

AMERICAN HOMEOWNERSHIP AND ECONOMIC OPPORTUNITY ACT OF 2000

The Committee resumed its sitting.

Ms. PELOSI. Mr. Chairman, I strongly support the Shays/Nadler/Crowley/Morella amendment to increase authorized HOPWA funding to \$292 million for FY2001. This increase will allow the HOPWA program to meet current needs and bring additional newly eligible communities into this effective program.

The need for housing assistance among those living with HIV/AIDS is greater now than ever. As new treatments allow infected individuals to live longer, new HIV infections are continuing at a steady rate. This means that the overall number of people living with HIV/AIDS has grown to its highest level ever. The new treatments that are extending so many lives involve a complicated regimen of medications, requiring certain medications to be taken at certain times, certain medications to be taken after eating, and still others on an empty stomach. This makes adherence very difficult, and nearly impossible without stable housing.

More than 200,000 people with HIV/AIDS are currently in need of housing assistance, and 60% of those living with this disease will need housing assistance at some point during their illness. HIV prevalence within the homeless population is estimated to be ten times greater than infection rates in the general population. In addition, homeless individuals are much less likely to have regular access to health care than the general population and are therefore less likely to be tested for HIV than are people with stable housing. One San Francisco study showed that up to 33% of homeless individuals who were living with HIV were unaware of being HIV positive.

Under current HOPWA authority 101 jurisdictions qualified for FY2000 funding and HUD estimates that in FY2001, this will increase to between 105 and 111 qualified jurisdictions. HIV/AIDS community policy experts have estimate that unless HOPWA funding is substantially increased, jurisdictions will face decreased service levels and could suffer decreased funding. To avoid these reductions, we must pass the Shays/Nadler/Crowley/Morella amendment and provide HOPWA with the funding necessary to ensure that people living with HIV and AIDS have access to the stable housing that is necessary for their medical care.

The CHAIRMAN. The question is on the amendment, as modified, offered by the gentleman from Connecticut (Mr. SHAYS).

The amendment, as modified, was agreed to.

The CHAIRMAN. It is now in order to consider Amendment No. 9 printed in House Report 106-562.

AMENDMENT NO. 9 OFFERED BY MR. PAUL

Mr. PAUL. Mr. Chairman, I offer an amendment.

The CHAIRMAN. The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment No. 9 offered by Mr. PAUL:

Page 78, after line 20, insert the following new section:

SEC. 408. PROHIBITION ON USE OF AMOUNTS TO ACQUIRE CHURCH PROPERTY.

Section 105 of the Housing and Community Development Act of 1974 (42 U.S.C. 5305) is amended by adding at the end the following new subsection:

“(i) PROHIBITION ON USE OF ASSISTANCE TO ACQUIRE CHURCH PROPERTY.—Notwithstanding any other provision of this section, no amount from a grant under section 106 may be used to carry out or assist any activity if such activity, or the project for which such activity is to be conducted, involves acquisition of real property owned by a church that is exempt from tax under section 501(a) of the Internal Revenue Code of 1986 (26 U.S.C. 501(a)), unless the governing body of the church has previously consented to such acquisition.”.

The CHAIRMAN. Pursuant to House Resolution 460, the gentleman from Texas (Mr. PAUL) and a Member opposed each will control 5 minutes.

The Chair recognizes the gentleman from Texas (Mr. PAUL).

Mr. PAUL. Mr. Chairman, I yield myself such time as I may consume.

Mr. Chairman, I would first like to thank my colleague, the gentlewoman from Michigan (Ms. KILPATRICK) for co-sponsoring this amendment. This amendment is simple and straightforward. The amendment merely states that it prohibits the use of funds for activities involving the acquisition of church property unless the consent of the governing body of the church is obtained. This means that community development block grant money cannot be used to invoke eminent domain and take a church away from the church owners or the occupants without their permission.

It has been done in the past, and it is planned to be done in the future. I think this is a very important amendment to make sure that these funds are not used in this way. I think the point is that private property is very important, that owners do have rights; and quite frequently when this is invoked, it occurs in the poorer areas where there is less legal protection and legal help.

I am very pleased to introduce this amendment. I am very pleased to have the gentlewoman from Michigan (Ms. KILPATRICK) as the cosponsor.

Ms. KILPATRICK. Mr. Chairman, will the gentleman yield?

Mr. PAUL. I yield to the gentlewoman from Michigan, the coauthor.

Ms. KILPATRICK. Mr. Chairman, I stand as a cosponsor of this amendment, and it is a good amendment. We have had several calls in our office today wondering what it is, and we took the opportunity to explain it to them.

Mr. Chairman, let me first thank the gentleman from Iowa (Chairman LEACH), the gentleman from New York (Mr. LAZIO), as well as the gentleman from New York (Mr. LAFALCE), the ranking member, for the fine work that they have done and the entire Committee on Banking and Financial Serv-

ices. I was a former Member of that committee, and I know the hard work that they do.

No church in America should be denied the opportunity to participate in a developing community. The amendment that the gentleman from Texas (Mr. PAUL) and I are offering today is to say that no community development block grant funds can be used to take any church, unless that church is involved and does agree in that selection.

With that, Mr. Chairman, this is a good amendment. I commend the gentleman from Texas (Mr. PAUL) for bringing it to my attention. We have spoken to the minister and other people who are concerned about this issue. I would move, Mr. Chairman, that we adopt the amendment.

Mr. PAUL. I appreciate the support of the gentlewoman.

Mr. LAZIO. Mr. Chairman, will the gentleman yield?

Mr. PAUL. I yield to the gentleman from New York.

Mr. LAZIO. Mr. Chairman, I want to thank the gentleman from Texas (Mr. PAUL) for bringing this amendment to the House floor to address an important concern. I want to also thank the gentlewoman from Michigan (Ms. KILPATRICK) as well.

I rise in support of the amendment and want to thank the gentleman from Texas (Mr. PAUL) for his hard work in getting this to the floor and for his numerous discussions with my staff and with myself to ensure that the various concerns that have been raised have been addressed. I want to thank the gentleman. I am in strong support of it and I urge passage.

Mr. PAUL. I thank the gentleman from New York (Mr. LAZIO) for the support.

Mr. FRANK of Massachusetts. Mr. Chairman, will the gentleman yield?

Mr. PAUL. I yield to the gentleman from Massachusetts.

Mr. FRANK of Massachusetts. Mr. Chairman, I would just join in making it clear that we on the minority side have no objection to the “render unto Caesar” amendment.

Mr. PAUL. I thank the gentleman from Massachusetts.

Mr. Chairman, I yield back the balance of my time.

The CHAIRMAN. Does any Member seek time in opposition?

If not, the question is on the amendment offered by the gentleman from Texas (Mr. PAUL).

The amendment was agreed to.

The CHAIRMAN. It is now in order to consider Amendment No. 10 printed in House Report 106-562.

AMENDMENT NO. 10 OFFERED BY MR. TRAFICANT

Mr. TRAFICANT. Mr. Chairman, I offer an amendment.

The CHAIRMAN. The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment No. 10 offered by Mr. TRAFICANT:

At the end of title IV, add the following new section:

SEC. 408. CDBG SPECIAL PURPOSE GRANTS.

Section 107(a)(1) of the Housing and Community Development Act of 1974 (42 U.S.C. 5307(a)(1)) is amended—

(1) in the matter preceding subparagraph (A)—

(A) by striking “\$60,000,000” and inserting “\$95,000,000”; and

(B) by striking “subsection (b)” and inserting “this section”; and

(2) by striking subparagraph (G) and inserting the following new subparagraph:

“(G) \$35,000,000 shall be available in fiscal year 2001 for a grant to the City of Youngstown, Ohio, for the site acquisition, planning, architectural design, and construction of a convocation and community center in such city;”.

The CHAIRMAN. Pursuant to House Resolution 460, the gentleman from Ohio (Mr. TRAFICANT) and the gentleman from Massachusetts (Mr. FRANK) each will control 5 minutes.

The Chair recognizes the gentleman from Ohio (Mr. TRAFICANT).

Mr. TRAFICANT. Mr. Chairman, I yield myself such time as I may consume.

I want to thank the chairman for extending my existing authorization for emergency homeownership counseling programs. They have been cited to save homes with a 45-day notice. The Traficant amendment speaks for itself.

Mr. Chairman, I reserve the balance of my time.

Mr. FRANK of Massachusetts. Mr. Chairman, I yield myself 1½ minutes.

Mr. Chairman, this is a proposal for \$35 million out of CDPG funds for a convention center. We have had a lot of debate about the eligibility requirements of CDPG during the appropriation. At the urging of the gentlewoman from Florida, we modified a proposal extending funds to fire fighting, so that it was fully consistent with CDBG eligibility.

This amendment would be a very big breach in that wall. It is a large amount of money for a particular purpose; the purpose may well be a reasonable one. There are many cities where similar needs could be put forward. It has not had any consideration at the subcommittee or committee level. There was some proposal made, and it was not pursued.

It takes a very large chunk of CDBG for special purpose. Indeed, if you look at the current existing special purpose for CDBG, the existing special purpose for CDBG is \$60 million. This would add to that \$60 million, but it would add more than half as much as is currently set aside for that purpose. It does not seem to be appropriate to take an amount that is equal to more than half of what is currently set aside for the entire country for special purpose CDBG, use it without any regard for eligibility requirements for a particular project, no matter how worthy

in one city, when dozens of other communities that would have similar projects would not get a chance to do anything similar.

Mr. Chairman, I reserve the balance of my time.

Mr. TRAFICANT. Mr. Chairman, I yield myself such time as I may consume.

Mr. Chairman, this would not touch one penny of formula money for community development block grants. It would, in fact, add to community development block grants special purpose money of \$35 million for a city that is trapped, with the largest senior population outside of Florida, trapped in homes bordered in, with the highest murder per capita rate in America, with our kids on the street. It has been promised by Tip O’Neil, promised by Jim Wright. We had a deficit, and I did not ask for it.

Mr. Chairman, I want to thank the Republican leadership for showing a heart to my people who built the tanks, the steels and lost 55,000 steel workers’ jobs, replaced by 20 at minimum wage. This is not a convention center. It is a center for seniors, center for youth, center for them to have someplace to go besides the streets.

Mr. Chairman, I reserve the balance of my time.

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Mr. FRANK of Massachusetts. Madam Chairman, I yield myself 1 minute. It was originally described as a convention center, but I should note that was when we were talking about \$15 million. When it was first raised in the committee, it was \$15 million. Now it is \$35 million. Whether or not commitments were made by people now departed, in many senses, cannot be binding on us today.

The question is, do we set the precedent? I agree that there is a need here. There is need in much of the country. I would hope the leadership on both sides would be willing to expand the total amount of money that could go for CDBG and related purposes. But we just adopted a budget, which in my judgment underfunds this category. To take \$35 million for one community without any kind of process of checking out of a fixed amount of money that is going to be available in that allocation seems to me very unwise no matter what was promised 15 years ago.

Madam Chairman, I reserve the balance of my time.

Mr. TRAFICANT. Madam Chairman, I yield myself 30 seconds. The gentleman has been misrepresenting the amendment. It does not take any money from anywhere. It does add \$35 million. So instead of building schools overseas and vaccinating dogs overseas, the Traficant amendment adds some money for this significant project that Speaker Hastert has identified as a need. And I commend him.

Madam Chairman, I reserve the balance of my time.

Mr. FRANK of Massachusetts. Madam Chairman, I yield myself 1 minute.

I do not deny that this whole process speaks to a need of the speaker. I have a pretty good idea of exactly what that need is in the current political context. But the notion that it does not take from the other programs is simply wrong. We have a budget. We have 602(b) allocations. This does not add \$35 million to the overall allocation. It takes out of the allocation that flows from that limited, and I think inadequate, budget \$35 million.

Madam Chairman, I yield 1 minute to the gentlewoman from Florida (Mrs. MEEK).

Mrs. MEEK of Florida. Madam Chairman, I hate to go against my friend from Ohio, but all day long I have stood on the floor here to go against people taking a run on CDBG moneys. Even though it is a special purpose grant, I am pretty sure it is very much needed and deserved, so it is in all the other districts throughout the country.

We all have needs. I am sure the gentleman from Ohio is expressing the needs of his area. But I came to say that when we begin to deal with income and moving income eligibility around and placing new programs without additional money, we run into trouble. So the special purpose grants, \$35 million, that would fund maybe 25 programs throughout the country. With that I want to be sure that this amendment is defeated.

Mr. FRANK of Massachusetts. Madam Chairman, I yield myself such time as I may consume.

Let me just say, Madam Chairman, that I believe this does give a new meaning to the phrase “special purpose.” I had previously thought special purpose had to do with the more narrow purposes of community development block grant. It seems to me that with this \$35 million proposal that the gentleman from Ohio says was specifically approved by the Speaker, to meet one of the speaker’s needs, we are broadening the purposes beyond what is appropriate for a community development block grant program.

Madam Chairman, I reserve the balance of my time.

Mr. TRAFICANT. Madam Chairman, I yield myself the balance of my time.

There is only one legislative vehicle for which this amendment is germane. Without an authorization, there can be no appropriation. When the bombs were flying, we built those bombs. We built the tanks. When those steel mills closed, they were my mills. The city is basically dead. This is also an economic opportunity act.

I do not know what agenda the gentleman from Massachusetts (Mr. FRANK) is pursuing, but this is not Rotary, either. My kids are on the street.

The jobs they get are selling drugs. Then we put them in jails and build more jails. My seniors are boarding their windows from the inside, Madam Chairman. I am not taking a dime from anybody. But my people have paid taxes all these years. Where is the help from Washington for my people? Is it special purpose? Damn right. It is special. Stone cold special. And I want your vote. I did not plan to call for a recorded vote, but evidently the gentleman from Massachusetts is. I want your vote. I want you to stand up for my people, my people who have been solidly Democrat all these years. But by God their Congressman is going to do what he has to do to help his people. And you are the last appeal I have.

Now, when you built that tunnel up there in Boston and Tip O'Neill built that tunnel, I did not open my mouth. When that great Tom Bigby was built, everybody stepped aside. I am not taking a dime from anybody. This does not cut formula money. And by God I know I may not get the full \$35 million, but I want it all this year, too. I want it appropriated. I did not come out with no game, no smoke-filled business and try and sneak it in the bill. I gave the gentleman from Massachusetts his shot and everybody their shot. By God, I want your vote.

HENRY, I want your vote, I want it early. Chairman LAZIO, thank you. I want your vote, I want it early. Chairman LEACH, I want your vote. Mr. GEPHARDT, I want your vote. And I want it early. STEPHANIE, I want your vote, from Cleveland, and I want it early. CARRIE, I want you to change your position, vote against the gentleman from Massachusetts and vote with me, and I want you to do it early.

I yield back a decimated city that is looking for help for its last point of appeal.

Mr. FRANK of Massachusetts. Madam Chairman, I yield myself the balance of my time.

Madam Chairman, I want very much to help this city and others. I do not want to single out one city because of a particular political situation and provide large funds there when they inevitably come at the expense of others, because we are in a zero-sum situation. We have budget caps. We have a limited budget. And money spent on one program inevitably takes away from other programs.

I wish that we could expand all of the programs. I would be willing to do it. I understand that the gentleman wants people's vote. I understand that there are others who want the gentleman's vote. But that is not what governs. What ought to govern here is public policy. It is not good public policy in disregard of the basic economic considerations of CDBG to take a large chunk, and understand the total amount most recently appropriated for special purposes was \$60 million.

This adds to the special purpose. It adds an amount that is more than half of what had previously existed in that account. It is disproportionate. It is not that we do not think we should do some of these things in the much smaller amounts in which we have done them, but \$35 million for one community when we have many needy communities is a mistake.

The CHAIRMAN pro tempore (Mrs. EMERSON). The question is on the amendment offered by the gentleman from Ohio (Mr. TRAFICANT).

The question was taken; and the Chairman pro tempore announced that the noes appeared to have it.

Mr. TRAFICANT. Madam Chairman, I demand a recorded vote, and pending that, I make the point of order that a quorum is not present.

The CHAIRMAN pro tempore. Pursuant to House Resolution 460, further proceedings on the amendment offered by the gentleman from Ohio (Mr. TRAFICANT) will be postponed.

The point of no quorum is considered withdrawn.

The CHAIRMAN pro tempore. It is now in order to consider amendment No. 11 printed in House Report 106-592.

AMENDMENT OFFERED BY MR. SOUDER

Mr. SOUDER. Madam Chairman, I offer an amendment.

The CHAIRMAN pro tempore. The Clerk will designate the amendment. The text of the amendment is as follows:

Amendment No. 11 offered by Mr. SOUDER: Page 121, after line 11, insert the following new section:

SEC. 609. GRANT ELIGIBILITY OF COMMUNITY ORGANIZATIONS.

(a) ELIGIBILITY.—For any program administered by the Secretary of Housing and Urban Development under which financial assistance is provided by the Secretary to nongovernmental organizations or to a State or local government for provision to nongovernmental organizations, religious organizations shall be eligible, on the same basis as other nongovernmental organizations, to receive the financial assistance under the program from the Secretary or such State and local governments, as the case may be, as long as the program is implemented in a manner consistent with the Establishment Clause of the first amendment to the Constitution. Neither the Secretary nor a State or local government to which such financial assistance is provided shall discriminate against an organization that receives financial assistance, or applies to receive assistance, under a program administered by the Secretary, on the basis that the organization has a religious character.

(b) RELIGIOUS CHARACTER AND INDEPENDENCE.—

(1) IN GENERAL.—A religious organization that receives assistance under a program described in subsection (a) shall retain its religious character and control over the definition, development, practice, and expression of its religious beliefs.

(2) ADDITIONAL SAFEGUARDS.—Neither the Federal Government nor a State or local government shall require a religious organization—

(A) to alter its form of internal governance; or

(B) to remove religious art, icons, scripture, or other symbols;

in order to be eligible to provide assistance under a program described in subsection (a).

(3) EMPLOYMENT PRACTICES.—A religious organization's exemption provided under section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1) regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described in subsection (a).

