Government Funding for Religious Organizations: Can We Dance, and Who Calls the Tune?

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From the development of public schools through the New Deal to the Great Society, Government has assumed responsibility for many of the services traditionally provided by religious organizations. Today, an increasing number of government officials is seeking a different approach. Rather than providing the services themselves, these officials seek to *fund* the provision of services by private providers. When these providers are religious organizations, difficult questions arise. Can such church-state partnerships be structured consistent with the constitutional prohibition against laws respecting an establishment of religion, and if so, how?

I doubt that any of us is proposing a return to the colonial practice of the government paying clergy or directly subsidizing religious education. At the same time, few would deny the important role religious institutions play in providing education, quality health care and affordable housing. The key question is under what circumstances and subject to what conditions may religious providers receive government assistance. To assist our analysis, I will consider direct forms of assistance, such as grants and contracts, separately from indirect forms such as tuition vouchers or tax deductions. As we will see, the nature of the assistance provided can be critical to the constitutional analysis.

I. Grants and Contracts

The most common form of aid to religious providers is direct aid in the form of grants and contracts. Because it creates a direct and legally enforceable relationship between the institutions of government and religion, it is also the most problematic.

The establishment clause has been interpreted to prohibit government action that has a primary effect of advancing religion.[1] Therefore, any award of government funds to a religious organization must be structured accordingly. And, any compliance monitoring or other safeguards to prevent the unconstitutional advance of religion may not run afoul of the establishment clause's proscription against programs creating "excessive entanglement" between government and religion.[2] Sometimes referred to as the "Catch 22" of the establishment clause, these twin prohibitions constitute a significant hurdle for many church-state partnerships.

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[1] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[2] 403 U.S. at 613.

A. Educational Services:

With few exceptions,[3] the Supreme Court has prohibited the direct provision of government funds or equipment to religious primary and secondary schools. Even funding for secular, non-religious services, has been found impermissible based on the theory that primary and secondary schools are "pervasively sectarian" institutions.[4] That is, these institutions are so permeated with religion it is impossible to segregate and fund secular activities. In contrast, the Court has been unwilling to disqualify religious colleges and universities from receiving government funding.[5] The Court based these rulings on the theory that higher education is more critical and less indoctrinational and that college students are older and less impressionable. Religious colleges and

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[3] Exceptions include programs provided to parents and children as opposed to religious institutions, Everson v. Board of Education, 330 U.S. 1 (1947) (upholding the constitutionality of public bus transportation for students attending parochial schools) and Board of Education v. Allen, 392 U.S. 236 (1968) (upholding the provision of textbooks to students attending parochial schools), and the provision of standardized or diagnostic services that could not be used to advance an institution's religious mission, Committee on Public Education v. Regan, 444 U.S. 680 (1980) (standardized tests).

[4] Lemon v. Kurtzman, 403 U.S. 602, 617 (1971).

[5] Tilton v. Richardson, 403 U.S. 672 (1971); Hunt v. McNair, 413 U.S. 734 (1973); Roemer v. Board of Public Works, 426 U.S. 736 (1976).

universities may still be disqualified from receiving public funding if they are found to be "pervasively sectarian".[6]

The Court has also applied the religiously affiliated/pervasively sectarian distinction to so-called hybrid or quasi-educational programs that provide both educational and social welfare services. In Bowen v. Kendrick,[7] the Court was asked to rule on the constitutionality of a program that provided a variety of services including pregnancy testing, maternity counseling, adoption counseling and referral services, pre-natal and post-natal health care, nutritional information, child care, mental health services and educational services to adolescent girls. Over the dissent of four justices, the Court upheld the program subject to the

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[6] See Habel v. Independent Development Authority of the City of Lynchburg, 400 SE.2d 516 (1991); see also against: Minnesota Federation of Teachers v. Mammanga, 485 N.W.2d 305 (Minn. App. 1993).

