees.

One month after the suit was filed, the Court issued a preliminary injunction against the state officers in charge of the GPA. The injunction included several elements. First, the court ordered the GPA to stop disbursing funds to organizations that use the funds to convey religious messages or advance religion. This part of the order requires the GPA office, which the court acknowledged was understaffed, to install an oversight program which must include review of program curricula, visits to programs by GPA employees, and written notification of constitutional violations to grantees.[36]

Second, the court ordered the GPA to stop making grants to "pervasively sectarian institutions," which the court defined as

[34] That the choosers may have been both substance-dependent and under the strong influence of DOC officers might have given the district court some reason to hesitate before concluding that the choices being made here were genuine and independent. But the plaintiffs did not litigate this point aggressively, and we cannot say the district court was wrong on the record before it.

[35] The reports included references to the use of GPA funds to support prayer at pro-life rallies near abortion clinics, and to support Christmastime abstinence programs at which the concept of virgin birth was emphasized.

[36] This portion of the court's order and opinion matches up almost perfectly with the approach taken in *McCallum* I, above. The requirement of monitoring seems essential to avoid constitutional violations, but the requirement also raises difficult issues of entanglement between state officials and FBO representatives. To date, no court evaluating a program that has arisen as a part of the faith-based initiative has grappled with such issues, which once were a mainstay of Supreme Court opinions. See Lemon v. Kurtzman, 403 U.S. 602 (1971). If monitoring programs go into place, as these decisions suggest they must, courts, administrators, FBOs and others eventually will have to confront these questions.

"institutions in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." We think that this part of the order is inconsistent with the trend in the Supreme Court to cease reliance on the concept of "pervasively sectarian organizations," and to look at the activities financed rather than the general character of the entity in which they are being financed. Both Agostini and Mitchell, previously discussed in Part I-A, in fact approved programs of aid to schools without regard to the degree of sectarian atmosphere at the recipient institutions. The state's lawyers apparently did not advance this argument, however, and the breadth of the court's order may have been a product of this omission.

If courts are to tolerate the inclusion of FBOs as service providers, some degree of FBO-state interaction over the subject of constitutional boundaries must occur. The only way to avoid such interaction is to permit funding of religious activities, or to exclude FBOs categorically, neither of which seems consistent with the current law.

In mid-November, 2002, the parties in Foster announced that they had reached a settlement agreement. The agreement reveals sensitivity to many of the concerns we previously noted as well as in our Roundtable website comment on the decision (www.religionandsocialpolicy.org). First, the parties agreed to have the court vacate that portion of its preliminary injunction that ordered the GPA "to cease and desist from disbursing funds to institutions in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." This portion of the injunction, which focused on the religious character of FBOs as "pervasively sectarian" rather than more precisely on the character of the abstinence program, seemed to us legally questionable. Second, with respect to restrictions on religious activities by GPA grantees, the settlement agreement is very broad and sweeping in its prohibitions on the authority of providers to engage in religious activity with GPA funds. Among the operative provisions is III.B.1., which requires contracts between the GPA and providers to include the following language:

"The contractor understands and agrees that the contractor shall not convey religious messages, or promote or advocate religion in any way in any activity, event or material sponsored or financially supported in whole or in part by the GPA or the GPA's funds. The contractor further understands that the GPA may terminate its contract and cease funding to it should the contractor [violate the above restriction]."

Third, the agreement contemplates a variety of mechanisms for monitoring compliance with it. Included among these are: 1) a procedure for receiving outside complaints to the GPA, and

prescribed processes for responding to such complaints; 2) monthly reports to the GPA from providers, which must include an attestation by the provider that it has complied fully with the prohibition on religious activity with GPA funds; 3) submission by providers to the GPA of all lesson plans and curricula on abstinence; and 4) "quarterly in-person interview[s]" of providers by GPA personnel. We note here that the monitoring mechanisms seem designed to permit ordinary compliance without elaborate and frequent interaction between providers and government personnel. Nevertheless, in the event of issues concerning compliance, interaction of that character is inevitable. If courts are to tolerate the inclusion of FBOs in programs such as this, some degree of FBO-state interaction over the subject of constitutional boundaries must occur. The only way to avoid such interaction is to permit funding of religious activities, or to exclude FBOs categorically, neither of which seems consistent with the current law.

3. American Jewish Congress v. Bost (S.D. Texas, 2002).

This case involved a small contract, now expired, which gave rise to an important dispute over the appropriate remedy in cases in which FBOs spend state funds in ways that violate the Constitution. In 1996, a number of churches and businesses in Brenham, Texas, came together to form the Jobs Partnership of Washington County. Modeled on a successful program in Raleigh, North Carolina, the Jobs Partnership provided training in basic employment skills, such as punctuality and appropriate behavior on the job, and also helped trainees to prepare for job interviews. The curriculum of the Jobs Partnership intertwined these basic employment skills with biblical study and teaching; the program's directors asserted that religious and moral transformation is an integral component of success in moving participants from unemployment to employment.

The program's directors asserted that religious and moral transformation is an integral component of success in moving participants from unemployment to employment.

In 1999, the Jobs Partnership received an $8000 contract from the Texas Department of Human Services (DHS) to support the program's mission of preparing the unemployed for work. The contract provided that the state's funds were to be used to pay a portion of the director's salary. Rev. George Nelson, the program's director, supervised both the religious and non-religious components of the program. Although the contract between the Jobs Partnership and DHS specified that "no state expenditures can have as their objective the funding of sectarian worship, instruction, or proselytization," the

Partnership made no effort to segregate religious and secular portions of the Program.

The American Jewish Congress and the Texas Civil Rights Project brought suit against the Texas DHS and the Jobs Partnership, claiming that the contract violated the Establishment Clause. The plaintiffs asked the court to order a halt to this and all similar contracts between the state of Texas and faith-based programs, and also asked the court to order reimbursement of the $8000 that DHS paid the Jobs Partnership under the contract. The district court dismissed the case as moot because the contract had already ended, and DHS did not plan to renew the contract with the Jobs Partnership. The plaintiffs appealed, and in May 2002, the U.S. Court of Appeals for the Fifth Circuit affirmed the district court's ruling that injunctive relief was unnecessary, but instructed the district court to consider whether the Jobs Partnership should be ordered to repay the money it received from DHS under the contract. In July of 2002, the district court ruled that the Jobs Partnership was not legally obligated to repay the funds. The plaintiffs appealed, but have since dismissed their appeal, and the case is now over.

A repayment remedy is highly unusual in Establishment Clause cases, and if it were to be ordered in cases of this sort, the consequences for FBOs would be dramatic.

AJC v. Bost never produced a reported judicial opinion on the questions it presents, and we think the remedial issue in particular deserves attention. As a substantive matter, DHS's relationship with the Jobs Partnership seems indistinguishable from the arrangement held unconstitutional in the McCallum I case, previously described. The DHS contract involved a direct expenditure of state funds in a program in which the religious and secular components were inextricably intertwined. Because the secular aspects of the Jobs Partnership had not been segregated from its religious activities, the arrangement between DHS and the Jobs Partnership was unconstitutional.

The crucial question raised by the case, however, is one of remedy rather than substance. When a court determines that a government expenditure or program violates the Establishment Clause, the normal remedy is an order to stop the offending activity (i.e., an injunction). A repayment remedy is highly unusual in Establishment Clause cases, and if it were to be ordered in cases of this sort, the consequences for FBOs would be dramatic. An order to repay some or all of the $8000 it received from DHS would imperil the Jobs Partnership's existence, given that its annual operating budget is only $20,000. Concerned about the possibility of having to repay amounts received under

government contracts – even after providing the services or goods covered by the contract – religious organizations would (indeed, should) be reluctant to accept any government financing for social services.

We are unsurprised that the court did not issue such a reimbursement order, and we think it highly unlikely that other courts will do so, unless the contract specifically outlines prohibited religious activity and specifies that engaging in such activity with contract proceeds will give rise to an obligation to reimburse. Gilfillan v. City of Philadelphia[37] presents a rare case in which the court ordered reimbursement, but the unique features of that case distinguish it from the Jobs Partnership case. In Gilfillan, a taxpayer sued to stop the City of Philadelphia from building a platform on which Pope John Paul II was going to celebrate Mass during his visit to the city. The suit was filed before construction started, and construction proceeded only after the Archdiocese of Philadelphia agreed to repay the city for building the platform if the expenditure were later held to violate the Establishment Clause. In addition, the challenged expenditures were intended for an unambiguously religious purpose – a structure for worship.

Because the law of the Establishment Clause is unsettled in the area of aid to faith-based social services, it would be unreasonable to say that the Jobs Partnership should have known that the grant would later be challenged and perhaps found unconstitutional.

The Jobs Partnership case is easily distinguished from Gilfillan. First, no Establishment Clause challenge to DHS programs had been filed at the time the Jobs Partnership entered into its contract with DHS, or even at the time it performed its services under the contract. Because the law of the Establishment Clause is unsettled in the area of aid to faith-based social services, it would be unreasonable to say that the Jobs Partnership should have known that the grant would later be challenged and perhaps found unconstitutional. Second, unlike the Archdiocese of Philadelphia in the Gilfillan case, the Jobs Partnership did not expressly agree to reimburse DHS if the relationship were later held to be unconstitutional. And third, the government funds were used not for the direct benefit of the religious organization, but to provide employment services. There was no allegation that the Jobs Partnership diverted the state funds for uses other than employment training, even if the employment training was faith-based. DHS received the benefits contemplated by the contract with the Jobs Partnership, and ordinary principles of fairness would prohibit the state from receiving those benefits and then getting its money back as well.

[37] 637 F.2d 924 (3d Cir. 1980).

These equitable considerations have a long history in Establishment Clause decisions. Even at the height of the Separationist interpretation of the Establishment Clause, under which the Supreme Court frequently invalidated government assistance to highly sectarian institutions, the Court did not order religious organizations to repay state funds that they received in good faith. In perhaps the most famous of these Separationist decisions, Lemon v. Kurtzman,[38] which involved government grants to sectarian schools, the schools were permitted to keep the payments that were later deemed to be unconstitutional, and the Court even allowed the state to make additional payments to the schools to cover services that the schools had provided before the decision.

The remedial issue raised in the Jobs Partnership case deserves close attention, because a repayment order would have created significant uncertainty in charitable choice programs in Texas and across the country. The court did not enter such an order, and for the reasons suggested above, we believe that such an order in cases of this character are unlikely. Moreover, even if the contract specifies forbidden activities, and further specifies an obligation of reimbursement for FBOs which engage in such activities with contract proceeds, it is only the contracting partner – some agency of government – and not taxpayer-plaintiffs that should be able to recover the funds in an appropriate proceeding.

[38] 403 U.S. 602 (1971).

II. The Role of State Constitutional Law in the Charitable Choice Movement

MAJOR FINDING:

- Many state constitutions restrict financial support to FBOs, although state courts have sometimes interpreted those restrictions in permissive ways. Such restrictions may be vulnerable to challenge on federal constitutional grounds.

There is wide variety among the states on the subject of government support for religious entities. States that entered the Union in the first part of the 19th century resonate with the still-vital federal constitutional concern that government remain disconnected from the enterprise of religious worship. Beginning in the mid-19th century, however, states exhibit a pattern of broad and explicit prohibition on state transfers of funds to "sectarian institutions."

The recent relaxation of federal constitutional restrictions on government financing of FBOs has lifted a veil from the once obscure field of state constitutional limits on government transfers to such organizations. So long as Separationist principles remained in full flower, as they did from the late 1940's to the early 1980's, state courts were rarely called upon to give independent meaning to Separationist provisions in their own constitutions. When state courts did so, they frequently construed these provisions in ways that mirrored federal non-establishment principles. Now that the Supreme Court has embraced versions of those federal law principles that are more hospitable to aid to FBOs, opponents of such aid have seized upon state constitutions as the latest weapon in the struggles over church-state relations. In response, proponents of such aid have counterattacked, claiming that these state constitutional provisions themselves offend one or more federal constitutional norms. The stage is well-set for a lengthy battle over this territory.[39]

A. The Patterns of State Constitutional Law.

In our federal system, states enact, implement, and interpret their own constitutions, subject only to federal constitutional limitations on their content. And there is wide variety among the states, as is revealed by examinations of the relevant texts. In order to facilitate this examination, we have attached to this report (see Appendix A) a

[39] We explore this field in greater depth in Ira C. Lupu & Robert W. Tuttle, Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional battles, 78 Notre Dame L. Rev. __ (forthcoming, 2003). The current draft of the article can be downloaded from the Roundtable website (www.religionandsocialpolicy.org), or from the Social Science Research Network (www.ssrn.com).

compilation of the provisions from the constitutions of all fifty states on the subject of government support for religious entities.[40]

The original thirteen states, and others that entered the Union in the first part of the 19th century, tend to have provisions on the subject of state aid to religion that track the colonial experience which the Supreme Court, in Everson v. Board of Education,[41] claimed was at the center of original constitutional concern. Such provisions are typified by Article I, section 1 of the Delaware Constitution: "[N]o person shall . . . be compelled to . . . contribute to the . . . support of any place of worship, or to the maintenance of any ministry." Such provisions, singling out support of houses of worship and clergy, resonate with the still-vital federal constitutional concern that government remain disconnected from the enterprise of religious worship.

Beginning in the mid-19th century, however, and continuing through the admission of Alaska and Hawaii in the mid-20th century, a different pattern appears. States coming into the Union in that time period (and some older states, by mid-19th century amendment) exhibit a pattern of broad and explicit prohibition on state transfers of funds to "sectarian institutions." Many of these provisions are education-specific, prohibiting, for example, any "appropriation of public money made in aid of any church, or private or sectarian school . . ." (Arizona Constitution, Art. 2, sec. 12.) Provisions of this character originated in a Nativist political movement, beginning in the 19th century, aimed at retaining the Protestant character of America's common (public) schools and forbidding states from appropriating monies for the support of Catholic schools. Such provisions are often called "little Blaine Amendments," after Senator James Blaine who urged unsuccessfully, as part of a run for the Presidency in 1876, that the federal Constitution be similarly amended to explicitly preclude the states from using tax monies or public lands to aid sectarian schools.

As revealed by the details in Appendix A, the current breakdown among the states with respect to constitutional provisions of these varying characters is as follows (some states have more than one such provision, so the total is greater than 50):

[40] Appendix A also includes annotations of relevant decisions from each of the states on the scope of these constitutional provisions. Some of these decisions are relatively recent, but some are quite old, and the landscape of church-state relations in America has changed so much in the past 40 years that older decisions may not be a safe basis from which to predict what state courts would decide today. The Appendix is thus a useful starting place for research into the law of each state, but it is no substitute for in-depth research into the complex questions of state constitutional law that may arise under these provisions.

[41] 330 U.S. 1 (1947).

- Ten states have constitutional provisions similar in language and effect to the First Amendment to the U.S. Constitution (See, e.g., Alaska Const. Art. I, § 4: "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof").

- Thirty-seven states have constitutional provisions that explicitly forbid state financing of religious organizations (See, e.g., Illinois Const., Art. 10, § 3: "Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose...").

- Twenty-nine states have constitutional provisions that explicitly forbid state financing of religious schools (See, e.g., Washington Const. Art. I § 11: "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence").

- Ten states have constitutional provisions that extend these limitations to both "direct" and "indirect" financing (See, e.g., Florida Const., Art. I § 3: "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.)

It is crucial to note that state courts may, and sometimes do, construe their state constitutions in ways that appear to depart from the literal meaning of the text. In Arizona, for example, despite the strong anti-funding language contained in the state charter, the state Supreme Court has upheld programs of reimbursement to sectarian organizations for aiding families in financial need,[42] and tax credits for money contributed to organizations supporting the payment of tuition for low-income students at religious schools.[43] And in Ohio, prior to Zelman, the Ohio Supreme Court upheld the Cleveland school voucher plan as consistent with a clause in the state constitution barring religious sects from having "control of any part of the school funds of this state."[44] Decisions like these

[42] Community Council v. Jordan, 102 Ariz. 448, 432 P.2d 460 (1967).
[43] Kotterman v. Killian, 193 Ariz. 273, 972 P.2d 606 (1999).
[44] Ohio Constitution, Art. VI, sec. 2. The decision upholding the Cleveland plan against an attack based on this provision is Simmons-Harris v. Goff, 86 Ohio St. 3d 1, 711 N.E.2d 203 (1999).

from Arizona and Ohio sometimes rest on textual interpretations of the language of the state constitution, and sometimes rest on an implicit urge by state courts to conform their state's constitutional norms with comparable norms on the federal level. In cases of indirect financing of state FBOs through beneficiary choice plans, those interpretive moves and conforming urges may coincide – following the lead of the Supreme Court in Zelman, state courts may conclude that beneficiary choice programs involve transfers to service beneficiaries, who separately and independently make the transfers to FBO providers. But, as we discuss here later in connection with Florida's school voucher program, there is no guarantee that state courts will so construe such state provisions.

State courts may conclude that beneficiary choice programs involve transfers to service beneficiaries, who separately and independently make the transfers to FBO providers. But, there is no guarantee that state courts will so construe such state provisions.

B. State Constitutional Law and the Faith-Based Initiative

Two recent cases, one decided by a Florida Circuit Court, and the other pending in a state court in Georgia, illustrate the potential roadblocks that state constitutional law may impose on the faith-based initiative. In Holmes v. Bush,[45] Florida's state-wide school voucher program, designed to provide families of children in failing public schools a private-school option, was challenged on a number of state law grounds. One challenge invoked Article I, section 3 of the Florida Constitution, which provides that "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." Rejecting arguments that the Supreme Court's decision in Zelman should be viewed, by analogy, as settling the state law issues surrounding voucher programs, the Circuit Court's opinion ruled that the state voucher program violated this section of the Florida Constitution. The Court reasoned that Florida's constitution provided a "clear and unambiguous" directive - no public funds may be used to aid a religious institution. The Court found unpersuasive the state's claims that the voucher financing method disconnected the government from the money flowing to religious schools, describing the argument as "a colossal triumph of form over substance." The court ordered the Opportunity

Two recent cases, one decided by a Florida Circuit Court, and the other pending in a state court in Georgia, illustrate the potential roadblocks that state constitutional law may impose on the faith-based initiative.

[45] Holmes v. Bush, Second Judicial Circuit, Leon Cty, Florida, No. CV 99-3370, Aug. 5, 2002. Earlier claims that the program violated other provisions of the state constitution had already been resolved in Bush v. Holmes, 767 So. 2d 768 (FL 1st DCA 2000), or had been dismissed voluntarily.

Scholarship program halted for the 2002-2003 school year.[46] The ruling is under appeal.

A similar state constitutional attack on direct financing of FBOs is now underway in Bellmore v. United Methodist Children's Home and Georgia Department of Human Resources, discussed further in Part III, which follows. Although the employment issues in Bellmore have attracted the most attention, the complaint also alleges that the contract between the Department of Human Resources and the United Methodist Children's Home, providing for foster care of children in state custody, transfers state funds in violation of Georgia's Constitution. Article I, Section. II, paragraph VII of that document provides: "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution." The United Methodist Children's Home quite emphatically identifies itself as a sectarian institution, one that asserts and exercises the right to hire only co-religionists and which involves its wards in religious experience. Prior interpretations of this provision of Georgia's constitution have been quite strict,[47] but it remains to be seen if Georgia state courts will now construe it in a way that permits such programs to continue.

Where federal law permits, states might contract with FBOs using federal money only, thereby staying clear of the restrictions in state constitutions.

One possibility for states whose constitutions prohibit transfer of state funds to FBOs is to function as administrative conduits for federal funds that pass through the hands of state and local governments on their way to providers. Many federal programs for which FBOs are eligible are packaged into block grants, administered directly by state and local social service offices. Where federal law permits (as in the Child Care Development Fund, described in Part IV), states might contract with FBOs under such programs using federal money only, thereby staying clear of the restrictions in state constitutions.[48]

C. Federal Constitutional Attacks on State Constitutional Provisions.

[46] The court did not explain why the voucher program could not go forward without the participation of the religious schools.

[47] See Bennett v. City of La Grange, 112 S.E. 482 (Ga. 1922) (state may not reimburse Salvation Army for services rendered); 1969 Op. Att'y Gen. No. 69-136 (state funding of YMCA likely to violate state constitution).

[48] The Charitable Choice provisions of the Personal Responsibility and Work Opportunities Reconciliation Act of 1996 specifically acknowledge state constitutional restrictions on government financing of FBOs.

As suggested above, state constitutional provisions restricting government transfers to FBOs may create significant impediments to state service contracts with, or grants to, FBOs. One potential solution to this problem comes in the form of federal constitutional attack on the validity of such provisions. During Separationism's heyday in federal constitutional law, such an attack would have been unthinkable. In that period, state constitutional law on this subject typically tracked that of the federal law of the Establishment Clause, and it would have been odd indeed for courts to rule that state constitutions could not do explicitly what the Supreme Court was doing in the name of the Establishment Clause.

Now that the federal barriers to aid to FBOs have fallen to some extent, a gap has been created between federal restrictions and the apparent restrictions associated with the Little Blaine Amendments. Into this gap have charged litigators and commentators eager to eliminate the impediments imposed by the Little Blaines.[49] Motivated primarily by their concern for school voucher programs, these advocates have begun to argue that the Little Blaines should be invalidated, or limited in their scope, by reason of federal constitutional law. Such an argument proved successful in the U.S. Court of Appeals for the 9th Circuit in Davey v. Locke,[50] and is likely to reappear in courts in the near future. Indeed, in the previously discussed Holmes v. Bush case, the defenders of the voucher program argued that excluding religious schools from the program would violate the federal Constitution. The Circuit Court made no mention of this argument, but it enjoined the entire voucher program, as applied to both religious and secular schools, thereby obviating the inequality complained of by program defenders.

Advocates have begun to argue that the Little Blaines should be invalidated, or limited in their scope, by reason of federal constitutional law.

Three sets of federal constitutional arguments are typically advanced against the Little Blaine Amendments. The first, accepted by the Ninth Circuit in Davey v. Locke, is that the Free

[49] The Becket Fund, here in Washington, DC, is leading the litigation attack on the Little Blaines. For commentary arguing that the Little Blaines may violate the federal Constitution, see Toby J. Heytens, School Choice and State Constitutions, 86 Va. L. Rev. 117 (2000); Joseph P. Viteritti, Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law, 21 Harv. J.L. & Pub. Pol'y 657 (1998); Eric Treene, "The Grand Finale is Just the Beginning: School Choice and the Coming Battle Over Blaine Amendments.," available at www.becketfund.org.

[50] 2002 U.S. App. LEXIS 14461 (9th Cir., 2002). *Davey* ruled unconstitutional Washington State's exclusion of students pursuing theology majors at religiously affiliated colleges from eligibility for its state scholarship program. The State's program apparently covered students taking courses in theology at branches of the state university, and the court held that the discrimination against students at religiously affiliated colleges violated the Free Exercise Clause of the First Amendment to the U.S. Constitution.

Exercise Clause of the First Amendment forbids states, in their constitutions or otherwise, from treating religious entities worse than secular ones in the distribution of state support. The second set of arguments, closely related to the first, rests on the Equal Protection Clause of the 14th Amendment. Drawing on the law of forbidden discrimination, such as that based on race, advocates of this approach assert that any state classifications that turn on the religious character of a private entity are presumptively unconstitutional. Both of these lines of argument are sweeping, and threaten to undermine virtually all attempts by states to maintain church-state separation any broader than is currently required by the federal constitution.

Drawing on the law of forbidden discrimination, advocates assert that any state classifications that turn on the religious character of a private entity are presumptively unconstitutional.

The third line of federal constitutional attack on the Little Blaines is, in our judgment, the most promising. This set of arguments focuses on the anti-Catholic animus that surrounded the enactment of the Little Blaines, at least in some of the states in whose constitutions they appear. This line of argument may depend, however, on state-to-state proof of that sort of animus. One hundred years or more after enactment of such provisions, that proof may be hard to uncover.

Moreover, considerations of federalism, toward which a narrow majority of the current Supreme Court appears sympathetic in other contexts, may operate to limit the force of any of these attacks on the Little Blaines. States will argue that they should be free to maintain their own policies of church-state separation, even if the Supreme Court has relaxed those policies at the federal level. That the Justices who most strenuously reject Separationism are the same ones who most warmly embrace the concerns of states in the federal system suggests the total unpredictability of Supreme Court resolution of the questions addressed here.

III. Faith-Based Organizations and the Law of Employment Discrimination

MAJOR FINDING:

- FBOs are frequently exempt from the federal prohibition on religious discrimination in employment, but they are not so exempt in every federal program. States and cities vary in their laws on the subject, and a considerable number of states and cities do NOT extend that exemption to FBOs that are receiving state or city funds. Congress may pre-empt state and local law on this subject as it applies to federally funded programs, but has not done so thus far.