(c) LIMITATIONS ON USE OF FUNDS FOR CERTAIN PURPOSES.—No funds provided directly to a religious organization to provide assistance under any program described in subsection (a) shall be expended for sectarian worship, instruction, or proselytization.

(d) FISCAL ACCOUNTABILITY.—

(1) IN GENERAL.—Except as provided in paragraph (2), any religious organization providing assistance under any program described in subsection (a) shall be subject to the same regulations as other nongovernmental organizations to account in accord with generally accepted accounting principles for the use of such funds provided under such program.

(2) LIMITED AUDIT.—Such organization shall segregate government funds provided under such program into a separate account. Only the government funds shall be subject to audit by the government.

(e) TREATMENT OF ELIGIBLE ENTITIES AND OTHER INTERMEDIATE ORGANIZATIONS.—If an eligible entity or other organization (referred to in this subsection as an "intermediate organization"), acting under a contract, or grant or other agreement, with the Federal Government or a State or local government, is given the authority under the contract or agreement to select nongovernmental organizations to provide assistance under the programs described in subsection (a), the intermediate organization shall have the same duties under this section as the government.

(f) DEFINITIONS.—For purposes of this section:

(1) FINANCIAL ASSISTANCE.—The term "financial assistance" means any grant, loan, subsidy, guarantee, or other financial assistance, except that such term does not include any mortgage insurance provided under a program administered by the Secretary.

(2) SECRETARY.—The term "Secretary" means the Secretary of Housing and Urban Development.

The CHAIRMAN pro tempore. Pursuant to House Resolution 460, the gentleman from Indiana (Mr. SOUDER) and the gentleman from Massachusetts (Mr. FRANK) each will control 10 minutes.

The Chair recognizes the gentleman from Indiana (Mr. SOUDER).

Mr. SOUDER. Madam Chairman, I yield myself 4 minutes.

First I want to again thank the distinguished gentleman from New York (Mr. LAZIO) for his leadership in the housing bill. Once again he is reaching out to those who are hurting in this country trying to expand the base in a creative market-based way, and he has been a tremendous leader in the housing issue.

Madam Chairman, I rise today to offer this amendment to codify what HUD is already doing, encouraging faith-based organizations to have a place at the table in receiving Federal

funds to provide social services. This amendment will simply codify the practice that religious organizations can compete on the same basis as other grantees for HUD grants.

In reality, charitable choice started in HUD under Jack Kemp, and that is really where the first charitable choice efforts came because many people simply did not care enough to work with the homeless. We both at the Federal level and the State level were not providing enough funds for the homeless. Without the charitable-based groups, many of these people would not have had a place to stay. Thus, we started charitable choice really inside HUD. It has enjoyed bipartisan support from this branch.

The House has endorsed charitable choice on five different occasions as a means of making social programs more effective. I offered an amendment to give faith-based organizations a role in anti-crime efforts in the Consequences for Juvenile Offenders Act in 1999. The House passed that amendment 346-83.

The Fathers Count Act included a charitable choice provision to allow faith-based organizations to apply for grants through the fatherhood program. An amendment on the House floor that would have removed the charitable choice language failed by a vote of 184-238. A form of charitable choice was also included in the Welfare and Medicaid Reform Act of 1996 and the Human Services Authorization Act of 1998, both of which have been signed into law. Finally, the charitable choice language was most recently included in the Even Start literacy program passed by the Committee on Education and the Workforce.

It is also noteworthy that the likely nominees of both presidential parties support charitable choice. Governor George W. Bush has been a leader in the effort to include religious groups in social programs as governor of Texas. Vice President Gore has endorsed this practice in speeches and on his Web site. In fact, the two candidates have been competing to see who is most for charitable choice and arguing over who is the most pro-charitable choice. Charitable choice makes it clear that religious organizations receiving Federal funds to provide services may not discriminate against those who would receive those services. It makes it clear that they will not be forced to change their identity or the characteristics which make them unique and effective. These protections include their religious character, independence and employment practices.

The goal here is to allow faith-based organizations to compete without handicapping them by eliminating the characteristics which make them effective in improving lives and restoring communities. I also want to make it clear that it is supported by the current Secretary of HUD as it was by

Secretary Kemp and as it was by Secretary Cisneros who was a leader when he was mayor of San Antonio in involving faith-based organizations.

On HUD's current home site, they talk about the importance of community and faith-based organizations. In 1997, HUD Secretary Cuomo initiated a new Center for Community and Interfaith Partnerships directed by Father Joseph Hacala. In this year's budget, HUD has requested \$20 million for the interfaith housing initiative. Between the fall of 1999 and the summer of 2000, HUD's Center for Community and Interfaith Partnerships will host 10 regional conferences, quote, targeted to the needs of community and faith-based organizations which Secretary Cuomo has recognized are, quote, the voice of conscience in the struggle for economic rights.

In reference to those conferences, Secretary Cuomo stated:

"Our challenge is to engage partners in a new way to spurt the critical housing and community development efforts of community and faith-based organizations. Government cannot do this alone. Community and faith-based organizations cannot do this alone. But together, by combining our strategies, resources and commitment, we can build communities into law."

Finally, charitable choice is something that is already being done. We need to codify it here. I commend Vice President Gore, Governor Bush, Secretary Cuomo and the previous housing secretaries before him to realize we cannot solve the housing problems in this country without charitable organizations.

Mr. FRANK of Massachusetts. Madam Chairman, I yield myself such time as I may consume. I may not be in opposition. I was hoping to clarify this. I certainly agree that we should enlist the valuable help of faith-based organizations in dealing with social problems.

When we first confronted this during my congressional tenure in the context of child care, I supported full inclusion of churches but I did have one question and I hope I can engage the gentleman about it.

His amendment, very correctly I believe, says these funds can only be given if they are in accordance with the establishment clause of the first amendment. My concern was the omission of the free exercise clause. Maybe it was unintentional. And I do not necessarily mean to make a lot out of it, but I have this concern. What about a citizen who happens to live in the area where the service is being provided to a religious organization who wishes to avail himself or herself of the federally funded service who is not religious and does not wish to be?

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Is there a first amendment free exercise protection so that the citizen who

wishes to partake of the program can do so without being required as a condition of that to undergo certain religious activities?

Mr. SOUDER. Madam Chairman, will the gentleman yield?

Mr. FRANK of Massachusetts. I yield to the gentleman from Indiana.

Mr. SOUDER. Madam Chairman, we had this debate in the Even Start debate in the Committee on Education and the Workforce. My understanding of this, and there are only a couple of exceptions which we could get into if we wanted to, but in this grant, there would not be an exception, and that is that one cannot discriminate on who one covers, nor can one force them to participate in a religious activity. This would allow a Catholic priest to have his collar on if it is at a Catholic facility. It would not require them to remove icons, and it would not require them to hire people who do not share their faith. But if one is in the neighborhood and one is not a Catholic, they cannot require one to go to a biblical study, to show up at church, because there cannot be discrimination against applicants.

Mr. FRANK of Massachusetts. Madam Chairman, I thank the gentleman. It is nice to have one more affirmation of the fact that wearing a Catholic collar is not an obstacle to one's performance, whether it is here as the Chaplain or elsewhere.

I would then ask the gentleman, we do not need to do it now, but as this bill proceeds and we get to conference, would there be a problem, and would I ask him to look at adding where he has the establishment clause, also the free exercise clause. I do not ask him to agree to that now, but is that something that we could work together on?

Mr. SOUDER. Madam Chairman, will the gentleman yield?

Mr. FRANK of Massachusetts. I yield to the gentleman from Indiana.

Mr. SOUDER. Madam Chairman, working with the gentleman from New York (Mr. LAZIO), the chairman of the subcommittee, I would be happy to consider that.

Mr. FRANK of Massachusetts. Madam Chairman, reclaiming my time, the reason I say this, lawyers can be very picky; and if we mention one thing and do not mention another, the inference can arise that it was meant to be excluded. So if it had just said first amendment, it would be different; but where it says the establishment clause, lest be there an inference that we did not mean the free exercise clause, I would like to include that. If we could do that, I would be largely satisfied.

Madam Chairman, how much time do I have remaining?

The CHAIRMAN pro tempore (Mrs. EMERSON). The gentleman from Massachusetts (Mr. FRANK) has 7 minutes remaining.

Mr. FRANK of Massachusetts. Madam Chairman, I yield 2 minutes to the gentleman from Texas (Mr. EDWARDS).

Mr. EDWARDS. Madam Chairman, if the gentleman from Indiana would not mind, because this is a terribly significant issue, possibly dealing with protections of the first amendment of the Constitution, I would like to be sure I know what we are voting on.

Would funding under the gentleman's amendment be allowed to go to pervasively sectarian organizations?

Mr. SOUDER. Madam Chairman, will the gentleman yield?

Mr. EDWARDS. I yield to the gentleman from Indiana.

Mr. SOUDER. Yes.

Mr. EDWARDS. Madam Chairman, is the gentleman aware that in 1988 the Supreme Court made a specific ruling that that is unconstitutional under the first 16 words of the Bill of Rights? It says, having direct Federal funding of churches and synagogues and houses of worship is an infringement upon the first amendment. Is the gentleman aware of that?

Mr. SOUDER. Madam Chairman, will the gentleman yield?

Mr. EDWARDS. I yield to the gentleman from Indiana.

Mr. SOUDER. Madam Chairman, the gentleman is aware, as we debated a number of times, that there are multiple rulings if it is used to teach primarily sectarian doctrine. In other words, if you teach religious doctrine, the courts clearly ruled. However, if one is pervasively sectarian, but not teaching religious views, the court has ruled in other cases. That is why we said consistent with the establishment clause, because it could be challenged.

The fact is, HUD currently gives and has given hundreds of these grants around the country to pervasively sectarian organizations.

Mr. EDWARDS. Madam Chairman, reclaiming my time, not necessarily to the First Baptist Church of Waco or to the First Methodist Church of New York City.

I think Members need to be aware of this. I think it is a shame that we are given just a handful of minutes to discuss an issue that Mr. Madison and Mr. Jefferson debated for 10 years in the Virginia legislature that provided the foundation for the first 16 words of the Bill of Rights.

Let me ask the gentleman another question. Let us say that it is the gentleman's intent that dollars go directly to churches and houses of worship under this amendment, which eases my concern, because the Supreme Court would rule that that is unconstitutional. But let us just say that is the gentleman's intent. If money goes to a church associated with Bob Jones University next year under the gentleman's amendment, can that church, can that religious organization put out

a sign saying, using your tax dollars, no Catholics need apply for a job here?

Mr. SOUDER. Madam Chairman, will the gentleman yield?

Mr. EDWARDS. I yield to the gentleman from Indiana.

Mr. SOUDER. Madam Chair, an orthodox Jewish synagogue could also do that. The gentleman is trying to demagogue the question.

Mr. EDWARDS. Madam Chairman, reclaiming my time, I am trying to ask the gentleman a very significant question under the gentleman's amendment, and let me repeat it.

Next year, would a church associated with Bob Jones University be able to put out a sign saying, using your tax dollars, no Catholics need apply for a job?

Mr. SOUDER. Madam Chairman, if the gentleman will continue to yield, if Secretary Cuomo or the Secretary of Housing and Urban Development chose to give it to a place that would discriminate on that basis, which could include Jewish, Catholic, evangelical, then that could happen.

Mr. EDWARDS. Madam Chair, reclaiming my time, I would hope Members who have not paid attention to this amendment that is added at the end of an otherwise excellent bill will understand that what the gentleman is saying is that contrary to 200 years of history in this country, the gentleman wants the American taxpayers' dollars to be used, would allow them to be used, regardless of intent, to discriminate against people because of their religious views. I would urge Members to pay attention to that.

Madam Chairman, I appreciate the gentleman answering that question honestly. Let me ask the gentleman another question.

Mr. LAZIO. Madam Chairman, will the gentleman yield?

Mr. EDWARDS. Madam Chairman, no, I will not yield at this point. I would like to ask the gentleman a question, the author of the amendment, if I could. If we had more time, I would be glad to have a discussion. I wish we had several hours, if not days of debate on this church-state issue.

Madam Chairman, let me ask the question. Under the gentleman's amendment, would the Wiccans be able to apply for Federal tax funding?

Mr. SOUDER. Madam Chairman, will the gentleman yield?

Mr. EDWARDS. I yield to the gentleman from Indiana.

Mr. SOUDER. Madam Chairman, it is unlikely under President Bush that the witches would get funding.

Mr. EDWARDS. Madam Chairman, reclaiming my time, does the gentleman understand that the Supreme Court of the United States has given tax-free status to the Wiccans; and, therefore, they would be protected, as would the Methodist church, the Baptist church, and the Jewish synagogue.

So would the gentleman admit to the fact that under his amendment, our Federal tax dollars could go to the Wiccan church to run a housing program. Is that correct?

Mr. SOUDER. Madam Chairman, if the gentleman will continue to yield, nonprofit organizations are already covered under the Tax Code, because under religious freedom in the United States, one is allowed to exercise freedom of religion. What this does would leave the discretion to the Department of HUD, as they do currently, to give grants to faith-based organizations, including African American church units which currently get the funding in the inter-faith initiative under Secretary Cuomo.

Mr. EDWARDS. Madam Chairman, reclaiming my time, that is my point, I say to the Members.

Mr. SOUDER. Madam Chairman, they can get it now under the Democratic administration.

The CHAIRMAN pro tempore. The time of the gentleman from Texas (Mr. EDWARDS) has expired.

Mr. FRANK of Massachusetts. Madam Chairman, I yield 30 seconds to the gentleman from Texas (Mr. EDWARDS).

Mr. EDWARDS. Madam Chairman, in 30 seconds, let me debate the first amendment to the Constitution.

The gentleman has made my point better than I could make it. He is saying that under "the Bush administration," they would pick out which religious organization qualifies for Federal tax dollars and which ones would not. That is exactly what Mr. Madison and Mr. Jefferson did not want when they founded the basis of the Bill of Rights. They did not want politicians and government officials deciding which religious organization receives official government approval and which ones do not. I would suggest that providing direct Federal tax dollars to let group discrimination based on religion is a reason to oppose this amendment.

Mr. SOUDER. Madam Chairman, first I yield myself 30 seconds.

What the gentlemen said was witches were not likely to be funded; but that is not my decision, and we do not know. But what is true is that the current administration already makes these decisions in HUD; they have an entire division that makes these decisions in HUD. They go through it, it is public review. It has worked tremendously well. It is one of the only ways to reach poor people, and I am disappointed that a few people in this House separate themselves from the leadership of both parties in arguing for charitable choice.

Madam Chairman, I yield 3 minutes to the distinguished gentleman from Kansas (Mr. TIAHRT).

Mr. TIAHRT. Madam Chair, I thank the gentleman for yielding me this time.

I just want to say that I think this is a way to provide a wonderful opportunity to people who do not have a chance to get into homeownership. There are many avenues that we have available; sometimes we just focus on the Government providing all of these services. We have to go through housing and urban development, and we want to cut off the opportunity for nonprofit organizations and religious organizations to get involved. But there is a long history in States like Kansas.

For example, in adoption, we had trouble with adoption through the State agencies, and they opened it up to a Lutheran organization, the amount of adoptions increased dramatically, because their heart was in it. They were able to do more things quicker. That was very beneficial.

If we look back at Wichita, there is a group called Mennonite Housing. That is a faith-based organization. But if they had access to these grants, they would do in a larger scale what they are doing today, and that is taking properties that are less than acceptable today, that are in poor condition, dilapidated, and through this organization and through block grants could create opportunity for people who would not be able to purchase housing. Single mothers, minority mothers, poor families, people without work that are just working maybe just a minimum-level job while they are getting some education or training.

So Mennonite Housing, a faith-based organization, would be, under the Souder amendment, able to capture some money, take these dilapidated properties, and then get them into a position or an order for people to move in. Put new roofs on, new siding, whatever it takes to bring them up to code, make them livable. It would be a very exciting opportunity for the people who are too poor right now to be able to afford this housing on their own.

Now, it is not pushing any faith; there is not going to be any sermons given here. Mennonite Housing does not do that. They simply meet the needs of the poor. They let their faith be their actions, and their actions are taking poor houses in bad condition, and they refurbish them; and they give them through low-interest loans to people at a payment that they can make, and they have hope. They have their own home. They have a wonderful opportunity.

The Souder amendment is going to allow that to expand. It will not be just limited to private donations; it is going to be an opportunity for them to apply for these block grants, take large sections and not just in Wichita, Kansas. It could be in any city across America, large areas of unclaimed city that has gone to crime, it has gone to drugs. If it was just brought up to code, new paint, new shingles, new lawn, other

families would want to move in there and improve the property and refurbish these cities.

How do we do it? We give faith-based organizations the opportunity to get block grants to make these houses liveable. So I would ask my colleagues to support the Souder amendment and let us see if we cannot do something for the poor.

Mr. FRANK of Massachusetts. Madam Chairman, I yield myself such time as I may consume.

I would like to have a colloquy with the gentleman from New York or the gentleman from Indiana. I would just ask, I guess I can mention this, whether we include language that protected free exercise, i.e., no one would be coerced into a religion, whether or not that would affect the employment issue, and my answer clearly is no.

There are two separate issues that we raised. My colleague from Texas has raised the employment issue. I may agree with him on that, but it is a separate one from the free exercise. The free exercise goes to the question of the citizens not employed by the program, but who would be participants in it? I am assuming if we did free exercise, that would cover them. That would then leave unresolved the issue of employment, but the two would not be affected.

Mr. SOUDER. Madam Chairman, will the gentleman yield?

Mr. FRANK of Massachusetts. I yield to the gentleman from Indiana.

Mr. SOUDER. Madam Chairman, I would agree to such an amendment and believe it is consistent with what we have been doing all the way along and consistent with court decisions that we cannot discriminate among recipients.

Mr. FRANK of Massachusetts. Madam Chairman, I would give unanimous consent, if we were asking for a modification that added the free exercise clause, with the understanding that that left unresolved and untouched to be further debated the employment issue raised by the gentleman from Texas. The free exercise goes to the beneficiaries; employment goes to the other section.

Mr. LAZIO. Madam Chairman, will the gentleman yield?

Mr. FRANK of Massachusetts. I yield to the gentleman from New York.