The American Jewish Committee in its report from The Task Force on Sectarian Social Services and Public Funding dated October 25, 1990, identifies the following criteria for determining whether a college should be considered pervasively sectarian: 1) The faculty members or students are required to subscribed to a particular religious belief as a condition of employment, admission or graduation. 2) Students are required to attend religious programs or observances of one particular faith. 3) Students are required to register for courses or attend classes designed to foster a particular religious doctrine (in contrast with objectively presenting courses in comparative religion or the history of religion). 4) Students are subject to disciplinary measures based solely on religious grounds, and 5) Academic freedom is significantly curtailed on religious grounds.

[7] 487 U.S. 598 (1988).

condition that no grants or contracts be awarded to pervasively sectarian institutions.[8]

The government's refusal to fund the educational programs of churches, synagogues, theological seminaries and other pervasively sectarian organizations is sound as a matter of public policy and constitutional law. As a matter of public policy, government should not subsidize discrimination. Requiring taxpayers of all faiths to support the indoctrination of a particular faith creates resentment in the body politic and division along religious lines. Such political divisiveness--as seen in India, Ireland and other nations with state supported religion--is one of the evils the establishment clause guards against.[9]

As a matter of constitutional law, public funding of religious education is precisely what gave rise to the Virginia Statute for Religious Freedom and ultimately the First Amendment. It was Patrick Henry's assessment bill, which provided tax support for teachers of the Christian religion,[10] that provoked James Madison's famous Memorial and

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[8] Justices Kennedy and Scalia filed a concurring opinion in which they maintained that the *use* of the funds rather than the nature of the institution receiving those funds should be the determinative question for purposes of the establishment clause. 487 U.S. at 624.

[9] Lemon, 403 U.S. at 622; see also, Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

[10] A Bill Establishing a Provision for Teachers of The Christian Religion, as quoted in Everson v. Board of Education, 330 U.S. 72 (supplemental appendix) (1947).

Remonstrance against Religious Assessments in which Madison repeatedly referred to Henry's bill as "an establishment."[11] Madison went on to state: "Who does not see that the same authority which can establish Christianity, at the exclusion of all other religions, may establish with the same ease any particular sect of Christians, in exclusion of all other sects? That the same authority that can force a citizen to contribute three-tenths only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"[12]

Thomas Jefferson's response to the proposal that tax dollars should be used to subsidize the teaching of religious faith was even stronger. He wrote in the Virginia Statute for Religious Freedom:

> "To compel [anyone] to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness."

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[11] Everson, 330 U.S. 1 at 63 (quoting Memorial and Remonstrance Against Religious Assessments).

[12] Id. at 65-66.

B. Other Social Services:

The Supreme Court's 1899 decision Bradfield v. Roberts,[13] makes clear that religious organizations are not disqualified from receiving all forms of governmental assistance. To the contrary, religious hospitals, universities, homeless shelters and other religiously affiliated institutions receive millions of tax dollars annually. And, although the Supreme Court has never addressed the question, it appears that even pervasively sectarian institutions may receive public funding for non-educational social services where the risk of proselytizing and indoctrination is slight.

Any social services funded by government and provided by religious organizations should include provisions that provide for the following:[14] 1) No sectarian worship or activities--while Kendrick makes

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[13] 175 U.S. 291 (1989).

[14] A number of denominations have developed policies setting forth the conditions and restrictions they think should be placed upon the use of government funds by religious organizations. For example, the General Assembly of the Presbyterian Church, (USA) has adopted the following statement concerning public funding of social services by religious bodies: 1) Government payments on behalf of individuals, under programs such as Medicare, Medicaid and scholarship assistance, should without exception be available to clients and students at church-sponsored agencies and institutions on exactly the same terms as if those patients or clients were receiving those services from secular entities. 2) Government should not discriminate against religious institutions and agencies in the expenditure or administration of public funds when the public purpose can be achieved by the religious group in a way that does not support or advance religion. When public funds are made available to private agencies to meet welfare

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clear that public funds may not be used to subsidize sectarian worship or activities under the establishment clause, this prohibition should be plainly stated on the face of the statute or regulations. 2) Non-discrimination in the provision of services--it was critical to the holding

