Serving People in Need, Safeguarding Religious Freedom
Legal and Policy Backgrounders

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The following items are the legal and policy backgrounders referenced in the report, *Serving People in Need, Safeguarding Religious Freedom: Recommendations for the New Administration on Partnerships with Faith-Based Organizations*.

Legal and Policy Backgrounder #1: *Aguilar* and *Agostini*

In 1985, the U.S. Supreme Court confronted a case, *Aguilar v. Felton*, involving New York City's use of federal funds associated with Title I of the Elementary and Secondary Education Act of 1965.[1] Title I aid is made available to all students in need of remedial instruction, whether they attend public or private schools. To deliver the aid to qualified students who attended religious elementary and secondary schools, New York City sent some public school teachers to these religious schools. It also directed field personnel to make occasional unannounced visits to Title I classes at religious schools to ensure that religious symbols and content were not part of Title I instruction. The city told government employees to steer clear of religious activities and to keep their contact with religious school personnel minimal.[2]

In 1978, a group of taxpayers brought a lawsuit, alleging that this arrangement violated the First Amendment's Establishment Clause. They sought to bar the delivery of this aid on religious school premises. The Supreme Court found these claims persuasive. It said that providing Title I remedial education to disadvantaged students at religious elementary and secondary schools was unconstitutional. The system aimed at ensuring that the aid was not used to inculcate religion "inevitably result[ed] in the excessive entanglement of church and state."[3] Because public school teachers provided the aid in a "pervasively sectarian environment," the Court said, "ongoing inspection [was] required to ensure the absence of a religious message."[4] Writing for the Court, Justice Brennan said city agents would have to make regular inspections of the schools, identify religious symbols and materials that must be kept out of the Title I classrooms, and work with religious school personnel on administrative matters.[5] Church-state separation did not mean religious institutions and government must avoid all contact, the Court acknowledged, but "New York City's Title I aid program would require a permanent and pervasive state presence in the sectarian schools receiving aid."[6] That kind of interaction between church and state was unconstitutional.

In the wake of this decision, a district court permanently enjoined the New York City Board from sending public school teachers to "sectarian schools" to deliver Title I aid.[7] Accordingly, the Board modified its program so it could continue providing Title I aid to qualified students who attended religious schools. It arranged for instruction to be provided to these students in a

[1] Aguilar v. Felton, 473 U.S. 402 (1985).
[2] *Id*. at 406-407.
[3] *Id*. at 409.
[4] *Id*. at 412.
[5] *Id*. at 412-413.
[6] *Id*. at 414, 413.
[7] Agostini v. Felton, 521 U.S. 203, 212 (1997).

variety of ways — at public schools, in vans parked near religious schools, and through computer instruction.[8]

In 1995, the New York City Board and a group of parents whose children received Title I services and attended religious schools filed a lawsuit asking for an end to the permanent injunction implementing the *Aguilar* ruling. They argued that the Supreme Court's interpretation of First Amendment doctrine had changed since 1985, making the delivery of Title I aid on the premises of religious schools constitutionally permissible. Lower courts rejected these claims, but the Supreme Court agreed to hear the case, *Agostini v. Felton*, in 1997.

Acting Solicitor General Walter Dellinger filed an amicus brief in the case on behalf of Richard Riley, who served as secretary of the Department of Education.[9] In the brief, Secretary Riley noted that school districts had had to "expend[] hundreds of millions of dollars in non-instructional costs in order to comply" with the Court's decision in *Aguilar*.[10] "New York City was required in one fiscal year alone to spend $6 million on compliance that could otherwise have been used for the core instructional and counseling purposes of Title I," Riley said.[11] According to the brief, school districts had to pay these administrative costs before using any Title I funds for instructional services.[12] The Clinton administration argued that the *Aguilar* decision should be overruled "because there [was] no serious danger of entanglement of church and state when public school teachers deliver secular services to students in a supplementary program under circumstances carefully designed to ensure that the instruction is not influenced by the surroundings of a religious school."[13]

In 1997, the Court agreed to reverse the *Aguilar* decision, finding that delivering Title I aid at religious schools and monitoring it appropriately would not violate the First Amendment. Some of its more recent cases had undermined the assumptions upon which it had relied in the 1985 *Aguilar* case, the Court said.[14] In particular, its understanding of the criteria used to determine whether government aid had an impermissible effect had changed.[15] Writing for the Court, Justice Sandra Day O'Connor said it had "abandoned the presumption . . . that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination. . . ."[16] O'Connor also said the Court had "departed from the rule . . . that all government aid that directly aids the educational function of religious schools is invalid."[17] Further, the Court no longer understood "administrative cooperation" between church and state to create excessive entanglement, at least not by itself.[18] Because it "no longer presume[d] that public employees will inculcate religion simply because they happen to be in a sectarian environment," the Court also "discard[ed] the assumption that *pervasive* monitoring [of such programs] is required."[19] The unannounced monthly visits contemplated by the New York City Board seemed adequate to guard against government-promoted faith, and they did not

[8] *Id*. at 213 (1997).
[9] Brief for the Secretary of Education, Agostini v. Felton (Nos. 96-552 and 96-553), 1997 U.S. S. Ct. Briefs LEXIS 112 (February 28, 1997).
[10] *Id*. at *13.
[11] *Id*.
[12] *Id*. at *11-*12.
[13] *Id*. at *18.
[14] 521 U.S. at 222.
[15] *Id*. at 223.
[16] *Id*.
[17] *Id*. at 225.
[18] *Id*. at 233-234.
[19] *Id.* at 234.

create excessive church-state entanglement.[20] For this and other reasons, the Supreme Court concluded that its "Establishment Clause jurisprudence ha[d] changed significantly" since the mid-1980s.[21]

Legal and Policy Backgrounder #2: *Mitchell v. Helms*

The case of *Mitchell v. Helms* involved educational materials and equipment that the government directed to public and private schools, including religious schools.[22] The Court upheld the aid but split on the reasoning supporting its decision. Four of the justices — a plurality, not a majority — took the position that if government aid was itself nonreligious and made available to a broad range of recipients without regard to their religion, the aid did not violate the Establishment Clause.[23] The plurality argued that the distinction between direct and indirect government aid was overly formalistic.[24] The plurality also took the opportunity to confront the pervasively sectarian doctrine head-on. These justices said that the doctrine was not only unworkable but also rooted in anti-Catholic bigotry.[25] The plurality rejected the pervasively sectarian doctrine in its entirety.

This reasoning could not attract a majority. Justices O'Connor and Breyer provided the crucial votes for the result, but they disagreed strongly with several aspects of the plurality's reasoning.[26] Because their opinion contributed the key votes for the result in the case and is the narrowest opinion in favor of that result, it is called the "controlling opinion,"[27] meaning that it is the one lower courts look to as precedent. Justice O'Connor wrote this opinion concurring in the judgment, and Justice Breyer joined it.