Mr. LAZIO. Madam Chairman, I would like to make a unanimous consent request, if it is appropriate, to modify the amendment of the gentleman from Indiana, so that on page 1, line 13, after the reference to the establishment clause, we also add the free exercise clause.

The CHAIRMAN pro tempore. The Chair requests that the gentleman from Indiana (Mr. SOUDER) propound such a unanimous consent.

Mr. FRANK of Massachusetts. Would the gentleman repeat the unanimous consent request?

Mr. LAZIO. The proposed unanimous consent request, which I believe now the gentleman from Indiana will make, would be that the amendment would be modified so that language would be inserted on page 1, line 13, after the phrase "establishment clause" to include "and the free exercise clause."

Mr. FRANK of Massachusetts. Madam Chairman, I have no objection.

Mr. SOUDER. Madam Chairman, I would request that that be done.

Mr. FRANK of Massachusetts. Madam Chair, how much time remains?

The CHAIRMAN pro tempore. The gentleman from Massachusetts (Mr. FRANK) has no remaining time.

□ 1430

MODIFICATION TO AMENDMENT NO. 11 OFFERED BY MR. SOUDER

Mr. SOUDER. Madam Chairman, I ask unanimous consent to modify my amendment.

The CHAIRMAN pro tempore (Mrs. EMERSON). The Clerk will report the modification to the amendment.

The Clerk read as follows:

Modification to Amendment No. 11 offered by Mr. SOUDER:

Page 1, line 13 of the amendment after "Establishment Clause" insert "and The Free Exercise Clause".

The CHAIRMAN pro tempore. Is there objection to the modification?

Mr. EDWARDS. Madam Chairman, I reserve the right to object.

The CHAIRMAN pro tempore. The gentleman from Texas (Mr. EDWARDS) is recognized.

Mr. EDWARDS. Madam Chairman, I would like to ask the question, has the gentleman dealt with the issue in this amendment or other intended amendment of using Federal tax dollars to discriminate against people based on their religious faith, or is he just dealing with an addition to the question of the establishment and the free exercise clauses?

Mr. SOUDER. Madam Chairman, will the gentleman yield?

Mr. EDWARDS. I yield to the gentleman from Indiana.

Mr. SOUDER. I accepted an amendment that in my opinion was already covered by the bill under the establishment clause, but this clarified that.

Obviously the gentleman's concern is the guts of my bill, which would allow faith-based organizations to apply for government grants without giving up the faith part of their organization.

Mr. EDWARDS. Madam Chairman, let me just clarify a couple of points, then, under my reservation of objection.

First of all, Madam Chairman, it is meaningless to add to any bill that "this bill cannot be inconsistent with the Constitution." That is already implied in the writing of the Constitution. We have no power to pass a bill that is unconstitutional, so let us not be deluded to think that somehow that is adding a protection to this bill.

Secondly, I would still point out to all Members who have not been aware of this that this particular amendment, as I now understand it, still would allow someone to take Federal tax dollars and put up a sign saying "no Catholics need apply here for a job, federally-funded job; no Jews need apply here for a federally-funded job."

Is that correct, the gentleman's amendment that we are talking about does not address the employment discrimination using tax dollars? Or does the gentleman have a separate amendment that I can see a copy of?

Mr. LAFALCE. Madam Chairman, would the gentleman yield?

Mr. EDWARDS. I yield to the gentleman from New York.

Mr. LAFALCE. Madam Chairman, I do not think there is a difficulty with the gentleman's amendment now that it has been amended. We have 202 programs, we have Section 8 programs. They go to Jewish organizations, they go to Catholic organizations, they go to Protestant organizations right now. They cannot discriminate. They cannot discriminate and say, you must be a Catholic, you must be Jewish, you must be a Muslim, you must be a Protestant in order to become a tenant in this organization.

They do not discriminate, they cannot discriminate, under these laws with respect to hiring practices, too. I do not think this gentleman's amendment accomplishes that much, but I do not think it changes anything. It does not hurt that much, either. I think we are making a big argument out of a relatively small matter.

Mr. EDWARDS. If I could reclaim my time, then, the difference, and perhaps the gentleman from New York did not hear the answer of the gentleman, he said it was his intent with his language—

Mr. SOUDER. Madam Chairman, if the gentleman will yield further, I do not believe this is relevant to the particular objection. I think he has raised a separate issue.

Mr. EDWARDS. Madam Chairman, what we are trying to do is clarify what is in the amendment.

The CHAIRMAN pro tempore. Under the gentleman's reservation of objection, he has a right to object.

Mr. SOUDER. He is not discussing the particular item under the objection, Madam Chairman.

Mr. EDWARDS. I am trying to, because there was a discussion between the gentleman from Massachusetts (Mr. FRANK) and the gentleman about another amendment being accepted on a unanimous basis, and then the gentleman mentioned this amendment, resolve this. Frankly, this Member is a bit uncertain as to what amendment we are including here.

I guess, to clarify, this does not have any language dealing with job discrimination.

To the gentleman from New York (Mr. LAFALCE), let me just point out, in response to his comments on this amendment, the gentleman previously said it is his intent with this amendment that these Federal dollars go to pervasively sectarian organizations. That is something that the Supreme Court ruled in 1998 is unconstitutional.

I have no problem with faith-based organizations, Catholic Charities, getting Federal money. I have a huge problem with the Federal government directly funding the First Catholic Church, the First Methodist Church, the First Synagogue, or the First Wiccans with direct Federal money. That has huge implications.

Because the gentleman said "pervasively sectarian organizations" get the money, those pervasively sectarian organizations have special protections under the law where they can discriminate based on someone's religious faith.

So based on the gentleman's answer, under this bill, even including this amendment, they could take Federal tax dollars and put up a sign and say, no Jews, no Catholics, no Christians, no Hindus need apply here. I think that is incredibly significant.

My problem is that what otherwise is an outstanding bipartisan bill is complicated now by an issue that frankly we should spend days, not just moments, debating. I would urge my colleagues to look at what they are about to vote on. I would urge its rejection.

Madam Chairman, I withdraw my reservation of objection.

The CHAIRMAN pro tempore. Is there objection to the request of the gentleman from Indiana?

There was no objection.

The CHAIRMAN pro tempore. The modification is accepted.

The gentleman from Indiana (Mr. SOUDER) is recognized for the balance of his time, 2½ minutes.

Mr. SOUDER. Madam Chairman, I will not use the full time.

I merely want to reiterate that for all the hullabaloo here, this is the same language we had in the juvenile justice bill that passed 346 to 83 with the same language; the same in the Fathers Count, in the welfare bill, the human services bill. It is what is in the Even Start bill. It is supported by the current administration, by the previous HUD Secretaries before this.

It is supported by African-American, Hispanic, Orthodox Jewish, Catholic, Protestant organizations all over the country that are trying to deal with the terrible problems of homelessness, of inadequate housing for the poor.

Without extending Federal dollars, it is going to be very difficult. Quite frankly, faith-based organizations are not willing to give up their faith in order to become part of a charitable system. They will just choose not to participate, as they did for years prior

to the current Secretary of HUD and other Secretaries reaching out to them.

So I think this merely codifies what is already being done. We have done it in other bills. Quite frankly, it is going to be coming in more bills, because it is one of the most important things we can do to extend Federal dollars and involve people whose hearts say they want to help those who are hurting, and this enables them to do so.

Mr. POMEROY. Madam Chairman, I rise to express my opposition to the Souder Amendment.

The Souder amendment would allow religious and faith-based organizations to compete for all federal housing, homeless and community development programs under the Department of Housing and Urban Development (HUD). Madam Chairman, I strongly believe that religious organizations can play a key role in addressing housing needs throughout our communities and rural areas. However, the legislation would allow the funding to be funneled directly to the religious organizations as opposed to going through a private foundation. I believe it is more appropriate for religious organizations wanting to administer programs to assist the poor and elderly to establish private foundations and apply for federal funding. In fact, many religious organizations have established private foundations like the Catholic Charities and receive funding through various HUD programs to administer to the poor and elderly. I believe it is in the best interest of religious organizations to operate completely independently of the federal government. This independence provides religious organizations with certain protections under federal law, and helps insulate them from government intervention.

Madam Chairman, I believe that the Souder amendment needlessly tampers with our nation's strong tradition of the protection of religious institutions from government interference, and I would urge my colleagues to oppose this amendment.

Ms. PELOSI. Madam Chairman, I rise today to oppose Representative SOUDER's amendment. This amendment will violate the constitutional separation of church and state; weaken important anti-discrimination civil rights protections; and entangle religious institutions in the reach of government.

Representative SOUDER's amendment is damaging because his charitable choice provision is unconstitutional. It attacks existing constitutional protections separating church and state. It diverts taxpayer and government funding to sectarian religious groups who could then use these funds to facilitate overtly religious activities and practices. The Constitution does not allow the government to fund overtly religious or "pervasively sectarian" religious organizations. This is an inappropriate use of government funds.

Representative SOUDER's amendment is unneeded because the Constitution does permit the government to fund religious organizations that are "nonsectarian" to pursue non-religious activities and currently the government funds many of these groups. These groups are often called religious affiliates. For example, local Catholic Charities and Jewish Social

Services groups that receive federal funding are non-sectarian groups.

The differences between non-sectarian religious organizations and pervasively sectarian religious organizations are very important and we must continue to respect these differences. Sectarian groups may proselytize, discriminate by religion, and advance religious beliefs. For these reasons, the government can not provide funds directly to a sectarian church or synagogue. We would not want employers which receive government funds to refuse to hire Jewish or Catholic employees on the basis of their religion. This would be wrong. We would not want organizations that receive government funds to proselytize the Mormon faith to non-Mormons who seek social services. We do not want government funded organizations to discriminate in their social service delivery against gays and lesbians; unmarried couples living together; or to practice other discriminatory practices.

Both non-sectarian and sectarian religious groups do good work, and this work deserves our support. Nonetheless, taxpayer and government funds should not subsidize sectarian religious activities nor violate the separation of church and state. Let us remember, that under current law, pervasively sectarian religious groups are permitted to form an affiliate organization and this affiliate is eligible to apply for federal funding. I urge my colleagues to vote for the Constitution and oppose the Souder amendment.

Mr. SOUDER. Madam Chairman, many of the Constitutional issues relevant to the Charitable Choice debate were discussed in an excellent article by Carl Esbeck in the *Emory Law Review*, which follows:

A CONSTITUTIONAL CASE FOR GOVERNMENTAL COOPERATION WITH FAITH-BASED SOCIAL SERVICE PROVIDERS⁴

It is often said that America's founding was an experiment in government. Certainly few features of the American constitutional settlement left more to future change—and were more of a break with existing European patterns—than the Establishment Clause set out in the First Amendment. The new Republic sought to rely on transcendent principles to justify its unprecedented advancements in human liberty.¹ Concurrently, the Founders rejected any official or fixed formulation of these principles, for no public credo was to be established by law. So it is more than just a little ironic that the nation's most cherished human rights depend upon the continued private faith of innumerable Americans in creeds and confessions that themselves cannot be officially adopted by the Republic, lest the adoption run afoul of the prohibition on laws respecting an establishment of religion. Yet, coming full circle, it is this "no-establishment principle" that allows voluntary religion to flourish, which in turn nurtures belief in God-endowed rights.² The resulting juggling act is what Dr. Os Guinness aptly describes as the still "undecided experiment in freedom, a gravity-defying gamble that stands or falls on the dynamism and endurance of (the Republic's) unofficial faiths."³

This ongoing experiment in human liberty, because of its indeterminacy, has had the unforeseen effect of concentrating intense pressure on a single constitutional restraint on governmental power, namely the Establish-

ment Clause. To the uninitiated, having the cause of this pressure pinpointed goes far toward explaining why the no-establishment principle has become one of the chief battle sites over who exercises cultural authority in this nation.⁴ Quite simply, the Establishment Clause has become where Americans litigate over the meaning of America.⁵ Thus, it is to the Establishment Clause that we rightly devote so much of our attention and energy.

The United States Supreme Court's modern jurisprudence concerning church/state relations is commonly dated from its 1947 decision in *Everson v. Board of Education*,⁶ which embraced a separationist interpretation of the Establishment Clause. Since *Everson*, the Court begins with separatistic assumptions when addressing novel questions that invoke the no-establishment principle. The separationism theory has become so dominant that today, fifty years after *Everson*, courts assume a need to justify holdings that reach results not easily fitting into Jefferson's influential metaphor ("a wall of separation") as allowable departures from the rule first laid down in *Everson*.

This article will refer to separationism as based on "older assumptions." The Court's presuppositions concerning the nature and contemporary value of religion and the proper role of modern government underlie what will be referred to as a "traditional analysis" of the case law. Part I is a partial overview of the Supreme Court's cases since *Everson*, and has the goal of making the strongest arguments—within the framework of separationism—for the constitutionality of governmental welfare programs that permit participation by faith-based social service providers.

Part II is about separationism's major competitor, a theory centered on the unleashing of personal liberty to the end that, with minimal governmental interference, individuals make their own religious choices. The theory has come to be called the neutrality principle.⁷ Neutrality theory surfaced most obviously in 1981 when the Supreme Court handed down its decision in the free speech and religion case of *Widmar v. Vincent*.⁸ Religious neutrality as a model for interpreting the Establishment Clause is based on what will be termed "new assumptions." The aim of the new assumptions is to minimize the effects of governmental action on individual or group choices⁹ concerning religious belief and practice. When the dispute is over a welfare program in which faith-based social service providers desire to participate, the neutrality principle requires government to follow a rule of minimizing the impact of its actions on religion, to wit: all service providers may participate in a welfare program without regard to religion and free of eligibility criteria that require the abandonment of a provider's religious expression or character. Thus, Part II consists of a realignment of the Supreme Court's cases along a new axis, with the goal of making the strongest arguments—within the framework of these new assumptions—for the constitutionality of governmental programs of aid which permit full and equal participation by faith-based social service providers.

Before turning to the case law, it should be stated candidly and up front that there is no truly neutral position concerning these matters, for all models of church/state relations embody substantive choices. The decisions the Supreme Court handed down in both *Everson* and *Widmar* are not otherwise. Separationism is a value-laden judgment

that certain areas of the human condition best lie within the province of religion, while other areas of life are properly under the authority of civil government. Separationism, this most dominant of theories, is in no sense the inevitable product of objective reason unadulterated by an ideological commitment to some higher point of reference. Separationism cannot stand outside of the political and religious milieu from which it emerged and honestly claim to be neutral concerning the nature and contemporary value of religion or the purposes of modern government. The same must be said for its primary competitor, the neutrality theory.¹⁰ Indeed, to demand that any theory of church/state relations transcend its pedigree or its presuppositions and be substantively neutral is to ask the impossible.¹¹

I. OLDER ASSUMPTIONS: SEPARATIONISM AND A TRADITIONAL ANALYSIS OF THE CASE LAW

The Supreme Court distinguishes between the direct¹² and the indirect¹³ receipt of a government's welfare assistance by social service providers. "Indirect" welfare assistance means that a personal choice by the ultimate beneficiary—rather than by the government—determines which social service provider eventually receives the assistance. Indirect forms of assistance will be discussed first because the current state of the case law is more easily sorted out.

The Court has consistently held that government may design a welfare program that places benefits in the hands of individuals, who in turn have freedom in the choice of service provider to which they take their benefits and "spend" them. It makes no difference whether the chosen provider is governmental or independent, secular or religious. Any aid to religion as a consequence of such a program only indirectly reaches—and thereby only indirectly advances—the religion of a faith-based provider. In situations of indirect assistance, the equal treatment of religion—no separationism—is the Court's operative rule for interpreting the Establishment Clause. As will be shown below, this rule of equality is instrumental to neutrality theory.¹⁴

The leading cases are *Mueller v. Allen*,¹⁵ *Witters v. Washington Department of Services for the Blind*,¹⁶ and most recently *Zobrest v. Catalina Foothills School District*.¹⁷ Even the more liberal Justices on the Court have acceded to the direct/indirect distinction.¹⁸

The rationale for this distinction is twofold. First, the constitutionally salient cause of any indirect aid to religion is entirely in the control of independent actors, not in the hands of the government. So long as individuals may freely choose or not choose religion, merely enabling private decisions logically cannot be a governmental establishment of religion. The government is essentially passive as to the relevant decision, and hence not the agent of any resulting religious use. Second, the indirect nature of the aid, channelled as it is through countless individual beneficiaries, reduces church/state interaction and any resulting regulatory oversight. This enhances the nonentanglement that is so desirable from the perspective of the Establishment Clause.

There are a number of familiar programs that illustrate this rule: individual income tax deductions for contributions to charitable organizations, including those that are religious;¹⁹ and G.I. Bill²⁰ and other federal aid to students attending the college or university of their choice, including those affiliated with a church;²¹ federal child care certificates for low-income parents of preschool-age children;²² and state-issued

Footnotes appear at the end of article.

vouchers permitted under the Temporary Assistance for Needy Families program.²³ Pursuant to this rule of law, vouchers given to welfare beneficiaries that are redeemable by any eligible provider, whether governmental or independent, secular or religious, would be constitutional.²⁴

It bears emphasizing that the programs of aid upheld in *Mueller*, *Witters*, and *Zobrest* were adopted as a matter of legislative discretion or prudence. These cases do not hold that there is a constitutional right to equal treatment between governmental and independent sector providers. Government may decide that these indirect benefits are redeemable at its welfare agencies alone,²⁵ thereby excluding all similarly situated independent sector providers. Should a state decide to provide assistance only through government-operated agencies, it can do so without violating the First Amendment. The caveat is that a state cannot adopt a program of aid that involves all providers of welfare services, governmental and independent sectors, but specifically disqualified participation by religious providers. The Free Exercise Clause prohibits any such intentional discrimination against religion.²⁶

Unlike indirect forms of assistance, when it comes to direct assistance—that is, a government's general program of assistance flows directly to all organizations, including faith-based providers of services—then separationism is the Court's beginning frame of reference. Separationism makes three assumptions. First, it assumes that a sacred/secular dichotomy accurately describes the world of religion and the work of faith-based providers called to minister among the poor and needy. That is to say, the activities of faith-based providers can be separated into the temporal and the spiritual. This assumption, of course, is vigorously challenged by neutrality theorists.²⁷ Second, separatists assume that religion is private and that it should not involve itself with public matters, with "public" often equated to "political" or "governmental" affairs. The neutrality principle rejects this private/public dichotomy as well, insisting that personal faith has public consequences and that the practice of religious faith can lead to cooperation with the government in achieving laudable public purposes.²⁸ Third, separatists assume that a government's welfare assistance equates to aid for the service provider. Neutrality theories contest this characterization as well, describing the situation as one of cooperation between government and independent sector providers, with the joint aim being society's betterment through the delivery of aid to the ultimate beneficiaries.²⁹

As a general proposition, the Supreme Court has said that direct forms of reimbursement can be provided for the "secular" services offered by a religious organization but not for those services comprising the group's "religious" practices. Thus, if an organization's secular and religious functions are reliably separable, direct assistance can be provided for the secular function alone. But if they are not separable, then the Court disallows the assistance altogether, with the explanation that the Establishment Clause will not allow the risk³⁰ of governmental aid furthering the transmission of religious beliefs or practices.