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[14](...continued)
and social service needs, religious programs and agencies should not be excluded provided that: a) the service is open to the public without discrimination on the basis of race, age, sex, religion or national origin; b) the service is administered without religious emphasis or content or religious preference or other discrimination in employment or purchase of services; c) no public funds are used by religiously controlled organizations to acquire permanent title to real property; and, d) a religious organization or agency is subject to the same provisions for safety, general standards and licensing, qualifications of personnel and financial accountability as other private agencies. 3) Since each state guarantees the right to a free public elementary and secondary education and maintains universally accessible institutions for that purpose, we oppose as a matter of public policy the use of substantial public funds to support private educational systems, including tax deductions or credits and use of educational vouchers.

The American Jewish Committee has distributed a similar set of guidelines to its membership:

> As a general rule, the determination of whether public funding of a particular sectarian social service is permissible should turn on consideration of any of the following criteria as applied to the funded program.
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> A. Direct care providers or care recipients (or their parents) are not required to subscribe to a particular religious belief as a condition of employment or in order to receive the services.
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> B. Care recipients are not required to attend religious programs or observances of one particular faith.
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> C. Care recipients are not subject to disciplinary measures based solely on religious grounds, and
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> D. The services funded do not involve counseling regarding matters as to which sectarian institutions would inevitably teach religious doctrines.

In contrast, the American Jewish Committee opposes virtually all forms of public assistance to primary and secondary educational programs provided by religious organizations.

in Bradfield that the services provided by the religiously affiliated hospital were made available to all citizens without regard to their religious affiliation. 3) Non-discrimination in employment--in order to ensure against impermissible proselytizing and indoctrination with public funds, those employees providing services at the expense of the government should be hired without respect to their religious affiliation.[15]

An example of how such a program might be structured is the National Service Trust Act recently passed by Congress. The Act, which provides federal financial assistance to youth who volunteer their services to non-profit organizations, contains several church-state provisions. First, recipients of assistance may not give religious instruction; conduct worship services; provide instruction as part of a program that includes mandatory religious education or worship; construct or operate facilities devoted to religious instruction or worship, maintain facilities primarily or inherently devoted to religious instruction or worship; or engage in any form of proselytizing. Second, projects that receive assistance out of the Title may not discriminate on the basis of religion against participants in the project or staff members

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[15] At least one district court has held that such a non-discrimination provision is constitutionally required. See Dodge v. Salvation Army __ Fed Sup.__(1980) (Holding that §702 of Title VII of the Civil Rights Act of 1964 violates the establishment clause as applied to a religious provider administering a program funded exclusively by the government.)

who are paid with government funds. A grandfather clause is appended to the employment provision to allow organizations to retain employees who are operating the project on the date the grants are awarded. This disqualification of pervasively sectarian institutions (i.e., those that provide some mandatory religious education or worship) coupled with the non-discrimination provisions on services and employment provide some safeguard against the use of federal funds to subsidize and promote religion.

An example of how *not* to structure such a program is the Act For Better Child Care. Providing block grants to states for the provision of child care services, the Act contains a number of confusing, if not conflicting, church-state provisions. First, the Act provides that no assistance shall be expended for any sectarian purpose or activity, including sectarian worship or instruction. Yet, regulations promulgated under the Act permit sectarian worship and activities as long as none of the grant money actually pays for these activities. Moreover, the prohibition against sectarian purposes and activities is completely eliminated if the provider receives child care certificates (i.e., vouchers) as opposed to grants and contracts. Second, although the Act proports to prohibit religious discrimination in employment it permits providers to favor current employees as well as those (such as members of a local church) who are already participating in the other activities of the

organization that owns or operates the child care center. Even more importantly, religious providers receiving grants and contracts may require that all employees adhere to the religious tenants and teachings of the organization.

Finally, a religious provider can escape the non-discrimination rules altogether by eschewing grants and contracts and receiving only child care certificates as long as the total amount of government assistance does not exceed 80% of the organization's operating budget. The Act does prohibit religious discrimination in the provision of child care services which are paid for with federal financial assistance.