O'Connor and Breyer aligned with the plurality on certain points. For example, they said the Court's recognition of "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions"[28] did not mean the mere fact that aid could be diverted to religious use made it constitutionally problematic.[29] To demonstrate a constitutional violation, they said, it was necessary to "prove that the aid in question actually is, or has been, used for religious purposes."[30]

In this sense, Justices O'Connor and Breyer seemed sympathetic with the plurality's argument. But they argued the plurality went too far. They scored the plurality opinion for its suggestion

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[20] The Court noted it had not found excessive entanglement in cases where the government had imposed "far more onerous burdens on religious institutions than the monitoring system at issue here." *Id*.
[21] *Id*. at 236. At the same time, however, a Court majority has clung to the general principle that there are special dangers when the government directs funds to religious institutions and that the use of such aid to subsidize religious activities or otherwise promote religion is unconstitutional. *See, e.g.,* Mitchell v. Helms, 530 U.S. 793 (2000).
[22] 530 U.S. 793 (2000).
[23] *Id*. at 801-836.
[24] *Id*., 815-820.
[25] *Id*., 828-829. Justice Souter took serious issue with this assertion in his dissenting opinion. *Id*., at 912-913 (Souter, J., dissenting).
[26] *Id.* at 836-867 (O'Connor & Breyer, JJ., concurring in the judgment).
[27] Marks v. United States, 430 U.S. 188 (1977).
[28] Mitchell v. Helms, 530 U.S. at 843.
[29] *Id*. at 856. Rather, Justices O'Connor and Breyer said, "the most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition." *Id*. at 856.
[30] *Id*. at 857.

that nothing was constitutionally troubling about the actual use of direct government aid to promote religion. Justices O'Connor and Breyer said: "[T]here is no reason that, under the plurality's reasoning, the government should be precluded from providing direct money payments to religious organizations (including churches) based on the number of persons belonging to each organization."[31] They continued: "And, because actual diversion is permissible under the plurality's holding, the participating religious organizations (including churches) could use that aid to support religious indoctrination."[32] While the plurality did not say that the Establishment Clause must be interpreted in these ways, "[i]n its logic — as well as its specific advisory language — the plurality opinion foreshadows the approval of direct monetary subsidies to religious organizations, even when they use the money to advance their religious objectives."[33] In contrast to the plurality, Justices O'Connor and Breyer emphatically embraced the longstanding Establishment Clause principle that direct aid may not be diverted to religious use.[34]

Justices O'Connor and Breyer also distinguished themselves from the plurality by refusing to join its arguments against the pervasively sectarian doctrine and by singling out churches for special mention in their opinion. This distinction may signal that the character of at least some religious institutions — namely, houses of worship — continues to have some constitutional significance.[35] To be sure, Justices O'Connor and Breyer refused to assume that aid would be diverted to religious use by certain institutions, but their opinion left open the possibility that churches and other houses of worship constitute a category of religious institutions that are special in some sense, at least in terms of their ability to receive certain forms of government aid.

Legal and Policy Backgrounder #3: H.R. 7 and CARE Act

The faith-based initiative bill introduced by Representative J.C. Watts (R-OK) in the House of Representatives in 2001 proposed new incentives for charitable giving and an expansion of charitable choice.[36] Instead of simply applying charitable choice provisions to a single or small number of streams of federal social service funds, the bill proposed applying them to a wide range of such funds.

During a July 12, 2001 mark up of the bill, the House Judiciary Committee revised it in some important ways. The revised bill said that, if the religious organization offered "sectarian instruction, worship, or proselytiz[ing]" activities, then those activities must be "voluntary for the individuals receiving services [funded by direct government aid] and offered separate from" such

[31] *Id.* at 843-844.
[32] *Id.* at 844.
[33] *Id* (citation omitted).
[34] Mitchell v. Helms, 530 U.S. at 840-841 & 845 (O'Connor and Breyer, JJ., concurring in the judgment).
[35] *See* Memorandum for William P. Marshall, Deputy Counsel to the President, from Randolph D. Moss, Assistant Attorney General, Application of the Coreligionists Exemption in Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-1(a), to Religious Organizations That Would Directly Receive Substance Abuse and Mental Health Services Administration Funds Pursuant to Section 704 of H.R. 4923, the "Community Renewal and New Markets Act of 2000" (October 12, 2000) at n.36 ("[I]t remains unresolved after *Mitchell [v. Helms*] whether there are some sorts of religious institutions, such as churches, to which a government may not provide direct *monetary* aid under any circumstances").
[36] H.R. 7, "Community Solutions Act of 2001," introduced by Representative J.C. Watts (R-OK) (March 29, 2001, 107th Congress, 1st Session).

services.[37] This change helped to correct certain constitutional defects of the charitable choice model.[38] At the same time, the House Judiciary Committee added a sweeping provision that deepened the controversy surrounding the bill. That provision sought to authorize federal agencies to convert "some or all of the funds" of a wide range of grant programs to voucherized aid.[39] Unlike direct aid, this aid would be unencumbered by statutory restrictions requiring secular use of the funds. Congressional Quarterly reported that this provision would have given the Bush administration the authority to turn $47 billion in social service programs into voucher programs.[40]

The debate over the House legislation became even more intense after an internal memo written by the Salvation Army surfaced. It said the Army had a "firm commitment" from the White House to implement a federal regulation that would exempt religious groups that received government aid from state and local gay nondiscrimination laws.[41] The Salvation Army believed the House legislation was too vague on this issue.[42] Like earlier charitable choice provisions, the House legislation stated that a religious organization that received government funds "shall have the right to retain its autonomy from Federal, State, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs."[43] Some believed this and related provisions of the bill were sufficient to require the exemption of religious groups from certain state and local antidiscrimination laws and policies, but the Army pressed the White House for a federal regulation that would be more specific.

As proposed by the Salvation Army, the regulation would have said that federal agencies cannot give assistance to states or localities that would require religious organizations to " 'adopt terms or practices for those with religious responsibilities' or to provide employment benefits, if the practices or benefits 'are inconsistent with the beliefs and practices' of the charity."[44] The memo said the White House agreed that a regulation would be "a better alternative than the legislative process, which is more time-consuming and more visible."[45] The Salvation Army would back the House legislation mainly to get the White House to issue the federal regulation.[46] It said passage of the faith-based legislation could serve as "the strategic springboard for the White House to act" on the proposed regulation.[47] When the memo became public, the White House said it had not made the "firm commitment" described therein.[48]

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[37] H.R. 7, "Community Solutions Act of 2001," reported from the House Committee on the Judiciary with amendments (July 12, 2001, 107th Congress, 1st Session).
[38] *See Serving People in Need, Safeguarding Religious Freedom: Recommendations for the New Administration on Partnerships with Faith-Based Organizations,* available at http://www.brookings.edu/~/media/Files/rc/papers/2008/12_religion_dionne/12_religion_dionne.pdf.
[39] H.R. 7, "Community Solutions Act of 2001," reported from the House Committee on the Judiciary with amendments (July 12, 2001, 107th Congress, 1st Session).
[40] David Nather, *Bush's House Win on 'Faith-Based' Charity Clouded by Bias Concerns in Senate* (CQ Weekly, July 21, 2001).
[41] Dana Milbank, *Bush Legislative Approach Failed in Faith Bill Battle; White House is Faulted for Not Building a Consensus in Congress* (The Washington Post, April 23, 2003).
[42] *Id*.
[43] H.R. 7, "Community Solutions Act of 2001," reported from the House Committee on the Judiciary with amendments (July 12, 2001, 107th Congress, 1st Session).
[44] Dana Milbank, *Charity Cites Bush Help in Fight Against Hiring Gays: Salvation Army Wants Exemption from Laws* (The Washington Post, July 10, 2001).
[45] *Id*.
[46] *Id*.
[47] *Id.*
[48] *Id*.