The juridical category the Court utilizes to determine whether a general program of direct assistance risks advancing religion is whether the provider is "pervasively sectarian."³¹ Should the provider fit the profile of a pervasively sectarian organization, then separationist theory prohibits any direct aid

to the provider. The one small exception is aid that, due to its form or nature, cannot be converted to a religious use. For example, the Court has allowed independent religious schools to receive government-provided secular textbooks and bus transportation between a student's home and school.³²

All the Supreme Court's cases striking down direct programs of aid have involved primary and secondary faith-based schools.³³ Contrariwise, in each of the three instances that have come before the Court involving direct aid to colleges and universities, including those which are faith-related, the Court has upheld the financial aid.³⁴ The Court received considerable criticism—even ridicule—for the close distinctions it has made in religious school cases between the types of permissible and impermissible aid. However, for present purposes these distinctions are best seen as fact-finding quibbles over whether the Court rightly determined if the nature of a particular direct benefit can be converted to a religious and, therefore, forbidden use.

On the two occasions the Court has considered the constitutionality of social service direct aid programs, it has sustained both programs. In a turn of the century case, *Bradfield v. Roberts*,³⁵ the Court upheld a capital improvement grant for a church-affiliated hospital.³⁶ At present, however, *Bowen v. Kendrick*³⁷ is the modern and hence more pertinent case. By the narrow margin of five to four, the Court in *Kendrick* upheld "on its face" federal grants for teenage sexuality counseling, including counseling offered by faith-related centers. However, the Court remanded for a case-by-case or "as applied" review in order that teenage counseling centers found to be pervasively sectarian would have their grants discontinued.³⁸

Under the Adolescent Family Life Act (AFLA),³⁹ the Secretary of Health and Human Services authorizes direct cash grants to both governmental and independent sector nonprofit organizations doing research or providing services in the areas of teenage pregnancy and counseling for adolescents concerning premarital sexual relations. Accordingly, the societal problems addressed by AFLA are a blend of health, economic, and moral issues surrounding teenage sexuality and out-of-wedlock pregnancy. The statute defines an eligible grant recipient as a "public or non-profit private organization or agency," apparently permitting otherwise qualified religious organizations to receive the grants on the same terms as nonreligious agencies.⁴⁰ Moreover, language in the Act expressly invites participation by religious organizations and requires certain secular grantees to take into account involvement by religious organizations, along with family and community volunteer groups, in addressing the problem of adolescent sexuality.⁴¹ These provisions were written into the law to ensure that religious groups would be treated in a nondiscriminatory manner when compared with other similarly situated eligible grant recipients. No statutory language specifically barred the use of grant monies for worship, prayer, or other intrinsically religious activities. Finally, other than routine fiscal accountability to ensure that federal funds were not misappropriated, no monitoring or other oversight was made part of the resulting relationship between the Department of Health and Human Services and the participating religious organizations.⁴²

After describing the broad outlines of AFLA, the majority spoke in sweeping terms of the Establishment Clause and govern-

mental aid as permitting an equality-based rule. It said that "religious institutions need not be quarantined from public benefits that are neutrally available to all,"⁴³ and that "this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs."⁴⁴ The Court then went on to utilize the three-prong *Lemon* test for its analysis.⁴⁵

Concerning *Lemon*'s first prong, requiring that legislation have a secular purpose, the contending parties in *Kendrick* agreed "that, on the whole, religious concerns were not the sole motivation behind the Act."⁴⁶ As usual, the Court's application of the purpose test was highly deferential to the legislature.

Lemon's second prong requires that the principal or primary effect of a law not advance religion. There was nothing "inherently religious" or "specifically religious," pointed out the Court, about the activities or social services provided by the grantees to adolescents with premarital sexuality questions and problems.⁴⁷ Moreover, simply because AFLA expressly required religious organizations to be considered among the available grantees and demanded that the role of religion be taken into account by secular grantees, that did not have the effect of endorsing a religious view of how to solve the problem.⁴⁸ As to grantee eligibility, the Court interpreted AFLA as "religion-blind" when Congress required that all organizations, secular and religious, be considered on an equal footing. Further, the legislation did not violate the Establishment Clause merely because religious beliefs and the moral values urged by AFLA overlap.⁴⁹ Critical to the result was that the majority refused to hold that faith-based teenage counseling centers were necessarily pervasively sectarian.⁵⁰ Although the form of the assistance was a direct cash grant, the First Amendment was not offended as long as the grantee was not pervasively sectarian.⁵¹ The fact that the ultimate beneficiaries were impressionable adolescents did not, without more, present an unacceptable risk that the no-establishment principle was violated.⁵² Although AFLA did not expressly bar the use of federal funds for worship, prayer, or other inherently religious activities, the Court said no explicit bar was required. The Court added, however, that "(c)learly, if there were such a provision in this statute, it would be easier to conclude that the statute on its face" was constitutional.⁵³

Under the third prong of *Lemon*, the Court considers whether the statute in question fosters an excessive administrative entanglement between religious officials and the offices of government. Monitoring of AFLA grantees by the Department of Health and Human Services is necessary only to ensure that federal money is not misappropriated. There is no requirement that faith-based grantees follow any federal guidelines concerning the content of the advice given to teenagers or otherwise modify their programs. There are no nondiscrimination requirements as to the beneficiaries served. Because religious grantees are not necessarily pervasively sectarian, the majority concluded that this limited oversight by the federal agency could not be deemed excessively entangling.⁵⁴

Dividing the analysis between "facial" and "as applied" components places a considerable burden on separationists, like the legal activists behind the *Kendrick* litigation, who rove the country filing suits claiming Establishment Clause transgressions. The aim of these activists is to halt the government aid,

not on a piecemeal or case-by-case basis, but by enjoining the entire Act insofar as it allows any participation by faith-based providers. This was possible when the Court was willing to overturn legislation on the mere "risk" that the second of third prongs of *Lemon* were violated.⁵⁵ After *Kendrick*, a violation of the Establishment Clause must be proved in each case by palpable evidence that confessional religion is being advanced. The only exception occurs when the entire class of religious service providers is pervasively sectarian. Because not all faith-based social service providers are pervasively sectarian, a facial attack will fail.

In a short concurring opinion, Justice O'Connor drew a helpful distinction. She noted that the object of congressional funding under AFLA, namely the moral issue of teenage sexuality, was "inevitably more difficult than in other projects, such as ministering to the poor and the sick."⁵⁶ Far easier cases, she opined, would be welfare programs funding faith-based soup kitchens or hospitals.⁵⁷ Accordingly, where the object of the governmental aid is clearly addressed to temporal needs (e.g., food, clothing, shelter, health), in Justice O'Connor's view, a social service program that includes religious providers is facially constitutional.⁵⁸

For the Court to require officials to distinguish between "pervasively" and "non-pervasively" sectarian organizations creates a fundamental inconsistency within its own doctrine. The Court had earlier held in *Larson v. Valente*⁵⁹ that the Establishment Clause requires that government not intentionally discriminate among types of religions,⁶⁰ nor should government utilize classifications based on denominational or sectarian affiliation.⁶¹ Moreover, in order to distinguish between "pervasively" and "non-pervasively sectarian" organizations, as *Kendrick* requires, courts will become deeply entangled in the religious character of these faith-based providers of social services.⁶² The Supreme Court, however, has said that whenever possible officials should avoid making detailed inquiries into religious practices, or probing into the significance of religious words and events.⁶³

Justice Kennedy, sensing analytical difficulty with Establishment Clause doctrine whose application requires the Court to discriminate among religious groups, wrote a brief concurring opinion.⁶⁴ Stating that he doubted whether "the term 'pervasively sectarian' is a well-founded juridical category,"⁶⁵ Justice Kennedy went on to adopt a neutrality-based rule. A social assistance program would be facially constitutional, Kennedy said, as long as its purpose was neutral as to religion and a diverse array of organizations were eligible to participate.⁶⁶ Upon remand of the case, for Justice Kennedy the "question in an as-applied challenge is not whether the entity is of a religious character, but how it spends its grant."⁶⁷ As long as the grant is actually used for the designated public purpose—rather than to advance inherently religious beliefs or practices—there is no violation of the Establishment Clause.⁶⁸ This proposal has the virtue of not violating the rule set down in *Larson*.

In laying down its rules concerning programs of direct assistance, the Supreme Court has adopted a funds-tracing analysis rather than a freed-funds analysis. That is, the Court interprets the Establishment Clause as forbidding the direct flow of taxpayer funds, as such, to pay for inherently religious activities. The Court does not concern itself when governmental funding of a

faith-based provider's secular activities thereby frees private dollars to spend on religious activities. In a pervasively sectarian organization, however, in which the mixing of religious and secular activities is complete, the tracing of taxpayer funds will always determine that religious activities are advanced in tandem with the secular. Hence, in a pervasively sectarian organization even a funds-tracing analysis causes the Court to hold that no taxpayer funds can go directly to such organizations.

The harm that separationists fear is not that privately raised dollars are freed as a consequence of the government's program so that they may be reallocated to a religious use. Rather, the feared harm is that governmental monies (collected as taxes, user fees, fines, sale of government property, etc.)⁶⁹ may be used to pay for such inherently religious activities as worship, prayer, proselytizing, doctrinal teaching, and devotional scriptural reading. Indeed, separationists on the Court have been most insistent that the Establishment Clause "absolutely prohibit(s) government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."⁷⁰

Although it will scandalize separationists, the rest of us are led to probe below the bluff and bluster and ask the following: "Is the harm resulting from government-collected monies going to religion so self-evident and severe?" As citizens we are taxed to support all manner of policies and programs with which we disagree. Tax dollars pay for weapons of mass destruction that some believe are evil. Taxes pay for abortions and the execution of capital offenders, that some believe are acts of murder. Taxes pay the salaries of public officials whose policies we despise and oppose at every opportunity. Why is religion different? If the answer is that we are protecting a religiously informed conscientious right not to have one's taxes go toward the support of religion, the Supreme Court has already rejected such a claim.⁷¹ It makes no difference to the Court that a taxpayer avers that he or she is "coerced" or otherwise "offended" when general tax revenues are used in a program that involves faith-based social service providers.⁷² Accordingly, with reference to the Court's interpretation of the Establishment Clause, it must again be asked, "Is the harm that separationists would have us avoid at all cost so self-evident and severe?"

Although a thorough treatment of this question is beyond the scope of this Article, the answer separationists give is that there are two such harms which the Establishment Clause is designed to safeguard against, and history demonstrates that they can be quite severe: first, divisiveness within the body politic along sectarian lines;⁷³ and, second, the damage to religion itself by the undermining of religious voluntarism and the weakening of church autonomy.⁷⁴ Separationism has yet to give a convincing argument that these two harms will befall the nation as a result of the equal involvement of faith-based providers in social service programs. The harm of sectarian divisiveness within the body politic is not altogether different in kind or more threatening than tax funding for other ideologies and programs that citizens find disagreeable.⁷⁵ And the harm to religion itself when too closely allied with government, while real and threatening, can be adequately protected by writing into the welfare legislation safeguards for protecting the religious character and expression of faith-based providers.⁷⁶

II. NEW ASSUMPTIONS: A PARADIGM SHIFT TO GOVERNMENTAL NEUTRALITY

Neutrality theory approaches the debate over the Establishment Clause from an altogether different point of entry. According to this theory, when government provides benefits to enable activities that serve the public good, such as education, health care, or social services, there should be neither discrimination in eligibility based on religion, nor exclusionary criteria requiring these charities to engage in self-censorship or otherwise water down their religious identity as a condition for program participation.⁷⁷ The neutrality model allows individuals and religious groups to participate fully and equally with their fellow citizens in America's public life, without being forced either to shed or disguise their religious convictions or character. The theory is not a call for preferential treatment for religion in the administration of publicly funded programs.⁷⁸ Rather, when it comes to participation in programs of aid, neutrality merely lays claim to the same access to benefits, without regard to religion, enjoyed by others.⁷⁹ Finally, as noted above,⁸⁰ the neutrality principle rejects the three assumptions made by separationist theory: that the activities of faith-based charities are severable into "sacred" and "secular" aspects, that religion is "private" whereas government monopolizes "public" matters, and that governmental assistance paid to service providers is aid to the providers as well as aid to the ultimate beneficiaries.

Should separationism eventually be dislodged from its place as the controlling paradigm, it will be said that this change began in 1981 with the Supreme Court's decision in *Widmar v. Vincent*.⁸¹ In *Widmar*, a state university permitted student organizations to hold their meetings in campus buildings when the facilities were not being used for other purposes. However, student religious organizations were specifically denied such access. The university maintained that the denial was required because it could not support religion by providing meeting space for worship, prayer, and Bible study, consistent with a no-aid interpretation of the Establishment Clause. A group of students brought suit, first pointing out that the university had voluntarily created a limited public forum generally open to student expression. Having dedicated the forum, the students argued that expression of religious content could not be singled out for discrimination. A near-unanimous Supreme Court agreed. Most significantly, the Court held that the Establishment Clause did not override the Free Speech Clause as long as the creation of the forum had a secular purpose. Religious groups were just one of many student organizations permitted into the forum. As long as the circumstances were such that the university did not appear to be placing its power or prestige behind the religious message, the Establishment Clause was not a problem.⁸²

The *Widmar* approach was soon dubbed "equal access," and in 1984 Congress extended the same equality-based right to students enrolled in governmental secondary schools.⁸³ Following recent free speech victories in *Lamb's Chapel v. Center Moriches Union Free School District*,⁸⁴ *Capitol Square Review and Advisory Board v. Pinette*,⁸⁵ and *Rosenberg v. Rector and Visitors of the University of Virginia*,⁸⁶ equal treatment has indeed become the normative rule of law concerning private speech of religious content or viewpoint.⁸⁷ As discussed below, this equality-based rule is instrumental to neutrality theory.⁸⁸

Notwithstanding this unbroken line of victories for the equal treatment of religion, it must be emphasized that in each case from *Widmar* to *Rosenberger*, it was the Free Speech Clause that required nondiscrimination, thereby supplying the victory. It remains to be explored below whether the neutrality principle can make the transition from an equality right in free speech to a right of equal participation in direct financial aid programs.⁸⁹

Before continuing with the argument for neutrality theory based on the most recent Supreme Court cases, a digression is necessary to address the rationale for grounding the major competitor to separationism in the juridical concept of governmental neutrality rather than equality. As it turns out, a rule of equality works quite well when the church/state dispute is over access to benefits.⁹⁰ However, when the Establishment Clause challenge is to legislation that exempts religious organizations from regulatory burdens,⁹¹ the normative rule of law continues to follow a separationist model. Accordingly, when the issue is relief from government-imposed burdens, religious groups want to be viewed not as equal to others, but as separate and unique.

As a juridical concept, neutrality integrates into a single coherent theory both (1) allowing religious providers equal access to benefits, and (2) allowing them separate relief from regulatory burdens. The rationale entails distinguishing between burdens and benefits.

The Supreme Court has repeatedly held that the Establishment Clause is not violated when government refrains from imposing a burden on religion, even though that same burden is imposed on the nonreligious who are otherwise similarly situated. *Corporation of Presiding Bishop v. Amos*⁹² is the leading case. *Amos* upheld an exemption for religious organizations in federal civil rights legislation. The exemption permitted religious organizations to discriminate on a religious basis in matters concerning employment. Finding that the exemption did not violate the Establishment Clause, the Court explained that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their missions."⁹³ When the Court permits a legislature to exempt religion from regulatory burdens, it enables private religious choice.

The Court's rationale is twofold. First, to establish a religion connotes that a government must take some affirmative step to achieve the prohibited result. Conversely, for government to passively "leave religion where it found it" logically cannot be an act establishing a religion.⁹⁴ Referencing the First Amendment's text, the words "shall make no law"⁹⁵ imply the performance of some affirmative act by government, not maintenance of the status quo. Stating the practical sense of the matter, Professor Laycock observed that "(t)he state does not support or establish religion by leaving it alone."⁹⁶ Second, unlike benefit programs, religious exemptions reduce civil/religious tensions and minimize church/state interactions, both matters that enhance the non-entanglement so desired by the Establishment Clause.⁹⁷

Should the Court in the future permit a legislature to design welfare programs that confer direct assistance without regard to religion, it would be following a rule of equal treatment as to religion. However, exemptions from burdens and equal treatment as

to benefits have a common thread that ties the two together. In following an equality-based rule as to benefits, equality is not an end in itself but a means to a higher goal. That goal is the minimization of the government's influence over personal choices concerning religious beliefs and practices. The goal is realized when government is neutral as to the religious choices of its citizens. Thus, whether pondering the constitutionality of exemptions from regulatory burdens or of equal treatment as to benefit programs, in both situations the integrating principle is neutralizing the impact of governmental action on personal religious choices.⁹⁸ From that common axis, it makes sense to agree with the Court's holding, in cases such as *Amos*, that religious exemptions from legislative burdens are consistent with the Establishment Clause, and, on the other hand, to insist that the Establishment Clause permits the equal treatment of religion when it comes to financial benefits.⁹⁹

It would be rhetorical, but still a fair comment, to say that in neutrality theory religion gets the best of both worlds: religion is free of burdens borne by others but shares equally in the benefits.¹⁰⁰ However, this observation is not an argument against the neutrality principle but a commendation of it. No one need apologize for a model of church/state relations that maximizes religious liberty (subject, of course, to the reasonable demands of organized society) and limits the power of the modern regulatory state. This combination of liberty and limits is what the First Amendment is about. It was the First Amendment, after all, that expressly singled out religion as an attribute of human nature that called for special treatment.