Whether FBOs participating in service partnerships with government should be permitted in their employment practices to favor co-religionists is among the most hotly debated topics in this field. On one side are the proponents of unfettered religious association and community. They argue that religious organizations should be free to define their own identity and mission, and that service delivery will be strengthened if FBOs are free to confine their hiring to like-minded individuals. Indeed, advocates on this side at times go so far as to argue that the Constitution forbids any regulation of their hiring practices, at least with respect to issues of religious affiliation and belief. From this point of view, even an explicit effort by the government to condition contracts with FBOs on surrender of this right would violate the associational rights of such organizations.

In stark opposition to this viewpoint are those who fiercely defend norms of nondiscrimination. Those on this side argue that government should not be contracting with service providers who would deny equal employment opportunity to those who do not share the providers' religious identity or religious beliefs.[51] As a matter of national policy, these advocates assert, government should not be using its resources to support private entities that fail to hire exclusively on merit. Here, too, some advocates believe that the Constitution is on their side, and that government is constitutionally forbidden to enter into contracts with those who

[51] When religious identity and racial identity coincide, as they appear to do in the case of the Nation of Islam or the World-Wide Church of God, the concern about discrimination extends beyond religious favoritism to racial animosity and exclusion. One can well understand reluctance to have government financing discrimination of this character.

engage in religious discrimination, even if legislatures have not outlawed such arrangements.

This latter, constitutionally based view is reflected in the recent lawsuit, Bellmore v. United Methodist Children's Home and the Georgia Department of Human Resources. The suit alleges that the Home, which has a contract with the State to provide foster care for children in state custody, has unlawfully refused to hire non-Christian employees and has unlawfully dismissed an employee who does not share the Home's religion-based view of homosexuality. The Home is exempt by federal statute from the federal ban on religious discrimination in hiring, and no state law bans this discrimination, but the proponents of the suit allege that state funding of the Home operates to make such hiring practices unlawful.

Neither side in this debate is likely to persuade the courts that the Constitution requires acceptance of its position.

Our own view, strongly supported in the case law to date, is that neither side in this debate is likely to persuade the courts that the Constitution requires acceptance of its position. Questions of employment discrimination law, as it regulates private entities, are rarely controlled by constitutional principles. With one exception, which follows, these matters must be decided as legislative policy, rather than be settled in constitutional adjudication.

Thus far, the courts have tended to rule precisely in this direction – legislatures have wide discretion to decide these issues as judgments of public policy. Arguments that FBOs have a constitutional right of association which renders them immune from nondiscrimination law, even when they receive government benefits conditioned on compliance with such norms, have been systematically rejected by the courts.[52] On the other side, all court decisions – save one – have rejected arguments that private entities that accept government funds waive whatever statutory exemption from nondiscrimination laws they otherwise possess.[53] Although the Supreme Court has not confronted this precise question, the

[52] Bob Jones University v. United States, 461 U.S. 574 (1983); Grove City College v. Bell, 465 U.S. 555 (1984).

[53] Siegel v. Truett-McConnell College, 13 F. Supp. 2d 1335 (N.D. Ga. 1994), aff'd 73 F.3d 1108 (11th Cir. 1995); Hall v. Baptist Memorial Health Care Corp., 215 F.3d 618 (6th Cir. 2000); Arriaga v. Loma Linda Univ., 13 Cal. Rptr. 2d 619, 621 (Cal. Ct. App. 1993) (finding that the exclusion from the California Fair Employment and Housing Act for religious organizations "does not hinge upon whether the corporation received state funds"); Ward v. Hengle, 706 N.E.2d 392, 400 (Ohio Ct. App. 1997) (holding that the Title VII exemption for religious organizations cannot be waived). he one decision to the contrary is Dodge v. Salvation Army, 1989 WL 53857 (S.D. Miss. 1989) (holding that position that is funded almost entirely by government support cannot be restricted to co-religionists).

Court has on several occasions repudiated the contention that private actors must behave as if they were the state once they accept state funds.[54]

The applicability of employment discrimination norms to FBOs receiving government grants and contracts is thus to be determined not by judicial rulings in the name of the Constitution but by close inspection of the relevant statutory law, local ordinances, and the terms of government contracts. Political authorities may of course alter these norms, but the current ones can be carefully identified. In what follows, we summarize the prevailing law of employment discrimination as it applies to FBOs. We begin with a summary description of the federal law, then turn to state and local law, and conclude with a brief discussion of the relationship between federal and state law.

A. Federal Law

As a general rule, Title VII of the 1964 Civil Rights Act forbids employers with fifteen or more employees from discriminating in employment based on religion, race, color, sex, or national origin. This prohibition includes discrimination based on religious belief as well as religious identity or affiliation.[55]

The Constitution excludes employment practices related to clergy selection from nondiscrimination laws of any kind, although the precise boundaries of the ministerial exception are open to question.

There are two very important ways, however, in which federal law immunizes FBOs from the application of these nondiscrimination rules. The first, required by the Constitution, excludes employment practices related to clergy selection from nondiscrimination laws of any kind, including those relating to religion, race, sex, age, and disability. Although the Supreme Court has never ruled on this issue, the "ministerial exception," as it known, has been widely approved in the lower courts.[56] The precise boundaries of the ministerial

[54] See Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (private school receiving over 90% of its funding from the state is not a state actor when it fires a teacher because of her speech activities); Blum v. Yaretsky, 457 U.S. 991 (1982) (private nursing home is not a state actor when it decides to transfer patients supported by Medicaid, a government-financed program, from one level of care to another).

[55] On the inclusion of religious conformity to the employers' beliefs as a permissible ground of discrimination by those entitled to the exemption, see Little v. Weurl, 929 F.2d 944 (3rd Cir. 1991); Cline v. Catholic Diocese, 206 F.3d 651 (6th Cir. 2000). The question of religious practice is more complicated. If a practice, such as Sabbath observance or dress codes, interferes with the employer's ordinary business, employers are under a duty of de minimis accommodation, but no more. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

[56] The leading cases on the ministerial exception include McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972); Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985); EEOC v. Catholic University of America, 83 F.3d 455 (DC Cir. 1996).

exception are open to question, but ordination is not a prerequisite to its application. As one court described it, "if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he . . . should be considered clergy."[57]

Religious entities are explicitly exempt from Title VII's prohibition on religious discrimination. Unlike the ministerial exception, the Section 702 exemption applies to all positions related to carrying on the organization's activities.

Second, religious entities are explicitly exempt from Title VII's prohibition on religious discrimination. Section 702 of Title VII "does not apply to . . . religious [entities] with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities." Section 702 is both broader and narrower than the ministerial exception. Unlike the ministerial exception, which immunizes clergy hiring from all nondiscrimination law, the exemption in Section 702 immunizes religious entities only with respect to claims of discrimination based on religion. Also unlike the ministerial exception, however, which applies only to religious leaders, the Section 702 exemption applies to all positions related to carrying on the organization's activities.

Does the exemption disappear when FBOs receive government funds? As previously noted, courts have generally held that the exemption does not disappear by force of the Constitution alone. Nor has Congress ever enacted an umbrella rule that requires FBOs to surrender the exemption if they receive federal funds. Indeed, Title VI of the 1964 Civil Rights Act requires recipients of federal funds to refrain from discrimination based on race, sex, or national origin, but says nothing about religion. Thus, the default rule for FBOs receiving federal funds is that they retain their federal right to prefer co-religionists for all positions.

At times, Congress explicitly reaffirms the applicability of the exemption for FBOs participating in federally funded programs. This was most prominently the case with respect to the pioneering effort in Charitable Choice, the welfare reform legislation of 1996, discussed in further detail in Part IV below. At other times, however, Congress may and sometimes does override the default rule of exemption for co-religionist hiring by FBOs with respect to hiring in particular programs that receive federal monies. We provide a series of examples of such an override of the exemption policy in Part IV, which follows. When Congress

[57] EEOC v. The Roman Catholic Diocese, 213 F.3d 795, 801 (4th Cir. 2000).

has been silent with respect to a particular program, however, the basic exemption for FBOs from the federal ban on religious discrimination remain in force.

Federal law of nondiscrimination is relatively straightforward. FBOs are presumptively exempt from the ban on religious discrimination, but they must carefully examine the details of federal programs, to determine if the exemption has been overridden in particular circumstances.

State and local governments may, and usually do, have their own employment discrimination regimes, and FBOs must examine carefully the law of the jurisdiction(s) in which their programs operate.

For FBOs, therefore, the approach to understanding the federal law of nondiscrimination is relatively straightforward. The ministerial exception insulates from legal control the process of employment relations with clergy-type figures. FBOs are presumptively exempt from the ban on religious discrimination, but they must carefully examine the details of federal programs, canvassed below, to determine if the exemption has been overridden in particular circumstances.

B. State and Local Law

Contrary to what some may think, the federal government is not necessarily the first and last word with respect to employment discrimination norms. State and local governments may, and usually do, have their own employment discrimination regimes, and FBOs must examine carefully the law of the jurisdiction(s) in which their programs operate.

We have attached to this report (see Appendix B) a compilation of the relevant employment discrimination laws of all 50 states, together with the comparable laws of a number of major cities. The compilation is organized around four questions, all of which pertain to coverage of FBOs, exemption for FBOs from the prohibition on religious discrimination, and potential loss or waiver of that exemption for FBOs who enter into contractual relationships with state and local government.

The broad outlines of that survey can be simply stated.

- Forty-six states have enacted a set of their own employment discrimination norms.
- Of these, forty-three recognize some form of exemption for FBOs from the state law prohibition on religious discrimination.
- Of these forty-three, however, eighteen states explicitly provide that FBOs that enter into contracts with the state do

NOT retain their exemption from state nondiscrimination law.[58]

- Moreover, most major cities that we surveyed forbid all entities, including FBOs, that do business with the city from engaging in religious discrimination in employment decisions.

- Several major cities require that entities doing business with the city provide employee benefits for domestic partners to the same extent as spouses;[59] this requirement may create particular conflict for some FBOs.

In about one-third of the states, and we expect in most major cities and counties, FBOs do not have or retain any right to prefer co-religionists in their hiring practices insofar as they relate to contracts with the government.

Thus, in about one-third of the states, and we expect in most major cities and counties, FBOs do not have or retain any right to prefer co-religionists in their hiring practices insofar as they relate to contracts with the government. One major question which we have not been able to answer definitively in these jurisdictions is whether the loss of the co-religionist exemption applies only to positions funded in whole or part by the government, or applies umbrella-like to all hiring by FBOs that have government contracts. On this question, like all others, we urge FBOs and their counsel to make a careful inspection of state and local laws, policies, and contract documents.

C. The Relationship between State and Federal Law

This relationship can be stated simply. First, exemption from any portion of federal law of nondiscrimination does NOT create exemption from state or local law. State or local laws at times have their own pattern of exemptions, which must be consulted independently. Second, Congress may displace state or local law, but must do so explicitly. If Congress makes displacement of state or local law a condition of receiving federal funds, that condition will effectively displace state or local law if the funds are accepted. If, however, Congress is silent about state and local law, that law remains in effect.

On this question of preemption of state and local employment laws, we take issue with the view expressed in *The Implementation Guide to Charitable Choice*, published by the Center for Public Justice. The Guide asserts that "State and local

[58] See Appendix B.
[59] The 1997 Equal Benefits Ordinance in San Francisco is a leading example of this type.

nondiscrimination laws that normally attach to government funding apply only if they do not compromise a faith-based provider's religious character, which is expressly protected in all versions of Charitable Choice" (p.9), and goes on to say that "[FBOs] cannot be required to certify that they will not use religious criteria in their employment decisions."

We do not think that this is a sound reading of the religious character provision in current Charitable Choice legislation. That provision, which declares among other things that FBOs retain "independence from federal, state, and local governments," cannot be sensibly interpreted to mean that FBOs with government contracts are entirely immune from government control, even with respect to matters directly governed by the contract (or other legal sources, including the remainder of the Charitable Choice legislation and the Constitution). Instead, the "religious character" provision should be read to mean that agencies of government must not assert leverage or control over the FBO in matters extraneous to the contract – for example, by requiring contracting parties to remove religious symbols from all of their premises, even those not being used for service under the contract. So understood, the "religious character" provision is in harmony with the overall purpose of Charitable Choice legislation, which is to end categorical discrimination against FBOs in the award of such contracts.

Congress has not preempted state and local employment discrimination rules in any Charitable Choice legislation.

This approach to the "religious character" provision would exclude an interpretation that it preempts state and local employment law in matters governed by the contract. Our view is buttressed by normal preemption principles, which require a clear statement of congressional intent to oust state law. In addition to the failure to mention state employment law in the religious character provision, the Charitable Choice legislation contains separate sections on employment practices (42 USC § 604a(f)) and preemption (42 USC § 604a(k)), neither of which mention state and local employment discrimination law.[60] This lack of explicit attention to that body of law in provisions focused on employment and preemption, respectively, reinforces our sense that Congress has not preempted state and local employment discrimination rules in any Charitable Choice legislation.

[60] The employment practices provision of the Charitable Choice legislation preserves the exemption, in Section 702 of the 1964 Civil Rights Act, for FBOs from the federal prohibition on religious discrimination law. The preemption provision of the Charitable Choice legislation preserves any state law that "prohibits or restricts the expenditure of state funds in or by religious organizations." That Congress preserved these policies does not support an inference that it pre-empted other, unspecified ones.

IV. Federal Programs

MAJOR FINDING:

• Charitable choice provisions appear in a variety of federal programs, though far from all, and permit FBOs to retain their religious identity while participating in government social welfare programs. Important variations appear among federal programs. The White House and five federal agency offices of the Faith-Based and Community Initiatives have taken significant steps over the past year to increase the participation of FBOs in federal programs.

A. Overview

The federal government has a long history of partnerships with faith-based organizations in the provision of social services. Indeed, one of the U.S. Supreme Court's first decisions interpreting the Establishment Clause, Bradfield v. Roberts,[61] upheld such a partnership. Government funds have supported FBOs across the full range of social welfare programs, from orphanages and health care to disaster relief and housing. These partnerships continued – and many even started or expanded – during the ascendancy of Separationist interpretations of the federal constitution. To the extent that statutes or regulations specifically addressed FBOs, however, their purpose has typically been to limit or bar participation by FBOs in particular programs. For example, the Community Development Block Grant, administered by HUD, provides that "CDBG assistance may not be used for religious activities or provided to primarily religious entities for any activities, including secular activities."[62] In other programs, policies or regulations have required FBOs, in order to receive government assistance, to strip religious symbols from locations in which services are provided or to remove religious statements from their governing documents.

Over the last two decades, the Separationist wariness with partnerships between government and FBOs has gradually shifted to a more affirmative attitude.

Over the last two decades, the Separationist wariness with partnerships between government and FBOs has gradually shifted to a more affirmative attitude. An early example of this shift can be found in the Emergency Food and Shelter Program, started in 1983. Funded by a grant from Congress, the program is administered by a National Board which is chaired by a

[61] 175 U.S. 291 (1899).
[62] 24 CFR § 570.200(j).

representative of the Federal Emergency Management Agency and composed of representatives from the American Red Cross, Catholic Charities, the National Council of Churches of Christ, the Salvation Army, United Jewish Charities, and United Way. The National Board distributes appropriated funds to local boards – whose membership should mirror that of the National Board – which in turn award grants to local government and nonprofit programs that assist the homeless.[63]

The Adolescent Family Life Act (AFLA) presents a second, though far more controversial, example of partnership with FBOs. Originally enacted in 1981, AFLA provides education for teenagers about sexual health and reproduction, and encourages the involvement of "family members, religious and charitable organizations," and other groups in that educational effort. The law, which also supports programs of care for pregnant teenagers, specifically prohibits expenditure of AFLA funds on programs that "advocate, promote, or encourage abortion."[64] In 1983, the American Civil Liberties Union filed a lawsuit challenging AFLA grants to FBOs, alleging that such grants violated the Establishment Clause. The case eventually reached the Supreme Court, and in Bowen v. Kendrick the Court held that the religious character of some AFLA grantees did not, in itself, represent a constitutional violation. The case was returned to the district court for further developments of the facts; the parties subsequently reached a settlement in the case, which imposed a set of restrictions on FBOs that receive grants under AFLA (discussed in Part IV.B).

During the 1990s, new federal legislation created the possibility of even more extensive partnerships between government and FBOs.

During the 1990s, new federal legislation created the possibility of even more extensive partnerships between government and FBOs. The Child Care and Development Block Grant Act of 1990 (CCDBG) represents an important step in this development. CCDBG requires states (the primary grantees under the program) to maximize eligible parents' choices of child care providers, and includes sectarian institutions among the classes of eligible providers (see below for further details of this program).

The Personal Responsibility and Work Opportunities Reconciliation Act of 1996 (PRWORA), enacted in 1996, effected the most significant legislative changes to the relationship between

[63] For more information, see the Emergency Food and Shelter Program website, www.efsp.unitedway.org. The EFSP legislation can be found at 42 USC § 11331 et. seq.

[64] 42 USC § 300z et. seq.

government and FBOs. PRWORA's sweeping reform of federal welfare programs contain the "Charitable Choice" provisions, which include the following:[65]

- Non-Discrimination in Funding:

  If a state funds non-governmental entities to provide services financed under PRWORA, the state cannot exclude FBOs from participating as providers simply because of their religious character. PRWORA does not require states to use non-governmental entities to provide services under the act, but if they choose to do so, states must allow FBOs to participate (or compete for grants) on equal terms. Where state law forbids support for sectarian organizations, PRWORA requires that federal funds be placed in a separate account, and FBOs must be eligible to compete for or receive the segregated funds.

- Providers' Religious Identity Preserved:

  An FBO need not abandon its religious identity to receive government funds under the PRWORA. The religious character of the FBO's governance, including its mission statement and criteria for selecting officers and board members, may be maintained. Nor may federal or state officials require an FBO to "remove religious art, icons, scripture, or other symbols" as a condition of receiving PRWORA funds. In addition, FBOs funded through PRWORA programs retain their right, under section 702 of Title VII, to prefer co-religionists in employment decisions. PRWORA does not, however, expressly preempt state or local anti-discrimination laws, which may operate to limit FBOs' right to prefer co-religionists.

- Recipients' Religious Liberty Protected:

  An individual who is eligible to receive benefits under a PRWORA-funded program, but who objects to receiving services from an FBO, has the right to receive such services from an alternative provider. Providers financed through PRWORA may not discriminate against service recipients on grounds of religion, and may not condition delivery of services on recipients' participation in religious activities.

[65] PRWORA's Charitable Choice provisions are codified at 42 USC § 604a.

- Limited Audit:

  If an FBO providing services under a PRWORA program establishes a separate account for government funds received for such services, the required government audit will be limited to that separate account.

- Religious Activities Proscribed:

  PRWORA specifies that "No funds provided directly to institutions or organizations to provide services and administer programs under [this Act] shall be expended for sectarian worship, instruction, or proselytization." This limitation is important for two reasons. First, it reflects the unquestioned minimum content of the Establishment Clause: the government may not directly finance these distinctively religious activities. Second, the limitation applies only to "direct" funding under the PRWORA – grants or contracts to FBOs – not to indirect forms of financing such as vouchers or certificates. If an FBO receives only indirect government aid, the service provided by the FBO does not need to be segregated from worship, religious instruction, or proselytizing.

As originally enacted, the Charitable Choice provisions applied to the Temporary Aid for Needy Families program (TANF, created by PRWORA to replace Aid to Families with Dependant Children), along with the Food Stamps, Medicaid, and Supplemental Security Income programs. Since 1996, Congress has added Charitable Choice provisions to a number of other federal programs. In 1997, Charitable Choice provisions were applied to the Welfare-to-Work program; in 1998, to the Community Services Block Grant; and in 2000, to the Substance Abuse Prevention and Treatment Block Grant and Projects for Assistance in Transition from Homelessness, along with discretionary funding programs for substance abuse treatment administered by the Substance Abuse and Mental Health Services Administration (SAMHSA). With minor exceptions,[66] the CSBG

[66] The Charitable Choice provisions in PRWORA apply directly to the Welfare-to-Work program. The Charitable Choice provisions in the Community Services Block Grant (CSBG) differ from that in PRWORA in four respects: a) since CSBG programs operate only through grants or contracts, the references to vouchers and indirect funding in the PRWORA's provision do not apply; b) CSBG requires a specific, "tripartite" board for Community Action Agencies, and an FBO seeking to become a Community Action Agency under CSBG would be required to conform its governance structure to the statute's specified form; c) entities receiving funds under CSBG are required to establish a separate account for such funds (PRWORA gives FBOs the option to create separate accounts); and d) the CSBG provisions omit the protections for the religious liberty of program beneficiaries. The CSBG Charitable Choice provisions are found at 42 USC § 9920. The Charitable Choice provisions covering programs under

and SAMHSA Charitable Choice provisions mirror those in PRWORA, while the Welfare-to-Work program directly adopts PRWORA's Charitable Choice provisions.

In the past two years, the Bush administration has strongly supported efforts to improve and increase partnerships between government and faith-based providers of social services. Soon after taking office, President Bush issued two executive orders, which created Offices of the Faith-Based and Community Initiatives in the White House and the Departments of Education, Health & Human Services, Housing & Urban Development, Labor, and Justice.[67] The executive orders charged those offices with two basic tasks: first, to search existing federal social welfare programs for barriers that prevent faith-based and community organizations from fully participating, and work to remove barriers that are inessential; and second, through outreach and education efforts, to encourage faith-based and community organizations to participate in government social welfare programs.

Obstacles to greater FBO participation tend to be subtle, and include agencies' failure to aggressively implement existing Charitable Choice provisions; ambiguous limitations on religious activity, which administrators may interpret in terms more restrictive than the Constitution requires; requirements of partnership with other organizations (which may not be willing to partner with FBOs); and the absence of specific encouragement for faith-based and community organizations to apply for funding.

The White House and agency offices have made substantial progress on both tasks assigned by the executive orders. With respect to the first task, the audit of barriers to FBO participation in federal programs, each agency office issued a report in the summer of 2001, detailing regulatory and other barriers found in that agency's programs. The White House office then released its report, "*Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs*," which summarizes and combines the findings in the five agency reports. The White House and agency reports found relatively few examples of statutory or regulatory provisions that explicitly bar faith-based institutions from participating in federal programs. The obstacles to greater FBO participation tend to be more subtle, and include agencies' failure to aggressively implement existing Charitable Choice provisions; ambiguous limitations on religious activity, which administrators may interpret in terms more restrictive than the Constitution requires; requirements of partnership with other organizations

SAMHSA are found at 42 USC § 290kk; we discuss their differences with the PRWORA provisions which follow.

[67] The agency offices of the Faith-Based and Community Initiatives are officially designated as Centers, except for the Justice Department's, which is designated the Faith-Based and Community Initiatives Taskforce. For purposes of simplicity, this report will refer to all as offices.

(which may not be willing to partner with FBOs); and the absence of specific encouragement for faith-based and community organizations to apply for funding. In addition, the reports noted that federal programs often have complicated applications and grant administration rules, which tend to discourage smaller and less established organizations from applying.

With respect to the second task, outreach and education, the offices have (to somewhat varied extent) developed websites that provide significant information about available programs to interested FBOs, and have publicized training sessions for grantees and prospective grantees in specific program areas. Within the last several months, the White House and agency offices have initiated a series of conferences to promote the Faith-Based and Community Initiatives. The conferences include workshops with officials from the agency offices and representatives of faith-based and community organizations that have received federal funding, along with training sessions on applying for government grants.

Notwithstanding a general direction of change which points toward greater involvement of FBOs in federal social welfare programs, the specific legal contexts in which FBOs might provide government-financed services remain, in many instances, complicated and sometimes uncertain.

The Faith-Based and Community Initiative has received little legislative support in the last two years. The most ambitious legislative proposal, the Community Solutions Act of 2001 (typically referred to as HR 7), would have extended the Charitable Choice provisions to all federal programs (and all state or local programs carried out with federal funds); after passing the House of Representatives, HR 7 did not pass the Senate, largely – though not exclusively – because of objections to the broad co-religionist hiring preference contained in the act. The CARE Act of 2002, with more limited Charitable Choice provisions (and omitting the controversial co-religionist hiring preference) recently failed to come to a vote in the Senate. Congress did, however, appropriate a modest sum – $30 million – for the Compassion Capital Fund, which will support increased involvement of faith-based and community organizations in a broad range of government services, from aid to the homeless and at-risk children to substance abuse treatment and employment training. (The Compassion Capital Fund are discussed in greater detail later.) The Department of Labor has also awarded a series of grants, made under the Workforce Investment Act, for the specific purpose of linking faith-based and community organizations to local "One Stop" employment centers (these grants will also be discussed later in more detail).