In the wake of this development, GOP leaders had to pull the faith-based bill from the House floor for a day to address Republican moderates' concerns about discrimination issues.[49] These moderate Republicans secured a promise from then-Representative J.C. Watts that "if a faith-based bill passes the Senate, the ensuing conference will 'more clearly address' their objections to the provision that would exempt faith-based groups from state and local [nondiscrimination] laws if they take federal funds."[50] In exchange, the moderates dropped their support for a motion to send the bill back to the relevant House committees. The House approved the bill in the summer of 2001.[51]

In early 2002, the Senate began work on a bill that took a very different approach. It focused on common ground, including the creation of new tax incentives for charitable giving, increased funding for social service block grants, initiatives to make it easier for charitable groups to obtain designation as 501(c)(3) tax-exempt entities, and the establishment of the Compassion Capital Fund to provide technical assistance to community-serving organizations.[52] The Senate bill also contained a few "equal treatment" provisions, declaring that applicants for federal funding may not be disqualified from competing for federal grants because they use religious criteria to select their board members, have charter provisions or organizational names that contain religious references, or have facilities that contain some religious art, scripture, or symbols.[53] The "equal treatment" provisions were removed from the bill in further negotiations.[54] While Senate legislative efforts appeared at some points poised for victory, the bill was never brought to the floor for a vote.[55]

Legal and Policy Backgrounder #4: Some Approaches to Religion-Based Employment Decisions in Government-Funded Jobs

Some believe the government should allow religious organizations to make religion-based employment decisions with respect to all government-funded jobs. Those who take different positions fall into a number of camps, some of which are briefly described below.

Institution-wide

When an organization receives federal funding, some argue that it should be prohibited from discriminating on the basis of religion with regard to all of its jobs, including privately subsidized positions within a religious organization that function outside the government-funded program. This position is clearly an outlier in the debate over charitable choice and the faith-based initiative, however. That debate has focused on whether employment discrimination on the basis of religion should be prohibited in government-funded programs or activities or, more narrowly, in some or all government-funded jobs.

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[49] David Nather, *Bush's House Win on 'Faith-Based' Charity Clouded by Bias Concerns in Senate* (CQ Weekly, July 21, 2001).
[50] *Id*.
[51] The House approved the bill by a vote of 233-198. *Id*.
[52] Charity, Aid, Recovery, and Empowerment Act (CARE) S.1924.
[53] *Id*.
[54] Dana Milbank, *Bush Legislative Approach Failed in Faith Bill Battle; White House is Faulted for Not Building a Consensus in Congress* (The Washington Post, April 23, 2003).
[55] Amy E. Black, Douglas L. Koopman, and David K. Ryden, *Of Little Faith: The Politics of George W. Bush's Faith-Based Initiatives*, (Washington, DC: Georgetown University Press, 2004), 182 -183.

Program-wide

Some believe that organizations receiving federal funding should be barred from discriminating on the basis of religion for any jobs operating within the government-funded program, either primarily or entirely. This camp says a religious organization should be able to continue to discriminate on the basis of religion with regard to a chaplain position, for example, whose salary is paid with private funds and who works outside the government program. But it believes a religious organization should be prohibited from choosing employees on a religious basis – even if those employees are paid exclusively with private funds – if those employees will work within a government-funded program. The argument here is that government funding of the program essentially created these jobs. Thus, the jobs should be open to people of all faiths and none, regardless of whether the organization uses government funds to pay the salary of the specific position.

Job-Specific

Others believe that religious organizations receiving federal funding should be barred from discriminating on the basis of religion for any jobs whose salaries are subsidized exclusively or partially with government funds. This camp says these organizations should not be subject to religious nondiscrimination obligations regarding jobs exclusively funded with private money, even if they operate partially within the context of government-funded programs.

Direct Aid or Indirect Aid

Some who fall into the program-wide and job-specific camps would draw a distinction between government financial aid that is direct (e.g., grants or contracts) and that which is indirect (e.g., vouchers or certificates). In other words, either for pragmatic or constitutional reasons or both, some believe the government should prohibit religious organizations from discriminating on the basis of religion with regard to programs or jobs funded by direct aid but not by indirect aid.

Distinctions within Direct Aid: Percentage of Salaries

Some who would draw a distinction between direct and indirect aid also would say that a religious organization that receives direct aid should be permitted to discriminate on the basis of religion with regard to some positions whose salaries are paid in part with direct government funds. For example, Marc Stern, assistant executive director of the American Jewish Congress, has said "it is possible to draw a distinction" between "a worker wholly funded by government versus an executive of an agency only a small portion of whose salary is attributable to government funds. . . ." [56]

Distinctions within Direct Aid: Overall Amount of Government Funding Organization Receives

Others advocate an approach that turns on the overall amount of government funding an institution receives. The Child Care Development Block Grant Act (CCDBG) is one illustration

[56] Marc Stern, *An Interview with Q and A on the Hiring Rights of Tax-funded Religious Organizations*, Roundtable on Religion and Social Welfare Policy (September 23, 2008), available at http://www.socialpolicyandreligion.org/interviews/interview_upd.cfm?id=178&pageMode=general.

of this approach.[57] CCDBG has been interpreted to prohibit providers receiving direct government assistance from discriminating on the basis of religion with regard to a prospective employee "if such employee's primary responsibility is or will be working directly with children in the provision of child care services."[58] It sets forth an exception to the statute's nondiscrimination employment provisions. "If two or more prospective employees are qualified for any position with a child care provider" receiving CCDBG assistance, the Act does not "prohibit such child care provider from employing a prospective employee who is already participating on a regular basis in other activities of the organization that owns or operates such provider."[59] That exception, however, is unavailable if the child care provider receives 80 percent or more of its operating budget from federal or state funds, whether from direct or indirect aid or some combination of the two.[60]

Legal and Policy Backgrounder #5: Constitutionality of Laws and Policies Allowing Religious Organizations to Discriminate on the Basis of Religion with regard to Government-Funded Jobs

The government is constitutionally prohibited from discriminating on the basis of religion when making employment decisions. Is it constitutionally permissible for the government to allow a religious body to do so for jobs subsidized with direct government aid?

The U.S. Supreme Court has never addressed this question. It has addressed the constitutionality of religion-based employment decisions within a religious organization that did not receive government funds. The 1987 case of *Corporation of Presiding Bishop v. Amos* involved an assistant building engineer who worked at a gymnasium owned by the Church of Jesus Christ of Latter-day Saints, sometimes known as the LDS or Mormon church.[61] The church discharged the engineer after sixteen years of service because he failed to qualify for a "temple recommend," a certificate demonstrating that he is a church member in good standing and thus eligible to attend LDS temples.[62] According to the Court, the LDS church issues temple recommends "only to individuals who observe the Church's standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco."[63] To the extent that the Title VII exemption allowed the LDS church to fire him for this reason, it violated the First Amendment's Establishment Clause, the engineer argued.