Previously mentioned were two cases handed down by the Court in late June of 1995: *Capitol Square Review and Advisory Board v. Pinette*,¹⁰¹ and *Rosenberger v. Rector and Visitors of the University of Virginia*.¹⁰² They represent the Court's most recent pronouncements on the Establishment Clause. Notably, the two newest appointees to the Court, Justices Ginsburg and Breyer, were members of the Court by then and heard both cases.

The *prima facie* claim in both of these cases was that private religious speech was denied equal access to a public forum, in violation of the Free Speech Clause. The Court agreed. Further, in both cases the government sought to justify its discriminatory treatment of religious speech as being compelled by the Establishment Clause. A majority of the Justices rejected this defense. Hence, the result in both cases is more consistent with a theory of neutrality than of separationism.

In *Pinette*, the Ohio Ku Klux Klan sought a permit to place a display consisting of a Latin cross in Capitol Square, a public area surrounding the statehouse. The square was otherwise open for private displays sponsored by a variety of citizen groups. The State denied the permit, claiming that the cross would be viewed as an endorsement of religion in violation of church/state separation.¹⁰³

By a vote of seven to two the Court sided with the Klan. All of the Justices in the majority believed that placement of the cross by a private group was not barred by the Establishment Clause. However, these seven Justices generated four opinions, none of which commanded a five-vote majority concerning the application of the Establishment Clause to these facts.

Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy and Thom-

as, believed that the exclusion of a private religious symbol from a public forum could never be justified by the Establishment Clause. Long-standing free speech doctrine required that there be no discrimination as to content, and religious speech was not to be singled out for special scrutiny. The mere fact that onlookers might view a religious display and mistake it for the message of the state was no reason to suppress private speech. Rather, the solution to the problem of the mistaken observer is not to suppress the speech, but to correct the erroneous conclusion concerning the source of the message. So long as the government treats all speakers equally and does nothing to intentionally foster the onlooker's mistake, the government has done all that the establishment Clause requires.¹⁰⁴

Justice O'Connor wrote separately about the mistaken observer.¹⁰⁵ Applying an endorsement test, Justice O'Connor said that in some instances the Establishment Clause imposed a duty on the state to take steps to disclaim sponsorship of a private religious message.¹⁰⁶ In her view, a government's formal equality toward religion may not always be enough. In circumstances in which, for example, private religious messages "so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval" in the eyes of an objective observer, the Establishment Clause requires the state to take affirmative measures to see to it that religion is not advanced.¹⁰⁷

Justice Souter, joined by Justices O'Connor and Breyer, write separately about the inadequacy of facial equality. Justice Souter agreed that equal treatment of religion should narrowly prevail on these facts. However, this was because his concern for the appearance of state endorsement of religion could be remedied by requiring the affixing of a sign to the cross disclaiming official sponsorship. Such a disclaimer, of course, would be required only when the content of the speech is religious. Hence, the appropriate response, in Justice Souter's opinion, is not a facially neutral policy. Rather, the law ought to respond to private religious speech as a "handle with care" item. In Justice Souter's view, an access rule that is nondiscriminatory in purpose is required of the state, but by itself is insufficient. "Effects matter to the Establishment Clause."¹⁰⁸ The tone and content of Justice Souter's opinion left little doubt that in his view church/state separation, rather than even-handed treatment, is the dominant concern of the First Amendment.

Justices Stevens and Ginsburg dissented in separate opinions. Justice Stevens believed that the Establishment Clause created "a strong presumption against the installation of unattended religious symbols on public property."¹⁰⁹ Thus, in his view separationism subordinates the Free Speech Clause and its rule of equal treatment.

Justice Ginsburg was even more extreme, articulating not a presumption but an absolute rule of religious expulsion. She was of the opinion that "(i)f the aim of the Establishment Clause is genuinely to uncouple government from church," then "a State may not permit, and a court may not order, a display of this character."¹¹⁰ As authority for this absolutist separationism, Justice Ginsburg cited a law review article. The article is openly hostile to the contributions of traditional religion and urges that it be driven out of the public square.¹¹¹ It is deeply disturbing that Justice Ginsburg, in her first opinion concerning religion as a Supreme

Court Justice, would cite with approval this article with its brutish regard for religion and religious expression.

In *Rosenberger*,¹¹² decided the same day as *Pinette*, a university-recognized student organization published a newspaper known as *Wide Awake*. The newspaper ran a number of stories on contemporary matters of interest to students such as racism, homosexuality, eating disorders, and music reviews, all from an unabashedly Christian perspective.¹¹³ The university provided student newspapers work space and paid the expenses of printing these publications. The printing costs were paid from a fund generated by a student activity fee.¹¹⁴ The university refused to reimburse the cost of printing *Wide Awake*. The refusal was pursuant to a policy disqualifying printing costs for groups promoting "a particular belief in or about a deity or ultimate reality."¹¹⁵ The student sued, claiming this was yet another instance of discrimination against private religious speech in violation of the Free Speech Clause. The university sought to justify its discriminatory treatment as required by a no-aid interpretation of the Establishment Clause.¹¹⁶

By a vote of five to four, the Court ruled in favor of the students and directed the university to treat *Wide Awake* the same as other student publications, without regard to the newspaper's religious perspective. Justice Kennedy wrote the majority opinion, and was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas. Justice Kennedy determined that the university had created a limited public forum for student expression on a wide array of topics.¹¹⁷ Further, the denial of student activity funds to pay for the cost of printing *Wide Awake* was discrimination on the basis of the newspaper's Christian viewpoint concerning topics otherwise permitted in the forum.¹¹⁸ The university's policy denied funding not because *Wide Awake* was a religious organization, but because of its religious perspective.¹¹⁹ Justice Kennedy also rejected the argument that providing student groups with a scarce resource such as money differed from providing abundant resources such as classroom meeting space. Whether abundant or in limited supply, the university could not dispense its resources on a basis that was viewpoint-discriminatory.¹²⁰

Justice Kennedy went on to reject the university's argument that providing direct funding for a newspaper with a religious perspective was prohibited by the Establishment Clause. In so doing, Justice Kennedy stated a rule of law consistent with neutrality theory, although he added that compliance with a neutrality rule was a significant factor—but not itself sufficient—in finding that the Establishment Clause was not violated:

A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion. . . . (I)n enforcing the prohibition against laws respecting establishment of religion, we must be sure that we do not inadvertently prohibit the government from extending its general state law benefits to all its citizens without regard to their religious belief. . . . We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.¹²¹

Continuing, Justice Kennedy assessed both the purpose and "practical details" of the

university's program. The university's purpose was clearly not the advancement of religion. The student activity fee was to promote a wide variety of speech of interest to students. Hence, the fee was unlike an earmarked tax for the support of religion.¹²² As to the "practical details" that augured in favor of constitutionality, Justice Kennedy noted that state funds did not flow directly into the coffers of *Wide Awake*; rather, the newspaper's outside printer was paid by the university upon submission of an invoice.¹²³ Further, Justice Kennedy noted that *Wide Awake* was a student publication, "not a religious institution, at least in the usual sense of that term as used in our case law, and it is not a religious organization as used in the University's own regulations."¹²⁴

Although she joined the majority opinion, Justice O'Connor had greater difficulty concluding that the Establishment Clause was not transgressed on these facts. As between separatist and neutrality models, she declared that *Rosenberger* did not elevate neutrality as the new paradigm:

The Court's decision today therefore neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence.¹²⁵

Accordingly, separationism appears to be Justice O'Connor's starting point in cases involving direct funding of religious organizations. However, she found several mitigating details which on balance satisfied her that providing assistance in this case did not carry the danger of governmental funds' endorsing a religious message. First, university policies made it clear that the ideas expressed by student organizations, including religious groups, were not those of the university. Second, the funds were disbursed in a manner that ensured monies would be used only for the university's purpose of maintaining a robust marketplace of ideas. Finally, Justice O'Connor noted the possibility that students who objected to their fees going toward ideas they opposed might not be compelled to pay the entire fee.¹²⁶

In addition to joining the majority opinion, Justice Thomas wrote separately to criticize the historical account in Justice Souter's dissent. Justice Thomas agreed with Justice Souter that history indicated that the Founders intended the Establishment Clause to prevent earmarking a tax for the support of religion.¹²⁷ However, the equal participation of religious and nonreligious groups in a direct-aid program funded out of general tax revenues was never an issue faced by the founding generation.¹²⁸ Hence, in Justice Thomas's view, it is not prohibited by the Establishment Clause.

Justice Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer. Concerning a direct-aid program funded by public monies, Justice Souter stated that any such program was unconstitutional if it used public monies to support religion.¹²⁹ Hence, the four dissenting Justices followed a separatist model.

Justice Souter severely criticized Justice Kennedy's opinion insofar as it made distinctions based on certain factual peculiarities of the case: The funds going directly to the printer, not to the publication; the funds originating from student fees, not taxes; and the newspaper not being a religious organization, although it espoused overtly religious beliefs.¹³⁰ The "practical details" section of Justice Kennedy's opinion does appear to focus on minutiae. These are indeed chimerical distinctions on which the Establishment Clause is seemingly made to turn. In fairness

to Justice Kennedy, however, he may have been forced into these rationalizations in order to keep Justice O'Connor with the majority. She supplied the crucial fifth vote. But if keeping Justice O'Connor from separately concurring explains Justice Kennedy's attention to "practical details," it came at a high price: Officials and judges who do not like the result in *Rosenberger* have plenty of fine distinctions to manipulate so as to confine the case's holding narrowly to its facts.

In summary, concerning the constitutionality of general programs of direct aid, from *Pinette* and *Rosenberger* we learn that presently four Justices are prepared to allow a rule of neutrality, four Justices remain entrenched in separationism as their theory, and Justice O'Connor is the swing vote. Although it is clear that facial neutrality alone is insufficient, Justice O'Connor was unwilling to commit to any broader statement of general legal principles. It must be conceded that her instinct in these cases is not to begin with neutrality theory, but to follow a weak version of separationism.¹³¹ She starts with a presumption of no aid, but then advises weighing the totality of the circumstances. If the legislation is facially neutral as to religion, if the program is administered so that there is no appearance of official endorsement of religion, and if there are sufficient safeguards against the welfare program's functioning as a subterfuge for channeling tax monies to support religion, then she will allow a rule of neutrality.¹³²

In *Rosenberger*, as in *Widmar*, *Lamb's Chapel*, and *Pinette*, it was the Free Speech Clause that compelled the equal treatment of religion.¹³³ In the absence of the free speech claim, there was no indication the Court would have required—as a matter of constitutional right—that religion be treated equally in welfare programs. It is uncertain whether the Court will do so.¹³⁴ All that can be said with assurance is that should a legislature choose to treat religion in a non-discriminatory manner when designing a program of aid, then a slim majority of the present Court will uphold the aid. Accordingly, religious social service providers have no certainty of equal treatment, but it is permitted.¹³⁵

As we look at the progression from *Widmar* to *Rosenberger* in terms of the Court's attitude toward enabling personal religious choice, there is a logical continuum. The Court has moved toward neutralizing government's impact on religious belief and practice. In *Widmar*, the Establishment Clause was not violated when the government provided a direct benefit in the form of reserved meeting space (classrooms, heat, and light) because of the larger public purpose at issue—enriching the marketplace of ideas. In *Rosenberger*, the Establishment Clause was not violated when the government provided a direct benefit in the form of funding (paid printing costs) for the same reason as in *Widmar*—the larger public purpose of enriching the marketplace of ideas. Both the classroom space and payment of printing costs were valuable benefits to which a sum certain could be assigned. Free access to other forms of valuable direct benefits easily come to mind: Bulletin boards, photocopy machines, computers for word processing and e-mail, facsimile machines, organizational mailboxes, organizational office space, and even something as common as use of a telephone. All of these direct benefits when provided to a wide variety of student organizations, including organizations that are either religious or have religious viewpoints, would be permitted by the *Widmar/Rosenberger* interpretation of the Establishment Clause.

Indeed, there is no logical stopping place as the circumstance evolves from funding private expression without regard to religion to funding a social program without regard to religion. The essential requisite, as far as the Establishment Clause is concerned, is that in the case of expression, the creation of the public forum have a public purposes. In the case of a social service program, its enactment must have a public purpose as well.

The general principle of law that emerges is that the Establishment Clause is not violated when, for a public purpose, a program of direct aid is made available to an array of providers selected without regard to religion. In recently enacting the Church Arson Prevention Act,¹³⁶ Congress made use of this principle. Section 4(a) of the Act enables nonprofit organizations exempt under S 501(c)(3) of the Internal Revenue Code, which are victims of arson or terrorism as a result of racial or religious animus, to obtain federally guaranteed loans through private lending institutions.¹³⁷ This of course means churches can obtain the necessary credit to repair or rebuild their houses of worship at reduced rates. This Act, quite sensibly, treats churches the same as all similarly situated exempt nonprofit organizations. The public purpose is to assist the victims of crime. The federal guarantee represents a form of direct aid to religion, but because the aid is neutrally available to all 501(c)(3) organizations, it does not violate the Establishment Clause.

In the context of welfare legislation, the public purpose is for government and the independent sector to engage in a cooperative program that addresses the temporal needs of the ultimate beneficiaries,¹³⁸ and to do so in a manner that enhances the quality or quantity of the services to those beneficiaries. If some of the providers happen (indeed, are known) to be religious, and in the course of administering their programs they integrate therein religious beliefs and practices, that is of no concern to the government. As long as the beneficiaries have a choice as to where they can obtain services, thereby preventing any religious coercion of beneficiaries, and as long as the public purpose of the program is met,¹³⁹ the government's interest is at an end.¹⁴⁰

For a welfare program to have a public purpose, more is required than that the program merely be facially neutral as to religion.¹⁴¹ The legislation must have as its genuine object the pursuit of the good of civil society. Permissible public purposes encompass health (including freedom from addictions), safety, morals, or meeting temporal needs, such as shelter, food, clothing, and employment.

Unlike separationism, in neutrality theory it makes no difference whether a provider is "pervasively sectarian" or whether the nature of the direct aid is such that it can be diverted to a religious use.¹⁴² Most importantly, the courts no longer need to ensure that governmental funds are used exclusively for "secular, neutral, and nonideological purposes"¹⁴³ as opposed to worship or religious instruction. Neutrality theory eliminates the need for the judiciary to engage in such alchemy.

For faith-based providers to retain their religious character, programs of aid must be written to specially exempt them from regulatory burdens that would frustrate or compromise their religious character. Not only is this essential to attracting their participation, but it is in the government's interest for these providers to retain the spiritual character so central to their success in reha-

bitating the poor and needy.¹⁴⁴ The line of cases typified by the holding in Amos gives assurance that the adoption of such exemptions do not violate the Establishment Clause.¹⁴⁵

In neutrality theory it might be asked, "Just what is left of the Establishment Clause?" The answer is, "Quite a lot!" In addition to the several applications noted elsewhere in this Article,¹⁴⁶ the Establishment Clause continues to prohibit the government from adopting or administering a welfare program out of a purpose that is inherently religious.¹⁴⁷ For example, the no-establishment principle does not permit as the object of legislation the pursuit of worship, religious teaching, prayer, proselytizing, or devotional Bible reading.¹⁴⁸ Characterizing the purpose of a program of aid as "non-sectarian" or "secular" should be avoided, for that just clouds the issue. Mere overlap between a statutory purpose and religious belief or practice does not, without more, make the legislation unconstitutional.¹⁴⁹ Finally, although the Establishment Clause does require a public purpose, the neutrality principle is not concerned with unintended effects among religions. Accordingly, the Establishment Clause is not offended should a general program of aid affect, for good or ill, some religious providers more than others,¹⁵⁰ as long as any disparate effect is unintentional.¹⁵¹

State constitutions also address the matter of church/state relations, sometimes in terms that are more separatistic than the Supreme Court's interpretation of the Establishment Clause.¹⁵² A program of aid that successfully navigates the First Amendment can nonetheless go aground on claims based on state constitutional law. However, if the welfare program is federal or federal revenues are shared with the states, then these state constitutions can be preempted by Congress.

CONCLUSION

As one facet of the nation's overall effort to reform welfare, it is imperative to increase the involvement of the independent sector in the delivery of government-assisted social services. A significant part of the voluntary sector presently engaged in social work consists of faith-based nonprofit organizations. Indeed, these religious charities are some of the most efficient social service providers, as well as among the most successful, measured in terms of lives permanently changed for the better.¹⁵³ Although some faith-based providers have been willing to participate in government-assisted programs, many are wary about involvement with the government because they rightly fear the debasing of their religious characters and expression.¹⁵⁴ Consequently, what is needed is legislation that invites the equal participation of faith-based organizations as social service providers, while safeguarding their religious character, which is the very source of their genius and success.

Achieving this goal will require change in how Americans conceive of the role of modern government, which fortunately is already underway. For starters, the activity of government must not be thought of as monopolizing the "public." Rather, civil society is comprised of many intermediate institutions and communities that also serve public purposes, including the independent sector of nonprofit faith-based providers.

Further, independent sector providers that opt to participate in a government welfare program are not in any primary sense to be regarded as "beneficiaries" of the government's assistance. Rather, it is those who

are the ultimate object of the social service program—the hungry, the homeless, the alcoholic, the teenage mother—who are the beneficiaries of taxpayer funds. As they deliver services to those in need with such remarkable efficiency and effectiveness, faith-based providers, along with others in the voluntary sector, give far more in value, measured in societal betterment, than they could possibly receive as an incident of their expanded responsibilities. This is not a case of tax dollars funding religion.

Rightly interpreted, the Establishment Clause does not require that faith-based providers censor their religious expression and secularize their identity as conditions of participation in a governmental program. So long as the welfare program has as its object the public purpose of society's betterment—that is, help for the poor and needy—and so long as the program is equally open to all providers, religious and secular, then the First Amendment requirement that the law be neutral as to religion is fully satisfied.