This overview has stressed a general direction of change, which points toward greater involvement of FBOs in federal social welfare programs. Notwithstanding that general trajectory, the specific legal contexts in which FBOs might provide government-financed services remain, in many instances, complicated and sometimes uncertain. To illuminate these contexts, we have selected six representative program areas.

B. Specific Federal Programs

1. The Child Care and Development Fund

The Child Care and Development Fund unites in one program the major federal funding streams for child care services.

CCDF directly contemplates the involvement of faith-based child care providers, and draws a bright line between providers that receive direct grants and contracts, and those that receive only indirect financing through vouchers.

The Child Care and Development Fund (CCDF), created in PRWORA, unites in one program the major federal funding streams for child care services, including the Child Care and Development Block Grant program. CCDF operates as a block grant program, under which the administering agency (HHS) transfers money – in an amount determined by a set formula – to a state, territorial, or tribal entity (a "lead agency"), which in turn funds and administers the child care program in its jurisdiction. In addition, states may elect to transfer up to 30% of their funds received through the TANF Block Grant to their funds under CCDF.

Although states have significant discretion in designing programs under CCDF, the program's underlying theme remains consistent – poor parents should be afforded a reasonable array of choices for child care services. States may contract directly with a child care provider, such as paying for a block of spaces in a child care center. Even if they choose to finance care providers directly, states are required to offer parents the option of payment vouchers that can be redeemed by a wide range of providers, including home-based caregivers, certain relatives, and child care centers run by secular and religious institutions.

CCDF directly contemplates the involvement of faith-based child care providers, and draws a bright line between providers that receive direct grants and contracts, and those that receive only indirect financing through vouchers. While faith-based providers are eligible to enter direct contracts with states, such providers are then prohibited from using funds received through the program for religious purposes. Indirect financing, however, carries no such restrictions. "Funds provided through child care certificates may be

expended for sectarian purposes or activities, including sectarian worship or instruction when provided as part of the child care services."[68]

In terms of financing, CCDF draws one distinction between faith-based and secular providers. While CCDF funds can be used for "minor remodeling" of secular facilities, faith-based providers are only eligible for construction funding when repairs are "necessary to bring the facility into compliance" with applicable health and safety regulations.[69]

Although CCDF was created through PRWORA, its rules governing employment discrimination are more complicated than the Charitable Choice provisions. The Charitable Choice provisions of PRWORA do not apply to CCDF; it is governed instead by the provisions originally enacted to cover the Child Care and Development Block Grant. The CCDF employment discrimination rules permit a faith-based provider, financed through a CCDF contract or grant, to "require that employees adhere to the religious tenets and teachings of such organization"; the regulation does not impose a general nondiscrimination rule on providers financed by vouchers, so no exemption is needed for faith-based providers. The CCDF, however, limits the scope of faith-based providers' exemptions. The regulations specify that any provider receiving more than 80% of its operating budget from federal and state funds, whether through direct contracts or vouchers, loses its privilege to hire co-religionists for caregiver positions.[70]

The CCDF, limits the scope of faith-based providers' exemptions. The regulations specify that any provider receiving more than 80% of its operating budget from federal and state funds, whether through direct contracts or vouchers, loses its privilege to hire co-religionists for caregiver positions. the 80% threshold applies to providers financed either through direct or indirect sources.

The rules on nondiscrimination in admission to child care function in a similar way. If a provider is financed by direct contracts or grants, the provider may not discriminate in admissions on religious grounds. If such a provider receives 80% or less of its operating budget from

[68] CCDF Regulations, 45 CFR §§ 98.30(c)(5), 98.54(d). So long as beneficiaries have genuine choices among secular and religious options, this provision is consistent with the Establishment Clause as construed in *Zelman v. Simmons-Harris*.

[69] 45 CFR § 98.54(b)

[70] 45 CFR § 98.47(c). The provision reads, in relevant part: "if 80 percent or more of the operating budget of a child care provider comes from Federal and State funds, including direct and indirect assistance under the CCDF, the Lead Agency shall assure that, before any further CCDF assistance is given to the provider, (1) The grant or contract relating to the assistance, or (2) The employment policies of the provider specifically provide that no person with responsibilities in the operation of the child care program will discriminate, on the basis of religion, in the employment of any individual as a caregiver."

federal and state funds, the provider may – in allocating slots that are not funded by a government grant or contract – give preference to children whose families "participate on a regular basis in other activities" of the provider. Thus, a congregation-based child care center could reserve spaces for the children of congregational members, but only so long as the center does not receive more than 80% of its funding from federal and state sources. Importantly, and parallel to the employment discrimination rule, the 80% threshold applies to providers financed either through direct or indirect sources. Any child care provider that receives more than 80% of its operating budget from federal or state funds may not discriminate on religious grounds in the allocation of any of its spaces, whether such spaces are government funded or not.[71]

FBOs interested in participating in programs designed to encourage sexual abstinence among adolescents can look to three federal funding streams: the Adolescent Family Life Demonstration Program, the Abstinence Education Grant Program and the Special Projects of Regional and National Significance - Community-Based Abstinence Education grants.

CCDF does follow the Charitable Choice provisions in one important respect, however. Recognizing that some states' constitutions and statutes may prohibit direct or indirect funding of religious organizations, CCDF provides that such restrictions should not be construed to limit the expenditure of federal funds under the program. CCDF then specifies that where state restrictions would purport to limit expenditures under the program, federal and state funds should be segregated to ensure that the federal monies are available to meet the full range of the program's purposes.[72]

2. Sexual Abstinence Education Projects

FBOs interested in participating in programs designed to encourage sexual abstinence among adolescents can look to three federal funding streams. The first, under the Adolescent Family Life Demonstration Program (AFL), dates from the early 1980s.[73] The other two, the Abstinence Education Grant Program and the Special Projects of Regional and National Significance - Community-Based Abstinence Education grants (SPRANS), were created under the 1996 welfare reform legislation. The AFL and SPRANS programs consist of discretionary grants administered by HHS; the Abstinence Education Grant Program is a formula grant program distributed to

[71] 45 CFR § 98.45 (the rule exempts "family child care providers," defined as single individuals providing child care services in a home setting).

[72] 45 CFR § 98.3.

[73] The AFL funds both prevention (abstinence education) and care for pregnant adolescents; since 1996 a significant majority of the funding has gone to education programs.

states (and other jurisdictions), which have a matching funds requirement. In 2002, the AFL program made grants of $29 million; the Abstinence Education block grant was authorized to distribute $50 million; and the SPRANS abstinence program was authorized to award $40 million in grants.

Since 1996, the three funding streams have shared a common definition of the content of abstinence education, as specified in section 912 of PRWORA (codified at 42 USC § 710): For purposes of this section, the term "abstinence education" means an educational or motivational program which –

(A) has as its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity;

(B) teaches abstinence from sexual activity outside marriage as the expected standard for all school age children;

(C) teaches that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems;

(D) teaches that a mutually faithful monogamous relationship in context of marriage is the expected standard of human sexual activity;

(E) teaches that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects;

(F) teaches that bearing children out-of-wedlock is likely to have harmful consequences for the child, the child's parents, and society;

(G) teaches young people how to reject sexual advances and how alcohol and drug use increases vulnerability to sexual advances; and

(H) teaches the importance of attaining self-sufficiency before engaging in sexual activity.

The AFL specifically encouraged the involvement of faith-based organizations in its prevention programs, and FBOs comprised a significant portion of the grantees and sub-grantees in the program's early years. The funding of FBOs – coupled with

the AFL's promotion of family obligations and restrictions on information about abortion – led the American Civil Liberties Union to file suit against the program in 1983, alleging that the AFL promoted religion in violation of the Establishment Clause. In Bowen v. Kendrick, the Supreme Court held that the AFL, considered only on its face, did not promote religion; the Court then sent the case back to the district court to determine whether AFL funds had, in fact, been used by grantees or sub-grantees to promote religion.

In 1993, the government and AFL's challengers reached a settlement in the lawsuit. The settlement centers on an agreement by HHS to maintain certain constitutional safeguards in the administration of the AFL. First, as specified by the Supreme Court's decision, HHS agreed not to fund "pervasively sectarian" providers under AFL. Second, HHS agreed to instruct grantees on specific restrictions related to religion, including limits on the presence of religious images or publications in space used for AFL programs. Third, HHS agreed to a robust system of monitoring grantees under the AFL, including advance review of grantees' curricula for education programs and site visits to ensure compliance.

Although the agreement expired in 1998, the same criteria continue to be used by the Office of Adolescent Pregnancy Programs (OAPP, the HHS office charged with administering the AFL). Each grantee under AFL receives two memos that address the issue of FBO participation, AFL Policies Pertaining to Religion and Guidance to AFL Grantees.[74] The Policies letter describes the Kendrick litigation and settlement, and identifies two core elements of the settlement that remain binding on AFL grantees:

- The grantee will not teach or promote religion in the AFL Title XX program. The program shall be designed so as to be, to the extent possible, accessible to the public generally.

- The grantee shall submit all curricula and educational materials proposed for use in the AFL project, whether currently available or to be developed, to OAPP for review and approval prior to use in the AFL project, to ensure that these materials are medically accurate, do not teach or promote religion and are neutral on abortion.

[74] Available at http://opa.osophs.dhhs.gov/xxgrants/01march/care/afl_care_03-2001.html.

The Guidance memo, which was developed to implement the Kendrick settlement, consists of a series of questions and answers concerning the involvement of religious institutions in AFL projects. The memo strongly encourages grantees to limit service recipients' exposure to religious messages, materials, or imagery where AFL services are provided, and to ensure that AFL services are clearly distinguished from specifically religious programs.

The instructions to remove religious imagery and influences, found in the AFL guidance materials, and the prohibition on funding "pervasively sectarian" institutions, which was at the heart of the Kendrick settlement, do not conflict with the legislation that created the Abstinence Education block grant or SPRANS program.

Grantees are expected to ensure that the services are "accessible to the public generally," with special emphasis on avoiding settings or messages that would expose recipients to unwanted religious experience.

The Abstinence Education block grant and SPRANS programs were not involved in the Kendrick litigation or settlement, but HHS' Maternal and Child Health Bureau (which administers these funds) provides grantees with the same instructions and guidance materials that OAPP uses in the AFL program. Although these two programs were created through the PRWORA, the Charitable Choice provisions were not made applicable to these funding streams. Thus, the instructions to remove religious imagery and influences, found in the AFL guidance materials, and the prohibition on funding "pervasively sectarian" institutions, which was at the heart of the Kendrick settlement, do not conflict with the legislation that created the Abstinence Education block grant or SPRANS program.

The AFL grant legislation contains no express nondiscrimination provisions, relating either to services or employment. The Kendrick settlement (and continuing guidance), however, imposes a strong principle of nondiscrimination in the delivery of services. AFL grantees are expected to ensure that the services are "accessible to the public generally," with special emphasis on avoiding settings or messages that would expose recipients to unwanted religious experience.

As noted above, the Abstinence Education block grant and SPRANS programs have adopted the AFL guidance materials, including the concern about protecting recipients from unwanted exposure to religious materials or messages. In addition, the legislation that created the Abstinence Education and SPRANS programs has a broad nondiscrimination rule: "No person shall on the ground of sex or religion be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity funded in whole or in part with funds made

available under this title."[75] The rule clearly prohibits discrimination in the delivery of services, but the language suggests a broader reach to the rule, a reach that seems to encompass employment discrimination. Again, because the Charitable Choice provisions of the PRWORA do not apply to the Abstinence Education block grants or the SPRANS program, such a construction of the nondiscrimination rule is likely.

Charitable Choice provisions cover the Substance Abuse Prevention and Treatment Block Grant, Projects for Assistance in Transition from Homelessness and a variety of discretionary grant programs administered by SAMHSA.

Religious providers are entitled to equal treatment in the grant process, to retain their religious symbols and identity, and to retain their right to prefer co-religionists in employment decisions.

They are required to maintain government funds in a separate account, and that account alone may be audited by program officials.

3. Substance Abuse Prevention & Treatment Services

Late in 2000, Congress included Charitable Choice provisions in two authorization statutes for the Substance Abuse and Mental Health Services Administration.[76] These provisions apply to all programs administered by SAMSHA, including both discretionary and block grant programs, that offer financial assistance to providers of substance abuse treatment or prevention services. Thus, the Charitable Choice provisions cover the Substance Abuse Prevention and Treatment Block Grant, Projects for Assistance in Transition from Homelessness (both of which are formula grants), and a variety of discretionary grant programs administered by SAMHSA.

The SAMHSA Charitable Choice provisions encompass all of the significant elements of the provisions found in the PRWORA. Religious providers are entitled to equal treatment in the grant process; religious providers are permitted to retain their religious symbols and identity, and to retain their right to prefer co-religionists in employment decisions. Providers are also forbidden to discriminate against service recipients on the basis of religion, religious beliefs, or the recipient's participation in religious activities. As in the Community Service Block Grant's Charitable Choice provisions, religious grantees are required to maintain government funds in a separate account, and that account alone may be audited by program officials.

Two elements of the SAMHSA rules go beyond those in the PRWORA. First, the SAMHSA provisions formalize

[75] 42 USC § 708.
[76] The two provisions are codified at 42 USC § 290kk and 42 USC § 300x-65.

and make more concrete the protections for the religious liberty of service recipients. Like the PRWORA rule, the SAMHSA provision specifies that service recipients have the right to object to receiving services from a faith-based provider, and that the government must offer an alternative provider that is both reasonably accessible to the recipient and offers services at least as valuable as those rejected by the recipient. The SAMHSA rule goes further, and requires the government entity financing the services and the service provider to ensure that service recipients are given notice of their right to object to the services offered.[77]

SAMHSA requires the government entity financing the services and the service provider to ensure that service recipients are given notice of their right to object to the services offered.

Second, the SAMHSA provisions reflect a debate over the necessary qualifications for providing substance abuse prevention or treatment services, as well as more fundamental questions about the nature of such services. In its audit of the SAMHSA programs, the HHS Center for the Faith-Based and Community Initiatives concluded that repeated invocations of "science-based" treatment and "scientific and technical merit," along with restrictive interpretations of professional credentials in the field, discouraged some faith-based service providers from applying for grants. Congress had addressed at least some of these concerns in the SAMHSA Charitable Choice provisions. The legislation incorporates a specific finding that "establishing unduly rigid or uniform educational qualification for counselors and other personnel in drug treatment programs may undermine the effectiveness of such programs."[78] Based on that finding, Congress added a rule to the SAMHSA Charitable Choice provisions which prohibits discrimination against individuals and programs because of the religious nature of their training in substance abuse treatment, so long as that training is "substantially equivalent" to nonreligious training that satisfies government requirements. SAMHSA has not yet proposed any standards or guidance for determining what religious training should count as "substantially equivalent" to nonreligious education.

4. Compassion Capital Fund

[77] The two SAMHSA Charitable Choice provisions differ in their assignment of this duty to provide notice. 42 USC § 290kk-1 assigns the duty to service providers, entities that refer recipients for covered services, and the governmental entities that administer the program; 42 USC § 300x-65 places the duty on "the appropriate Federal, State, or local governmental entity."

[78] 42 USC § 290kk-3.

In October, 2000, HHS announced $30 million in discretionary grants made under the newly-created Compassion Capital Fund (CCF). Congress appropriated the funds in order "to provide grants to charitable organizations to emulate model social service programs and to encourage research on the best practices of social service organizations."[79] Nearly $25 million of this fund was awarded to twenty-one "intermediary organizations," which are charged with two basic tasks: to build the capacity of grassroots faith-based and community organizations that provide social welfare services; and to make subgrants to grassroots organizations that the grantees determine to be particularly promising.[80]

Further guidance should make clear, at a minimum, that grantees are responsible for ensuring that sub-grantees comply with federal accounting standards for grant recipients, and that sub-grantees segregate government funds from resources used to support religious activities.

The first task seems relatively clear and raises few particular legal problems. CCF grantees are expected to provide faith-based and community organizations with technical assistance, which may include training staff, providing information about government or private funding, helping the organizations to form partnerships with other organizations, and developing models of best practices. So long as grantees provide this assistance on a nondiscriminatory basis, legal concerns with the task of capacity building should be minimized.

The sub-grants to grassroots organizations, however, raise more serious questions. The CCF program announcement for the fund contains the standard limitation on the use of public funds: "Compassion Capital Funds shall not be used to support religious practices such as religious instruction, worship or prayer." Apart from the ambiguity inherent in any operative definition of these practices, the program announcement does not specify that these limitations apply to sub-grants of government funds as well as to primary grants. Indeed, the announcement seems to envision quite limited monitoring of sub-grantees' activities, requiring little more than a general description of the funded activities and a proposed plan for measuring outcomes of the funding. Further guidance from HHS to CCF grantees should

[79] Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 107 PL 116 (2002).

[80] The authority to make subgrants under the Compassion Capital Fund has been called into question. The scant legislative history of the fund would indicate that subgrants are not consistent with Congress's intent in creating the program (the consensus of several senators discussing the fund is that "this fund is only for the development of model best practices"). 147 Cong. Rec. S 11546 (Nov. 7, 2001). See OMB Watch, Comments on Guildelines for Compassion Capital Fund, March 29, 2002. The statutory language, however, seems broader in that it authorizes funding not only for research on best practices, but for charitable organizations to "emulate" such practices, which could suggest funding for services.

make clear, at a minimum, that grantees are responsible for ensuring that sub-grantees comply with federal accounting standards for grant recipients, and that sub-grantees segregate government funds from resources used to support religious activities.[81]

5. Workforce Investment Act

Created in 1998, the Workforce Investment Act (WIA) is designed to combine and coordinate federal programs that provide employment-related services. The One-Stop service delivery system stands at the heart of the WIA's reforms. One-Stop centers, located across the country, draw together under one roof the wide variety of federal employment services, which range from unemployment insurance and employment counseling to job-training and placement, along with assistance in transportation or child care. Most of the money authorized under the WIA goes to states through formula grants, but the Department of Labor's Employment and Training Administration does make some discretionary grants for demonstration and pilot projects.

FBOs are eligible to participate as operators or partners in the One-Stop system.

WIA formula grants are administered through Statewide and Local Workforce Investment Boards (WIBs), entities established by the WIA to assess needs related to workforce development and develop plans for meeting those needs. State WIBs allocate program resources to local WIBs, which in turn distribute WIA funds to the operators of One-Stop centers and other service providers that are partners in the One-Stop system.[82] Local WIBs are generally barred from providing direct services under the WIA; instead, their role is to develop policy and select and monitor the performance of the One-Stop operators and partners.

FBOs are eligible to participate as operators or partners in the One-Stop system. DOL's Employment and Training Administration (ETA) has actively sought to involve faith-based and community organizations in workforce development programs.[83] In the summer of 2002, DOL awarded $17.5 million

[81] The first requirement, on accountability, can be found in HHS's Uniform Requirements for Awards and Subawards, 45 CFR § 74 (the HHS version of OMB Circular A-110). The second requirement derives from Establishment Clause case law. As demonstrated by *Bowen v. Kendrick*, sub-grants of government funds carry the same constitutional limits as grants of such funds.

[82] The WIA specifies that providers of certain federally financed employment services are "required partners" in the One-Stop system, meaning that such providers must enter into cooperative relationships with the operators of One-Stop centers, ensuring that service beneficiaries can receive the full range of services to which they are entitled. 29 USC § 2841 (defining One-Stop system, identifying required and permitted partners).

[83] DOL's ETA has also solicited grant applications from community and faith-based organizations that

in WIA demonstration grants to states, intermediary organizations, and grassroots service providers for the purpose of linking community and faith-based organizations to the One-Stop system.[84]

The WIA, however, places restrictions on faith-based providers financed through its programs. WIA programs carry a broad nondiscrimination rule which forbids discrimination on religion (among other grounds) and extends protection both to those who receive services and to those employed in providing the services. The rule does not exempt FBOs from its reach, and ETA guidance materials clearly state that FBOs are covered by the nondiscrimination requirement. The WIA's nondiscrimination provisions apply to any "program or activity" that is "financially assisted by the WIA" or operated "as part of the One-Stop delivery system."[85] Although the "financial assistance" prong seems relatively clear – any provider that receives WIA funds must comply with the Act's nondiscrimination rule – the applicable regulations define "financial assistance" in expansive terms. Such assistance includes both direct and indirect (voucher) financing; permission to use property purchased or leased with WIA funds, if the use is connected with One-Stop services; or use of personnel financed by the WIA.[86] The nondiscrimination provisions apply only to the "program or activity" participating in the One-Stop system; they do not extend to all programs and activities of participating entities.

WIA programs carry a broad nondiscrimination rule which forbids discrimination on religion (among other grounds) and extends protection both to those who receive services and to those employed in providing the services. The rule does not exempt FBOs from its reach.

In addition, the WIA prohibits the use of program funds for "employment or training of participants in sectarian activities."[87] DOL regulations define "sectarian activities" as "religious worship or ceremony, or sectarian instruction."[88] Thus, a WIA-supported activity could not use a faith-intensive curriculum as part of its

provide employment-related services to people with significant disabilities. SGA 02-22, 67 FR 50711 (August 5, 2002).

[84] These grants are described in the Employment and Training Administration's Training and Education Guidance Letter 17-01, on April 17, 2002. The grants were formally solicited in the DOL's Solicitations for Grant Applications (SGA) 2-106, 2-107, and 2-108, published in the Federal Register at 67 FR 18938, 67 FR 18946, and 67 FR 18030 respectively. For a list of grants awarded, see http://www.dol.gov/opa/media/press/opa/OPA2002370.htm.

[85] 29 CFR § 37.10.

[86] 29 CFR § 37.4. This definition is highlighted in the ETA's extremely useful document "Questions and Answers Relating to FBO/CBO Solicitations," available through the DOL's website at http://www.doleta.gov/usworkforce/documents/misc/fbo-cbo.asp#qanda.

[87] 20 USC § 9276(c); 20 CFR § 667.266, 29 CFR § 37.6(f).

[88] 29 CFR § 37.4.

employment readiness program. The WIA's restrictions on sectarian activities extend beyond worship and religious instruction; participants in WIA-supported programs cannot be "employed or trained in any way" to construct, operate, or maintain any facility that is "primarily or inherently devoted to sectarian instruction or religious worship."[89] This restriction does not, however, bar FBOs as a class from employing WIA participants, even in the maintenance of FBO facilities – so long as the facility is not "primarily or inherently devoted to sectarian instruction or religious worship." This distinction reflects the constitutional interpretation expressed in ETA guidance materials: "the Establishment Clause of the First Amendment of the United States Constitution prohibits the government from directly funding religious activity."

A WIA-supported activity could not use a faith-intensive curriculum as part of its employment readiness program. The WIA's restrictions on sectarian activities extend beyond worship and religious instruction; participants in WIA-supported programs cannot be "employed or trained in any way" to construct, operate, or maintain any facility that is "primarily or inherently devoted to sectarian instruction or religious worship."

6. Welfare-to-Work

The Welfare-to-Work (WtW) program stands at the intersection of the TANF program, created in the 1996 welfare reform law, and the Workforce Investment Act. Enacted in 1997, WtW is designed to advance one of the major goals of TANF – moving people off of welfare and into permanent employment that permits them to be self-supporting. As such, WtW's services are targeted at those who are likely to face the greatest challenges in entering or remaining in the workforce. WtW funds can be used for a wide variety of services for this target population, including wage subsidies for public or private sector employment; vocational training; mentoring; child care, transportation, or short-term housing assistance; and substance abuse treatment.[90] DOL distributes three-quarters of WtW funds through formula grants to states, which in turn redistribute the funds to local WIBs. Local WIBs then enter contracts or voucher financing arrangements with providers of WtW services; WIA regulations specify that WtW providers financed through formula grants are "required partners" in the One-Stop system.[91] The other one-quarter of WtW funds are distributed by DOL through competitive grants. Applicants for competitive grants must show that they have consulted with their local WIB and state governor, in order to ensure that programs

[89] 20 USC § 9276(c); 20 § CFR 667.266, 29 CFR § 37.6(f).
[90] The full list of allowable activities can be found at 20 CFR § 645.220.
[91] 20 CFR § 663.620; 20 CFR § 645.430.

awarded competitive grants coordinate (and are consistent) with local WIB and WtW activities.