Title VII is the equal employment opportunity title of 1964 Civil Rights Act. [64] Title VII applies to employers with fifteen or more employees in an industry affecting interstate commerce[65] and

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[57] *See generally* 42 U.S.C. Section 98581 (2008). The CCDBG religious nondiscrimination provisions are complex and only partially described here.
[58] The statute does not specify different treatment for providers based on the type of government aid they receive. 42 U.S.C. Section 9858l(3)(A). Federal regulations, however, state that this statutory ban applies to providers that receive direct assistance from the government. 45 C.F.R. Section 98.47(1). Professor Elizabeth Samuels says this regulatory interpretation is "questionable" because the statute itself does not draw a distinction between direct and indirect aid on this point. *The Art of Line Drawing: The Establishment Clause and Public Aid to Religiously Affiliated Child Care,* 69 Ind. L.J. 39, 57-58 (1993).
[59] 42 U.S.C. Section 9858l(3)(B).
[60] *Id*. at Section 9858l(4). *See also* 47 C.F.R. Section 98.47(c).
[61] 483 U.S. 327 (1987).
[62] *Id*. at 330.
[63] *Id*. at n.4.
[64] 42 U.S.C. Section 2000e *et seq.* (2008).

prohibits them from discriminating in employment on the basis of "race, color, religion, sex, or national origin."[66] However, Title VII exempts religious organizations from its prohibition on religious discrimination in employment.[67]

As signed into law in 1964, the Civil Rights Act contained an exemption from its religious nondiscrimination requirements for positions engaged in the religious activities of the organization.[68] Congress broadened this exemption in 1972 to allow religious organizations to hire on the basis of religion in all employee positions.[69] This exemption from Title VII is often referred to as the "702 exemption."[70]

In the *Amos* case, the Court rejected the engineer's argument that the 702 exemption violated the First Amendment's Establishment Clause. First, the Court found that the exemption had a bona fide secular purpose. It was a "significant burden" for religious organizations to have to predict which of their jobs a court would find to be engaged in religious activities and which were not, the Court said.[71] The 702 exemption spared a religious organization this concern, thus freeing it to define and advance its mission as it saw fit, rather than as the government saw fit. The Court also noted that Congress could lift governmental burdens on religious practices.[72] Finally, the Court determined that the exemption did not have the forbidden primary effect of advancing religion. It said: "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon* [*v. Kurtzman*], it must be fair to say that the *government itself* has advanced religion through its own activities and influence."[73]

However, the Court explicitly declined to consider whether the Constitution mandated the Title VII exemption.[74] It also did not find that the Constitution required or permitted the government to allow religious organizations to discriminate in employment based on religion for government-funded jobs. The case did not raise this issue, as there was no suggestion that the LDS organization received any financial assistance from the state.

In the wake of the *Amos* decision, two federal trial courts have considered whether the First Amendment allows the government to permit religious organizations to discriminate on the basis of religion with regard to government-funded jobs. Both cases involved the Salvation Army, but the decisions were handed down sixteen years apart and reflect very different conclusions.

In the 1989 case, *Dodge v. Salvation Army*, a federal district court considered a claim brought by a person who had been fired from her position as a Victims' Assistance Coordinator in a Mississippi shelter owned and operated by the Salvation Army.[75] The coordinator alleged she

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[65] 42 U.S.C. Section 2000e(b) **(**2008)(defining an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees . . .").
[66] *Id.* at Section 2000e-2(a)(2).
[67] *Id*. at Section 2000e-1(a).
[68] Section 702 of the Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241 (1964) (reprinted in U.S.C.C.A.N. at 287)(the exemption did not apply to job positions "connected with the carrying on by such [religious] corporation[s], association[s] or societ[ies] of [their] religious activities. . . .").
[69] P.L. 92-261, 86 Stat. 103 (1972).
[70] In the bill passed by Congress in 1964, this exemption was labeled "Section 702." *See* P.L. 88-352, 78 Stat. 241.
[71] 482 U.S. at 336.
[72] *Id*. at 335.
[73] *Id.* at 337.
[74] "We have no occasion to pass on the argument . . . that the exemption to which [the religious organization is] entitled under Section 702 is required by the Free Exercise Clause." *Id*. at n.17.
[75] Dodge v. Salvation Army, 1989 U.S. Dist. LEXIS 4797, No. S88-0353, 1989 WL 53857 (S.D. Miss. Jan. 9, 1989).

had been fired because she was a practicing Wiccan and that her termination violated the federal Constitution and Title VII.

The court first determined that the position within the Salvation Army was "*funded substantially, if not entirely,* by federal, state and local government. . . . "[76] In an unpublished decision, it concluded that when the government "allow[ed] the [religious organization] to choose the person to fill or maintain the position based on religious preference[, it] clearly ha[d] the effect of advancing religion and is unconstitutional."[77] The court understood Title VII to permit the Salvation Army to discriminate on the basis of religion, but the facts "[gave] rise to constitutional considerations which effectively prohibit the application of the exemption to the facts in this case."[78] In this context, the court said, "*the government itself* ha[d] advanced religion through its own activities and influence,"[79] something the First Amendment's Establishment Clause prohibits.

In addition to noting what the court said in *Dodge v. Salvation Army*, it is important to note what it did not say. It did not say that the Salvation Army lost its ability to discriminate on the basis of religion with regard to privately funded jobs. It did not say that the Army waived its rights to a Title VII exemption.[80] Instead, it said that constitutional concerns prevented the Army from discriminating on the basis of religion with respect to jobs funded substantially, if not exclusively, by the government.

Sixteen years later, a group of present and former Salvation Army employees in the state of New York raised similar claims in *Lown v. Salvation Army*. [81] They took issue with a variety of actions by the Salvation Army, including its firing of at least one employee for refusing to compel employees to disclose information about their religious affiliations. [82] "Historically," the court said, "the Salvation Army did not scrupulously monitor [social service] employees for adherence to [its] religious tenets."[83] That changed in late 2003, when the Army instituted a "Reorganization Plan" meant to further what it called a "One Army Concept."[84] The court explained that the aim of this plan was to ensure that all employees conducted themselves in ways consistent with the Army's religious mission and that " 'a reasonable number of Salvationists along with other Christians [will be employed]' because the Salvation Army is 'not a Social Service Agency [but] a Christian Movement with a Social Service program.'"[85] The Army revised its employee manual to state that employees must agree to do nothing to undermine its religious mission.[86] The court noted that the Army's religious beliefs include disapproval of non-marital sexual relationships, abortion, same-sex sexual contact, social drinking, gambling, contraceptive use outside of marriage, smoking, and drug use.[87]

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[76] *Id*. at *7.
[77] *Id*. at *11.
[78] *Id.* at *7-8.
[79] Amos, 483 U.S. at 337.
[80] Melissa Rogers, "Federal Funding and Religion-based Employment Decisions," chapter in *Sanctioning Religion? Politics, Law, and Faith-based Public Services*, ed. David K. Ryden and Jeffrey Polet (Lynn Rienner Publishers) (2005).
[81] Lown v. Salvation Army, 393 F. Supp. 2d 223 (S.D.N.Y. 2005).
[82] *Id*. at 232.
[83] *Id*. at 229.
[84] *Id*.
[85] *Id*.
[86] *Id*. at n.5.
[87] *Id*. at 233.