Neutrality theory has the additional virtue of eliminating existing "conflict" among the clauses of the First Amendment. By not discriminating between "pervasively" and "non-pervasively sectarian" organizations, the Court's interpretation of the Establishment Clause is brought into line with the rule of *Larson v. Valente*¹⁵⁵ prohibiting intentional discrimination among religious groups, and avoids as well excessive inquiry into the character of religious organizations.¹⁵⁶ By not discriminating in favor of secular organizations over religious organizations through the funding of only the former, the Court's interpretation of the Establishment Clause is brought into line with the rule of *Church of the Lukumi Babalu Aye, Inc. v. City Hialeah*¹⁵⁷ prohibiting intentional discrimination against religion. And by not discriminating against private religious speech in either content or viewpoint, the Court's interpretation of the Establishment Clause is in line with long-standing free speech doctrine as adhered to in *Rosenberger*. The separationist view that when in "conflict," the Establishment Clause subordinates the Free Exercise and Free Speech Clauses has heightened religious tensions over political matters. Contrary to the neutrality principle promises to reduce political factionalism along religious lines.

As First Amendment law evolves away from separationism and in the direction of neutrality theory, it is inevitable that there will be setbacks. But the neutrality principle has about it the march of an idea, one that is compelling because it unleashes liberty, limits government, and reinvigorates citizen involvement at the neighborhood level. For the sake of America's poor and needy, we can only hope that the Supreme Court's full embrace of neutrality will come soon.

¹This Article was first presented at a workshop on the Constitutionality of Governmental Cooperation with Religious Social Ministries on August 2-3, 1996, at Washington, D.C., sponsored by the Religious Social-Sector Project of the Center for Public Justice.

²Isabelle Wade & Paul C. Lyda Professor of Law, University of Missouri-Columbia. B.S., Iowa State University of Science & Technology, 1971; J.D., Cornell University, 1974.

³The Declaration of Independence, for example, refers to these transcending principles as "self-evident truths," "Creator-endowed inalienable rights," and "the laws of nature and of nature's God." These higher law principles did not necessarily rest upon a

common confession of revealed truth. For some among the Founders, the principles were derived from a faith in reason. But the reliance on transcendent principles, whether extrapolated from reason or revelation, did mean agreement at the level of the moral basis for political action. See, e.g., John G. West, Jr., *The Politics of Revelation & Reason: Religion & Civic Life In The New Nation* (1996):

The Founders eliminated the problem of dual allegiance to God and government by removing God from the authority of the government. . . .

This solution to the theological-political problem in theory, however, required a major corollary to work in practice: a belief that church and state would agree on the moral basis of political action. . . . Only if church and state can agree on the moral standard for political action can (subjugation of religion to state or vice versa) be avoided. In other words, reason (the operating principle of civil government) and revelation (the ultimate standard for religion) must concur on the moral law for the Founders' solution to work.

The Founders, of course, agreed with this proposition. . . . This conceit that reason and revelation agreed on the moral law so permeated the Founding era that the modern reader may miss it because authors of the period more often assumed this proposition than demonstrated it. When citing authority for fundamental propositions, writers of the Founding era appealed to both reason and revelation as a matter of course. *Id.* at 74-75.

²See, for example, James Madison's letter wherein he observes how the Virginia churches had greatly expanded in number and reputation since disestablishment. Letter to Edward Livingston (July 10, 1822), in 3 *Letters and Other Writings of James Madison*, Fourth President of the United States 273, 276 (1865) ("(in) Virginia. . . religion prevails with more zeal and a more exemplary priesthood than it ever did when established. . . . Religion flourishes in greater purity without, than with the aid of Government").

That keenest of observers, Alexis de Tocqueville, sketched this delicate balance in operation during his visits to the America of the 1830s:

Religion, which never intervenes directly in the government of American society, should . . . be considered as the first of their political institutions. . . .

I do not know if all Americans have faith in their religion—for who can read the secrets of the heart?—but I am sure that they think it necessary to the maintenance of republican institutions. That is not the view of one class or party among the citizens, but of the whole nation; it is found in all ranks.

For the Americans the ideals of Christianity and liberty are so completely mingled that it is almost impossible to get them to conceive of the one without the other. . . .

The religious atmosphere of the country was the first thing that struck me on arrival in the United States. The longer I stayed in the country, the more conscious I became of the important political consequences resulting from this novel situation.

In France I had seen the spirits of religion and of freedom almost always marching in opposite directions. In America I found them intimately linked together in joint reign over the same land. My longing to understand the reason for this phenomenon increased daily. To find this out, I questioned the faithful of all communions. . . . I found that (American Catholic priests) all . . .

thought that the main reason for the quiet sway of religion over their country was the complete separation of church and state. I have no hesitation in stating that throughout my stay in America I met nobody, lay or cleric, who did not agree about that. Alexis de Tocqueville, *Democracy In America* 269-72 (J.P. Mayer & Max Lerner, eds., Harper & Row 1966).

³*Os Guinness, The American Hour: A Time of Reckoning and the Once and Future Role of Faith* 18-19 (1993).

⁴See Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (1993); James Davison Hunter, *Culture Wars: The Struggle to Define America* (1991).

⁵Some have puzzled as to why broad coalitions, like that behind the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994), can come together over the meaning of the Free Exercise Clause but not the Establishment Clause. The Free Exercise Clause is about protecting religiously informed conscience, especially freedom for religious minorities to continue practices that are out of step with the general culture. Most everyone who cares about religion agrees on the desirability of protecting these matters. This is not the case, however, with the Establishment Clause. Where the stakes are high, as in the culture wars, there can be little coalition building between social liberals and social conservatives or between theological liberals and theological conservatives.

⁶330 U.S. 1 (1947). While narrowly upholding a state law permitting local authorities to reimburse parents for the cost of transporting children to school, including church-related institutions, the rhetoric and historical method adopted by the Court in *Everson* were separatistic.

⁷See e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2528 (1995) (O'Connor, J., concurring) (contrasting the "neutrality principle" with the "funding prohibition" view of the Establishment Clause); *Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994) ("(The neutrality) principle is well grounded in our case law, as we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges.") *Bowen v. Kendrick*, 487 U.S. 589, 624 (1988) (Kennedy, J., concurring) (characterizing a social service program open to a diverse array of organizations neutral as to religious and nonreligious applicants).

⁸454 U.S. 263 (1981). *Widmar* held that the Free Speech Clause, with its requirement that there be no content-based discrimination, is not overridden by the Establishment Clause. *Id.* at 271-75. Accordingly, a state university was prohibited from denying a student religious organization the same access to facilities provided to other student organizations, thereby permitting the students to meet, pray, sing, and worship on campus.

⁹Religious choices by an individual believer or by a religious group are not differentiated in this Article. Individual rights are akin to the group rights of a church or religious denomination as long as the organization can show injury-in-fact to the purposes or activities of the group itself, or when the organization has third-party standing to assert a rights claim on behalf of its members pursuant to the three-part test set out in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

¹⁰The term "neutrality" can mislead readers into believing that the theory claims to

be substantively neutral. It is not. The theory is neutral only in the sense that government minimizes its role in influencing the religious choices of its citizens, thereby leaving persons free to make these choices for themselves. Government does so, for example, by structuring its social welfare programs to give citizens wide choices, with religious choices being among the available selections.

To further confuse matters, courts and commentators sometimes use "equal" as a substitute for "neutral." See, e.g., Stephen V. Monsma & J. Christopher Soper, eds., *Equal Treatment of Religion in a Pluralist Society* (forthcoming 1997). In this context, "neutrality" and "equality" are intended to convey the same meaning. Whether termed the "neutrality principle" or "equal-treatment review," the theory stakes out substantive positions as to the nature and contemporary value of religion and the purposes of modern government. The theory places a great deal of importance on the religious impulse in human nature. And the theory assigns to government a minimal role in directing religion, seeking to limit government to addressing the reasonable regulatory needs for the protection of organized society.

¹¹One of the conceits of modernism is that humankind acting alone, through reason and scientific observation, can determine universal truths, the Jewish and Christian traditions will test any such "universals" against the special revelation of Scripture. Postmodernists, like observant Jews and traditional Christians, dismiss the professed objectivity or claimed neutrality of modernists as arrogant pretensions. Without embracing the rest of their philosophy, religionists can agree with postmodernists that human reason—and hence one of its products, the positive law—is contingent on time, place, perception, and culture. See generally Stanley J. Grenz, *A Primer on Postmodernism* (1966); Gene Edward Veith, Jr., *Postmodern Times: A Christian Guide to Contemporary Thought and Culture* (1994). Thus, when engaging the church/state debate, observant Jews and traditional Christians may be disarmingly candid and lose nothing in the bargain by conceding that there is no neutral theory concerning the proper interpretation of the Establishment Clause. Rather, the question for Jews and Christians is to determine which theory of church/state relations most nearly comports with the biblical image of life's purpose, as well as the proper role of the political community.

¹²Direct forms of assistance come not just as payments on specified-use grants or purchase-of-service contracts, but in a variety of other forms as well; high-risk loans, low-interest loans, and government-guaranteed loans; tax-exempt low-interest bonds for capital improvements; insurance at favorable premiums; in-kind donations of goods such as used furniture or surplus food; free use of government property, facilities, or equipment; free assistance by government personnel to perform certain tasks; free instruction, consultation, or training by government personnel; and reduced postal rates. Office of Management and Budget, Executive Office of the President, *Catalog of Fed. Domestic Assistance xv-svi* (29th ed. 1995). The catalog lists and defines 15 types of federal assistance. As classified by the General Services Administration, federal benefits and services are provided through seven categories of financial assistance (grants, insurance, donated property, etc.) and eight categories of nonfinancial assistance (training,

counseling, supplying technical literature, investigation of complaints, etc.). *Id.* See also Douglas J. Besharov, *Bottom-up Funding*, in *To Empower People: From State to Civil Society 124* (Michael Novak ed., 2d ed. 1996) (comparing the strengths and weaknesses that arise when funding comes directly and indirectly from government).

¹³ Indirect forms of assistance include: individual income tax credits and deductions; student scholarships, fellowships, and guaranteed loans; and educational vouchers and federal child care certificates. Indirect assistance can be further divided. Vouchers and scholarships, for example, are types of indirect aid where the immediate source of the benefit is the government. On the other hand, indirect benefits such as tax credits and deductions are examples of so called "bottom-up" aid, in which the immediate source of aid is private. The government's role in connection with this second type of indirect assistance is to facilitate the flow of aid by rewarding the private source after the fact. The distinction between these two types of indirect assistance may enter into certain policy debates and decisions made by legislators. However, the Supreme Court has not made use of this distinction for purposes of interpreting the Establishment Clause.

¹⁴ See *infra* notes 90–100 and accompanying text.

¹⁵ 463 U.S. 388 (1983) (upholding a state income tax deduction conferred on school parents to assist in their children's tuition and other educational expenses).

¹⁶ 474 U.S. 481 (1986) (upholding a state vocational grant program to finance a blind individual's training at a sectarian school to obtain a degree to enter a religious vocation).

¹⁷ 509 U.S. 1 (1993) (providing an interpreter to a deaf student attending a parochial high school does not violate the Establishment Clause). Even *Everson v. Board of Educ.*, 330 U.S. 1 (1947), which upheld a state law allowing local governments to provide reimbursement to parents for the expense of transporting their children by bus to school, including to parochial schools, can also be characterized as having subscribed to this direct/indirect distinction.

¹⁸ See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2541 (1995) (Souter, J., dissenting, writing for himself and Justices Stevens, Ginsburg, and Breyer) (acknowledging the rule applied in *Mueller, Witters*, and *Zobrest*).

¹⁹ See 26 U.S.C. §§ 170, 501(c)(3)(1994).

²⁰ 38 U.S.C. §§ 3201–3243 (1994).

²¹ See, e.g., *Federal Pell Grants*, 20 U.S.C. § 1070a (1994); 34 C.F.R. § 690.78. An eligible student for a Pell grant is defined in 20 U.S.C. § 1091 (1994). Students may utilize their grant at an institution of higher education (§ 1088) or other eligible institution (§ 1094). Church-affiliated colleges and universities are not excluded.

²² *The Child Care and Development Block Grant Act of 1990*, 42 U.S.C. §§ 9858–9858q (Supp. 1996). The Act allows parents receiving child care certificates from the government to obtain child care at a center operated by a church or other religious organization, including a pervasively sectarian center. *Id.* at §§ 9858n(2), 9858k(a), 9859c(c)(2)(A)(i)(I).

²³ See § 104(j) of the *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 42 U.S.C. § 604a (1996 Supp.). Section 104 is known by the popular name of "Charitable Choice." Charitable Choice permits states to involve faith-based providers in the delivery of welfare services funded by the federal government though block grants to the states.

Where the form of the assistance is indirect, such as by means of certificates or vouchers, the faith-based providers are not restricted as to their religious activities.

²⁴ To be sure, care must be exercised in the design of the welfare program. If only voluntary sector providers are eligible and if most of these providers are faith-based, then the case law may support overturning the program as having a primary religious effect. See *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (striking down a state educational program that was designed to aid only nonpublic schools); Similar to *Nyquist* is *Sloan v. Lemon*, 413 U.S. 825, 833–35 (1973) (holding unconstitutional a state tuition reimbursement plan available only to parents of nonpublic school students).

Because the plan in *Nyquist* excluded government schools, *Nyquist* is distinguishable from *Mueller, Witters*, and *Zobrest*. See *Durham v. McLeod*, 192 S.E.2d 202 (S.C. 1972), dismissed for want of a substantial federal question, 413 U.S. 902 (1973) (decided on the same day the Court decided *Nyquist*). In *Durham*, the state court had upheld a student loan program wherein students could attend the college of their choice, religious or nonreligious. The Supreme Court apparently approved. Likewise, the Court in *Nyquist* said that educational assistance provisions such as the G.I. Bill do not violate the Establishment Clause even when some GIs choose to attend church-affiliated colleges. 413 U.S. at 782 n.38 (leaving open the option of "some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian/nonsectarian, or public/non-public nature of the institution benefited").

²⁵ See *Norwood v. Harrison*, 413 U.S. 455, 462 (1973); *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (dictum); *Brusca v. State Bd. of Educ.*, 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd mem.*, 405 U.S. 1050 (1972).

²⁶ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *McDaniel v. Paty*, 435 U.S. 618 (1978).

Should such case ever arise, separationists will argue that there is a compelling interest in overriding the Free Exercise Clause, namely the "no aid" interpretation of the Establishment Clause. There are no Supreme Court cases on this precise point. However, the recent case of *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510 (1995), did uphold direct aid to a publication with an overtly religious viewpoint. The Establishment Clause was found not to prohibit the direct funding. Hence, compliance with the Clause was not a compelling governmental interest. See *infra* notes 112–30 and accompanying text.

A recent case in the Sixth Circuit, citing *Church of the Lukumi*, held that the U.S. Army violated the Free Exercise Clause when it excluded religious but not secular child care providers from operating on its bases and receiving various direct benefits. *Hartman v. Stone*, 68 F.3d 973 (6th Cir. 1995). The appeals court went on to hold that the governmental assistance did not advance or endorse religion in violation of the Establishment Clause. In all respects, *Hartman* appears to have correctly applied Supreme Court precedent.

²⁷ The Court has constructed a society in which faith-based providers deliver their welfare services within discrete and clearly defined boundaries easily segregated from the provider's religious beliefs and practices. For a thorough debunking of the Court's sacred/secular dichotomy, see *Laura Underkuffler-Freund, The Separation of the Religious and the Secular: A Foundation*

challenge to First Amendment Theory, 36 *Wm. & Mary L. Rev.* 837 (1995).

²⁸ In neutrality theory, the activities of "government" do not monopolize the "public." At present—as well as historically—faith-based charities comprise a large number of the available voluntary sector social service providers, and they operate many of the most efficient and successful programs. As long as the government's welfare program furthers the public purpose of society's betterment—that is, helping the poor and the needy—it is neutral as to religion if the program involves faith-based providers on an equal basis with all others.

²⁹ In neutrality theory, the independent sector providers of social services who opt to participate in a government's welfare program are not in any primary sense "beneficiaries" of the government's assistance. Because they deliver services to those in need, faith-based providers give far more in value measured by societal betterment than they could possibly receive as an incident of their expanded responsibilities.

³⁰ The Court has not always required proof of actual advancement of religion. In certain instances, the mere presence of such a risk or hazard has been sufficient to strike down the aid program. See *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385, 387 (1985); *Wolman v. Walter*, 433 U.S. 229, 254 (1977); *Meek v. Pittenger*, 421 U.S. 349, 370, 372 (1975); *Levitt v. Committee for Pub. Educ.*, 413 U.S. 474, 480 (1973); cf. *Bowen v. Kendrick*, 487 U.S. 589, 610–12 (1988).

³¹ The meaning of the term "pervasively sectarian" can be gleaned from the cases. In *Roemer v. Board of Public Works*, 426 U.S. 736, 758 (1976) (plurality opinion), the Court turned back a challenge to a state program awarding noncategorical grants to colleges, including sectarian institutions that offered more than just seminarian degrees. In discussion focused on the fostering of religion, the Court said: (T)he primary-effect question is the substantive one of what private educational activities, by whatever procedure, may be supported by state funds. *Hunt (v. McNair)*, 413 U.S. 734 (1973) requires (1) that no state aid at all go to institutions that are so "pervasively sectarian" that secular activities cannot be separated from sectarian ones, and (2) that if secular activities can be separated out, they alone may be funded. 426 U.S. at 755. The Roman Catholic colleagues in *Roemer* were held not be pervasively sectarian. The record supported findings that the institutions employed chaplains who held worship services on campus, taught mandatory religious classes, and started some classes with prayer. However, there was a high degree of autonomy from the Roman Catholic Church, the faculty was not hired on a religious basis and had complete academic freedom except in religion classes, and students were chosen without regard to their religion.