II. Vouchers, Tax Deductions and Other Forms of Assistance.

As illustrated by the Act for Better Child Care, restrictions accompanying the provision of federal financial assistance may change depending on the particular funding mechanism used. Specifically, it may be significant whether the assistance is provided directly in the form of grants and contracts or indirectly through tax deductions, vouchers and other means.

In the 1983 decision Mueller v.Allen[16] the Supreme Court upheld a Minnesota program providing tax deductions for tuition, transportation and textbook expenditures of all parents whose children

[16] 463 U.S. 388 (1983).

attended public, private or parochial schools. The decision came a decade after the Court struck down a similar tax credit provided only for parents whose children attended private and parochial schools.[17] The difference, according to five of the Justices, was that the Minnesota plan provided the benefits to *all* parents including those whose children attended public schools. Such a facially neutral, generally applicable program was not rendered unconstitutional because some parents wished to send their children to parochial schools. The flaw in the majority's logic, as pointed out by the four dissenting Justices, was that, though facially neutral, the program provided more than 90% of its benefits to students attending parochial schools. This is because tuition, transportation and textbooks were already provided free-of-charge to children attending public schools.

Three years later in Witters v. Washington Department of Services for the Blind[18] the Court applied the Mueller rationale to uphold a blind ministerial student's use of government rehabilitation funds to pay his tuition at a Bible college. Though Justice Marshall, writing for the majority, held that the program was permissible in light of the fact that no substantial amount of public funds would be flowing to religious

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[17] Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

[18] 474 U.S. 481 (1986).

institutions, five of the Justices (including Justice O'Connor) filed concurring opinions based squarely on Mueller. In the view of these Justices, the fact that 1) the program was facially neutral and generally applicable (i.e., it did not favor religious institutions) and 2) any assistance to religious institutions resulted from the private choice of qualified individuals meant that the program did not violate the establishment clause. This year, the Court in Zobrest v. Catalina Hills School District[19] applied Mueller and Witters to uphold the provision of a sign interpreter to a deaf student who wished to attend a parochial school.

The lesson of Mueller, Witters and Zobrest is that pervasively sectarian institutions can receive federal financial assistance without the accompanying restrictions on religious discrimination and activities as long as that assistance arrives indirectly through the intervening mechanism of private choice. Disqualifying religious institutions from receiving such indirect assistance could call into question such time-honored practices as the deductibility of charitable contributions, including those made to religious organizations,[20] as well as gifts made to religious organizations by the recipients of Social Security benefits, loans and other forms of government assistance.

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[19] ___U.S.___, 113 S.Ct. 652 (1993).

[20] See I.R.C. §170.

While choice plans that are truly, or substantively, neutral may be consistent with establishment clause principles, this does not mean that the establishment clause should be interpreted to permit *all* indirect forms of aid to religion that are facially neutral. If the program is a sham, that is if its primary purpose and effect is to advance religion, it should *not* withstand establishment clause scrutiny. This, of course, was the problem with Mueller v. Allen as well as tuition vouchers for primary and secondary schools. While such programs may be facially neutral, their overriding purpose and effect is to subsidize private and parochial schools.[21] This is because free public education, which must be neutral on matters of faith, is already available. In contrast, because there is no free and universal program of public child care services, the child care certificates provided by the Act for Better Child Care would seem to be permissible.[22]

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[21] Apart from the Constitution, there may be significant policy reasons for opposing any program that diverts public funds away from public schools to private and parochial schools.

[22] It is the author's opinion that the provision of grants and contracts to pervasively sectarian institutions to provide child care services without the necessary restrictions on religious activities and religious discrimination in employment is unconstitutional. See, Grand Rapids School District v. Ball 473 U.S. 373 (1985) (in which six of the justices, including Justice O'Connor, held that the community education program which utilized the staff of parochial schools to provide non-sectarian educational services was unconstitutional).