At some point, Salvation Army leaders asked certain employees to name the gay people who were working at the organization[88] and to ensure that other employees completed forms disclosing the churches they had attended regularly over the past ten years and the names of the ministers of those churches.[89] Some employees refused to comply. The Salvation Army fired at least one such employee.[90] Some other employees subsequently resigned, citing constructive termination.[91] They were paid "virtually in full" with funds the Army received through contracts with the state.[92] Indeed, the court noted that this division of the Salvation Army received more than 95 percent of its approximately $50 million budget from government contracts,[93] and the salaries of 900 employees were paid almost entirely with these government funds.[94] A group of these employees filed suit against the city of New York and the Salvation Army, claiming that the application of the employment policy to government-funded jobs violated the federal Constitution and Title VII.

The federal district court in *Lown* dismissed the plaintiffs' federal constitutional and statutory claims. First, it said that "mere approval or acquiescence" on the part of the government in this employment discrimination by a religious organization did not make the government responsible for it.[95] Second, the court dismissed the plaintiffs' claims that the Title VII exemptions should not be construed to apply to the circumstances at issue or, alternatively, that those exemptions were unconstitutional as applied to these facts.[96] The plaintiffs had argued that when the government permitted the Salvation Army to engage in religious discrimination with regard to government-funded jobs, it impermissibly advanced religion rather than permissibly accommodated it. The court said:

> Religious organizations undoubtedly forfeit certain free exercise interests when they agree to provide social services on behalf of the government. For example, the Establishment Clause requires that such organizations not possess unfettered discretion over the content of the services provided with public funds. Nevertheless, the Establishment Clause does not mandate that such organizations abandon all free exercise interests. Nothing in the Constitution precludes Congress from accommodating the Salvation Army's residual free exercise interest in selecting and managing its employees with reference to religion.[97]

The *Lown* court was careful to note, however, that "[t]his is not to imply that the Constitution forbids Congress from imposing a universally applicable, neutral rule that government contractors not discriminate on the basis of religion."[98]

Further, the *Lown* court refused to dismiss the plaintiffs' claims that some of the government contract money had been used for religious activities, including the implementation of the Salvation Army's Reorganization Plan. The court said that "it is a reasonable inference from the allegations in the [complaint] that government funds have been used in furtherance of [the Salvation Army's] compliance with the Reorganization Plan, particularly given that [this

[88] *Id.* at 230.
[89] *Id.* at 231.
[90] *Id.* at 232.
[91] *Id.* at 232-233.
[92] *Id.* at 228.
[93] *Id.*
[94] *Id.*
[95] *Id.* at 243.
[96] *Id.* at 246 -252.
[97] *Id.* at 250 (citation omitted).
[98] *Id.* at n.14.

branch of the Salvation Army] is 95% funded by government sources and that its employees are paid virtually in full by government funds."[99] Thus, the court seemed to leave open the door to a claim that an employer could not use direct government aid to subsidize the process of identifying a religiously qualified workforce and managing it according to those precepts. As Professors Ira C. Lupu and Robert W. Tuttle have said, if a court were to arrive at such a finding, the government would have to require religious organizations "to establish accounting mechanisms to ensure that [government] funds are not used to implement or enforce the organization's religious selectivity."[100]

Some argue that the ruling in the 1989 *Dodge* case is simply a relic of a bygone era of constitutional reasoning.[101] According to these critics, the *Dodge* court "refused to follow the Supreme Court decision most directly in point, *Corporation of the Presiding Bishop v. Amos*" and "reasoned from a fifteen-year-old case that was essentially irrelevant, *Lemon v. Kurtzman*."[102] Others argue the test used in *Dodge* seems more akin to the pervasively sectarian test because it focuses on religiously restricted hiring.[103] Because that test has been undermined, they argue, the conclusion in *Dodge* has been undermined as well.

The Court has significantly relaxed some of the rules governing the flow of government financial aid to religious bodies over the past two decades.[104] The pervasively sectarian test clearly has been weakened.[105] But the multi-factor pervasively sectarian test dealt with the nature of certain religious institutions, and the employment issue is about the use of government funds.[106] The Court continues to ask whether direct aid has been diverted to religious use.[107] In the employment context, a key question is whether the government directly subsidizes certain positions. Whether that position is within a pervasively sectarian or a nonpervasively sectarian organization is beside the point.[108]

Turning to the 2005 *Lown* decision, the New York court concluded that the Salvation Army was not a state actor. An organization, including a religious organization, usually does not become a state actor merely by accepting a government grant or contract.[109] Further, the Court has generally held that the state's "mere acquiescence" in a private group's activities does not convert those activities to state action.[110] However, the Court has long held that the use of

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[99] *Id*. at 240.
[100] Ira C. Lupu and Robert W. Tuttle, *The State of the Law 2005: Legal Developments Affecting Partnerships Between Government and Faith-Based Organizations* (Roundtable on Religion and Social Welfare Policy) at 45, available at http://www.socialpolicyandreligion.org/publications/publication.cfm?id=67.
[101] Testimony of Carl H. Esbeck, Isabelle Wade and Paul C. Lyda Professor of Law, University of Missouri-Columbia, before the Subcommittee on Select Education of the House Committee on Education and the Workforce (April 1, 2003)(arguing that Dodge "was of doubtful rationale when decided, and given later developments the opinion is clearly not the law today").
[102] *Id*.
[103] Church Autonomy and Conditions on Benefits, 2008 Church Autonomy Conference of the Federalist Society (March 14, 2008), available at http://www.fed-soc.org/publications/id.514/default.asp.
[104] *See, e.g.,* Mitchell v. Helms, 503 U.S. 793 (2000); Agostini v. Felton, 521 U.S. 203 (1997).
[105] *See Serving People in Need, Safeguarding Religious Freedom: Recommendations for the New Administration on Partnerships with Faith-Based Organizations,* available at http://www.brookings.edu/~/media/Files/rc/papers/2008/12_religion_dionne/12_religion_dionne.pdf.
[106] *Id.*
[107] *Id*.
[108] Further, the *Dodge* court's reliance on the *Lemon v. Kurtzman* decision as well as *Amos* was quite appropriate. As the *Dodge* court observed: "This Court is of the opinion that although *Amos* does not specifically address the issue of funding, the Supreme Court went to great lengths to distinguish *Amos* from *Lemon* on the questions of financial support and active involvement by the sovereign." Dodge, 1989 U.S. Dist. LEXIS at *11 (citations omitted).
[109] *See, e.g.,* Blum v. Yaretsky, 457 U.S. 991 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982).
[110] *Id.*

direct aid for religious purposes or activities violates the First Amendment.[111] Thus, some argue that the Establishment Clause bars the government from allowing a religious group to use direct aid to pay the salaries of employees selected because of their faith.