A comparison of the colleges in *Roemer* with the elementary and secondary schools in *Committee for Public Education v. Nyquist*, 413 U.S. 756, 767–68 (1973), clarifies the term "pervasively sectarian." The schools in *Nyquist* that were found to be pervasively sectarian placed religious restrictions on student admissions and faculty appointments, enforced obedience to religious dogma, required attendance at religious services, required religious or doctrinal study, were an integral part of the mission of the sponsoring church, had religious indoctrination as a primary purpose, and imposed religious restrictions on how and what the faculty could teach.

Although the definition of a pervasively sectarian institution has been stated in the foregoing general terms, only church-affiliated primary and secondary schools have ever been found by the Supreme Court to fit the profile. Presumably a church, synagogue, or mosque would also be regarded as pervasively sectarian insofar as it performs sacerdotal functions.

³² See, e.g., *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980) (subsidy for state-prepared testing and recordkeeping required by law); *Wolman v. Walter*, 433 U.S. 229 (1977) (upholding use of public personnel to provide guidance, remedial, and therapeutic speech and hearing services at a neutral site; upholding provision of diagnostic services in the nonpublic school; upholding provision of standardized tests and state scoring); *Meek*, 421 U.S. 349 (loan of secular textbooks); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (secular textbooks).

³³ See *Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids Sch. Dist.*, 473 U.S. 373; *New York v. Cathedral Academy*, 434 U.S. 125 (1977); *Wolman*, 433 U.S. 229; *Meek*, 421 U.S. 349; *Nyquist*, 413 U.S. 756; *Levitt*, 413 U.S. 472; *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

³⁴ See *Roemer*, 426 U.S. 736; *Hunt*, 413 U.S. 734; *Tilton v. Richardson*, 403 U.S. 672 (1971).

³⁵ 175 U.S. 291 (1899).

³⁶ In *Bradfield*, a corporation located in the District of Columbia known as Providence Hospital was chartered in 1864 by act of Congress. The enabling act was facially neutral in that it made no mention of religion, nor was the hospital ostensibly controlled by or associated with a church. Nevertheless, all the directors of the hospital and their successors were "members of a monastic order or sisterhood of the Roman Catholic Church," and title to the real estate on which the hospital buildings were constructed was "vested in the Sisters of Charity of Emmitsburg, Maryland." *Id.* at 297. Federal taxpayers challenged as violative of the Establishment Clause an 1897 appropriation to build on the hospital grounds "an isolating building or ward for the treatment of minor contagious diseases," that when completed was to be turned over to Providence Hospital. *Id.* at 293. This arrangement, alleged plaintiffs, was an instance in which "public funds are being used and pledged for the advancement and support of a private and sectarian corporation." *Id.* For consideration of the question before it, the Court assumed, *arguendo*, that a capital appropriation to a religious corporation would violate the Establishment Clause. The Court said plaintiffs' allegations nonetheless failed to show that Providence Hospital was a religious or sectarian body. Merely because the board of directors was composed entirely of members of the same religion did not make the hospital religious. Without additional evidence, the Court was unwilling to assume that Providence Hospital would act otherwise than in accord with its legal charter, in which its powers by all appearances were secular, having to do with the care of the injured and infirm. Although plaintiffs alleged that the hospital's business was "conducted under the auspices of the Roman Catholic Church," there was no evidence that management of the business was limited to members of that faith or that patients had to be Catholic. *Id.* at 298-99. *Bradfield* turned on the inadequacies of plaintiffs' pleading and evidence. The Court also had a formalistic view of the importance of separate incorporation by means of a facially neutral charter, notwithstanding that the corporation had a de facto interlocking directorate with

a religious order. Accordingly, although the bottom-line result in *Bradfield* was counter to a no-aid view of the Establishment Clause, the Court utilized a separatistic framework for its analysis.

³⁷ 487 U.S. 589 (1994).

³⁸ *Id.* at 600-02, 622.

³⁹ 42 U.S.C. §§ 300z to 300z-10 (1994).

⁴⁰ *Kendrick*, 487 U.S. at 593, 608-09.

⁴¹ *Id.* at 595-96, 605-07.

⁴² *Id.* at 614-15.

⁴³ *Id.* at 608 (quoting *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736, 746 (1976)).

⁴⁴ *Id.* at 609.

⁴⁵ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

⁴⁶ *Kendrick*, 487 U.S. at 602-03.

⁴⁷ *Id.* at 604-05, 613.

⁴⁸ *Id.* at 605-06.

⁴⁹ *Id.* at 606-07.

⁵⁰ *Id.* at 610-11.

⁵¹ *Id.* at 606, 608.

⁵² *Id.* at 611-12.

⁵³ *Id.* at 614.

⁵⁴ *Id.* at 615-17.

⁵⁵ See *supra* note 30 and accompanying text.

⁵⁶ *Kendrick*, 487 U.S. at 623 (O'Connor, J., concurring).

⁵⁷ *Id.* Justice O'Connor went on to warn that evidence of a pattern or practice at HHS of disregarding the concerns of the Establishment Clause on an as-applied basis would, in her view, warrant overturning the entire AFILA. *Id.* at 623-24 (O'Connor, J., concurring).

⁵⁸ In making this distinction, Justice O'Connor utilized the sacred/secular dichotomy. See *supra* note 27. But the dichotomy results in AFILA's constitutionality. In fact, the presumption leads to the facial approval of all welfare programs that permit equal participation by faith-based providers.

⁵⁹ 456 U.S. 228 (1982).

⁶⁰ *Id.* at 244, 246. See also *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Neimotko v. Maryland*, 340 U.S. 268 (1951). Religious organizations most willing to conform to contemporary culture are less sectarian. Conversely, those organizations more conservative in theology and that have resisted acculturation will inevitably appear to civil judges as more sectarian. "To exclude from funding those groups that are more 'sectarian' is to punish those religions which are countercultural while rewarding those groups willing to secularize. A sociologist has identified the 'pervasively sectarian' groups as 'orthodox,' and the 'non-sectarians' as religious 'progressives.'" *Hunter*, *supra* note 4, at 42-46. *Hunter* says the religious "orthodox" are devoted "to an external, definable, and transcendent authority," whereas "progressives" "resymbolize historic faiths according to the prevailing assumptions of contemporary life." *Id.* From the standpoint of wanting to minimize governmental influence on private religious choices, it is hard to imagine a more detrimental rule than for the Supreme Court to penalize the orthodox while rewarding the progressives.

⁶¹ *Kiyas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 702-07 (1994); see *Larson v. Valenta*, 456 U.S. 228, 246 n. 23 (1982). The rationale, in part, is that the Court wants to avoid making affiliation with a particular denomination or type of religious group more attractive. If this were not the law, then merely affiliating with a particular religious group could result in a civil advantage or disadvantage.

⁶² One problem with the requirement of distinguishing between "pervasively" and "non-

pervasively" sectarian organizations is that the level of religiousness of faith-based social service providers is a matter of degree, and there are multiple ways to measure religiousness. Carl H. Esbeck, *The Religious of Religious Organizations as Recipients of Governmental Assistance* 8-9 (1996). Most providers are neither fully sectarian nor fully secularized. Any multifactor test the courts devise will end up favoring some religious and prejudicing others. Sorting through the array of social service providers would be a veritable briar patch and cause the judiciary to violate its own admonitions concerning entanglement.

⁶³ See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2524 (1995) (university should avoid distinguishing between evangelism, on the one hand, and the expression of ideas merely approved by a given religion on the other); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987), and *id.* at 344-45 (Brennan, J., concurring) (recognizing a problem when the government attempts to divine which jobs are sufficiently related to the core of a religious organization as to merit exemption from statutory duties); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (avoiding potentially entangling inquiry into religious practice is desirable); *Widmar v. Vincent*, 454 U.S. 263, 269-70 n.6, 272 n.11 (1981) (holding that inquiries into significance of religious words or events are to be avoided); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (avoiding entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs is desirable). Likewise, in *Jimmy Swaggart Ministries v. California Bd. of Equalization*, 493 U.S. 378, 396-98 (1990), and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 20 (1989) (plurality opinion), the Court cautioned against unnecessarily making distinctions between core religious practices (e.g., worship, doctrinal teaching, distributing sacred literature) and those activities of religious organizations that are more ancillary (e.g., operating a soup kitchen or hospital). For similar reasons, courts are to avoid making a determination concerning the centrality of the belief or practice in question to an overall religious system. See *Lyng v. Northwest Indian Cemetery Ass'n*, 485 U.S. 439, 451 (1988) (rejecting free exercise test that "depend(s) on measuring the effects of a governmental action on a religious objector's spiritual development"); *United States v. Lee*, 455 U.S. 252, 257 (1982) (rejecting government's argument that free exercise claim does not lie unless "payment of social security taxes will . . . threaten the integrity of the Amish religious belief or observance"); *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981) (holding that it is not within the judicial function or competence to resolve religious differences); see also *Employment Div. v. Smith*, 494 U.S. 872, 886-87 (1990).

⁶⁴ *Kendrick*, 487 U.S. at 624-25 (Kennedy J., concurring). Justice Kennedy's opinion was joined by Justice Scalia.

⁶⁵ *Id.* at 624 (Kennedy, J., concurring).

⁶⁶ *Id.* (Kennedy, J., concurring).

⁶⁷ *Id.* at 624-25 (Kennedy, J., concurring).

⁶⁸ Justice Kennedy's opinion is closest to the view of neutrality theorists. But he too falls short. Justice Kennedy would trace the government's funds and disallow any use for the advancement of religion. The neutrality principle, as will be discussed below, *infra* notes 138-43 and accompanying text, requires only that the Court examine the outcome of the welfare program with an eye to determining whether the public purpose is being

served by the social service provider. If so, then the judicial inquiry is at an end, for the government has received full "secular" value in exchange for taxpayer funds.

⁶⁹There is no dispute between separationists and neutrality theorists over whether the Establishment Clause prohibits a tax or user fee earmarked for a religious purpose. It clearly does. See *infra* note 127 and accompanying text. What is disputed is whether monies collected by general taxation and appropriated to support a welfare program that does not discriminate against the participation of faith-based social service providers is constitutional. See *infra* notes 131-45 and accompanying text.

⁷⁰*Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985).

⁷¹*Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (rejecting claim by taxpayers challenging use of revenues for funding of a state program to assist institutions of higher education, including church-affiliated colleges); cf. *United States v. Lee*, 455 U.S. 252, 257 (1982) (requiring Amish employer to pay Social Security tax in violation of his religious beliefs); *United States v. American Friends Serv. Comm.*, 419 U.S. 7 (1974) (per curiam) (holding that Quakers facing federal income tax liability did not have free exercise rights that overrode provision in anti-injunction act barring claimants from suing to enjoin government from collecting tax). The Court has never recognized a free exercise right to object when revenues raised by general taxation are used to assist the poor or needy by involving faith-based providers in the delivery of welfare services.

⁷²The Court has recognized a strong protection of religious conscience found in the Free Speech Clause. See *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977) (sustaining claim by Jehovah's Witness challenging state requirement that motor vehicle license plate bear the motto "Live Free or Die" was violative of freedom of thought, which includes the "right to refrain from speaking at all"); *West Virginia v. Barnette*, 319 U.S. 624, 642 (1943) (public school compulsory flag salute and pledge of allegiance "invades the sphere of intellect and spirit"); see also *United States v. Ballard*, 322 U.S. 78, 86 (1944) ("Freedom of thought, which includes freedom of religious belief, is basic in a society of free men."). But such protection does not extend to taxpayers objecting to the monies being paid to faith-based organizations.

⁷³See, e.g., John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. Contemp. Legal Issues 275, 280-82 (1996) (identifying liberal arguments for church/state separation as, *inter alia*, the protection of society from political strife); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Legal Issues 313, 317 (1996) (one reason for no-establishment principle is to minimize the societal conflict that attends use of governmental force to suppress religion); Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. Contemp. Legal Issues 357, 360-62 (1996) (no-establishment principle arose in response to the grave risk of political disharmony resulting from uncontrolled religious factionalism).

Typically the concern with religion dividing the body politic is buttressed by reference to European religious wars, which were known to the founding generation, as well as by warnings that point to modern-day Northern Ireland, Bosnia, or Lebanon. These are indeed events worthy of avoidance. But separationists omit an obvious distinction between these instances of sectarian

strife and the goal of neutrality theory. The sectarian wars of medieval Europe were wars for religious monopoly. Each side sought to defeat the other so as to establish its own religious hegemony. Neutrality theory has no such goal. Indeed, its goal is just the opposite. If the neutrality principle were to be followed, then government's influence over religion would be minimized and each individual's religious choices would be more fully enabled. See *infra* note 98 and accompanying text.

In their concern for preventing sectarian strife, an additional point overlooked by separationists is that the Establishment Clause (indeed, the entire Bill of Rights) is a check on government—not a check on religion. Thus, the no-establishment principle guards against government's using its power inappropriately taking sides on behalf of a religion. Simply put, the Clause protects people from government. It does not protect people from other people. It does not protect a minority religion from a majority religion. And it does not protect the nonreligious from the religious. Separationists are prone to assume that religious ideologies are more intolerant and absolutist than secular ideologies; thus, they believe that the Establishment Clause is there specifically to hold in check the excesses of religion. But it is only the excesses of government that the Clause can check. See Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 Minn. L. Rev. 1047, 1048, 1089-95, 1102 (1996). In the twentieth century, secular ideologies have proven every bit as violent as the sectarianisms of the Middle Ages.

⁷⁴The most compelling argument for a continued strict separation of church and state is the harm that can befall religion itself when faith-based ministries become unduly involved with governmental programs and benefits. Preserving the autonomy of religious providers is beyond the scope of this Article. This author has touched briefly on the matter elsewhere. See Esbeck, *supra* note 62, at 47-51; Carl H. Esbeck, *Religion and a Neutral State: Imperative or Impossibility?* 15 *Comberland L. Rev.* 67, 80-83 (1984-85). Others have also published on the topic. See, e.g., Besharov, *supra* note 12; Marvin Olasky, *The Corruption of Religious Charities, in To Empower People: From State to Civil Society* ch. 8 (Michael Novak, ed., 2d ed. 1996); Joe Loconte, *The 7 Deadly Sins of Government Funding for Private Charities*, *Policy Rev.*, Mar./Apr. 1997; Amy L. Sherman, *Cross Purposes: Will Conservative Welfare Reform Corrupt Religious Charities?* *Policy Rev.*, Fall 1995, at 58-63; David Walsh, *Irreducible, Inexplicable: The Effort to Carve Out a Utilitarian, Public-Policy Role for Religion Strikes at the Core of Faith*, *Wash. Post*, Mar. 1, 1996, at A17. Nonetheless, the available materials are few and anecdotal, and religious autonomy as an important topic warrants more attention by scholars and judges alike.

⁷⁵There was a time when the Supreme Court, in its interpretation of the Establishment Clause, sought out political divisiveness along religious lines as a violation of the Clause. However, such evidence as a separate element of Establishment Clause doctrine is now repudiated. *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 n.17 (1987); *Lynch v. Donnelly*, 465 U.S. 668 684-85 (1984); *Mueller v. Allen*, 463 U.S. 388, 403-04 n.11 (1983). The foregoing cases essentially rejected broad language in earlier cases. See *Wolman v. Walter*, 433 U.S. 229, 256 (1977)

(*Brennan, J., concurring and dissenting*); *id.* at 258-59 (Marshall, J., concurring and dissenting); *Meek v. Pittenger*, 421 U.S. 349, 374-77 (1975) (*Brennan, J., concurring and dissenting*); *Lemon v. Kurtzman*, 403 U.S. 602, 622-23 (1971). Political divisiveness analysis was heavily criticized because it ran counter to the Court's recognition elsewhere that religious persons and groups have full rights of free speech and political participation. See Edward M. Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 *St. Louis U. L.J.* 205 (1980).

⁷⁶An example of this is found in §104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. §604a (1996 Supp.). Section 104, known by the popular name "Charitable Choice," permits the involvement of faith-based providers in the delivery of welfare services funded by the federal government through block grants to the states. For those faith-based providers that choose to participate, §104(b), (d), and (f) set forth several rights of provider autonomy from excessive governmental regulation.

⁷⁷To these three requisites (a public purpose of social betterment, nondiscrimination, and religious autonomy), neutrality theory adds the right of the ultimate beneficiaries to obtain their services from a non-religious provider if they have a sincere objection to a particular faith-based provider. See *infra* note 138 and accompanying text.

⁷⁸Some argue that the Establishment Clause, while prohibiting the establishment of a single national religion, was nevertheless intended to allow Congress to support all religious denominations on a nonpreferential basis. This is unlikely. When drafting the First Amendment the First Congress was almost entirely negative concerning the Amendment's intent, i.e., the new central government was to have no authority concerning religion. Hence, the Establishment Clause detailed what the new central government could not do rather than what it could do. Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment 198-222* (1986). The Supreme Court rejected nonpreferentialism in *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985) (*O'Connor J., concurring*); *id.* at 113 (*Rehnquist, J., dissenting*). See also *Lee v. Weisman*, 505 U.S. 577, 612-18 (1992) (*Souter, J., concurring*); Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 *Wm. & Mary L. Rev.* 875 (1986). For arguments in support of nonpreferentialism, see *Wallace*, 472 U.S. at 98 (*Rehnquist, J., dissenting*); Robert Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1988); Michael Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1978); Rodney K. Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 *St. John's L. Rev.* 245 (1991).

For present purposes it is important that the neutrality principle not be confused with nonpreferentialism. The distinction is clearly drawn in Justice Thomas's concurring opinion in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2528-30 (1995) (Thomas J., concurring).

⁷⁹Although the Supreme Court has never had before it a situation involving a direct program of aid for religious organizations alone, obiter dicta in various cases suggest that any such program would be unconstitutional. See *Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 702-07 (1994) (legislation

favoring one religious sect is unconstitutional; *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (striking down state aid to private education the benefits of which went almost entirely to religious schools); cf. *Mueller v. Allen*, 463 U.S. at 394, 396 n.6, 398-99 (explaining and distinguishing *Nyquist*).

⁸⁰See supra text accompanying notes 27-29.

⁸¹454 U.S. 263 (1981).

⁸²*Id.* at 271-74.

⁸³Equal Access act, 20 U.S.C. §§ 4071-4074 (1994). The constitutionality of the Act was upheld in the face of an Establishment Clause challenge in *Board of Education v. Mergens*, 496 U.S. 226 (1990).