The WtW legislation incorporates the Charitable Choice provisions of the PRWORA. Thus, FBOs are eligible to participate in the full range of WtW programs, whether through contracts or voucher arrangements with local WIBs or through discretionary grants from DOL. DOL's regulations for WtW do not mention the Charitable Choice provisions, which leads to some degree of confusion, especially given WtW's close connection with WIA. As noted above, WIA regulations impose a broad nondiscrimination rule on all service providers receiving financial assistance through that program. WtW regulations specify that "recipients of WtW financial assistance who operate programs that are part of the One-Stop system" must comply with the requirements of 29 CFR part 37 – which include the prohibition on religion-based employment discrimination.[92] Because of the requirement that WtW participants coordinate with – and, where possible, integrate their services with – the One-Stop system, a literal reading of this regulation would largely erase the exemption provided in WtW's Charitable Choice provision. Recognizing this conflict, ETA's guidance on the WIA indicates that the Charitable Choice provision will govern. While we believe this judgment is correct as a matter of statutory interpretation, ETA and the DOL's Center for Faith-Based and Community Initiatives need to provide significantly greater guidance on the implementation of Charitable Choice in WtW-supported programs.[93]

The Welfare-to-Work program incorporates Charitable Choice provisions, thus FBOs are eligible to participate in the full range of WtW programs.

[92] 20 CFR § 645.430(d).

[93] The lack of guidance is especially surprising given the extent of valuable information that ETA provides for WIA One-Stop participants (indeed, it is this WIA material – not WtW-specific guidance – that resolves the previously-mentioned conflict).

V. Social Service Contracts Between Government and FBOs

MAJOR FINDING:

- With a few notable exceptions, the existing contracts between states and FBOs are conspicuously silent on the subject of the particular rights and responsibilities that attach to FBOs in such contracts. This contractual silence invites confusion and legal controversy, because FBOs are not provided contractual guidance with respect to constitutional and statutory limits on their use of government funds.

When the legal issues that arise from the faith-based initiative are viewed from Washington, D.C., federal constitutional law seems to dominate. From the perspective of those who administer FBOs, however, the legal materials most pertinent to their daily circumstances are not so distant. Rather, the contractual arrangements between providers and government financiers of social services are likely to be the most immediate source of guidance, attention, and control. Of course, questions of constitutional law, or other legal concerns, are not irrelevant to those contracts – the answers to such questions may limit the contractual freedom of the parties. Because the contents of such contracts are so likely to be the primary source of front-line guidance for FBOs and contract officers, we think that a close look at their contents is especially important as an element of our report.

The contractual arrangements between providers and government financiers of social services are likely to be the most immediate source of guidance, attention, and control.

As part of our research, we sought copies of standard social service contracts from all the states. Thus far, we have successfully located such documents from approximately three-fourths of them. Therefore, we do not claim in this section to have exhaustively surveyed all relevant sources. We are missing a number of states, many states may have more than one standard form contract, depending on the agency and service involved, and some of the contracts may have been altered since we began our work in early 2002. Nevertheless, what we have seen suggests a pattern that deserves attention.

The question on which we focused in our examination of these contracts is whether they contain any FBO-specific provisions. Do they address questions of the religious character of FBOs, the permissible or impermissible religious content of its

service, its obligations to serve without religious coercion or discrimination, or its obligations to account separately for secular activities (for which government may pay) and religious activities (for which government may not pay in directly financed programs)? Do they address the question of employment discrimination by FBOs? Without this sort of guidance, FBOs and contracting officers alike may well be wary of entering into these contractual relationships. Alternatively, contractual silence on such matters permits ambiguity and evasiveness, which may eventually lead FBOs and state agencies into legal trouble.[94]

Without guidance, FBOs and contracting officers alike may well be wary of entering into these contractual relationships. Alternatively, contractual silence permits ambiguity and evasiveness, which may eventually lead FBOs and state agencies into legal trouble.

Many of these contracts do have employment discrimination provisions. At times, these provisions simply require compliance with existing state and federal law on the subject, but a number of these contracts go beyond that body of law and forbid religious discrimination without exempting FBOs. It is no surprise to find a set of provisions on this subject in government contracts, and we would venture a guess that none of the state contracts have been drafted, or recently redrafted, with the concerns of FBOs in mind. Instead, provisions of this character generally assert the state or local policy with respect to employment discrimination by entities that engage in business with government. These policies may, of course, present issues for FBOs, and it is important for contractual arrangements to be transparent concerning the relevant rules.

With respect to other, FBO-specific concerns, however, the pattern we have discovered is stark, and suggests a principal cause of difficulty and uncertainty for the faith-based initiative. Very few of these contracts have any FBO-specific provisions. Of the thirty-six states whose contract documents we have examined, the only such provisions we have found thus far appear in social service contracts in Oklahoma, Texas, and Wisconsin. We have set forth in Appendix C the full text of the relevant provisions from those three states. Here, we summarize them:

- Oklahoma - Specifies that FBOs may compete on an equal basis with others; protects the religious character and appearance of FBOs; prohibits religious discrimination against, and religious coercion of, beneficiaries

[94] The *McCallum* and *Foster* decisions, discussed in Part IC above, suggest the hazards of nontransparent policies of this character.

(Department of Human Services, Solicitation for Faith-Based Intermediary Services, section 6.3.3).

- Texas - This is by far the most elaborate FBO-specific provision. It preserves employment discrimination exemptions; specifies that FBOs may compete on an equal basis with others; protects the religious character and appearance of FBOs; suggests segregation of public and private funds and limits audits to public funds; disclaims state endorsement of religious practices or expression; denies that state objectives include "the funding of sectarian worship, instruction, or proselytization"; requires disclosure to "assisted individuals" of their right to be free of religious discrimination, and their right to choose a different provider if they object to a provider's religious character (Department of Human Services, Contract for Community Care Program, Provider Agreement, Section H)

- Wisconsin - In a section of its contract with field agencies that supervise workforce development services, a provision governing subcontracts with FBOs specifies that they may compete on an equal basis with others; forbids discrimination by the prime contractor against FBOs; protects the religious character and appearance of FBOs; prohibits religious discrimination against applicants for assistance; requires the prime contractor to provide "an alternate provider of the same services, worth the same value," to participants who object to the religious character of a provider; and requires that FBO subcontractors be held to the same fiscal and accounting standards as any other provider. (Wisconsin Works and Related Program Contract, Department of Workforce Development, Par. 13.5-13.8).

All three of these states have made a good start, but none have provided clear and sufficient guidance on all of the questions of greatest concern to FBOs. Moreover, the remainder of the state contracts we have examined say nothing at all about these subjects. The FBO-specific questions that such contracts might constructively address include:

1. Preserving religious character of the FBO (symbols, icons, etc.). One important feature of charitable choice legislation has been explicit recognition that FBOs may maintain their physical surroundings and their structure of governance. It is important and worthwhile for contracts to spell out in

FBO-specific items that social service contracts need to better address include:

1. Preserving religious character through symbols
2. Selecting beneficiaries
3. Alerting beneficiaries to secular options
4. Specifying constitutionally forbidden activities
5. Segregating and accounting for public support

detail what aspects of religious character are to be left undisturbed, as well as to provide general assurances on issues of religious character. It is essential, however, to maintain the distinction between the religious character of the institution and the religious content of the particular service provided under the contract. While the contract may permit FBOs to maintain their religious character and setting, the Constitution prohibits FBOs from using public funds to provide services that include religious themes and messages – unless such services are financed through an appropriate voucher system.

2. Selecting beneficiaries – The contract should be clear on the distinction between religious discrimination among beneficiaries (e.g., only Christians will be served) and religious coercion of beneficiaries (the provider will only serve those who are willing to participate in the program's religious aspects). If both discrimination and coercion are prohibited, the contract should so specify.

3. Alerting beneficiaries to secular options – Beneficiary choice programs must include secular options, and Charitable Choice principles (and legislation) typically require that such options must be provided in directly financed programs as well. The contract should explicitly allocate responsibility between the FBO and the government with respect to the obligation to disclose secular options and the scope of that disclosure. Ordinarily, the contract should oblige FBOs to inform clients of the existence of secular options, and should oblige the government agency to provide the details of those options and to warrant their adequacy.

4. Specifying with particularity the religious activities for which the state is constitutionally forbidden to pay. This is the most important FBO-specific provision in any contract for direct financing. Such a provision must start with the basic prohibitions in the Charitable Choice legislation, which are that government money may not be spent on religious instruction, worship, or proselytizing.[95] In a

[95] The standard contract prepared by the Texas Department of Human Services includes the following provision: "The purpose of this contract is the provision of social services; no State expenditures have as their objective the funding of sectarian worship, instruction, or proselytization." By focusing on purposes and objectives, rather than the specific services provided, this provision inadequately states the appropriate Establishment Clause limitation on direct expenditure of government funds. The constitutionality of such an expenditure is measured not only by its "secular purpose," but is measured as well by the secularity of the means employed to deliver the government-financed service.

direct financing program, those restrictions are required by the Constitution, whether or not statutes or regulations also require them. But, taken alone, those prohibitions do not exhaust the constitutional restrictions and so do not provide sufficient guidance. A provision appropriate to this task is the most difficult one to draft; in order to facilitate the work of FBOs, such a provision must be exquisitely precise and restrict neither too little nor too much religiously inspired activity.

Addressing this subject with sensitivity and good judgment is especially important in programs with goals that include personal transformation of beneficiaries. In such programs, exemplified by those aimed at substance dependency and abuse, separating spiritual and secular components may be very difficult, or may undermine the coherence of program design. Nevertheless, programs of this character are the most vulnerable to constitutional challenge if government is directly financing their therapeutic activities.[96]

In the Model Provision in Appendix C, we have suggested one way – by no means the only correct way – of drafting a provision of this character. The line between secular content and religious content can be a hard one to draw, but the viability of the faith-based initiative depends upon drawing it. We are confident that attempts to do so, coupled with good faith compliance with those attempts, will go a tremendous distance toward eliminating constitutional challenges to social service programs by FBOs, and to defeating any such challenges when they arise.

5. Segregating private support for religious activity from public support for secular service, and accounting properly for these segregated activities. The concern described above in Paragraph 4 relates closely to issues of accountability, monitoring, and entanglement. FBOs may continue to engage in religious activities with private support, but these activities must be financially segregated from the secular activities financed by government.[97] Government must monitor this segregation, but must do so

[96] For the reasons suggested in text, we strongly recommend that programs of this character be constructed as beneficiary choice programs. The results in *McCallum* I and II, described in Part I above, strongly support this suggestion.

[97] Physical segregation of government-financed activities from privately-supported religious activities is a salutary practice, but not a general constitutional requirement.

in ways that limit intrusion of government agents in sensitive judgments on the border between the religious and the secular. This represents a complex undertaking, but here too a basic framework of mutual understanding is a necessary first step. We have tried in the Model Provision in Appendix C to address the administrative and constitutional concerns raised by the state's obligation to monitor its expenditures, but there are many ways of approaching this problem. We welcome suggestions from those experienced in the field.

APPENDIX A

State Constitutional Provisions

This appendix compiles the non-establishment provisions in each of the fifty state constitutions. We have included the text of all constitutional provisions relating to the establishment of religion and the funding of religiously affiliated organizations. Following each state's provisions, we ask and answer the four questions noted below, and offer general comments. The comments contain a brief explanation of how the state attorneys general and high courts have interpreted their relevant constitutional provisions. Citations for the cases or opinions mentioned are listed below each comment in the order in which they are discussed. These comments and associated citations are intended to be representative rather than exhaustive.

Following are the four questions this appendix asks of each state's constitutional provisions. The table on the following page summarizes the answers to these questions with gray shading indicating positive responses.

1) Does the constitution have a general non-establishment clause?
   - These clauses tend be very similar in both language and application to the Federal Constitution.
   - Ten states have a general non-establishment clause.

2) Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?
   - Thirty-seven states have constitutional provisions that forbid expenditures that would benefit religiously affiliated organizations. Some of these are narrowly focused on places of worship and ministries.

3) Does the constitution have an education-specific "no-funding" clause?
   - Twenty nine states have provisions restricting appropriations to private schools, and/or private schools with religious affiliations.
   - Many of these provisions are the so-called Blaine Amendments.

4) In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?
   - Ten constitutions contain language that specifically details what sort of benefits may be bestowed upon religiously affiliated organizations. Some forbid only direct benefits, while others forbid both direct and indirect benefits.

	Non-Establishment	General - No Funding	Education - No Funding	Direct / Indirect Distinction
ALABAMA				
ALASKA				
ARIZONA				
ARKANSAS				
CALIFORNIA				
COLORADO				
CONNECTICUT				
DELAWARE				
FLORIDA				
GEORGIA				
HAWAII				
IDAHO				
ILLINOIS				
INDIANA				
IOWA				
KANSAS				
KENTUCKY				
LOUISIANA				
MAINE				
MARYLAND				
MASSACHUSETTS				
MICHIGAN				
MINNESOTA				
MISSISSIPPI				
MISSOURI				
MONTANA				
NEBRASKA				
NEVADA				
NEW HAMPSHIRE				
NEW JERSEY				
NEW MEXICO				
NEW YORK				
NORTH CAROLINA				
NORTH DAKOTA				
OHIO				
OKLAHOMA				
OREGON				

PENNSYLVANIA				
RHODE ISLAND				
SOUTH CAROLINA				
SOUTH DAKOTA				
TENNESSEE				
TEXAS				
UTAH				
VERMONT				
VIRGINIA				
WASHINGTON				
WEST VIRGINIA				
WISCONSIN				
WYOMING				

ALABAMA

Location: Alabama Const., Art. I, § 3
Text: That no religion shall be established by law ... nor to pay any tithes, taxes or other rate for building or repairing any place of worship, or for maintaining any minister or ministry ....

Location: Alabama Const. Art XIV § 263
Text: No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school.

Does the constitution have a general non-establishment clause?
Yes.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?
Yes.

Does the constitution have an education-specific "no-funding" clause?
Yes. However, it deals exclusively with monies "raised for the support of the schools," rather than just a more general reference to "any funds."

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?
No.

COMMENT:
Alabama is a state likely to be hostile towards an educational voucher program. However, they may be more willing to allow funding in other non-educational areas. The State Supreme Court has ruled that the general establishment clause of the Alabama Constitution is not to be read as more restrictive then the Federal Constitution.

Opinion of The Justices, 291 Ala. 301, 280 So. 2d 547 (1973).

Alabama Ed. Ass'n v. James, 373 So.2d 1076 (Ala.1979).

ALASKA

Location: Alaska Const. art. I, § 4

Text: No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof

Location: Alaska Const. art. XII, § 1
Title: Public Education.
Text: Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

Does the constitution have a general non-establishment clause?

Yes.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

No.

Does the constitution have an education-specific "no-funding" clause?

Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

Yes. The Alaska Constitution forbids only the expenditure of monies for the "direct" benefit of private schools.

COMMENT:

The Alaska courts would likely be hostile to a educational voucher program. Notice no private school may receive direct benefit from the state, whether or not that school is sectarian in nature. The Alaska Supreme Court has struck down school busing provisions, and educational grants for private colleges. There may be more room for maneuvering when it comes to more general funding. The Court did allow the funding a sectarian hospital.

Matthews v. Quinton, 362 P.2d 932 (Alaska 1961).

Sheldon Jackson College v. State, 599 P.2d 127 (Alaska 1979).

Lien v. City of Ketchikan, 383 P.2d 721 (Alaska 1963).

ARIZONA

Location: A.R.S. Const. Art. 2, § 12
Text: No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction

Location: A.R.S. Const. Art. 2, § 12
Text: No tax shall be laid or appropriation of public money made in aid of any church**,** or private or sectarian school, or any public service corporation

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

Yes. Funding is forbidden to both sectarian and non-sectarian private schools.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

Several Arizona Supreme Court opinions seem to soften the strong anti-funding language of the constitution. They allowed a tuition tax credit program where funds were paid into "tuition organizations" to continue. They also upheld a program in which sectarian organizations were being reimbursed for aid provided to families in need. The Court held that the "true beneficiaries" of the program are the families, not the organizations.

Kotterman v. Killian, 193 Ariz. 273, 972 P.2d 606 (1999).

Community Council v. Jordan, 102 Ariz. 448, 432 P.2d 460 (Ariz. 1967)

ARKANSAS

Location: Ark. Const. Art. 2, § 24
Title: Religious liberty
Text: All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can, of right, be compelled to attend, erect or support any place of worship; or to maintain any ministry against his consent. No human authority can, in any case or manner whatsoever, control or interfere with the right of conscience; and no preference shall ever be given, by law, to any religious establishment, denomination or mode of worship above any other.

Does the constitution have a general non-establishment clause?
No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?
Yes.

Does the constitution have an education-specific "no-funding" clause?
No.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?
No.

COMMENT:

CALIFORNIA

Location: Cal Const, Art I § 4
Title: Religion
Text: The Legislature shall make no law respecting an establishment of religion**.**

Location: Cal Const Art IX § 8.
Title: Appropriation for sectarian schools; Instruction in denominational doctrines
Text: No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or

denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.

Location: Cal Const Art XVI § 5.
Title: Public aid for sectarian purposes
Text: Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI.

Does the constitution have a general non-establishment clause?

Yes.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

California courts appear to be generally hostile toward the aiding of religious institutions. A textbook loan program was held unconstitutional in 1981, and the court rejected the child benefit theory. In an earlier case the Court did uphold a private school transportation program. However, the reasoning in that case relied heavily on the states overwhelming interest in the safety of the children.

Bowker v. Baker, 73 Cal.App.2d 653, 167 P.2d 256 (1946).

California Teachers Ass'n v. Riles, 176 Cal. Rptr. 300, 632 P.2d 953 (1981).

COLORADO

Location: Colo. Const. Art. V, Section 34
Title: Appropriations to private institutions forbidden
Text: No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.

Location: Colo. Const. Art. IX, Section 7
Title: Aid to private schools, churches**,** sectarian purpose, forbidden
Text: Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church**,** or for any sectarian purpose.

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

The Colorado Supreme court has ruled that a student incentive grant program did not violate the state Constitution. They refused to invalidate the program unless a substantial portion of the functions of the institution are subsumed in the religious mission, or the aid

funds a specifically religious activity. The Court has also ruled that the general no-funding provision does not apply to municipalities.

Americans United for Separation of Church State Fund, Inc. v. State, 648 P.2d 1072 (Colo. 1982).

Lyman v. Town of Bow Mar, 533 P.2d 1129, 188 Colo. 216 (Colo. 1975)

CONNECTICUT

Location: Conn. Const. Art. VII
Title: (No legal compulsion to join or support church. No preference in religion. Equal rights of all religious denominations.)
Text: … no person shall by law be compelled to join or support, nor be classed or associated with, any congregation, church or religious association. No preference shall be given by law to any religious society or denomination in the state.

Does the constitution have a general non-establishment clause?
No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?
No.

Does the constitution have an education-specific "no-funding" clause?
No.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?
No.

COMMENT:
The Connecticut Constitution contains no specific anti-funding language. Additionally the Connecticut Supreme Court has held that busing students to private schools would not violate the Constitution as long as the funds do not come directly from the school fund.

Snyder v. Newtown, 161 A.2d 770, 147 Conn. 374 (1960)

DELAWARE

Location: Del. Const. art I, § 1
Title: Freedom of religion
Text: ... yet no person shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry,

Location: Del. Const. art X, § 3 (2001)
Title:
Text: No portion of any fund now existing, or which may hereafter be appropriated, or raised by tax, for educational purposes, shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school; provided, that all real or personal property used for school purposes, where the tuition is free, shall be exempt from taxation and assessment for public purposes.

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

The Delaware courts may be hostile to appropriations in an educational setting. In 1934 the Delaware court held that transportation of private school students would violate the state's constitution.

State ex rel. Traub v. Brown, 36 Del. 181, 172 A. 835 (1934).

FLORIDA

Location: Fla. Const., Art. I § 3
Title: Religious freedom.
Text: There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof.

Location: Fla. Const., Art. I § 3
Title: Religious freedom.
Text: No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

Does the constitution have a general non-establishment clause?

Yes.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

No.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

Yes.

COMMENT:

The Florida Supreme Court has stated that indirect aid to religious organizations may be permissible under some circumstances. If the state action is to promote the general welfare of society, apart from any religious considerations, then it may be valid even though religious interests are indirectly benefited. However, one of Florida's lower courts has recently ruled against the State's school voucher program.

Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304 (1971).

Holmes v. Bush, Second Judicial Circuit, Leon Cty, Florida, No. CV 99-3370, Aug. 5, 2002. (holding that this section prohibits implementation of a school voucher program in which sectarian schools are a majority of participating private schools.)

GEORGIA

Location: Ga. Const. Art. I, § II, Para. VII
Title: Religious opinions; freedom of religion
Text: No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

No.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

Yes.

COMMENT:

In 1922 the Georgia Supreme Court relied on this provision to strike down a program that reimbursed the Salvation Army for services rendered. Several Attorney General Opinions also support the view that Georgia would be quite hostile to any form of state funding for religious organizations.

Bennett v. City of La Grange, 112 S.E. 482 (Ga.1922)

1969 Op. Att'y Gen. No. 69-136 (State funding of the YMCA likely to violate the constitution).

1945-47 Op. Att'y Gen. p. 222 (Public transportation to private schools would violate the constitution).

HAWAII

Location: HRS Const. Art. I, § 4
Title:
Text: No law shall be enacted respecting an establishment of religion …

Location: HRS Const. Art. X, § 1
Title:
Text: ... nor shall public funds be appropriated for the support or benefit of any sectarian or private educational institution...

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

No.

Does the constitution have an education-specific "no-funding" clause?

Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

The Hawaii Supreme court has stated that, at least when it comes to establishment clause jurisprudence, the Hawaii Constitution has not been interpreted differently from then the Federal Constitution. With regards to the education specific provision however, the Hawaii courts have been restrictive, ruling that transportation of students to private schools would violate the Hawaii Constitution.

Cammack v. Waihee, 673 F. Supp. 1524 (Haw. 1987).

Spears v. Honda, 51 Haw. 1, 449 P.2d 130 (1968).

IDAHO

Location: Idaho Const. Art. 9 § 5
Title: Education and School Lands
Text: Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

Yes. Both the general and education specific clauses are incorporated into the same section of the constitution.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

Idaho's Supreme Court appears to strictly apply this section. They have held that busing of students to private schools, tax credit funding of private schools, and the financing of a religious hospital all violate the Idaho State Constitution.

Board of County Comm'rs v. Idaho Health Facilities Auth., 96 Idaho 498, 531 P.2d 588 (1974).

Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971).

ILLINOIS

Location: Illinois Const., Art. 10, § 3
Title: Public Funds for Sectarian Purposes Forbidden
Text: Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church**,** or for any sectarian purpose.

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

The Illinois Constitution has a single provision encompassing both general and education-specific prohibitions. The Illinois Supreme Court has stated that this provision is no broader then the First Amendment to the United States Constitution. In 1973 the Illinois high court upheld a program that provided for the transportation of students to private schools at the public expense.

Constitution of the United States. People ex rel. Klinger v. Howlett, 56 Ill. 2d 1, 305 N.E.2d 129 (1973).

Board of Educ. v. Bakalis, 54 Ill. 2d 448, 299 N.E.2d 737 (1973).

INDIANA

Location: Ind. Const. Art. 1, § 4,6
Title: No preference to any creed
Text: Section 4. No preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent.

Section 6. No money shall be drawn from the treasury, for the benefit of any religious or theological institution.

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

No.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

Indiana is another state with very little case law on point. Several Attorney General Opinions' may still be helpful.

Atty. Gen. Opn. 1934, p. 356. (Division of Public Health may not contribute drugs to privately-owned charitable institutions for treatment of certain infectious diseases without violating this provision.)

Atty. Gen. Opn. 1967, No. 3, p. 9. (The furnishing of free bus transportation of children to and from parochial schools on the same basis as that furnished children attending public schools does not violate this provision, any benefit to the sponsoring religious organization being incidental to the protection and education of the children.)

IOWA

Location: Iowa Const., Art. I § 3
Title: Religion.
Text: The general assembly shall make no law respecting an establishment of religion**,** or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry.

Does the constitution have a general non-establishment clause?

Yes.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

No.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

There is little in the Iowa State Constitution would act as a barrier to "charitable choice" type legislation. Iowa does have a general establishment clause, but there is no case law pertaining to this subject matter.

KANSAS

Location: Kan. Const. B. OF R. § 7
Title: Religious liberty; property qualification for public office.
Text: The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship … nor any preference be given by law to any religious establishment or mode of worship….

Location: Kan. Const. Sec. 6 Art. 6

Title: Finance.
Text: No religious sect or sects shall control any part of the public educational funds.