The *Lown* court rejected this argument as well. Nevertheless, its conclusion on this issue is certainly debatable. For example, Professors Alan Brownstein and Vikram Amar have argued that giving direct government subsidies to religious organizations and allowing them to make employment decisions on the basis of religion with regard to those subsidies violates the Establishment Clause's prohibitions on government promotion and endorsement of religion.[112] Other scholars believe *Lown* was correctly decided.[113]

Legal and Policy Backgrounder #6: Some Federal Policy Precedents

The set of federal policy precedents on religion-based employment decisions by religious organizations includes the following laws and policies.

Title VII of the 1964 Civil Rights Act

Title VII of the Civil Rights Act of 1964 applies to employers with fifteen or more employees in an industry affecting interstate commerce and prohibits them from discriminating in employment on the basis of "race, color, religion, sex, or national origin."[114] Title VII exempts religious organizations from its prohibition on religious discrimination in employment. In 1972, this exemption was amended to allow religious organization to discriminate on the basis of religion with respect to all employment positions, rather than simply ones that the government would deem to be involved in the religious activities of the organization. In their arguments calling for adoption of this amendment, the chief congressional advocates of the amendment made a point of citing examples of religious institutions that they said did not receive government funds.[115] In addition to the general exemption for religious organizations from Title VII's prohibition on religious discrimination in employment, Title VII also specifically exempts certain religious educational institutions from this prohibition.[116]

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[111] In their controlling opinion in *Mitchell v. Helms*, Justices O'Connor and Breyer stated: "Although 'our cases have permitted some government funding of secular functions performed by sectarian organizations,' our decisions 'provide no precedent for the use of public funds to finance religious activities.'" Mitchell, 530 U.S. 793, 840 (2000)(O'Connor & Breyer, JJ., concurring in the judgment)(quoting Rosenberger v. Rector and Visitors, 515 U.S. 819, 847 (1995)(J. O'Connor concurring)). *See also* Mitchell v. Helms, 515 U.S. 840-41 (O'Connor & Breyer, JJ., concurring in the judgment)(discussing cases).

[112] Alan Brownstein and Vikram Amar, *The "Charitable Choice" Bill that was Recently Passed by the House and the Issues it Raises* (Findlaw, April 29, 2005). *See also* Steven K. Green, Religious Discrimination, Public Funding, and Constitutional Values, 30 Hastings Const. L.Q. 1 (2002).

[113] *See, e.g.,* Carl Esbeck, The Application of RFRA to Override Employment Nondiscrimination Clauses Embedded in Federal Social Service Programs, Legal Studies Research Paper Series, Research Paper No. 2008-09 (June 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1118961#. *See also* Ira C. Lupu and Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DePaul L. Rev. 1, 51-57, 102-105 (2005).

[114] 42 U.S.C. Section 2000e(b) and 2000e-2(a)(2).

[115] Rogers, "Federal Funding and Religion-based Employment Decisions", chapter in *Sanctioning Religion? Politics, Law, and Faith-based Public Services*, ed. David K. Ryden and Jeffrey Polet (Lynn Rienner Publishers) (2005).

[116] 42 U.S.C. Section 2000e-2(e) (2008). This exemption states:

> Notwithstanding any other provision of this subchapter, . . . it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such

Title VI of the 1964 Civil Rights Act

Another nondiscrimination title of the Civil Rights Act, Title VI, restricts the use of federal financial assistance.[117] In other words, while Title VII's nondiscrimination obligations apply to entities that affect interstate commerce, Title VI's nondiscrimination obligations are conditions following federal dollars. This provision states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[118] Thus, another difference between Title VII and Title VI is that Title VI does not prohibit discrimination on the basis of religion.

As Kenneth L. Marcus has noted, the overriding concern of Congress in framing the 1964 Civil Rights Act was discrimination against African Americans.[119] Thus, there was relatively little discussion of other types of discrimination, including religious discrimination.[120]

Nevertheless, there is some legislative history regarding religion and Title VI. An early version of Title VI considered by the House Judiciary Committee listed religion among the types of prohibited discrimination.[121] The Judiciary Committee subsequently adopted a substitute version of the bill that omitted the term "religion" from this title.[122] Professor Marcus notes that accompanying legislative reports do not explain this deletion, but he points to two times the topic was discussed briefly on the House floor: January 31, 1964, and February 7, 1964.

These discussions began when fellow legislators asked members of the House Judiciary Committee to explain the reasons the committee omitted the term "religion" from Title VI. Various members of the committee gave different explanations for this deletion, and some of their comments are vague and confusing. When asked about the omission on January 31, 1964, Chairman Emanuel Celler (D-NY) suggested that the committee took this action to avoid

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> school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Id.

[117] 42 U.S.C. Section 2000d *et seq*. (2008).

[118] *Id*.

[119] Kenneth L. Marcus, *The Most Important Right We Think We Have But Don't: Freedom From Religious Discrimination in Education*, 7 Nev. L.J. 171, 173 (2006).

[120] *Id*.

[121] *See* Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives (88th Congress, 1st Session), on Miscellaneous Proposal Regarding the Civil Rights of Persons Within the Jurisdiction of the United States (May, June, and August 1963) Part II at 827-828. The report on these hearings contains legislation that states, in relevant part:

> Notwithstanding any provision to the contrary in any law of the United States providing or authorizing direct or indirect financial assistance for or in connection with any program or activity by way of grant, contract, loan, insurance, guaranty, or otherwise, no such law shall be interpreted as requiring that such financial assistance shall be furnished in circumstances under which individuals participating in or benefiting from the program or activity are discriminated against on the ground of race, color, religion, or national origin or are denied participation or benefits therein on the ground of race, color, religion, or national origin. All contracts made in connection with any such program or activity shall contain such conditions as the President may prescribe for the purpose of assuring that there shall be no discrimination in employment by any contractor or subcontractor on the ground of race, color, religion, or national origin.

Id. at 827-828.

[122] Kenneth L. Marcus, *Anti-Zionism as Racism, Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 Wm. & Mary Bill of Rts. J. 837, 878 (2007).

disturbing existing practices of some religious institutions that discriminated in favor of co-religionists in employment.[123] At this point, Representative Peter Rodino (D-NJ) asked Celler to

[123] The following discussion took place on the House floor on January 31, 1964:

> Mr. Abernethy: I notice in examining the various titles of the bill that an attempt is made to eliminate several alleged and various kinds of discrimination on the ground of race, color, religion or national origin. Did the gentlemen's committee hear any testimony on any discriminations practiced against any people of this country because of their religion?
>
> Mr. Celler: We had testimony concerning religion. We did not have very much testimony of discriminations on the grounds of religion. You will notice in one of the titles, religion is left out.
>
> Mr. Abernethy: I was going to come to that. Now what religion, or the people of what faith were discriminated against? And who was doing the discriminating?
>
> Mr. Celler: You are talking about title VI? We left it out.
>
> Mr. Abernethy: I am not speaking of title VI just now. Who were the people who were being discriminated against because of religion, of what religious faith?
>
> Mr. Celler: We had very little evidence – I do not think we had any of it insofar as the Committee on the Judiciary is concerned that any particular sect or religion has been discriminated against.
>
> Mr. Abernethy: Was any religion at all mentioned by name?
>
> Mr. Celler: There was religion mentioned. There was testimony.
>
> Mr. Abernethy: I am not speaking in general terms – I am speaking of a specific religion.
>
> Mr. Celler: No, there was not.
>
> Mr. Abernethy: There was not? All right, then. . . .
>
> Mr. Abernethy: Going to title VI, the gentlemen made mention of the fact that the word "religion" was removed from title VI. Can the gentleman tell us why it is that the bill attempts only to eliminate the kind of discrimination referred to in title VI, discrimination with regard to race, color, or national origin only, but specifically omits discrimination as to religion?
>
> Mr. Celler: There was a good reason for that.
>
> Mr. Abernethy: Will the gentlemen enlighten us on it, please?
>
> Mr. Celler: Yes. There are organizations – religious organizations – churches and cathedrals and synagogues that have choirs, for example.
>
> Mr. Abernethy: Protestants?
>
> Mr. Celler: Choirs. And you could not expect that a Catholic church would take in Jewish singers or that in a Jewish church you would have Catholic singers, therefore, there would have to be something in the nature of discrimination there, but rather than risk getting into a thicket of discrimination in that area, it was left out.
>
> Mr. Abernethy: This title under discussion has to do with Federal assistance programs as I understand it. I do not know that it has anything to do with singing in a choir.
>
> Mr. Celler: I only have given an example. There may be an exclusion as to employees in a convent. There may be employees in a denominational college where it is required that people of certain faith do the particular kind of work that is required – and that is somewhat in the nature of discrimination if the authorities would only have those of a certain faith, consistent with the faith that dominates that college or seminary or that convent or academy and, therefore, it is essential to get the best talent and the best expertise they can for those kinds of jobs.

yield and asserted that "there [was] a specific reason why religion was left out of title VI."[124] Rodino said that "[t]here was no evidence that there was a need to include religion on the question of discrimination" in Title VI. Rodino continued: "We attempted to meet the problems as they arose. As a result, we did not include religion."[125] Celler then said he had "mentioned Title VI," but he "meant Title VII," presumably referring to his earlier remarks.[126]

When a fellow legislator asked Representative Celler about this issue on February 7, 1964, Celler noted that federal aid "now goes to sectarian schools and universities," and he mentioned the "excellent" work of "[l]ocal sectarian welfare groups." Celler continued: "There is no religious discrimination, of course, among them."[127] At the same time, Celler characterized the

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> Therefore, they have to discriminate in favor of those of their religion.
>
> Mr. Rodino: Mr. Chairman, will the gentlemen yield?
>
> Mr. Celler: I yield to the gentlemen from New Jersey.
>
> Mr. Rodino: Mr. Chairman, there is a specific reason why religion was left out of title VI. There was no evidence that there was a need to include religion on the question of discrimination.
>
> Various members of the clergy of the different faiths appeared before the committee and testified that religious discrimination was not a question. We attempted to meet the problems as they arose. As a result, we did not include religion. That is the answer to the gentlemen's question.
>
> Mr. Celler: I mentioned title VI. I meant title VII.
>
> Mr. Rodino: Mr. Chairman, will the gentleman yield further?
>
> Mr. Celler: I yield.
>
> Mr. Rodino: Father Cronin, representing the Catholic faith; Dr. Blake; and other members of the clergy appeared before the committee. I quote from the testimony by Father Cronin, as shown on page 2030 of the hearings. Father Cronin stated:
>
> > I don't believe that need is very pressing at this time. There are remnants of religious discrimination in the United States, but compared to the instant problem before us, of the civil rights of the Negro community, these are very, very minor and peripheral and I would not have any feeling that this should be broadened; no.
>
> Dr. Blake, in answer to a question by Mr. Foley, counsel of our committee, stated:
>
> > I would like to agree with Father Cronin in that too because one of the happy things that our joint testimony indicates is that the communications among the religious bodies have opened up in a very favorable way worldwide and certainly in the United States.
>
> Dr. Eugene Carson Blake represents the United Presbyterian Church, United States of America, and represents the National Council of Churches. Rabbi Irwin Blank represented the Synagogue Council of America, and also appeared before the committee. Both made statements in a like manner.

110 Congressional Record 1528-1529 (January 31, 1964).

[124] *Id*.

[125] *Id*.

[126] *Id*.

[127] On February 7, 1964, Representative Basil Lee Whitener (D-NC) asked about the deletion of the term "religion" from the Title VI. Representative Byron Rogers (D-CO) offered the following explanation for the omission:

> [W]e believe we should not in any way whatsoever invade the area or come in conflict with the first amendment of the Constitution of the United States and in view of recent decisions relating thereto, we felt that if that was not included, then we would have less difficulty convincing some who are interested in

committee's omission of the term "religion" from Title VI as an "expedient" decision and said it would help to "avoid a good many problems." [128] He did not explain what those problems were. Representative Byron Rogers (D-CO) said that the committee deleted religion from Title VI to avoid "invad[ing] the area or com[ing] in conflict" with the First Amendment.[129] Whatever the nature of the motivations for this omission, the version of Title VI that was enacted does not prohibit discrimination on the basis of religion in federally funded programs and activities.

The combination of Title VII exemptions for religious organizations from the ban on religious discrimination in employment coupled with the fact that Title VI does not place a blanket prohibition on religious discrimination in federally funded programs means that sometimes no statute bars religious institutions from discriminating on the basis of religion for jobs subsidized at least partially by federal aid. For example, many religious institutions of higher learning qualify for a Title VII exemption and also receive a large amount of government aid indirectly through such programs as Pell Grants and the G.I. Bill.[130] Some of these institutions discriminate on the basis of religion with regard to a wide range of jobs within their respective

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> recognizing that there should not be discrimination on account of race, color, creed, or national origin. That is the reason why it was left out.

110 Congressional Record 2462 (February 7, 1964). Representation Celler subsequently responded to Whitener's question:

> Of course, the gentleman knows that while this bill is a comprehensive bill, and as I have stated before, it does not solve all the problems because we cannot have perfection in any bill – the gentleman properly asks why religion is left out.
>
> First. There was no need shown and there was no evidence of any religious discrimination in Federal programs.
>
> Second. The clergy who testified accepted and stated they supported fully this bill with religion omitted.
>
> By eliminating religion, we avoid a good many problems which I am sure the gentleman understands. The aid now goes to sectarian schools and universities. Local sectarian welfare groups, I am sure you will agree, do an excellent job. There is no religious discrimination, of course, among them.
>
> For these reasons, the subcommittee and, I am sure, the full committee or the majority thereof deemed it wise and proper and expedient – and I emphasize the word "expedient" – to omit the word "religion."