Does the constitution have a general non-establishment clause?
No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?
Yes.

Does the constitution have an education-specific "no-funding" clause?
Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?
No.

COMMENT:
There is little to no case law on this topic in Kansas jurisprudence. The Constitution does not contain a general no-funding provision and the education specific clause is worded differently then most other states. Only funds that are part of the "public education funds" are proscribed from use by religiously affiliated groups.

KENTUCKY

Location: Ky. Const. § 5 189
Title: Right of religious freedom
Text: School money not to be used for church**,** sectarian, or denominational school.
No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church**,** sectarian or denominational school.

Does the constitution have a general non-establishment clause?
No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

No.

Does the constitution have an education-specific "no-funding" clause?

Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

The Kentucky Constitution does not have any general anti-funding language. However, Kentucky Courts appear to strictly enforce the educational no-funding provision. The Supreme Court of Kentucky has held that both textbook loan and student transportation programs violate the State Constitution.

Fannin v. Williams, 655 S.W.2d 480 (Ky. 1983).

Sherrard v. Jefferson, 294 Ky. 469, 171 S.W.2d 963 (1942).

LOUISIANA

Location:	La. Const. Art. I, § 8
Title:	Freedom of Religion
Text:	No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof.

Does the constitution have a general non-establishment clause?

Yes.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

No.

Does the constitution have an education-specific "no-funding" clause?

No.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

Until 1974 Louisiana's Constitution had a provision barring both direct and indirect aid to sectarian organizations. That provision was eliminated and now only the general non-establishment clause could pose a barrier. There has been no case law on the subject since the Constitutional change.

MAINE

Location:	M.R.S. Const. Art. 1, § 3
Title:	Religious freedom; sects equal; religious tests prohibited; religious teachers
Text:	... and no subordination nor preference of any one sect or denomination to another shall ever be established by law

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

No.

Does the constitution have an education-specific "no-funding" clause?

No.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

The constitution of the State of Maine contains no provision that would act as a barrier to "charitable choice" type legislation.

MARYLAND

Location: Md. Dec. of R. art. 36
Title: Religious freedom
Text: ... nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry;

Nothing in this article shall constitute an establishment of religion.

Does the constitution have a general non-establishment clause?
Yes.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?
Yes.

Does the constitution have an education-specific "no-funding" clause?
No.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?
No.

COMMENT:
The Court of Appeals of Maryland has upheld student transportation programs, as well as state aid to private religious universities.

Board of Educ. v. Wheat, 174 Md. 314, 199 A. 628 (1938).

Horace Mann League of United States of Am., Inc. v. Board of Pub. Works, 242 Md. 645, 220 A.2d 51 (1966).

MASSACHUSETTS

Location: Mass. Const. Ann. Amend. Art. XVIII
Title Expenditure of Public Money for Certain Institutions Prohibited.
Text: No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political

> subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth or federal authority or both ... and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church**,** religious denomination or society. Nothing herein contained shall be construed to prevent the Commonwealth from making grants-in-aid to private higher educational institution or to students or parents or guardians of students attending such institutions.

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes. The Massachusetts provision forbids expenditure on any organization that is not under the "exclusive control" of the state, whether or not that institution is sectarian in nature.

Does the constitution have an education-specific "no-funding" clause?

No.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

The language of the Massachusetts proscribes all government funding of private organizations regardless of religious affiliation. The case law does not soften the State's position on the issue. The Justices of the State Supreme Judicial Court have stated that the substantial purpose of the provision was to prevent direct assistance to private or sectarian charitable institutions and to preclude expenditure of public funds or appropriations for them. The Court struck down a textbook loan program as violative of this section.

Opinion of the Justices 354 Mass 779, 236 NE2d 523 (1968).

Opinion of Justices 357 Mass 846, 259 NE2d 564 (1970).

Bloom v School Committee of Springfield, 379 N.E.2d 578 (Mass. 1978).

MICHIGAN

Location:	MCLS Const. Art. I, § 4
Title	Freedom of worship and religious belief; appropriations.
Text:	... to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose.

Location:	MCLS Const. Art. VIII, § 2
Title	Free public elementary and secondary schools; discrimination; prohibition against use of public monies or property for nonpublic schools; transportation of students.
Text:	No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, preelementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

Yes.

COMMENT:

The Michigan Constitution contains some of the most restrictive language in any of the fifty state constitutions. The Michigan Supreme Court has held that voucher type programs are unconstitutional. They have also held that providing ancillary services such as textbooks and transportation are unconstitutional.

Traverse City Sch. Dist. v. Attorney General, 384 Mich. 390, 185 N.W.2d 9 (1971).

In re Advisory Opinion the Const. of 1974 PA 242, 394 Mich. 41, 228 N.W. 2d. 772 (1975).

MINNESOTA

Location:	Minn. Const., Art. I, § 16
Title:	Freedom of conscience; no preference to be given to any religious establishment or mode of worship
Text:	... or any preference be given by law to any religious establishment or mode of worship ... nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

Location:	Minn. Const., Art. XIII, § 2
Title:	Prohibition as to aiding sectarian school
Text:	In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

In Minnesota most of the case law in this area, like many other states, is focused on education. Minnesota courts upheld a student busing provision in 1970, but stated that the decision represented the outer limits of constitutionality in the State. The State Supreme Court struck down a tax credit provision that allowed parents to send their children to non-public schools. In that case, however, they relied solely on the Federal Constitution.

Americans United Inc. As Protestants, etc. v. Ind. School Dist., 288 Minn. 196, 179 N.W.2d 155 (1970).

Minnesota Civil Liberties Union v. State, 302 Minn. 216, 224 N.W.2d 344 (1974).

MISSISSIPPI

Location:	Miss. Const. Ann. Art. 3, § 18
Title:	Freedom of religion
Text:	... and no preference shall be given by law to any religious sect or mode of worship; but the free enjoyment of all religious sentiments and the different modes of worship shall be held sacred.

Location:	Miss. Const. Ann. Art. 4, § 66
Title:	Law granting donation or gratuity
Text:	No law granting a donation or gratuity in favor of any person or object shall be enacted except by the concurrence of two-thirds of the members elect of each branch of the legislature, nor by any vote for a sectarian purpose or use.

Location:	Miss. Const. Ann. Art. 8, § 208
Title:	Control of funds by religious sect; certain appropriations prohibited
Text:	No religious or other sect or sects shall ever control any part of the school or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian school, or to any school that at the time of receiving such appropriation is not conducted as a free school.

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

The Mississippi Supreme Court has upheld a textbook loan program. It held that the program did not constitute a direct or indirect aid to the respective schools which the pupils attended. The reasoning in the case, which interpreted Mississippi's general no-funding provision, would seem to indicate that Mississippi may be more open to "charitable choice" type programs then a literal reading of the constitution may otherwise indicate.

Chance v. Mississippi State Textbook Rating & Purchasing Bd., 190 Miss. 453, 200 So. 706 (1941).

MISSOURI

Location:	Mo. Const. Art. 1, § 7
Title:	Public aid for religious purposes--preferences and discriminations on religious grounds
Text:	That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church**,** sect or denomination of religion**,** or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church**,** sect or creed of religion**,** or any form of religious faith or worship.
Location:	Mo. Const. Art. 9, § 8
Title:	Prohibition of public aid for religious purposes and institutions
Text:	Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian

denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church**,** or sectarian purpose whatever.

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

Yes. The general "no funding" provision forbids both direct and indirect aid to religious organizations. The education specific provision makes no such distinction.

COMMENT:

There is no case law in Missouri focused on the general no-funding provision. The cases dealing with the education specific clause tend to be fairly restrictive in their enforcement of the provision. The Missouri Supreme Court has held that textbook loan programs and student transportation programs violate the section.

McVey v. Hawkins, 364 Mo. 44, 258 S.W.2d 927 (1953).

Paster v. Tussey, 512 S.W.2d 97 (Mo. 1974).

MONTANA

Location: Mont. Const., Art. II § 5 (2001)
Title: Freedom of religion.
Text: The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

Location: Mont. Const., Art. X § 6

Title: Aid prohibited to sectarian schools.
Text: The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church**,** school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church**,** sect, or denomination.

Does the constitution have a general non-establishment clause?
Yes.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?
Yes.

Does the constitution have an education-specific "no-funding" clause?
Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?
Yes. Both "no-funding" provisions are included within the same section. The provision forbids direct and indirect funding for both educational and other purposes.

COMMENT:
The Montana Supreme Court has held that payment of public funds to persons providing medical, hospitalization, and foster home care to indigents who have sought or received assistance from private rather than public adoptive agencies does not violate the State Constitution.

Welfare Bd. v. Lutheran Social Serv., 156 M 381, 480 P2d 181 (1971).

NEBRASKA

Location: Ne. Const. Art. 7, § 11
Title: Appropriation of public funds
Text: Notwithstanding any other provision in the Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision

thereof; *Provided,* that the Legislature may provide that the state or any political subdivision thereof may contract with institutions not wholly owned or controlled by the state or any political subdivision to provide for educational or other services for the benefit of children under the age of twenty-one years who are handicapped, as that term is from time to time defined by the Legislature, if such services are nonsectarian in nature

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

No.

Does the constitution have an education-specific "no-funding" clause?

Yes. The Nebraska Constitution forbids any appropriation of public funds to private schools, regardless of there religious affiliation.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

The Nebraska Constitution contains no general anti-funding language, but the State courts appear to strictly enforce the education provision. The Court has ruled that text book loan programs violate the State Constitution. The Attorney General of Nebraska has recently opined that grants, even competitive grants, to private religiously affiliated schools would violate the State Constitution.

Gaffney v. State Dep't of Educ., 192 Neb. 358, 220 N.W.2d 550 (1974).

1995 Op. Att'y Gen. No. 18.

NEVADA

Location:	Nev. Const. art. 11, § 10
Title:	No public money to be used for sectarian purposes
Text:	No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose.

Does the constitution have a general non-establishment clause?
No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?
Yes.

Does the constitution have an education-specific "no-funding" clause?
No.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?
No.

COMMENT:

There is no recent case law on the Nevada no-funding provision. The Nevada Attorney General, in a sixty year old opinion, stated that monies could be granted to a sectarian hospital for crippled children so long as no religious instruction occurred. In a slightly more recent opinion the Nevada AG opined that private school students could not attend classes at public schools without violating this provision.

AGO B-40 (2-11-1941).

AGO 278 (11-15-1965).

NEW HAMPSHIRE

Location:	RSA Const. Pt. 2, Art. 83
Title:	[Encouragement of Literature, etc.; Control of Corporations, Monopolies, etc]
Text:	*Provided, nevertheless,* that no money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination.

Location:	RSA Const. Pt. 1, Art. 5
Title:	Religious Freedom Recognized
Text:	Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for

worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession, sentiments, or persuasion; provided he doth not disturb the public peace or disturb others in their religious worship.

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

No.

Does the constitution have an education-specific "no-funding" clause?

Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

The New Hampshire Constitution does not have a general no-funding provision, and there is little to no case law on the education specific provision. A recent opinion statement by the Supreme Court of New Hampshire approves as constitutional a program which allows school districts to pay a portion of private school tuition so long as adequate safeguards are in place to insure that the monies do not directly benefit any religious activities.

Opinion of the Justices, 136 N.H. 357, 616 A.2d 478 (1992).

NEW JERSEY

Location: N.J. Const., Art. 1, Para. 3
Title:
Text: … nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches**,** place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform.

Does the constitution have a general non-establishment clause?
No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?
Yes.

Does the constitution have an education-specific "no-funding" clause?
No.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?
No.

COMMENT:

Everson v. Board of Education, 133 N.J.L. 350 (1945).

NEW MEXICO

Location: N.M. Const. art. XII, § 3
Title:
Text: The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.

Location: N.M. Const. art. IX, § 14 (2001)
Title: Aid to private enterprise
Text: Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation or in aid of any private enterprise for the construction of any railroad

Does the constitution have a general non-establishment clause?
No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

No. However, The New Mexico Constitution does forbid aid to any "private" organization, regardless of religious affiliation.

Does the constitution have an education-specific "no-funding" clause?

Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

Yes. Both direct and indirect funding of any private entity are forbidden.

COMMENT:

There is not an abundance of case law in this area of New Mexico law. The Attorney General has written several opinions that seem to indicate that New Mexico may be more open to government / religious organization partnerships then the plain language of the Constitution would otherwise seem to indicate.

1979 Op. Att'y Gen. No. 79-7. (Grants to students to attend private religiously affiliated colleges may not violate this provision so long as the grants go to the students rather than to the schools.)

1976 Op. Att'y Gen. No. 76-6. (A school voucher program would benefit the children, not the schools, and thus would likely be valid under the New Mexico constitution.)

NEW YORK

Location: NY CLS Const Art XI, § 3
Title:
Text: Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

No.

Does the constitution have an education-specific "no-funding" clause?

Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

Yes. The education specific clause forbids expenditures that are directly or indirectly in aid of sectarian schools.

COMMENT:

The New York Constitution does not contain any general anti-funding language. The education specific provision does prohibit both direct and indirect aid to religiously affiliated schools. The New York Supreme Court has upheld a textbook loan program as not violating this provision. However, in another case the Court held that a loan program that involved other school equipment did violate this section.

Board of Education v Allen, 228 N.E.2d 791 (New York 1967).

Meek v Pittenger, 421 US 349, 44 L Ed 2d 217, 95 S Ct 1753 (1975).

NORTH CAROLINA

Location: N.C. Const. art. I, § 13
Title: Religious liberty
Text: All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

No.

Does the constitution have an education-specific "no-funding" clause?
No.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?
No.

COMMENT:
North Carolina's constitution does not have any language that would appear to bar funding to sectarian organizations.

NORTH DAKOTA

Location: N.D. Const. Art. 8, § 5
Title:
Text: No money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school.

Does the constitution have a general non-establishment clause?
No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?
No.

Does the constitution have an education-specific "no-funding" clause?
Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?
No.

COMMENT:
There is no relevant case law in North Dakota on this issue. The education specific provision only places restrictions on funds that are "raised for the support of public schools."

OHIO

Location: OH Const I § 7
Title:
Text: No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted.

Location: OH Const VI § 2
Title: School funds.
Text: The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

The Ohio Supreme Court has very recently ruled that a school choice program did not violate the education no-funding provision of the Ohio Constitution. The Court has also allowed transportation of students to private schools and textbook loan programs. The Court upheld State construction of a hospital to be run by a sectarian organization, so long as patients of all religions are admitted.

Simmons-Harris et al. v. Goff, 711 N.E.2d 203 (Ohio 1999).

Lazarus v. Board of Commissioners, 217 NE2d 883 (Ohio 1966).

Honohan v. Holt, 244 NE2d 537 (Ohio 1968).

OKLAHOMA

Location: Okl. Const. Art. I, § 5
Title: Public schools
Text: Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control; and said schools shall always be conducted in English: Provided, that nothing herein shall preclude the teaching of other languages in said public schools.

Location: Okl. Const. Art. II, § 5
Title: Public money or property--Use for sectarian purposes
Text: No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion**,** or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

No.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

Yes. Both direct and indirect aid is forbidden.

COMMENT:

The Oklahoma Supreme Court is fairly restrictive in its enforcement of these provisions. They have held that the State is not permitted to give State funds to the YMCA/YWCA due to their religious affiliation. They have also held that transporting students to private schools would be in violation of this section.

Gurney et al. v. Ferguson, 190 Okl. 254, 122 P.2d 1002.

Connell v. Gray, 33 Okl. 591, 127 P. 417.

OREGON

Location: Ore. Const. Art. I, § 5
Title: No money to be appropriated for religion
Text: No money shall be drawn from the Treasury for the benefit of any religeous (sic), or theological institution, nor shall any money be appropriated for the payment of any religeous (sic) services in either house of the Legislative Assembly

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

No.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

The Oregon Constitution does have a general no-funding provision. However, there is little case law to illuminate the Constitution's language. The Oregon Supreme Court did strike down a textbook loan program as violative of this provision.

Dickman v. Sch. Dist. 62C, 232 Or. 238, 366 P2d 533 (1961).

PENNSYLVANIA

Location: Pa. Const. Art. 3, § 15
Title: Public school money not available to sectarian schools
Text: No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.

Location: Pa. Const. Art. 3, § 29
Title: Appropriations for public assistance
Text: No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association: Provided, That appropriations may be made for pensions or gratuities for military service and to blind persons twenty-one years of age and upwards and for assistance to mothers having dependent children and to aged persons without adequate means of support and in the form of scholarship grants or loans for higher educational purposes to residents of the Commonwealth enrolled in institutions of higher learning except that no scholarship, grants or loans for higher educational purposes shall be given to persons enrolled in a theological seminary or school of theology.

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

No.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

The Pennsylvania Supreme Court has held that funds appropriated to an institution for the support, care, and maintenance of delinquent, neglected, or dependent children placed in sectarian or denominational homes did not violate the State Constitution. The Court has also held that transportation of students to private sectarian schools is not in violation of these sections.

Schade v. *Allegheny County Institution District*, 126 A.2d 911 (Penn. 1956).

Rhoades v. Abington Township School District, 226 A.2d 53 (Penn. 1967).

RHODE ISLAND

Location: R.I. Const. Art. I, § 3
Title: Freedom of religion
Text: ... we, therefore, declare that no person shall be compelled to frequent or to support any religious worship, place, or ministry whatever

Does the constitution have a general non-establishment clause?
No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?
Yes.

Does the constitution have an education-specific "no-funding" clause?
No.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?
No.

COMMENT:
The Rhode Island Supreme Court has ruled that the state constitution should not be read as more restrictive then the federal Constitution on this issue.

Bowerman v. O'Connor, 247 A.2d 82 (R.I. 1968).

SOUTH CAROLINA

Location: S.C. Const. Ann. Art. I, § 2
Title: Religious freedom
Text: The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...

Location: S.C. Const. Ann. Art. XI, § 4

Title: Direct aid to religious or other private educational institutions prohibited.
Text: No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution.

Does the constitution have a general non-establishment clause?

Yes.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

No.

Does the constitution have an education-specific "no-funding" clause?

Yes

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

Yes. Only funds that are used for the direct benefit of sectarian, or other private schools, are forbidden.

COMMENT:

The South Carolina Supreme Court has shown some flexibility in its application of these provisions. It has upheld a tuition assistance program that allowed students to attend private colleges which are religiously affiliated. It has also upheld grant funding to religiously affiliated hospitals.

Durham v. McLeod, 259 S.C. 409, 192 S.E.2d 202 (S.C. 1972).

Gilbert v. Bath, 267 S.C. 171, 227 S.E.2d 177 (S.C. 1976).

SOUTH DAKOTA

Location: S.D. Const. Article VI, § 3
Title: Freedom of religion -- Support of religion prohibited
Text: No person shall be compelled to attend or support any ministry or place of worship against his consent nor shall any preference be given by law to any religious establishment or mode of worship. No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution.

Location: S.D. Const. Article VIII, § 16
Title: Public support of sectarian instruction prohibited
Text: No appropriation of lands, money or other property or credits to aid any sectarian school shall ever be made by the state, or any county or municipality within the state, nor shall the state or any county or municipality within the state accept any grant, conveyance, gift or bequest of lands, money or other property to be used for sectarian purposes, and no sectarian instruction shall be allowed in any school or institution aided or supported by the state.

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

The South Dakota Supreme Court appears to strictly enforce these constitutional provisions. They have held that textbook loan programs violate the State Constitution. They have also specifically rejected the "child benefit theory." The South Dakota constitution will likely present a significant bar to providing funds to religiously affiliated institutions.

Elbe v. Yankton Indep. Sch. Dist., 372 NW 2d 113 (1985).

McDonald v. School Board of Yankton Independent School Dist., 90 SD 599, 246 NW 2d 93 (1976).

TENNESSEE

Location: Tenn. Const. art. I, § 3
Title: Freedom of worship
Text: ... that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent;

Does the constitution have a general non-establishment clause?
No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?
Yes.

Does the constitution have an education-specific "no-funding" clause?
No.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?
No.

COMMENT:
The Tennessee Supreme Court has stated that the Tennessee constitution is no broader than the First Amendment to the Federal constitution on this issue.

Fort Sanders Presbyterian hosp. v. Health & Educ. Facilities Bd., 224 Tenn. 240, 254, 453 S.W.2d 771, 777 (1970).

TEXAS

Location: Tex. Const. Art. I § 6
Title: Freedom of worship
Text: ... No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent

Location: Tex. Const. Art. I § 7
Title: Appropriations for sectarian purposes
Text: No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes.

Location: Tex. Const. Art. VII § 5
Title: Permanent school fund; available school fund; use of funds
Text: ... nor shall the same, or any part thereof ever be appropriated to or used for the support of any sectarian school…

Does the constitution have a general non-establishment clause?
No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?
Yes.

Does the constitution have an education-specific "no-funding" clause?
Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?
No.

COMMENT:
There is no case law on point in Texas. Several Attorney General Opinions' may be illustrative, even if contradictory.

Op.Atty.Gen.1946, No. 0-7128. (The State may not transport students to private schools without running afoul of this provision.)

Op.Atty.Gen. 1940, No. 0-2412. (A state run rehabilitation program may not pay the tuition of participants who chose to attend classes at sectarian institutions.)

Op.Atty.Gen. 1971, No. M-861. (Tuition grants for college students attending private sectarian colleges do not violate the Texas Constitution.)

UTAH

Location: Utah Const. Art. I, § 4
Title: Religious liberty
Text: The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof;

Location: Utah Const. Art. I, § 4
Title: Religious liberty
Text: No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.

Location: Utah Const. Art. X, § 9
Title: Public aid to church schools forbidden.
Text: Neither the state of Utah nor its political subdivisions may make any appropriation for the direct support of any school or educational institution controlled by any religious organization.

Does the constitution have a general non-establishment clause?

Yes.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

The Utah Constitution has strong no-funding language, both general and education specific. However, the Utah Supreme Court has recently softened the bite of these two provisions. In 1973 the Court upheld a grant program which helped to build a religiously affiliated hospital. In 1993 the Court held that funds that indirectly benefited a religious organization are permissible so long as the money or property is equally available to all.

Society of Separationists, Inc. v. Whitehead, 870 P.2d 916 (Utah 1993).

Manning v. Sevier County, 30 Utah 2d 305, 517 P.2d 549 (1973).

VERMONT

Location: V.S.A. Const. Art. 3
Title:

Text: .... or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

No.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

The Supreme Court of Vermont has construed the "dictates of conscience" clause to invalidate a beneficiary choice program under which students in rural areas were free to attend religious schools at state expense. *Chittenden Town School District v. Vermont Dept. of Education, 738 A.2d 539 (Vt. 1999).*

VIRGINIA

Location: Va. Const. Art. I, § 16
Title: Free exercise of religion; no establishment of religion
Text: No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever ... or the people of any district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry

Location: Va. Const. Art. IV, § 16
Title: Appropriations to religious or charitable bodies
Text: The General Assembly shall not make any appropriation of public funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society. Nor shall the General Assembly make any like appropriation to any charitable

institution which is not owned or controlled by the Commonwealth; the General Assembly may, however, make appropriations to nonsectarian institutions for the reform of youthful criminals and may also authorize counties, cities, or towns to make such appropriations to any charitable institution or association.

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

An older Virginia Supreme Court case indicates that payment of tuition and other expenses for children attending sectarian school violates the State Constitution. In a recent opinion, however, the Attorney General has opined that a program granting funds to groups offering enhanced faith-based services to the state's prison inmates would not violate the constitution.

Almond v. Day, 197 Va. 419, 89 S.E.2d 851 (1955).

2002 Op.Atty.Gen., January 29, 2002.

WASHINGTON

Location: Wash. Const., Art. I, § 11
Title: Religious freedom
Text: No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment:

Location: Wash. Const., Art. IX, § 4
Title: Sectarian control or influence prohibited

Text: All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

Yes.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

The Washington Supreme Court has been fairly restrictive when enforcing these provisions, at least when dealing with issues of education. They have struck down student transportation programs and aid to non-public school students. However, in a 1998 opinion the Court held that the use of public funds to support the secular purpose of drug counseling at a religious institution did not violate the State Constitution.

Weiss v. Bruno, 82 Wash.2d 199, 509 P.2d 973 (1973).

Witters v. State Comm'n for the Blind, 771 P.2d 1119 (Wash. 1989).

Saucier v. Employment Sec. Dep't, 954 P.2d 285 (Wash. 1998).

WEST VIRGINIA

Location: W. Va. Const. Art. III, § 15

Title: Religious Freedom Guaranteed

Text: No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever ... or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this State, to levy on themselves, or others, any tax for the erection or repair of any house for public worship, or for the support of any church or ministry

Does the constitution have a general non-establishment clause?
No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?
Yes.

Does the constitution have an education-specific "no-funding" clause?
No.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?
No.

COMMENT:
The State Supreme Court has held that denying religious school children transportation would violate their rights to free exercise under the both the Federal and State Constitutions. This raises the possibility that other programs in West Virginia which exclude religious organizations from participation will be held in violation as well.

State ex rel.Hughes v. Board of Ed. of Kanawha County, 174 S.E.2d 711, 154 W.Va. 107 (1970).

WISCONSIN

Location:	Wis. Const. Art. I, § 18
Title:	Equality; inherent rights.
Text:	... nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

Does the constitution have a general non-establishment clause?
No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?
Yes.

Does the constitution have an education-specific "no-funding" clause?
No.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?
No

COMMENT:
The Wisconsin Supreme Court has recently upheld a school choice funding program against all constitutional challenges. They have also allowed funding of private religiously affiliated hospitals. Wisconsin would likely be open to other "charitable choice" type programs.

State ex rel. Wis. Health Fac. Auth. v. Lindner, 91 Wis. 2d 145, 280 N.W.2d 773 (1979).

Jackson v. Benson, 578 N.W.2d 602, 218 Wis.2d 835 (1998).

WYOMING

Location:	Wyo. Const. art. 1, § 19
Title:	Appropriations for sectarian or religious societies or institutions prohibited
Text:	No money of the state shall ever be given or appropriated to any sectarian or religious society or institution.

Location:	Wyo. Const. art. 3, § 36
Title:	Prohibited appropriations
Text:	No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.

Location:	Wyo. Const. art. 7, § 8
Title:	Distribution of school funds
Text:	... nor shall any portion of any public school fund ever be used to support or assist any private school, or any school, academy, seminary, college or other institution of learning controlled by any church or sectarian organization or religious denomination whatsoever.

Does the constitution have a general non-establishment clause?

No.

Does the constitution have a "no-funding" clause that prohibits funding of religious organizations?

Yes.

Does the constitution have an education-specific "no-funding" clause?

Yes. Aid to any private school, regardless or religious association, is forbidden.

In its prohibitions on spending, does the constitution make a distinction between direct and indirect funding?

No.

COMMENT:

There is little to no case law in Wyoming on this topic.

APPENDIX B

State-by-State Summary of Religious Exemption Statutes

ALABAMA

Where can state statutes be found online?
http://www.legislature.state.al.us/ALISHome.html

What are the employment discrimination statutes and what do they cover?
Ala. Code §29-4-3 (2002) - the Legislature is not allowed to discriminate on the basis of sex, race, creed, or color

Who is covered?
Only the Legislature is covered by anti-discrimination statute.

How are religious organizations exempted, if at all?
Not applicable - statute covers only the Legislature

What happens to the exemption if a religious organization contracts with the state government?
Not applicable - statute covers only the Legislature

Are there any court cases that interpret the exemption statutes?
None found

ALASKA

Where can state statutes be found online?
http://www.legis.state.ak.us/folhome.htm

What are the employment discrimination statutes and what do they cover?
Alaska Stat. §18.80.220(a) (2001) - it is unlawful for an employer to discriminate on the basis of race, religion, color, national origin, age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood

Who is covered?
Alaska Stat. §18.80.300(4) (2001) - any person who employs 1 or more people

How are religious organizations exempted, if at all?
Alaska Stat. §18.80.300(4) (2001) - non-profit religious organizations are not included in the definition of employer

What happens to the exemption if a religious organization contracts with the state government?
No provision

Are there any court cases that interpret the exemption statutes?

None found

ARIZONA

Where can state statutes be found online?

http://www.azleg.state.az.us/ars/ars.htm

What are the employment discrimination statutes and what do they cover?

Ariz. Rev. Stat. Ann. §41-1463(B) (2001) - it is unlawful for an employer to discriminate on the basis of race, color, religion, sex, age, handicap, or national origin

Who is covered?

Ariz. Rev. Stat. Ann. §41-1461(2) (2001) - anyone who employs 15 or more people for 20 or more weeks in the current or preceding calendar year

How are religious organizations exempted, if at all?

Ariz. Rev. Stat. Ann. §41-1463(F)(1) (2001) - it is not unlawful to discriminate on the basis of religion where religion is a bona fide occupational qualification

Ariz. Rev. Stat. Ann. §41-1463(F)(2) (2001) - it is not unlawful for religiously affiliated educational institutions to discriminate on the basis of religion

Ariz. Rev. Stat. Ann. §41-1462 (2001) - religious organizations may discriminate on the basis of religion

What happens to the exemption if a religious organization contracts with the state government?

Ariz. Rev. Stat. Ann. §41-3751 (2001) - exemption is not affected by receipt of government funds; religious organization may still discriminate on the basis of religion

Are there any court cases that interpret the exemption statutes?

None found

Phoenix, AZ

Where can city ordinances be found online?

http://livepublish.municode.com/LivePublish/newonlinecodes.asp?infobase=13485

What are the employment discrimination ordinances and what do they cover?

Phoenix Code §18-4(2) - it is unlawful for an employer to discriminate on the basis of race, color, religion, sex, national origin, or marital status.

Who is covered?

Phoenix Code §18-3(6) - any person who employs 1 or more people for each working day for 20 weeks of the preceding or current calendar year

How are religious organizations exempted, if at all?

Phoenix Code §18-4(7)(b) - religiously affiliated schools may discriminate on the basis of

religion, so long as the position at issue is one whose purpose is to further the propagation of that religion
Phoenix Code §18-4(8) - prohibition on discrimination on the basis of sexual orientation or marital status do not apply to bona fide religious organizations; religious organization may discriminate on the basis of religion in order to promote its religious principles

What happens to the exemption if a religious organization contracts with the city government?
Unknown

Are there any court cases that interpret the exemption ordinances?
None found

ARKANSAS

Where can state statutes be found online?
http://www.state.ar.us/government.php

What are the employment discrimination statutes and what do they cover?
Ark. Code Ann. §16-123-107 (2001) - employers shall not discriminate race, religion, national origin, gender, or the presence of any sensory, mental, or physical disability

Who is covered?
Ark. Code Ann. §16-123-102(5) (2001) - any person who employs 9 or more people for 20 weeks of the current or preceding calendar year

How are religious organizations exempted, if at all?
Ark. Code Ann. §16-123-103(a) (2001) - the prohibition on discrimination does not apply to religious entities

What happens to the exemption if a religious organization contracts with the state government?
Unknown

Are there any court cases that interpret the exemption statutes?
None found

CALIFORNIA

Where can state statutes be found online?
http://www.leginfo.ca.gov/calaw.html

What are the employment discrimination statutes and what do they cover?
Cal. Gov. Code §12940 (2002) - employers may not discriminate on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation
Who is covered?

Cal. Gov. Code §12940(j)(4)(A) (2002) - any person who employs 5 or more people

How are religious organizations exempted, if at all?

Cal. Gov. Code §12926(d) (2002) - the prohibition on discrimination does not apply to non-profit religious entities

Cal. Gov. Code §12926.2(c) (2002) - religiously affiliated health care providers may not discriminate, except for positions that involve religious duties

Cal. Gov. Code §12926.2(f)(1) (2002) - religiously affiliate schools may discriminate on any basis

What happens to the exemption if a religious organization contracts with the state government?

Cal. Const. Art. XVI §5 - the state may not give money to religious organizations

Cal. Gov. Code §12990(c) (2002) - every contract must include a clause prohibiting discrimination by the contractor or any subcontractor

Are there any court cases that interpret the exemption statutes?[??]

• *Silo v. CHW Medical Foundation*, 27 Cal. 4th 1097 (2002) - religiously affiliated hospital fired employee for objectionable religious speech; hospital claimed statutory exemption for religious entity. Employee argued that such an exemption violated the public policy banning discrimination. The court allowed the hospital to fire the employee, saying that the hospital fit under exemption, that public policy was not offended, and that religious entities must have the latitude to define their own religious goals

• *Kelly v. Methodist Hosp.*, 22 Cal. 4th 1108 (2000) - employee of religiously affiliated hospital sued alleging impermissible age discrimination and claiming violation of public policy (employee did not sue under California's Fair Education and Housing Act (FEHA) but claimed a violation of the public policy expressed in FEHA and that hospital should not be exempt because it was engaged in secular activities). The hospital argued that since only FEHA proscribes age discrimination and hospital was exempt from FEHA, no public policy was at issue. The court read FEHA broadly and said that plain language exempts religious employers from all discrimination prohibitions, and exemption is not limited to situations where the religious faith of the employee is a legitimate requirement of the job. The fact that the hospital engaged in secular activities was deemed irrelevant because it was still religious and the drafters of FEHA clearly intended for this to be included by using the word allowing non-profit religious "corporations" to be included

• *McKeon v. Mercy Healthcare Sacramento*, 19 Cal. 4th 321 (1998) - employee of religiously affiliated hospital sued claiming race and gender discrimination. Employee claimed that hospital could not claim exemption from FEHA because hospital was organized under the Nonprofit Public Benefit Corporation Law rather than the Nonprofit Religious Corporation Law. The court ruled that in order to claim the exemption, hospital had only to be in fact a nonprofit religious entity, and it did not matter which law it was organized under.

[98] All of these decisions precede the enactment of Cal. Gov. Code § 12926.2(c) which includes religiously affiliated hospitals in the definition of employer in FEHA for the purposes of discrimination involving employees performing non-religious duties

Los Angeles, CA

Where can city ordinances be found online?
http://www.ci.la.ca.us/lacity102.htm

What are the employment discrimination ordinances and what do they cover?
LA Administrative Code §4.400 - city not allowed to discriminate on the basis of race, color, national origin, ancestry, religion/creed, sex, disability, age, medical conditions (cancer), marital status, sexual orientation, retaliation for filing a claim of discrimination, or being afflicted or perceived as afflicted with Acquired Immune Deficiency Syndrome (AIDS) or the Human Immunovirus (HIV)

Who is covered?
Only the City is covered by the anti-discrimination statutes.

How are religious organizations exempted, if at all?
No exemption found

What happens to the exemption if a religious organization contracts with the city government?
LA Administrative Code §10.8.2 - all contracts with the city must contain a clause prohibiting the contractor and any subcontractor from discriminating on the basis of race, religion, national origin, ancestry, sex, sexual orientation, age, disability, marital status, domestic partner status, or medical condition. The provision does not exempt religious organizations that contract with the city.

Are there any court cases that interpret the exemption ordinances?
None found

San Francisco, CA

Where can city ordinances by found online?
http://www.ci.sf.ca.us/government/index.htm

What are the employment discrimination ordinances and what do they cover?
San Francisco Police Code §3303(a) - employers may not discriminate on the basis of race, religion, color, ancestry, age, sex, sexual orientation, gender identity, disability, place of birth, weight, height, association with members of protected classes, or in retaliation for opposition to any forbidden practices.

Who is covered?
San Francisco Police Code §3303(c)(2) - any person who employs 6 or more people

How are religious organizations exempted, if at all?
No exemption found
What happens to the exemption if a religious organization contracts with the city government?

San Francisco Administrative Code §12B.2 - all contracts with the city must contain a clause prohibiting the contractor and any subcontractor from discriminating on the basis of race, color, religion, ancestry, national origin, age, sex, sexual orientation, gender identity, domestic partner status, marital status, disability, weight, height, AIDS/HIV status, or association with members of protected classes, or in retaliation for opposition to any forbidden practices. The provision does not exempt religious organizations that contract with the city.

Are there any court cases that interpret the exemption ordinances?

None found

COLORADO

Where can state statutes be found online?

http://64.78.178.12/stat01/index.htm

What are the employment discrimination statutes and what do they cover?

Colo. Rev. Stat. Ann. §24-34-402(1) (2001) - employers may not discriminate on the basis of disability, race, creed, color, sex, age, national origin, or ancestry

Who is covered?

Colo. Rev. Stat. Ann. §24-34-401(3) (2001) - any person who employs any other person

How are religious organizations exempted, if at all?

Colo. Rev. Stat. Ann. §24-34-401(3) (2001) - the prohibition on discrimination does not apply to religious entities

What happens to the exemption if a religious organization contracts with the state government?

Colo. Rev. Stat. Ann. §24-34-401(3) (2001) - if a religious organization receive government funds, they cannot claim an exemption, and must follow the prohibition on discrimination

Are there any court cases that interpret the exemption statutes?

None found

Denver, CO

Where can city ordinances be found online?

http://www.denvergov.org/docudex/ordinances.asp

What are the employment discrimination ordinances and what do they cover?

Denver Municipal Code §28-93(a) - it is unlawful for an employer to discriminate on the basis of race, color, religion, national origin, gender, age, sexual orientation, gender variance, marital status, military status or physical or mental disability

Who is covered?

Denver Municipal Code §29-92 - anyone who has a written contract with 20 or more employees for each day of 20 or more weeks of the current or preceding calendar year

How are religious organizations exempted, if at all?

Denver Municipal Code §28-93(c)(4) - anti-discrimination laws do not apply to religious organizations

What happens to the exemption if a religious organization contracts with the city government?

According to the Mayor's Office of Contract Compliance, all contracts must include a non-discrimination clause.

Are there any court cases that interpret the exemption ordinances?

None found

CONNECTICUT

Where can state statutes be found online?

http://www.cga.state.ct.us/lco/Statute_Web_Site_LCO.htm

What are the employment discrimination statutes and what do they cover?

Conn. Gen. Stat. §46a-60 (2001) - employers may not discriminate on the basis of race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disorder, mental retardation, learning disability or physical disability
Conn. Gen. Stat. §46a-81c (2001) - employers may not discriminate on the basis of sexual orientation

Who is covered?

Conn. Gen. Stat. §46a-51(10) (2001) - any person employing 3 or more persons

How are religious organizations exempted, if at all?

Conn. Gen. Stat. §46a-81p (2001) - religious organizations may discriminate on the basis of sexual orientation

What happens to the exemption if a religious organization contracts with the state government?

Conn. Gen. Stat. §4a-60a (2001) - all contracts with the state must contain a clause prohibiting the contractor, as well as any subcontractor, from discriminating on the basis of sexual orientation

Are there any court cases that interpret the exemption statutes?

None found

DELAWARE

Where can state statutes be found online?
http://www.delcode.state.de.us/

What are the employment discrimination statutes and what do they cover?
Del. Code Ann. tit. 19 §711(a) (2001) - employers may not discriminate on the basis of race, marital status, genetic information, color, age, religion, sex or national origin

Who is covered?
Del. Code Ann. tit. 19 §710(3) (2001) - any person employing 4 or more persons

How are religious organizations exempted, if at all?
Del. Code Ann. tit. 19 §710(3) (2001) - religious organizations are only prohibited from discriminating on the basis of race, color, age, and national origin
Del. Code Ann. Tit. 19 §711(f)(2) (2001) - religiously affiliated educational institutions may discriminate on the basis of race

What happens to the exemption if a religious organization contracts with the state government?
Del. Code Ann. tit. 19 §710(3) (2001) - religious organizations receiving governmental funding are prohibited from discriminating on any basis

Are there any court cases that interpret the exemption statutes?
None found

DISTRICT OF COLUMBIA

Where can city ordinances be found online?
http://dccode.westgroup.com/home/dccodes/default.wl

What are the employment discrimination ordinances and what do they cover?
D.C. Code Ann. §2-1402.11(a) (2002) - employers may not discriminate on the basis of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, disability, matriculation, or political affiliation

Who is covered?
D.C. Code Ann. §2-1402.02(10) (2002) - any person who employs 1 or more people

How are religious organizations exempted, if at all?
D.C. Code Ann. §2-1401.03(b) (2002) - religious organizations may discriminate on the basis of religion and political persuasion in order to further their religious or political principles

What happens to the exemption if a religious organization contracts with the government?
D.C. Code Ann. §2-1401.03(a) (2002) - all contracts with the government must contain a clause prohibiting the contractor, as well as any subcontractor, from discriminating on any basis

Are there any court cases that interpret the exemption ordinances?
None found

FLORIDA

Where can state statutes be found online?
http://taxonomy.myflorida.com/Taxonomy/Government/Legislative%20Branch

What are the employment discrimination statutes and what do they cover?
Fla. Stat. §760-10(1) (2001) - employers may not discriminate on the basis of race, color, religion, sex, national origin, age, handicap, or marital status

Who is covered?
Fla. Stat. §760.02(7) (2001) - any person who employs 15 or more people each working day for 20 weeks of the preceding or current calendar year

How are religious organizations exempted, if at all?
Fla. Stat. §760.10(9) (2001) - religious organizations may discriminate on the basis of religion

What happens to the exemption if a religious organization contracts with the state government?
Unknown

Are there any court cases that interpret the exemption statutes?
None found

Miami, FL

Where can city ordinances be found online?
http://www.ci.miami.fl.us/

What are the employment discrimination ordinances and what do they cover?
Miami Code §2-692(a) - the city may not discriminate on the basis of race, color, religion, sex, age, national origin, place of birth, marital status or physical or mental handicap

Who is covered?
Only the city is covered by the anti-discrimination statute

How are religious organizations exempted, if at all?
Not applicable - religious organizations are not covered

What happens to the exemption if a religious organization contracts with the city government?
Miami Charter §28(c) requires the Chief of Procurement to ensure that no city contractors

discriminate on any basis; no exemption provided for religious organizations that contract with the city.

Are there any court cases that interpret the exemption ordinances?
None found

GEORGIA

Where can state statutes be found online?
http://www.ganet.org/services/ocode/ocgsearch.htm

What are the employment discrimination statutes and what do they cover?
Ga. Code Ann. §45-19-29 (2001) - employers may not discriminate on the basis of race, color, religion, national origin, sex, disability, or age

Who is covered?
Ga. Code Ann. §45-19-22(5) (2001) - employer means only public employers (any department, board, bureau, commission, authority, or other agency of the state) which employs 15 or more employees within the state for each working day in each of 20 or more calendar weeks in the current or preceding calendar year

How are religious organizations exempted, if at all?
Ga. Code Ann. §45-19-34 (2001) - religious organizations are not exempted as such, but any employer may discriminate on the basis of religion, if religion is a bona fide occupational qualification

What happens to the exemption if a religious organization contracts with the state government?
Unknown

Are there any court cases that interpret the exemption statutes?
None found

Atlanta, GA

Where can city ordinances be found online?
http://www.ci.atlanta.ga.us/

What are the employment discrimination ordinances and what do they cover?
Atlanta Code of Ordinances §94-112(a) - employers may not discriminate on the basis of race, color, creed, religion, sex, domestic relationship status, parental status, familial status, sexual orientation, national origin, gender identity, age, or disability

Who is covered?
Atlanta Code of Ordinances §94-111 - anyone who employs 10 or more people

How are religious organizations exempted, if at all?

Atlanta Code of Ordinances §94-114(2) - religiously affiliated schools may discriminate on the basis of religion

What happens to the exemption if a religious organization contracts with the city government?

According to the City Attorney, the city would not interfere with hiring decisions even if city funds were received; however, the exemption only applies to education institutions, which would not be given city funds.

Are there any court cases that interpret the exemption ordinances?

None found

HAWAII

Where can state statutes be found online?

http://www.ehawaiigov.org/government/html/hilaws.html

What are the employment discrimination statutes and what do they cover?

Haw. Rev. Stat. §378-2(1) (2001) - it is unlawful for an employer to discriminate on the basis of race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, or arrest and court record

Who is covered?

Haw. Rev. Stat. §378-1 (2001) - anyone who employs any other person

How are religious organizations exempted, if at all?

Haw. Rev. Stat. §378-3(5) (2001) - religious organizations may discriminate on the basis of religion to promote their religious principles

What happens to the exemption if a religious organization contracts with the government?

According to the Deputy Attorney General of Hawaii, the exemption would be affected as a result of state funding.

Are there any court cases that interpret the exemption statutes?

None found

IDAHO

Where can state statutes be found online?

http://www3.state.id.us/idstat/TOC/idstTOC.html

What are the employment discrimination statutes and what do they cover?

Idaho Code §67-5909 (2000) - it is unlawful for an employer to discriminate on the basis of race, color, religion, sex or national origin, age, or disability

Who is covered?

Idaho Code §67-5902(6) (2000) - anyone who employs five or more people each day for 20 or more weeks in the current or preceding calendar year

How are religious organizations exempted, if at all?

Idaho Code §67-5910(1) (2000) - religious organizations may discriminate on the basis of religion to promote its religious activities

Idaho Code §67-5910(2)(c) (2000) - religious affiliated schools may discriminate on the basis of religion

What happens to the exemption if a religious organization contracts with the government?

No provision

Are there any court cases that interpret the exemption statutes?

None found

ILLINOIS

Where can state statutes be found online?

http://www.legis.state.il.us/ilcs/chapterlist.html

What are the employment discrimination statutes and what do they cover?

775 ILCS 5/1-102(A) (2001) - it is unlawful for an employer to discriminate on the basis of race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental handicap, military status, or unfavorable discharge from military service

Who is covered?

775 ILCS 5/2-101(B)(1)(a) (2001) - anyone who employs 15 or more people within the state for 20 or more weeks of the calendar year

How are religious organizations exempted, if at all?

775 ILCS 5/2-101(B)(2) (2001) - religious organizations may discriminate on the basis of religion

What happens to the exemption if a religious organization contracts with the state government?

44 Ill. Admin. Code §750.10 (2002) - all contracts must include a clause requiring that contractor not discriminate

Are there any court cases that interpret the exemption statutes?

None found

Chicago, IL

Where can city ordinances be found online?

http://www.municode.com/Resources/online_codes.asp

What are the employment discrimination ordinances and what do they cover?

Chicago: Code of Ordinances §2-160-030 - it is unlawful for an employer to discriminate on the basis of race, color, sex, age, religion, disability, national origin, ancestry, sexual orientation, marital status, parental status, military discharge status or source of income

Who is covered?

No definition of employer is given

How are religious organizations exempted, if at all?

Chicago: Code of Ordinances §2-160-080 - religious organizations may discriminate in the interests of advancing their religious principles

What happens to the exemption if a religious organization contracts with the city government?

The exemption is not affected by receiving city funding

Are there any court cases that interpret the exemption ordinances?

None found

INDIANA

Where can state statutes be found online?

http://www.in.gov/legislative/ic/code/

What are the employment discrimination statutes and what do they cover?

Ind. Code Ann. §22-9-1-3(l) (2001) - it is unlawful for employers to discriminate on the basis of race, religion, color, sex, disability, national origin, or ancestry

Who is covered?

Ind. Code Ann. §22-9-1-3(h) (2001) - anyone who employs 6 or more people

How are religious organizations exempted, if at all?

Ind. Code Ann. §22-9-1-3(h) (2001) - the prohibition on discrimination does not apply to religious organizations

What happens to the exemption if a religious organization contracts with the state government?

Ind. Code Ann. §22-9-1-10 (2001) - all contracts must include clause that contractors and subcontractors may not discriminate on any basis

Are there any court cases that interpret the exemption statutes?

- *Indiana Civil Rights Comm'n v. Salvation Army Adult Rehab. Center*, 685 N.E.2d 487 (Ind. App. 1997) - religious organization retains the exemption even if it is engaged in a commercial endeavor

IOWA

Where can state statutes be found online?

http://www.legis.state.ia.us

What are the employment discrimination statutes and what do they cover?

Iowa Code §216.6(1) (2002) - it is unlawful for employers to discriminate on the basis of age, race, creed, color, sex, national origin, religion, or disability

Who is covered?

Iowa Code §216.6(6)(a) (2002) - anyone who regularly employs 4 or more people

How are religious organizations exempted, if at all?

Iowa Code §216.6(6)(d) (2002) - religious organizations may discriminate on the basis of religion where religion is a bona fide occupational qualification

What happens to the exemption if a religious organization contracts with the state government?

Iowa Admin. Code §441-152.2(234)(4) (2002) - all contractors must comply with the state's civil rights laws

Iowa Code Ann. §19B.7(1)(a)(3) (2002) - Department of Management is responsible for ensuring that no contractor discriminates

Are there any court cases that interpret the exemption statutes?

None found

KANSAS

Where can state statutes be found online?

http://www.accesskansas.org/government/laws-legal.html

What are the employment discrimination statutes and what do they cover?

Kan. Stat. Ann. §44-1009 (2000) - it is unlawful for employers to discriminate on the basis of race, religion, color, sex, disability, national origin or ancestry

Who is covered?

Kan. Stat. Ann. §44-1002(b) (2000) - anyone who employs 4 or more people

How are religious organizations exempted, if at all?

Kan. Stat. Ann. §44-1002(b) (2000) - anti-discrimination laws do not apply to religious organizations

What happens to the exemption if a religious organization contracts with the state government?