110 Congressional Record 2462 (February 7, 1964). Representative Whitener said that Celler "still ha[d] not given a very satisfactory answer in view of the fact that there was no testimony that there was any discrimination on the ground of religion in connection with any of the other titles of the bill." *Id*. Whitener continued: "The chairman has put the word 'religion' in the bill 15 times. How does he explain that?" Celler answered: "Because in respect to those other sections 'religion' did appear and there were some elements of discrimination based on religion, so it was deemed wise to include 'religion' in those other titles." *Id*. Whitener responded: "It seems a little incongruous that the proponents would deliberately strike 'religion' from this section, when they have been so careful to put it in 15 other places in the bill." *Id*.

[128] *Id*.

[129] *Id*.

[130] Paul J. Weber and Dennis A. Gilbert, *Private Churches and Public Money: Church-Government Fiscal Relations* (Greenwood Press, 1981). Professor Martha Minow has noted that the federal government took steps in the wake of World War II to include religious institutions in the pool of entities that could receive this type of governmental assistance. "[W]hen President Franklin D. Roosevelt signed the G.I. Bill into law in 1944 as an educational entitlement for World War II veterans," she writes, "the government initiated a program that paid billions of public dollars to both public and private educational institutions, with no apparent objection to including religious schools." *Public Values in an Era of Privatization: Public and Private Partnerships: Accounting for the New Religion*, 116 Harv. L. Rev. 1229, 1239 (2003). Minow references the Congressional Conference Committee report on this bill, noting that the word "all" was placed before "public or private" in defining "educational or training institutions" in order "to make it clear that church and other schools are included." *Id.*

institutions, and presumably indirect federal aid subsidizes a portion of those salaries.[131] Neither Title VII nor Title VI bar such discrimination.[132]

Nondiscrimination Clauses in Some Federal Statutes Authorizing Funding for Social Service Programs

Some statutes that authorize federal funds for social service programs have provisions prohibiting employment discrimination on the basis of religion among other bases. These statutes include the Omnibus Crime Control and Safe Streets Act[133] and the Workforce Investment Act.[134] Other statutes authorizing federal social service funding contain general nondiscrimination provisions that do not specifically mention employment but are written broadly enough to cover it in the context of government-funded programs and activities. These statutes include the one governing the Head Start program.[135]

Other nondiscrimination provisions take a different approach. For example, the Child Care Development Block Grant Act[136] has been interpreted to prohibit providers receiving direct government assistance from discriminating on the basis of religion with regard to prospective employees, "if such employee's primary responsibility is or will be working directly with children in the provision of child care services."[137] CCDBG sets forth an exception to the statute's blanket nondiscrimination employment provisions. "If two or more prospective employees are qualified for any position with a child care provider" receiving CCDBG assistance, the act does not "prohibit such child care provider from employing a prospective employee who is already participating on a regular basis in other activities of the organization that owns or operates such

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[131] Stephen V. Monsma, *When Sacred & Secular Mix: Religious Nonprofit Organizations and Public Money* (Rowman and Littlefield Publishers, 1996) at 70-108.

[132] Further, at least one federal court has suggested that the First Amendment's Establishment Clause does not require religious institutions to refrain from discriminating on the basis of religion with regard to jobs funded by such indirect aid. *See* Siegel v. Truett-McConnell College., 13 F. Supp. 2d 1335 (1994).

A study by Paul J. Weber and Dennis A. Gilbert found that various federal agencies provided religiously affiliated institutions of higher learning with direct aid totaling about a half- billion dollars in 1975. Paul J. Weber and Dennis A. Gilbert, *Private Churches and Public Money*: Church-Government Fiscal Relations, (Greenwood Press, Westport Connecticut, 1981) at 101. The author is unaware of research revealing whether such federal aid comes with any restrictions regarding employment discrimination on the basis of religion in the context of activities funded by federal grants and contracts.

[133] Section 3789d(c) of the Omnibus Crime Control and Safe Streets Act states: "No person in any State shall on the ground of . . religion . . . be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this chapter." 42 U.S.C. Section 3789d(c)(1).

[134] A nondiscrimination provision of the Workforce Investment Act states: "No individual shall be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with, any such program or activity because of race, color, religion, sex (except as otherwise permitted under title IX of the Education Amendments of 1972), national origin, age, disability, or political affiliation or belief." 29 U.S.C. Section 2938(a)(2) (2008).

[135] A nondiscrimination provision applicable to Head Start programs states:

> The Secretary shall not provide financial assistance for any program, project, or activity under this subchapter [42 USCS §§ 9831 et seq.] unless the grant or contract with respect thereto specifically provides that no person with responsibilities in the operation thereof will discriminate with respect to any such program, project, or activity because of race, creed, color, national origin, sex, political affiliation, or beliefs.

42 U.S.C. Section 9849(a) (2008).

[136] *See generally* 42 U.S.C. Section 98581 (2008). The CCDBG religious nondiscrimination provisions are complex and only partially described here.

[137] 42 U.S.C. Section 9858l(3)(A). *See also supra* p.7- 8.

provider."[138] That exception, however, is unavailable if the child care provider receives 80 percent or more of its operating budget from federal or state funds, whether from direct or indirect aid or some combination of the two.[139]

Employment nondiscrimination provisions governing National and Community Service programs prohibit discrimination on the basis of religion in government-funded jobs. [140] But they also state that this nondiscrimination requirement does not apply to staff members who were employed with the organization on the date the government grant was awarded.[141]

Charitable Choice Provisions

As discussed in the report, the charitable choice provisions enacted between 1996-2000 seek to allow religious organizations to discriminate on the basis of religion for all jobs subsidized by the relevant streams of federal social service funding.[142]

Executive Orders

In 1965, President Lyndon B. Johnson signed an executive order requiring all government contracting agencies to include a requirement in each government contract promising that the contractor would not discriminate against any employee on the basis of "race, creed, color or national origin."[143] In 2002, President Bush amended this executive order to allow government contractors and subcontractors that are religious organizations to make religion-based decisions in employment.[144]

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[138] 42 U.S.C. Section 9858l(3)(B).
[139] *Id*. at Section 9858l(4). *See also* 47 C.F.R. Section 98.47(c).
[140] For example, the nondiscrimination provision of the National and Community Service grant program states:

> (c) Religious discrimination.
>
> (1) In general. Except as provided in paragraph (2), an individual with responsibility for the operation of a project that receives assistance under this title [42 USCS §§ 12511 et seq.] shall not discriminate on the basis of religion against a participant in such project or a member of the staff of such project who is paid with funds received under this title [42 USCS §§ 12511 et seq.].
>
> (2) Exception. Paragraph (1) shall not apply to the employment, with assistance provided under this title [42 USCS §§ 12511 et seq.], of any member of the staff, of a project that receives assistance under this title [42 USCS §§ 12511 et seq.], who was employed with the organization operating the project on the date the grant under this title [42 USCS §§ 12511 et seq.] was awarded.

42 U.S.C. Section 12635(c)(2008).
[141] *Id*.
[142] *See Serving People in Need, Safeguarding Religious Freedom* available at http://www.brookings.edu/~/media/Files/rc/papers/2008/12_religion_dionne/12_religion_dionne.pdf.
[143] Executive Order 11246, *Equal Employment Opportunity* (September 24, 1965).
[144] Executive Order 13279 *Equal Protection of the Laws for Faith-based and Community Organizations* (December 12, 2002).