According to the Human Resources Department, the Kansas Human Rights Act is incorporated into every contract made with the state.

Are there any court cases that interpret the exemption statutes?

• *Zion Lutheran Church v. Kansas Comm'n on Civil Rights*, 16 Kan. App. 2d 237 (1991) - sectarian corporations are excluded from anti-discrimination laws and Kansas Commission on Civil Rights has no jurisdiction over discrimination complaints involving religious organizations

KENTUCKY

Where can state statutes be found online?

http://www.lrc.state.ky.us/legresou/legres2.htm

What are the employment discrimination statutes and what do they cover?

Ky. Rev. Stat. Ann. §344.040 (2001) - it is unlawful for employers to discriminate on the basis of race, color, religion, national origin, sex, age forty and over, or disability

Who is covered?

Ky. Rev. Stat. Ann. §344.030(2) (2001) - anyone who employs 8 or more people within the state for 20 or more weeks of the preceding or current calendar year

How are religious organizations exempted, if at all?

Ky. Rev. Stat. Ann. §344.090(2) (2001) - religious organizations may discriminate on the basis of religion for the purpose of carrying on their religious activities

What happens to the exemption if a religious organization contracts with the government?

Ky. Rev. Stat. Ann. §45.570(2) (2001) - all contractors with the state must agree not to discriminate on the basis of race, color, religion, sex, age, or national origin

Are there any court cases that interpret the exemption statutes?

None found

LOUISIANA

Where can state statutes be found online?

http://www.legis.state.la.us/

What are the employment discrimination statutes and what do they cover?

La. Stat. Ann. §23:332(A) (2001) - it is unlawful for any employer to intentionally discriminate on the basis of race, color, religion, sex, or national origin

Who is covered?

La. Stat. Ann. §23:302(2) (2001) - anyone who employs 20 or more people for 20 or more weeks of the current or preceding calendar year

How are religious organizations exempted, if at all?

La. Stat. Ann. §23:332(H)(2) (2001) - religiously affiliated educational institutions may discriminate on the basis of religion
La. Stat. Ann. §23:302(2)(b) (2001) - religious organizations are not covered by the anti-discrimination laws

What happens to the exemption if a religious organization contracts with the state government?
All contracts are required to have clause prohibiting discrimination on the basis of religion and requires all contractors to adhere to provisions of Title VII.

Are there any court cases that interpret the exemption statutes?
None found

New Orleans, LA

Where can city ordinances be found online?
http://www.new-orleans.la.us/home/cityCouncil/

What are the employment discrimination ordinances and what do they cover?
According to the Human Relations Committee, the city does not have its own anti-discrimination provisions, but rather follows federal law in that area.

Who is covered?
See above – follows federal law

How are religious organizations exempted, if at all?
See above – follows federal law

What happens to the exemption if a religious organization contracts with the city government?
See above – follows federal law

Are there any court cases that interpret the exemption ordinances?
None found

MAINE

Where can state statutes be found online?
http://www.maine.gov/portal/government/law.html#laws

What are the employment discrimination statutes and what do they cover?
5 Me. Rev. Stat. Ann. §4572(1) (2001) - it is unlawful for an employer to discriminate on the basis of race or color, sex, physical or mental disability, religion, age, ancestry or national origin

Who is covered?
5 Me. Rev. Stat. Ann. §4553(4) (2001) - any person who employs any other person

How are religious organizations exempted, if at all?

5 Me. Rev. Stat. Ann. §4553(4) (2001) - non-profit religious organizations may discriminate in favor of people of that religion

What happens to the exemption if a religious organization contracts with the state government?

5 Me. Rev. Stat. Ann. §784(2) (2001) - all contracts and sub-contracts must include non-discrimination clause

Are there any court cases that interpret the exemption statutes?

None found

MARYLAND

Where can state statutes be found online?

http://198.187.128.12/maryland/lpext.dll?f=templates&fn=fs-main.htm&2.0

What are the employment discrimination statutes and what do they cover?

Md. Ann. Code Art. 49B, §16(a) - it is unlawful for an employer to discriminate on the basis of race, color, religion, sex, age, national origin, marital status, sexual orientation, genetic information, or disability unrelated in nature and extent so as to reasonably preclude the performance of the employment, or because of the individual's refusal to submit to a genetic test or make available the results of a genetic test

Who is covered?

Md. Ann. Code Art. 49B, §15(b) (2001) - anyone who has 15 or more employs for each day of 20 or more weeks in the current or preceding calendar year

How are religious organizations exempted, if at all?

Md. Ann. Code Art. 49B, §16(g)(3) (2001) - religiously affiliated educational institutions may discriminate on the basis of religion

Md. Ann. Code Art. 49B, §18(2) (2001) - religious organizations may discriminate on the basis of religion or sexual orientation

What happens to the exemption if a religious organization contracts with the state government?

Md. State Fin. and Proc. §12-219 (2001) - discrimination by state contractors is prohibited

Are there any court cases that interpret the exemption statutes?

- *Montrose Christian Sch. Corp. v. Walsh*, 363 Md. 565 (2001) - religious organizations may discriminate on the basis of religion

Baltimore, MD

Where can city ordinances be found online?

Not online; call Baltimore City Department of Legislative Reference at (410) 396-4370

What are the employment discrimination ordinances and what do they cover?

Baltimore City Code §3-1 - it is unlawful for an employer to discriminate on the basis of race, color, religion, national origin, ancestry, sex, age, physical or mental capability, marital status, or sexual orientation

Who is covered?

Baltimore City Code §1-1(i)(1) - anyone who employs 15 or more people at least 15 days in the preceding 12 months

How are religious organizations exempted, if at all?

Baltimore City Code §1-1(f)(2) - religious organizations may discriminate on the basis of religion to promote its religious organization

What happens to the exemption if a religious organization contracts with the city government?

Unknown

Are there any court cases that interpret the exemption ordinances?

None found

MASSACHUSETTS

Where can state statutes be found online?

http://www.state.ma.us/legis/laws/mgl/index.htm

What are the employment discrimination statutes and what do they cover?

Mass. Gen. Laws. ch. 151B, §4 (2002) - it is unlawful for an employer to discriminate on the basis of race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, or ancestry

Who is covered?

Mass. Gen. Laws ch. 151B, §1(5) (2002) - anyone who employs 6 or more people

How are religious organizations exempted, if at all?

Mass. Gen. Laws ch. 151B, §1(5) (2002) - religious organizations may discriminate in favor of members of their religion to promote their religious principles

Mass. Gen. Laws ch. 151B, §4(18) (2002) - religious organizations may discriminate in favor of members of their religion to promote their religious principles

What happens to the exemption if a religious organization contracts with the state government?

Commonwealth Terms and Conditions, included in every contract, require contractors to comply with all state and federal laws regarding discrimination; contractors are prohibited from discriminating on the basis of religion or sexual orientation

Are there any court cases that interpret the exemption statutes?

• *Piatti v. Jewish Community Centers of Greater Boston*, 1993 Mass. Super. LEXIS 328 (1993) - although Jewish Community Center was not able to claim exemption from employment discrimination laws, court found that religion was a bona fide occupational qualification as used in the exemption statute

Boston, MA

Where can city ordinances be found online?

http://www.amlegal.com/boston_ma/

What are the employment discrimination ordinances and what do they cover?

City of Boston Municipal Code §12-9.3 - it is unlawful for an employer to discriminate on the basis of race, color, sex, age, religious creed, disability, national origin, ancestry, sexual orientation, marital status, parental status, ex-offender status, prior psychiatric treatment, military status, or source of income

Who is covered?

City of Boston Municipal Code §12-9.2 - anyone who employs 7 or more people

How are religious organizations exempted, if at all?

City of Boston Municipal Code §12-9.2 - non-profit religious organizations are not included in the anti-discrimination ordinance

City of Boston Municipal Code §12-9.3 - religious organizations may discriminate in favor of members of the same religion

What happens to the exemption if a religious organization contracts with the government?

Unknown

Are there any court cases that interpret the exemption ordinances?

None found

MICHIGAN

Where can state statutes be found online?

http://www.michiganlegislature.org/law/

What are the employment discrimination statutes and what do they cover?

Mich. Stat. Ann. §37.2202(1) (2001) - it is unlawful for an employer to discriminate on the basis religion, race, color, national origin, age, sex, height, weight, or marital status

Who is covered?

Mich. Stat. Ann. §37.2201 (2001) - anyone who employs any other person

How are religious organizations exempted, if at all?

Mich. Stat. Ann. §37.2208 (2002) - employers may apply for an exemption based on theory that discrimination on the basis of any of the prohibited classifications is a bona fide occupational qualification

What happens to the exemption if a religious organization contracts with the state government?

Mich Stat. Ann. §37.2209 (2002) - all contracts and subcontracts shall include non-discrimination clause

Are there any court cases that interpret the exemption statutes?

• *Porth v. Roman Catholic Diocese of Kalamazoo*, 209 Mich. App. 630 (1995) - analyzed under the Religious Freedom Restoration Act (which the U.S. Supreme Court later held unconstitutional as applied to states), the court decided that the state had no interest in prohibiting religious discrimination in the employment of teachers in church-operated schools, and that such regulation would substantially burden the mission of function of such schools (however, the court added that the burden was recognized by the US Congress, but not the Michigan Legislature)

MINNESOTA

Where can state statutes be found online?

http://www.leg.state.mn.us/leg/statutes.htm

What are the employment discrimination statutes and what do they cover?

Minn. Stat. §363.03 (2000) - it is unlawful for an employer to discriminate on the basis of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age

Who is covered?

Minn. Stat. §363.01(17) (2000) - anyone who employs any other person

How are religious organizations exempted, if at all?

Minn. Stat. §363.02(2) (2000) - religious organizations may discriminate on the basis of religion or sexual orientation where religion or sexual orientation is a bona fide occupational qualification

What happens to the exemption if a religious organization contracts with the state government?

Unknown

Are there any court cases that interpret the exemption statutes?

• *Geraci v. Eckankar*, 526 N.W.2d 391 (Minn. App. 1995) - in sex discrimination claim, religious employer could not claim exemption because religion was not a bona fide occupational qualification (nor did employer allege that it was, but rather that a male worker had better qualifications). However, court found that inquiry into sex discrimination claim would violate church's free exercise rights (church membership was

a prerequisite to employment, and church fired her after her membership was revoked). The court declined to examine whether the revocation was a pretext for discrimination.

• *State by McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (1985) - the court held that even if employment practices were mandated by owner/operators' deeply held religious beliefs, this was not enough to bring them under the statutory exemption when business was not a religious corporation (in this case, it was an exercise club).

MISSISSIPPI

Where can state statutes be found online?

http://198.187.128.12/mississippi/lpext.dll?f=templates&fn=fs-main.htm&2.0

What are the employment discrimination statutes and what do they cover?

Miss. Code Ann. §25-9-149 (2001) - legislative intent that there be no discriminatory hiring practices by the state

Who is covered?

Only applies to the state

How are religious organizations exempted, if at all?

Not applicable - statute applies only to the state

What happens to the exemption if a religious organization contracts with the state government?

No provision

Are there any court cases that interpret the exemption statutes?

Unknown

MISSOURI

Where can state statutes be found online?

http://www.moga.state.mo.us/homestat.asp

What are the employment discrimination statutes and what do they cover?

Mo. Rev. Stat. §213.055(1) (2001) - it is unlawful for an employer to discriminate on the basis of race, color, religion, national origin, sex, ancestry, age or disability

Who is covered?

Mo. Rev. Stat. §213.010(7) (2001) - anyone who employs 6 or more people

How are religious organizations exempted, if at all?

Mo. Rev. Stat. §213.010(7) (2001) - religious organizations are not included in the anti-discrimination law

Mo. Rev. Stat. §290.145 (2001) - religiously affiliated health-care organizations are not

included in the anti-discrimination

What happens to the exemption if a religious organization contracts with the state government?
Unknown

Are there any court cases that interpret the exemption statutes?
None found

St. Louis, MO

Where can city ordinances be found online?
http://www.slpl.lib.mo.us/cco/

What are the employment discrimination ordinances and what do they cover?
St. Louis City Ordinance 62710 §9(B)(1) - it is unlawful for an employer to discriminate on the basis of race, color, age, religion, sex, familial status, disability, sexual orientation, national origin or ancestry

Who is covered?
St. Louis City Ordinance 62710 §2(7) - any person who employs 6 or more people

How are religious organizations exempted, if at all?
St. Louis City Ordinance 62710 §9(B)(8) - religiously affiliated educational institutions may discriminate on the basis of religion when hiring for a teaching or counseling position, a professorship, or a position involving supervision of teachers, counselors or professors

What happens to the exemption if a religious organization contracts with the city government?
Unknown

Are there any court cases that interpret the exemption ordinances?
None found

MONTANA

Where can state statutes be found online?
http://data.opi.state.mt.us/bills/mca_toc/index.htm

What are the employment discrimination statutes and what do they cover?
Mont. Code Ann. §49-2-303(1) (2001) - it is unlawful for an employer to discriminate on the basis of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental disability, marital status, or sex distinction

Who is covered?

Mont. Code Ann. §49-2-101(11) (2001) - anyone who employs any other person

How are religious organizations exempted, if at all?

Mont. Code Ann. §49-2-101(11) (2001) - non-profit religious organizations are not included in the anti-discrimination laws

What happens to the exemption if a religious organization contracts with the state government?

Mont. Admin. Rules §24.9.604(3)(e) (2002) - it is unlawful for an employer participating in a contract of any kind to discriminate in employment

Are there any court cases that interpret the exemption statutes?

None found

NEBRASKA

Where can state statutes be found online?

http://www.unicam.state.ne.us/laws/index.htm

What are the employment discrimination statutes and what do they cover?

Neb. Rev. Stat. §48-1101 (2001) - policy of the state is not to allow discrimination on the basis of race, color, religion, sex, disability, or national origin

Who is covered?

Neb. Rev. Stat. §48-1102(2) (2001) - any person who employs 15 or more people for each day of 20 or more weeks in the current or preceding calendar year

How are religious organizations exempted, if at all?

Neb. Rev. Stat. §48-1108(2) (2001) - religiously affiliated educational institutions may discriminate on the basis of religion

Neb. Rev. Stat. §48-1103(1) (2002) - religious organizations may discriminate on the basis of religion to further their religious principles

What happens to the exemption if a religious organization contracts with the state government?

According to the state Equal Employment Opportunity Commission, the exemption does not change as a result of receiving state funds.

Are there any court cases that interpret the exemption statutes?

None found

NEVADA

Where can state statutes be found online?

http://www.leg.state.nv.us/law1.cfm

What are the employment discrimination statutes and what do they cover?

Nev. Rev. Stat. Ann. §613.330 (2001) - it is unlawful for an employer to discriminate on the basis of race, color, religion, sex, sexual orientation, age, disability or national origin

Who is covered?

Nev. Rev. Stat. Ann. §613.310(2) (2001) - anyone who employs 15 or more people for 20 more weeks of the current or preceding calendar year

How are religious organizations exempted, if at all?

Nev. Rev. Stat. Ann. §613.320(1)(b) (2001) - religious organizations may discriminate on the basis of religion in furtherance of their religious activities

Nev. Rev. Stat. Ann. §613.350(4) (2001) - religiously affiliated educational institutions may discriminate on the basis of religion

What happens to the exemption if a religious organization contracts with the state government?

Unknown

Are there any court cases that interpret the exemption statutes?

None found

NEW HAMPSHIRE

Where can state statutes be found online?

http://gencourt.state.nh.us/rsa/html/indexes/default.html

What are the employment discrimination statutes and what do they cover?

N.H. Rev. Stat. Ann. §354-A:7 (2000) - it is unlawful for an employer to discriminate on the basis of age, sex, race, color, marital status, physical or mental disability, religious creed, or national origin

Who is covered?

N.H. Rev. Stat. Ann. §354-A:2(VII) (2000) - anyone who employs 6 or more people

How are religious organizations exempted, if at all?

N.H. Rev. Stat. Ann. §354-A:2(VII) (2000) - non-profit religious organizations are not included in the anti-discrimination laws

What happens to the exemption if a religious organization contracts with the state government?

No provision

Are there any court cases that interpret the exemption statutes?

None found

NEW JERSEY

Where can state statutes be found online?
http://www.njleg.state.nj.us/

What are the employment discrimination statutes and what do they cover?
N.J. Stat. Ann. §10:5-12 (2001) - it is unlawful for an employer to discriminate on the basis of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, genetic information, sex or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer

Who is covered?
N.J. Stat. Ann. §10:5-5(e) (2001) - anyone who employs any other person

How are religious organizations exempted, if at all?
N.J. Stat. Ann. §10:5-12(a) (2002) - religious organizations may discriminate on the basis of religion to further their religious purposes

What happens to the exemption if a religious organization contracts with the state government?
N.J. Stat. Ann. §10:5-33(a) and (b) (2002) - all contracts must include non-discrimination language

Are there any court cases that interpret the exemption statutes?
- *Gallo v. Salesian Soc'y*, 290 N.J. Super 616 (1996) - that inquiry into sex and age discrimination claim did not impermissibly burden religious school's First Amendment rights nor was it an impermissible entanglement of government with religion, in light of compelling state interest against such discrimination

NEW MEXICO

Where can state statutes be found online?
http://198.187.128.12/newmexico/lpext.dll?f=templates&fn=fs-main.htm&2.0

What are the employment discrimination statutes and what do they cover?
N.M. Stat. Ann. §28-1-7 (2001) - it is unlawful for an employer to discriminate on the issue of race, age, religion, color, national origin, ancestry, sex, physical or mental handicap or serious medical condition

Who is covered?
N.M. Stat. Ann. §28-1-2(B) (2001) - anyone who employs 4 or more people

How are religious organizations exempted, if at all?
N.M. Stat. Ann. §28-1-9(B) (2001) - religious organizations may discriminate in favor of members of the same religion to further their religious principles

What happens to the exemption if a religious organization contracts with the state government?
Unknown

Are there any court cases that interpret the exemption statutes?
None found

Albuquerque, NM

Where can city ordinances be found online?
http://www.amlegal.com/albuquerque_nm/

What are the employment discrimination statutes and what do they cover?
Albuquerque Code of Ordinances §11-3-7 - it is unlawful for an employer to discriminate on the basis of race, color, religion, sex, national origin or ancestry, age or physical handicap

Who is covered?
Albuquerque Code of Ordinances §11-3-3 - anyone who employs any person

How are religious organizations exempted, if at all?
Albuquerque Code of Ordinances §11-3-12 - religious organizations may discriminate in favor of members of their religion to further their religious principles, so long as membership in the religious organization is not limited on the basis of race, color, sex, national origin, ancestry, age, or physical handicap

What happens to the exemption if a religious organization contracts with the government?
No provision

Are there any court cases that interpret the exemption statutes?
None found

NEW YORK

Where can state statutes be found online?
http://assembly.state.ny.us/leg/?sl=0

What are the employment discrimination statutes and what do they cover?
N.Y. CLS Exec. Ch. 18, Art. 15 §296(1) (2001) - it is unlawful for an employer to discriminate on the basis of age, race, creed, color, national origin, sex, disability, genetic predisposition or carrier status, or marital status

Who is covered?
N.Y. CLS Exec. Ch. 18, Art. 15 §292 (2001) - any person who employs 5 or more people

How are religious organizations exempted, if at all?

N.Y. CLS Exec. Ch. 18 Art. 15 §296(11) (2001) - religious organizations may discriminate on the basis of religion to further their religious purposes

What happens to the exemption if a religious organization contracts with the state government?

Standard Clause for all NY State Contracts §5 (2000) - all state contracts must include clause referencing non-discrimination laws, which include the exemption for religious entities

Are there any court cases that interpret the exemption statutes?

• *Scheiber v. St. John's Univ.*, 600 N.Y.S.2d 734 (1993) - religious university was exempt from prohibition on religious discrimination even though it was not incorporated under the Religious Corporations Law

New York, NY

Where can city ordinances be found online?

not online; call the Municipal Reference Library at 212-788-8590

What are the employment discrimination ordinances and what do they cover?

NYC Code §8-107(1) - it is unlawful for an employer to discriminate on the basis of age, race, creed, color, national origin, gender, disability, marital status, sexual orientation or alienage or citizenship status

Who is covered?

NYC Code §8-102(5) - anyone who employs 5 or more people

How are religious organizations exempted, if at all?

NYC Code §8-107(12) - religious organizations may discriminate in favor of members of their religion to further their religious principles

What happens to the exemption if a religious organization contracts with the city government?

NYC Procurement Policy Board Rules §1-03(c) - prohibits discrimination on basis of creed and sexual orientation by government contractors or subcontractors

Are there any court cases that interpret the exemption ordinances?

None found

NORTH CAROLINA

Where can state statutes be found online?

http://www.ncga.state.nc.us/gascripts/Statutes/statutestoc.pl

What are the employment discrimination statutes and what do they cover?

According the State's Attorney General, the state follows federal law.

Who is covered?
The state follows federal law.

How are religious organizations exempted, if at all?
The state follows federal law.

What happens to the exemption if a religious organization contracts with the state government?
The state follows federal law.

Are there any court cases that interpret the exemption statutes?
None found

NORTH DAKOTA

Where can state statutes be found online?
http://www.state.nd.us/lr/information/statutes/cent-code.html

What are the employment discrimination statutes and what do they cover?
N.D. Cent. Code §14-02.4-03 (2001) - it is unlawful for an employer to discriminate on the basis of race, color, religion, sex, national origin, age, physical or mental disability, status with respect to marriage or public assistance, or participation in lawful activity off the employer's premises during non-working hours which is not in direct conflict with the essential business-related interests of the employer

Who is covered?
N.C. Cent. Code §14-02.4-02 (2001) - anyone who employs any other person

How are religious organizations exempted, if at all?
According to the State's Attorney General, there is no exemption, but absent evidence of legislative intent to the contrary they would probably follow federal example.

What happens to the exemption if a religious organization contracts with the state government?
No provision

Are there any court cases that interpret the exemption statutes?
None found

OHIO

Where can state statutes be found online?
http://onlinedocs.andersonpublishing.com/revisedcode/

What are the employment discrimination statutes and what do they cover?

Ohio Rev. Code Ann. §4112.02 (2001) - it is unlawful for any employer to discriminate on the basis of race, color, religion, sex, national origin, disability, age, or ancestry

Who is covered?

Ohio Rev. Code Ann. §4112.01(2) (2001) - any person who employs 4 or more people

How are religious organizations exempted, if at all?

There is no statutory exemption for religious organizations, however, according to the State Equal Opportunity Department, the Civil Rights Comm. would take into account "factors that could violate or infringe upon the First Amendment protection of freedom of religion" when evaluating a discrimination claim.

What happens to the exemption if a religious organization contracts with the state government?

There is no exemption, regardless of the source of funding

Are there any court cases that interpret the exemption statutes?

- *Ward v. Hengle*, 124 Ohio App. 3d 396 (1997) - where no exemption exists for religious entities, and legislature has had numerous opportunities to create one, court will not infer one based on interpretation of Title VII exemption and even if religious entity were exempt under federal law, when suit is brought under state anti-discrimination law, no exemption

OKLAHOMA

Where can state statutes be found online?

http://www.lsb.state.ok.us/

What are the employment discrimination statutes and what do they cover?

25 Okla. Stat. §1302(A) (2000) - it is unlawful for an employer to discriminate on the basis of race, color, religion, sex, national origin, age, or handicap

Who is covered?

25 Okla. Stat. §1301(1) (2000) - any person who employs 15 or more people for 20 or more weeks of the current or preceding calendar year

How are religious organizations exempted, if at all?

25 Okla. Stat. §1307 (2000) - religious organizations may discriminate in favor of members of their religion to further their religious activities

25 Okla. Stat. §1308(2) (2000) - religiously affiliated schools may discriminate on the basis of religion

What happens to the exemption if a religious organization contracts with the state government?

Cent. Purch. Rules Tit. 280:15-4-14(e) (2001) - upon certification by State Human Rights Commission that supplies is discriminating, Purchasing Director can terminate all contracts and suspend the supplier

Are there any court cases that interpret the exemption statutes?
Unknown

OREGON

Where can state statutes be found online?
http://www.leg.state.or.us/ors/home.htm

What are the employment discrimination statutes and what do they cover?
Or. Rev. Stat. §659A.030(1) (2001) - it is unlawful for an employer to discriminate on the basis of race, religion, color, sex, national origin, marital status or age

Who is covered?
Or. Rev. Stat. §659A.001(4) - anyone who employs any other person

How are religious organizations exempted, if at all?
Or. Rev. Stat. §659A.006(2) (2001) - religious organizations may discriminate in favor of members of their religion to further their religious purposes, where the position involved is closely connected with or related to the primary purposes of the church or institution and is not connected with a commercial or business activity which has no necessary relationship to the church or institution, or to its primary purposes

What happens to the exemption if a religious organization contracts with the state government?
Or. Admin. Rules §125-020-0400(4) (2002) - contract must specify that it is subject to all applicable requirements of federal and state civil rights statutes, rules, and regulations

Are there any court cases that interpret the exemption statutes?
None found

Portland, OR

Where can city ordinances be found online?
http://municipalcodes.lexisnexis.com/codes/portland/

What are the employment discrimination ordinances and what do they cover?
Portland City Code §23.01.050 - it is unlawful for an employer to discriminate on the basis of race, religion, color, sex, national origin, marital status, age if the individual is 18 years of age or older, or disability

Who is covered?
Portland City Code §23.01.030(D) incorporates by reference Or. Rev. Stat. §659 (1999) - anyone who employs any other person

How are religious organizations exempted, if at all?
No exemption found

What happens to the exemption if a religious organization contracts with the city government?
There is no exemption, and Portland City Code §3.100.005 prohibits discrimination on basis of creed and sexual orientation by government contractors.

Are there any court cases that interpret the exemption ordinances?
None found

PENNSYLVANIA

Where can state statutes be found online?
Not available online

What are the employment discrimination statutes and what do they cover?
43 Pa. Consol. Stat. §955(a) (2001) - it is unlawful for an employer to discriminate on the basis of race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability

Who is covered?
43 Pa. Consol. Stat. §954(b) (2001) - anyone who employs 4 or more people

How are religious organizations exempted, if at all?
43 Pa. Consol. Stat. §954(b) (2001) - religious organizations specifically not allowed to discriminate on any basis other than religion
43 Pa. Consol. Stat. §955(h)(10) (2001) - religious organizations may discriminate in favor of members of their religion

What happens to the exemption if a religious organization contracts with the state government?
43 Pa. Consol. Stat. §954(b) (2001) - any religious organization receiving state money may not discriminate on any basis

Are there any court cases that interpret the exemption statutes?
None found

Philadelphia, PA

Where can city ordinances be found online?
http://www.amlegal.com/philadelphia_pa/

What are the employment discrimination ordinances and what do they cover?
Philadelphia City Code §9-1103(A) - it is unlawful for an employer to discriminate on the basis of race, color, sex, sexual orientation, religion, national origin, ancestry, age handicap, or marital status

Who is covered?
Philadelphia City Code §9-1103(f) - anyone who employs any other person

How are religious organizations exempted, if at all?

Philadelphia City Code §9-1103(f) - religious organizations are not included in the anti-discrimination ordinance

What happens to the exemption if a religious organization contracts with the city government?

Terms and Conditions of Bidding and Contracting Paragraph 18 specify that in accordance with the Philadelphia Home Rule Charter, contractors shall not discriminate.

Are there any court cases that interpret the exemption ordinances?

None found

RHODE ISLAND

Where can state statutes be found online?

http://www.rilin.state.ri.us/Statutes/Statutes.html

What are the employment discrimination statutes and what do they cover?

R.I. Gen. Laws. §28-5-7(1) (2001) - it is unlawful for an employer to discriminate on the basis of race or color, religion, sex, disability, age, sexual orientation, gender identity or expression, or country of ancestral origin

Who is covered?

R.I. Gen. Laws §28-5-6(7)(i) (2001) - anyone who employs 4 or more people

How are religious organizations exempted, if at all?

R.I. Gen. Laws §28-5-6-(7)(ii) (2001) - religious organizations may discriminate in favor of members of their religion

What happens to the exemption if a religious organization contracts with the state government?

Unknown

Are there any court cases that interpret the exemption statutes?

None found

SOUTH CAROLINA

Where can state statutes be found online?

http://www.scstatehouse.net/research.htm

What are the employment discrimination statutes and what do they cover?

S.C. Code Ann. §1-13-80(A) (2000) - it is unlawful for an employer to discriminate on the basis of race, religion, color, sex, age, national origin, or disability

Who is covered?

S.C. Code Ann. §1-13-30(e) (2000) - anyone who has 15 or more employees for 20 or more weeks of the current or preceding calendar year

How are religious organizations exempted, if at all?

S.C. Code Ann. §1-13-80(I)(5) (2000) - religious organizations may discriminate on the basis of religion

What happens to the exemption if a religious organization contracts with the state government?

According to the Human Affairs Commission, there is no provision regarding the source of funding and a religious organization's exemption.

Are there any court cases that interpret the exemption statutes?

None found

SOUTH DAKOTA

Where can state statutes be found online?

http://legis.state.sd.us/statutes/index.cfm

What are the employment discrimination statutes and what do they cover?

S.D. Codified Laws §20-13-10 (2001) - it is unlawful for an employer to discriminate on the basis of race, color, creed, religion, sex, ancestry, disability, or national origin

Who is covered?

S.D. Codified Laws §20-13-1(7) (2001) - anyone who employs any other person

How are religious organizations exempted, if at all?

S.D. Codified Laws §20-13-18 (2001) - religious organizations may discriminate on the basis of religion to further their religious purposes

What happens to the exemption if a religious organization contracts with the state government?

The Vendor's Manual includes a Non-Discrimination Statement which says that by signing a bid proposal, a bidder certifies that they do not discriminate in their employment practices.

Are there any court cases that interpret the exemption statutes?

None found

TENNESSEE

Where can state statutes be found online?

http://198.187.128.12/tennessee/lpext.dll?f=templates&fn=fs-main.htm&2.0

What are the employment discrimination statutes and what do they cover?

Tenn. Code Ann. §4-21-401(a) (2001) - it is unlawful for an employer to discriminate on the basis of race, creed, color, religion, sex, age or national origin

Who is covered?

Tenn. Code Ann. §4-21-102 (2001) - anyone who employs 8 or more people

How are religious organizations exempted, if at all?

Tenn. Code Ann. §4-21-405 (2001) - religious organizations may discriminate on the basis of religion to further their religious activities

What happens to the exemption if a religious organization contracts with the state government?

Tenn. Comp. R. & Regs. §0620-3-3-.05(6) (2002) - nondiscrimination clause must be included in all contract subject to the rule

Are there any court cases that interpret the exemption statutes?

None found

TEXAS

Where can state statutes be found online?

http://www.capitol.state.tx.us/statutes/statutes.html

What are the employment discrimination statutes and what do they cover?

Tex. Lab. Code Ann. §21.051 (2000) - it is unlawful for an employer to discriminate on the basis of race, color, disability, religion, sex, national origin, or age

Who is covered?

Tex. Lab. Code Ann. §21.002 (2000) - anyone who employs 15 or more people for each day of 20 or more weeks of the current or preceding calendar year

How are religious organizations exempted, if at all?

Tex. Lab. Code Ann. §21.109 (2000) - religious organizations may discriminate in favor of members of their religion

What happens to the exemption if a religious organization contracts with the state government?

40 Tex. Admin. Code §49.27 (2002) - status as a contractor with DHS does not alter religious entity's independent basis, and shall not be interpreted to require the entity to alter its internal governance

Are there any court cases that interpret the exemption statutes?

None found

Austin, TX

Where can city ordinances be found online?
http://www.ci.austin.tx.us/development/ldc1.htm
What are the employment discrimination ordinances and what do they cover?
Austin City Code §7-3-4(A) - it is unlawful for an employer to discriminate on the basis of race, color, religion, sex, sexual orientation, national origin, age or physical disability

Who is covered?
Austin City Code §7-3-2 - any person who employs 15 or more people for each working day of 20 more weeks of the current or preceding calendar year

How are religious organizations exempted, if at all?
Austin City Code §7-3-10(B) - religiously affiliated schools may discriminate on the basis of religion
Austin City Code §7-3-10(C) - religious organizations may discriminate on the basis of religion

What happens to the exemption if a religious organization contracts with the city government?
Austin City Code §7-4-2 - contractors with the government may not discriminate

Are there any court cases that interpret the exemption ordinances?
None found

UTAH

Where can state statutes be found online?
http://www.le.state.ut.us/Documents/code_const.htm

What are the employment discrimination statutes and what do they cover?
Utah Code Ann. §34A-5-106(a) (2001) - it is unlawful for an employer to discriminate on the basis of race, color, sex, pregnancy, childbirth, or pregnancy-related conditions, age, if the individual is 40 years of age or older, religion, national origin, or disability

Who is covered?
Utah Code Ann. §34A-5-102(8)(a)(iv) (2001) - anyone who employs 15 or more people for each working day of 20 or more weeks in the current or preceding calendar year

How are religious organizations exempted, if at all?
Utah Code Ann. §34A-5-102(8)(b) (2001) - religious organizations are not covered by the anti-discrimination laws
Utah Code Ann. §34A-5-106(3)(a)(ii) (2001) - religiously affiliated schools may discriminate on the basis of religion

What happens to the exemption if a religious organization contracts with the state government?
Unknown

Are there any court cases that interpret the exemption statutes?

• *Larsen v. Kirkham*, 499 F. Supp. 960 (Utah 1980) - Utah's Anti-Discrimination Act, which exempts religious organizations and their wholly-owned subsidiaries from the definition of employer, and exempts religious schools from the prohibition on religious discrimination, is not in conflict with Title VII

VERMONT

Where can state statutes be found online?

http://www.leg.state.vt.us/statutes/statutes2.htm

What are the employment discrimination statutes and what do they cover?

Vt. Stat. Ann. tit. 21, §495(a) (2001) - it is unlawful for an employer to discriminate on the basis of race, color, religion, national origin, sex, sexual orientation, ancestry, place of birth, age, or physical or mental condition

Who is covered?

Vt. Stat. Ann. tit. 21, §494 (2001) - any person who employs any other person within the state

How are religious organizations exempted, if at all?

Vt. Stat. Ann. tit. 21, §495(e) - the prohibition on discrimination on the basis of sexual orientation do not bar a religious organization from giving preference to members of their religion

What happens to the exemption is a religious organization contracts with the state government?

According to the State's Attorney General, there has no instance in which a state-funded organization has sought to use this provision to avoid hiring anyone and there is no way to know what would happen under such circumstances

Are there any court cases that interpret the exemption statutes?

None found

VIRGINIA

Where can state statutes be found online?

http://www.vipnet.org/cmsportal/government_881/virginia_1048/index.html

What are the employment discrimination statutes and what do they cover?

Va. Code Ann. §2.2-3901 (2001) - it is unlawful to discriminate on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability

Who is covered?

No definition found, although the Virginia Human Rights Act is construed in accordance with federal antidiscrimination law.

How are religious organizations exempted, if at all?

There is no exemption provided, although the Virginia Human Rights Act is construed in accordance with federal antidiscrimination law.

What happens to the exemption if a religious organization contracts with the state government?

Va. Code Ann. §2.2-4201 - contractors may not discriminate on any basis; the provision does permit discrimination where religion is a bona fide occupational qualification.

Are there any court cases that interpret the exemption statutes?

None found

WASHINGTON

Where can state statutes be found online?

http://www.leg.wa.gov/rcw/index.cfm

What are the employment discrimination statutes and what do they cover?

Wash. Rev. Code §49.60.180 (2001) - it is unlawful for an employer to discriminate on the basis of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability

Who is covered?

Wash. Rev. Code §49.60.040(3) (2001) - anyone who employs 8 or more people

How are religious organizations exempted, if at all?

Wash. Rev. Code §29.60.040(3) (2001) - religious organizations are not included in the anti-discrimination laws

What happens to the exemption if a religious organization contracts with the state government?

None found

Are there any court cases that interpret the exemption statute?

- *Hazen v. Catholic Credit Union*, 681 P.2d 856 (Wash. App. 1984) - Catholic Credit Union is not a religious organization because it lacks sufficient ties to the church and has no religious qualities; therefore it is not entitled to exemption and so is subject to sexual harassment claims

Seattle, WA

Where can city ordinances be found online?

http://www.cityofseattle.net/council/legdb.htm

What are the employment discrimination ordinances and what do they cover?

Seattle Municipal Code §§14.04.030(F) and 14.04.040 - it is unlawful for an employer to discriminate on the basis of race, color, age, sex, marital status, sexual orientation, gender identity, political ideology, creed, religion, ancestry, national origin

Who is covered?

Seattle Municipal Code §14.04.030(H) - anyone who employs any person

How are religious organizations exempted, if at all?

No exemption found

What happens to the exemption if a religious organization contracts with the city government?

Seattle Municipal Code §20.44.020(A) - Director of Finance is to assist all contracting authorities in preparing anti-discrimination provisions for contracts

Are there any court cases that interpret the exemption ordinances?

None found

WEST VIRGINIA

Where can state statutes be found online?

http://www.legis.state.wv.us/State_Code/finishedData/toc2.html

What are the employment discrimination statutes and what do they cover?

W.Va. Code §§5-11-3(h) (2001) and W.Va. Code §5-11-9(2) (2001) - it is unlawful for an employer to discriminate on the basis of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status and includes to separate or segregate

Who is covered?

W.Va. Code §5-11-3(d) (2001) - anyone who employs 12 or more people for 20 or more weeks in the current or preceding calendar year

How are religious organizations exempted, if at all?

No exemption

What happens to the exemption if a religious organization contracts with the state government?

There is no exemption

Are there any court cases that interpret the exemption statutes?

None found

WISCONSIN

Where can state statutes be found online?

http://www.legis.state.wi.us/rsb/stats.html

What are the employment discrimination statutes and what do they cover?

Wis. Stat. § 111.321 (2000) - it is unlawful for an employer to discriminate on the basis of age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest record, conviction record, membership in the national guard, state defense force or any reserve component of the military forces of the United States or this state or use or nonuse of lawful products off the employer's premises during nonworking hours

Who is covered?

Wis. Stat. §111.32(6)(a) (2000) - any person who employs any other person

How are religious organizations exempted, if at all?

Wis. Stat. §111.337(2) (2000) - non-profit religious organizations may discriminate on the basis of religion

What happens to the exemption if a religious organization contracts with the state government?

Wis. Stat. §46.027(5) (2000) - religious exemption under 42 USC §2000e not affected by receipt of funds administered by department of social services

Are there any court cases that interpret the exemption statutes?

• *Jocz v. Labor & Indus. Review Comm'n*, 196 Wis. 2d 273 (1995) - exemption only applies to religious discrimination; claim of sex discrimination could not be defeated through exemption. Although Dept. of Industry, Labor, and Human Relations is not categorically denied jurisdiction over discrimination claims in religious entities, WI Constitution Art. 1 §18 precludes investigation where the position at issue is ministerial in nature (as the Director of Field Placement was in this case).

• *Sacred Heart Sch. Bd. v. Labor & Indus. Review Comm'n*, 157 Wis. 2d 638 (1990) - narrow statutory co-religionist exemption does not preclude investigative agency from investigation to see if religious motivation for firing was pretext for age discrimination. The entity's Free Exercise rights are not compromised by such an investigation.

WYOMING

Where can state statutes be found online?

http://legisweb.state.wy.us/titles/statutes.htm

What are the employment discrimination statutes and what do they cover?

Wyo. Stat. Ann. §27-9-105(a) (2001) - it is unlawful for an employer to discriminate on the basis of age, sex, race, creed, color, national origin or ancestry

Who is covered?

Wyo. Stat. Ann. §27-9-102(b) (2001) - anyone who employs 2 or more people

How are religious organizations exempted, if at all?

Wyo. Stat. Ann. §27-9-102(b) (2001) - religious organizations are not included in the anti-discrimination statute

What happens to the exemption if a religious organization contracts with the state government?

Unknown

Are there any court cases that interpret the exemption statutes?

None found

APPENDIX C

PROPOSED MODEL PROVISIONS

RELIGIOUS IDENTITY PROTECTED. Providers that are faith-based organizations are eligible to compete for contracts with the State of _____ on the same basis as any other provider. Such providers shall not be required to alter their forms of internal governance or their religious character, or to remove religious art, icons, scripture or other symbols. Such providers understand and acknowledge that their right to maintain their religious character does not include the right to include religious messages or materials in programs financed under this contract.

RELIGIOUS DISCRIMINATION PROHIBITED. Providers may not discriminate against clients served under this contract on the basis of their religious affiliation or religious beliefs.

RELIGIOUS COERCION PROHIBITED. Providers may not require clients, as a condition of service under this contract, to participate in religious activities of any kind, even if those religious activities are funded entirely from private sources. Providers must clearly inform clients of their rights under this section.

SECULAR OPTIONS. Providers must inform clients that they are not obliged to accept service from a provider that has a religious character, even if the service itself is entirely secular. Clients who object to receiving service from a provider that has a religious character must be referred by such providers to [NAME APPROPRIATE STATE AGENCY]. The [AGENCY] must make available within a reasonable time an alternative provider of the same services, reasonably accessible to the client, and worth the same value, to any client who objects to the religious character of the organization or institution from which the client would receive or is receiving services or assistance.

EMPLOYMENT DISCRIMINATION. [SET OUT CLEARLY AND IN APPROPRIATE DETAIL THE EMPLOYMENT DISCRIMINATION RULES AS FEDERAL, STATE, AND LOCAL LAW REQUIRE]

PROHIBITED RELIGIOUS ACTIVITIES. The materials, curriculum, service, and instruction provided under this contract shall be entirely secular. The provider understands and agrees that it may not engage in the expression of religious themes or messages as part of the delivery of service under this contract. This prohibition includes activities commonly understood as religious worship, instruction, or proselytizing, but it also includes expressly religious methods of any other sort, regardless of the extent to which such methods are integrated into the delivery of service.[99]
Nothing in this provision shall prohibit the provider from making opportunities for religious expression or worship available to clients, so long as 1) clients are informed that such opportunities are entirely voluntary, and are not a condition of service; and 2) no funds derived

[99] We recommend that state agencies append to such contracts a list of examples, perhaps in the question and answer format currently provided on the website for the Department of Labor Center for Faith-Based and Community Initiatives, of religious activities forbidden under the contract.

from this contract are used to pay for materials, salaries, fringe benefits, construction or maintenance of space set aside for worship, or any other costs associated with providing such opportunities for religious expression. The [AGENCY] will use its best efforts to provide guidance to the provider about the scope of this section, and to answer questions that may arise under it. The provider understands and acknowledges that violation of this section may be grounds for nonrenewal or termination of the contract. Persistent, intentional, and flagrant violations may be grounds for [AGENCY] recovery of the cost of prohibited expenditures under the contract, as well as immediate termination of the contract.

PROVIDER REPORTS AND ATTESTATIONS REGARDING RELIGIOUS ACTIVITIES. Providers will transmit to the [AGENCY] written reports of activities, and statements of financial account, with respect to the funds provided under this contract. The [AGENCY] will make available to providers the forms on which such reports and statements are to be made, and will specify the frequency [quarterly, etc.] with which they are to be made. In the statements of financial accounts, the provider must segregate the funds provided under this contract and account for their separate use. The provider must meet the same fiscal and accounting standards, and generally accepted accounting principles as any other private provider. With respect to each such report and statement of account, the provider will include the following attestation: "I certify that [during this reporting period] no activity, event, or material created or supported in whole or in part with funds provided under this contract has included religious themes, messages, or content, and that funds provided under this contract have not supported any religious worship, instruction, or proselytizing."

MONITORING. The [AGENCY] and the provider acknowledge and understand that the AGENCY has authority over this contract and funds provided under it. The AGENCY will evaluate reports and accounts filed by the provider, and is under a legal duty to assure that the provider is not engaging in prohibited religious activities under this contract. The AGENCY and the provider also acknowledge and understand that the AGENCY does NOT have authority over the activities and character of the provider with respect to matters not supported by funds from this contract and outside the scope of this contract. With respect to matters outside the scope of the contract, the AGENCY will not audit provider expenditures or in any other way attempt to monitor or control the content, religious or otherwise, of provider activities.

SAMPLE STATE PROVISIONS

1 Oklahoma Department of Human Services: Solicitation for Faith-Based Intermediary Services

6.3.3 Charitable Choice Providers

Providers who are members of the faith community are eligible to compete for contracts with the State of Oklahoma on the same basis as any other provider. Such providers shall not be required to alter their forms of internal governance, their religious character or remove religious art, icons, scripture or other symbols. Such providers may not, however, discriminate against clients on the basis of their religion, religious beliefs or clients' refusal to participate in religious practices.

2 Texas Department of Human Services

H.

To comply with Title VI of the Civil Rights Act of 1964 (Public Law 88-352), Section 504 of the Rehabilitation Act of 1973 (Public Law 93-112), The Americans with Disabilities Act of 1990 (Public Law 101-336), and all amendments to each, and all requirements imposed by the regulations issued pursuant to these acts. In addition, the Provider Agency agrees to comply with Title 40, Chapter 73, of the Texas Administrative Code. These provide, in part, that no persons in the United States shall, on the grounds of race, color, national origin, age, sex, disability, political beliefs or religion be excluded from participation in, or denied, any aid, care, services or other benefits provided by federal and/or state funding, or otherwise be subjected to any discrimination.

The Provider Agency agrees to comply with Health and Safety Code Section 85.113 (relating to workplace and confidentiality guidelines regarding AIDS and HIV).

A religious organization that contracts with the Department does not by contracting with the Department lose exemption provided under Section 702 of the Civil Rights Act (42 U.S.C. §2000E-1(a)) regarding employment practices. A religious or charitable organization is eligible to be a Provider Agency on the same basis as any other private organization. The Provider Agency retains its independence from State and local governments, including the Provider Agency's control over the definition, development, practice, and expression of its charitable or religious beliefs. Except as provided by federal law, the Department shall not interpret this contract to require a charitable or religious organization to alter its form of internal governance or remove religious art, icons, scripture, or other symbols. Furthermore if a religious or charitable organization segregates the government funds provided under the contract, then only the financial assistance provided by these funds will be subject to audit. However, neither the Department's selection of a charitable or faith-based Provider Agency of social services nor the expenditure of funds under this contract is an endorsement of the Provider

Agency's charitable or religious character, practices, or expression. The purpose of this contract is the provision of social services; no State expenditures have as their objective the funding of sectarian worship, instruction, or proselytization. A charitable or faith-based provider of social services under this contract shall reasonably apprise all assisted individuals of the following: "Neither the Department's selection of a charitable or faith-based provider of social services nor the expenditure of funds under this contract is an endorsement of the provider's charitable or religious character, practices, or expressions. No provider of social services may discriminate against you on the basis of religion, a religious belief, or your refusal to actively participate in a religious practice. If you object to a particular provider agency because of its religious character, you may request assignment to a different provider agency. If you believe that your rights have been violated, please discuss the complaint with your provider agency or notify your appropriate case manger."

Section 104 of The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. §604a, sets forth certain additional rights and responsibilities for charitable and faith-based providers of social services, certain additional rights of assisted individuals, and certain additional responsibilities of the Department to these providers and assisted individuals. This contract is subject to those additional rights and responsibilities.

3 Wisconsin Works (W-2) and Related Programs Contract

13.5 Faith-based

The W-2 agency may subcontract with, or award grants to charitable, private or faith-based organizations to provide case management services or assistance to W-2 and Related Programs participants or applicants on the same basis as any other private organization.

13.6 Non-discrimination Against an Organization

The W-2 agency shall not discriminate against an organization that is or applies to be a subcontractor on the basis that the organization has a religious character. The W-2 agency shall not require the faith-based organization to alter its definition, development, practice or expression of its religious beliefs, nor shall it require the organization to alter its internal governance or remove religious art or any other expression of its religious belief in order to enter into a subcontract with or be awarded a grant from the W-2 agency.

13.7 Non-discrimination Against an Applicant or Participant

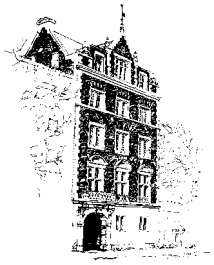
The W-2 agency shall not discriminate against any W-2 or Related Programs applicant or participant on the basis of religious or lack of religious belief. Therefore, if the W-2 agency subcontracts with a faith-based organization to provide case management services or assistance to W-2 and Related Programs participants, it must make available within a

reasonable time an alternative provider of the same services, worth the same value, to any participant who objects to the religious character of the organization or institution from which the participant would receive or is receiving case management services or assistance.

13.8 Fiscal and Accounting Standards

The W-2 agency shall require any faith-based organization that it subcontracts with or awards a grant to, to meet the same fiscal and accounting standards, and generally accepted accounting principles as any other private provider.

The Roundtable on Religion and Social Welfare Policy
www.religionandsocialpolicy.org
(518) 443-5014



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