⁸⁴508 U.S. 384 (1993) (disallowing viewpoint discrimination against a church that had sought to show a film about family life in a forum otherwise open to that subject).

⁸⁵115 S. Ct. 2440 (1995) (finding content-based discrimination in the refusal to permit a controversial group to sponsor a religious display in a civic park). Because *Pinette* is illustrative of the current divisions within the Court over separationism, the case is further discussed infra notes 101-11 and accompanying text.

⁸⁶115 S. Ct. 2510 (1995) (finding viewpoint discrimination in a public university's denial of printing costs for a student publication postulating religious perspectives on current issues). Because *Rosenberger* involved the Court in requiring a state university to finance a student publication that printed religious views—not just the provision of space in a public forum—the case is further discussed infra notes 112-30 and accompanying text.

⁸⁷When the expression is not private speech but speech by government, then the controlling norm remains a separationist model. This seems entirely proper. Government may neither confess inherently religious beliefs nor advocate that individuals profess such beliefs or observe such practices. Several cases illustrate this point. See *Lee v. Weisman* 505 U.S. 577 (1992) (striking down prayer in conjunction with commencement ceremonies at a public junior high); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (disallowing display of nativity scene inside courthouse, but upholding display of menorah outside public building as part of larger holiday scene); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (striking down state law requiring posting of Ten Commandments in public school classrooms); *Epperson v. Arkansas*, 393 U.S. 97 (1969) (striking down state law prohibiting teaching theory of evolution in public schools); *School Dist. v. Schempp*, 374 U.S. 203 (1963) (disallowing devotional reading of Bible and recitation of Lord's Prayer in public schools); *Engel v. Vitale*, 370 U.S. 421 (1962) (disallowing state requirement of daily classroom prayer in public schools); and *McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (disallowing program in which local volunteers came to public school campus to teach religion).

Lynch v. Donnelly, 465 U.S. 668 (1984), and *Marsh v. Chambers*, 463 U.S. 783 (1983), are two aberrations. But *Lynch* and *Marsh*, while antiseparationist to be sure, are not based on equality either. Rather, in their rationales, *Lynch* and *Marsh* are driven by a desire to cling to historical practices dating from a time when America was less religiously plural.

⁸⁸See infra notes 90-100 and accompanying text.

⁸⁹See infra notes 133-35 and accompanying text.

⁹⁰A "benefit" means direct or indirect financial assistance for a public purpose. The

benefit may be in the form of a subsidy, grant, entitlement, loan, or insurance, as well as a tax credit or deduction. A tax exemption, such as that upheld in *Walz v. Tax Commission*, 397 U.S. 664, 676 (1970), is to be distinguished from tax credits and deductions. Credits and deductions are government benefits. A tax exemption, however, is the government's election to "leave religion where it found it," rather than the conferring of a benefit. For First Amendment purposes a tax credit or deduction should all be regarded alike as "tax expenditures," while useful in other areas of fiscal policy, does not make sense in dealing with issues that arise under the Establishment Clause. See *Dean M. Kelley, Why Churches Should Not Pay Taxes* 11-13, 47-57 (1977); *Boris I. Bittker, Churches, Taxes and the Constitution*, 78 *Yale L.J.* 1285 (1969); *Boris I. Bittker & George K. Rahtert, The Exemption of Non-profit Organizations from Federal Income Taxation*, 85 *Yale L.J.* 299, 345 (1976).

⁹¹A "burden" means a regulation, a tax, or a criminal prohibition.

⁹²483 U.S. 327 (1987).

⁹³*Id.* at 335. See also *Trans World Airlines v. Hardison*, 432 U.S. 63, 90 (1977) (Marshall, J., dissenting) (stating that constitutionality of labor law not placed in doubt simply because it requires religion exemption); *Gillette v. United States*, 401 U.S. 437 (1971) (religious exemption from military draft for those who oppose all war does not violate Establishment Clause); *Walz*, 397 U.S. 664 (upholding property tax exemptions for religious organizations); *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding release time program for students to attend religious exercises off public school grounds); *Selective Draft Law Cases*, 245 U.S. 366 (1918) (upholding, inter alia, military service exemptions for clergy and theology students).

Estate of Thorton v. Caldor, Inc., 472 U.S. 703 (1985), is not to the contrary. In *Thorton*, the Court struck down a state law favoring Sabbath observance. However, as explained in *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 145 n.11 (1987), the Sabbath law was struck down because the state cannot utilize classifications that single out a specific religious practices, thereby favoring that particular practice, as opposed to language inclusive of a general category of religious observances. For example, if Saturday as a day of rest is legislatively required to be accommodated by employers, all religious practices to be excused (including all religious days of rest) must be required to be accommodated. If a kosher diet is required to be accommodated by commercial airlines, then all religious practices (including all religious dietary requirements) must be accommodated. If a student absence from school is excused for Good Friday, then all absences for all religious holy days must be accommodated. *Id.*

The special needs of national defense maker *Gillette* distinguishable from *Thorton*. In *Gillette*, Congress was permitted to accommodate "all war" pacifists but not "just war" inductees because to broaden the exemption would invite increased church/state entanglements and would render almost impossible the fair and uniform administration of the Selective Service System. *Gillette*, 401 U.S. at 450. The only decision that does appear to be at odds with the principle followed in *Amos* and these other cases is *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (plurality opinion) (disallowing sales tax exemption for purchases of religious literature).

⁹⁴The Court was most explicit in making the salient distinction between benefits and

burdens in *Amos*. Pointing out that it had previously upheld laws that helped religious groups advance their purposes, the Court explained:

A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. * * * (I)t must be fair to say that the government itself has advanced religion through its own activities and influence. * * *

(T)he Court * * * has never indicated that statutes that give special consideration to religious groups are per se invalid.

483 U.S. at 337, 338.

⁹⁵U.S. Const. amend. I. The Establishment Clause, in its entirety, provides: Congress shall make no law respecting an establishment of religion . . . U.S. Const. amend. I.

⁹⁶*Douglas Laycock, Towards a General Theory of the Religion Clauses*, 81 *Colum. L. Rev.* 1773, 1416 (1981).

⁹⁷*Walz*, 397 U.S. at 676 (It is desirable when government refrains from imposing a burden on religion so as "to complement and reinforce the desired separation insulating each from the other.")

⁹⁸Unleashing personal religious choice as the core value of the Establishment Clause is not being elevated here as good theology, just good jurisprudence. It is good jurisprudence because religious choice as a core value allows each religion to flourish or die in accord with its own appeal. Choice as the controlling legal standard maximizes liberty of both the individual and the religious community, while neutralizing the impact of governmental action on religious life. In these respects it is biased toward a Western conception of human rights and a limited state. This bias, however, is cause for neither surprise nor apology. It is the Founders' legacy, and they were decidedly Western.

Good theology is another matter; for observant Jews and Christians, religious liberty consists not in doing what we choose, but in the freedom to do what we ought. In Jewish and Christian orthodoxy, belief and practice are understood in terms of truth, not choice. The point here is that it should not be troubling that religious choice is the core value when interpreting the Establishment Clause. There is no reason that law and theology must converge on this point. It is sufficient that law maximizes the individual's freedom to pursue a direction indicated by his or her theology.

⁹⁹*In Dodge v. Salvation Army*, 48 *Empl. Prac. Dec.* (CCH) ae 38,619 (S.D. Miss. 1989), a strange case with an unfortunate holding, a religious social service ministry dismissed an employee when it was discovered she was a member of the Wiccan religion and was making unauthorized use of the office photocopy machine to reproduce cultic materials. When the employee sued, claiming religious discrimination, the Salvation Army invoked the "religious organization" exemption in Title VII, 42 U.S.C. § 2000e-1 (1994). The employee countered that the Title VII exemption should not apply because her salary was substantially funded by a federal grant. The trial court agreed with the employee, holding that the Title VII exemption for religious discrimination by a religious organization was unconstitutional on these facts. The trial court thought the exemption advanced religion in a manner violative of the Establishment Clause when applied to government-subsidized jobs. 48 *Empl. Prac. Dec.*, at 55,409.

The holding in *Dodge* was a mistake. The trial court failed to observe the burden/benefit distinction when it ran together the separate issues of benefits and burdens. The

question of whether the Salvation Army may receive a direct benefit consonant with the Establishment Clause is controlled by *Bowen v. Kendrick*, 487 U.S. 589 (1988). The answer to that question, whether “yes” or “no,” is entirely independent of the question of whether the Salvation Army may claim the Title VII exemption from the regulatory burden of compliance with the civil rights law. The Court’s decision in *Amos* holding that the Title VII exemption did not violate the Establishment Clause had already answered the second question in the affirmative. *Amos*, 483 U.S. 327.

A better reasoned result, one contrary to *Dodge*, was reached by the federal court in *Young v. Shawnee Mission Medical Center*, No. CIV.A. 88-2321-3, 1988 LEXIS 12248 (D. Kan. Oct. 21, 1988) (rejecting argument that Seventh-day Adventist Hospital lost its title VII exemption because it received federal Medicare funding).

¹⁰⁰Shifting the analysis from benefits to burdens does not mean moving the baseline from which the neutrality of the government’s action is measured. The baseline is not rooted in history or time, but in the principle of minimizing government’s impact on personal religious choice. As previously conceded, this choice of baseline is not genuinely neutral. See *supra* notes 10-11. Thus, whether assessing the constitutionality of a benefit or a burden, the location of the baseline is consistent, albeit not neutral.

This combination of receiving equal access to governmental benefits but being specially relieved of burdens carried by others occurred in *Hsu v. Roslyn Union Free School District*, 85 F.3d 839 (2d Cir.), cert. denied, 117 S. Ct. 608 (1996). In *Hsu*, a student religious club claimed the right to meet on the campus of a public high school on the same basis as other noncurricular student organizations. The religious club had a right to this benefit under a federal statutory law and the Free Speech Clause. However, when it came to its selection of leaders, the school prohibited the club from selecting only Christians. The appeals court held that as to officers with spiritual functions the club had a right to be relieved of the school’s nondiscrimination requirement. Election of leaders sharing the same faith was essential to the club’s self-definition, as well as the maintenance of its associational character and continued expression as a Christian club. *Id.* at 856-62. Logically, the same result would be reached under the Free Exercise Clause.

¹⁰¹115 S. Ct. 2440 (1995).

¹⁰²115 S. Ct. 2510 (1995).

¹⁰³*Pinette*, 115 S. Ct. at 2445.

¹⁰⁴*Id.* at 2447-50. Justice Thomas wrote separately stating his view that the content of the Klan’s message was political rather than religious. *Id.* at 2450-51 (Thomas, J., concurring).

¹⁰⁵*Id.* at 2455 (O’Connor, J., concurring). Justice O’Connor’s opinion was joined by Justices Souter and Breyer.

¹⁰⁶*Id.* at 2452-53 (O’Connor, J., concurring).

¹⁰⁷*Id.* at 2454 (O’Connor, J., concurring).

¹⁰⁸*Id.* at 2458-59 (Souter, J., concurring).

¹⁰⁹*Id.* at 2464 (Stevens, J., dissenting).

¹¹⁰*Id.* at 2475 (Ginsburg, J., dissenting).

¹¹¹See Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U. Chi. L. Rev. 195, 197-214, 222 (1992) (the First Amendment’s negative bar against an establishment of religion implies an affirmative establishment of a secular public order). To be sure, the Establishment Clause prohibits the establishment of a national church, which of course was no more likely in 1789-91 than it is today. But the Clause does not thereby es-

tablish a new religion of Secularism. Rather, no credo is by law established, setting at liberty the hearts of all to embrace any faith or none, as each is persuaded concerning such matters.

¹¹²115 S. Ct. 2510 (1995).

¹¹³*Id.* at 2515.

¹¹⁴*Id.* at 2514-15.

¹¹⁵*Id.* at 2513.

¹¹⁶*Id.* at 2520-21.

¹¹⁷*Id.* at 2516.

¹¹⁸*Id.* at 2516-18.

¹¹⁹*Id.* at 2515.

¹²⁰*Id.* at 2519-20.

¹²¹*Id.* at 2521 (citations and internal quotations omitted).

¹²²*Id.* at 2522.

¹²³*Id.* at 2523-24.

¹²⁴*Id.* at 2524.

¹²⁵*Id.* at 2528 (O’Connor, J., concurring).

¹²⁶*Id.* at 2526-27 (O’Connor, J., concurring).

¹²⁷*Id.* at 2528 and n.1 (Thomas, J., concurring).

¹²⁸*Id.* at 2528-30 (Thomas, J., concurring). Cf. *id.* at 2536 n.* (Souter, J., dissenting). The Supreme Court has already rejected an argument by federal taxpayers that the Free Exercise Clause is violated should they as contributors to the nation’s general tax revenues have to “pay for” benefits provided to religious organizations. See *supra* note 71.

¹²⁹*Rosenberger*, 115 S. Ct. at 2535-39 (Souter, J., dissenting).

¹³⁰*Id.* at 2544-47 (Souter, J., dissenting).

¹³¹Justice O’Connor’s “no endorsement test,” was first advanced in the Christmas nativity scene case of *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring).

¹³²In a departure from the separationist view, Justice O’Connor’s no endorsement test is not a funds-tracing analysis. Rather, her reliance on the objective observer is an appearance-of-impropriety analysis. Instead of focusing on whether religion is advanced by direct funding, as separationists do, Justice O’Connor is concerned with the civic alienation felt by her observer as she looks at welfare legislation aiding social service providers, including those that are faith-based. Accordingly, the issue for Justice O’Connor is not whether the aid has the effect of advancing religion, but whether it appears to single out religion for favoritism.

¹³³See also *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir.), cert. denied, 117 S. Ct. 360 (1996). Following *Rosenberger* and *Pinette*, the appeals court in *Church on the Rock* struck down a congressional prohibition on private religious speech, thereby permitting access to senior citizen centers funded in part by the federal government. The Free Speech Clause was again the source of the right to equal treatment.

¹³⁴The Free Exercise Clause prevents a legislature from adopting a welfare program in which a broad array of providers, governmental and independent, are eligible, but expressly excluding faith-based providers because they are religious. Thus, equal treatment is commanded by the Free Exercise as well as the Free Speech Clause. See *supra* note 26 and accompanying text.

While admitting to a prima facie violation of the Free Exercise Clause, separationists argue that stopping all funding to religious organizations serves the “compelling interest” of compliance with the Establishment Clause. But this argument was rejected as to the Free Speech Clause in *Rosenberger*, 115 S. Ct. at 2520-25. Moreover, there is nothing in the wording of the First Amendment that suggests that when clauses ostensibly “conflict,” the Establishment Clause overrides

the Free Exercise and Free Speech Clauses. One could just as easily presume that the Free Exercise and Free Speech Clauses supersede the Establishment Clause. Of course, there is no conflict between these Clauses when the neutrality principle is followed. See *infra* notes 155-57 and accompanying text.

¹³⁵It might be asked whether the Court majority would still have found the Establishment Clause defense unsuccessful in *Widmar*, *Lamb’s Chapel*, *Pinette*, and *Rosenberger*, in the absence of the claimants’ successful free speech claim. The answer is “yes.” In each case the free speech and no-establishment questions were considered independently of the other. Never did the Court suggest that the Free Speech Clause overrode the Establishment Clause. In each case the government voluntarily opened a limited public forum, and it was clear the government retained the authority to close the forum to all speakers. Free speech did not add the margin of victory over the no-aid-to-religion defense. What is required of government is that it have a secular purpose for its benefit program. That purpose may be the provision of a forum for a diverse array of speech, but the purpose may also be meeting the welfare needs of the poor.

¹³⁶Pub. L. 104-155, 104th Cong., (1996), signed into law by the President on July 3, 1996.

¹³⁷*Id.* at §4(a)(1).

¹³⁸See §104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. §604a (1996 Supp.). Known by the popular name of “Charitable Choice,” §104 permits states to involve faith-based providers in the delivery of welfare services funded by the federal government through block grants to the states. Subsection 104(e) provides that if a beneficiary has a religious objection to receiving social services from a faith-based provider, he or she has a right to obtain services from a different provider.

¹³⁹This can be accomplished by fiscal audits of monies from governmental sources, as well as by end-result evaluations during performance reviews undertaken to ensure that the needs of the beneficiaries targeted by the legislation are being served. Such intrusions are a tolerable level of interaction between religion and government.

¹⁴⁰An example of this model is found in the regulations to the federal Child Care Block Grant Act of 1990, providing, *inter alia*, certificates to low-income parents who may then “spend” the benefit at the child care provider they select for their child. The regulations state that the monies from such certificates: (3) May be used for child care services provided by a sectarian organization or agency, including those that engage in religious activities, if those services are chosen by the parent; and (4) May be expended by providers for any sectarian purpose or activity, including sectarian worship or instruction. * * *

42 C.F.R. §98.30(c).

¹⁴¹Inquiry into “purpose” may go beyond the mere text or “face” of a statute. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533-35 (1993); see *Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 699 (1994).

Legislative purpose, however, should not be confused with legislative motive. A judicial inquiry may not go into the subjective motive of each legislator supporting a legislative bill. A motive analysis would not only have implications for the denial of religious freedom (*McDaniel v. Paty*, 435 U.S. 616, 641 (1978) (Brennan, J., concurring in the judgment)), but also for violating the separation

of powers (*United States v. O'Brien*, 391 U.S. 367, 383 (1968)). See *Board of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) (plurality opinion) ("Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law.").

¹⁴²To require states to distinguish between "pervasively" and "non-pervasively" sectarian organizations would seem to violate one of the venerable rules of the Establishment Clause, to the effect that government is not to intentionally discriminate among religious groups. *Larson v. Valente*, 456 U.S. 228 (1982). See also *supra* notes 59–63, and accompanying text. Under neutrality theory this inconsistency is avoided.

¹⁴³*Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 780 (1973).

¹⁴⁴See Henry G. Cisneros, U.S. Dep't of Hous. and Urban Dev., *Higher Ground; Faith Communities and Community Building 6-12* (1996) (citing studies and examples of the success of faith-based community development activities); National Inst. on Drug Abuse, U.S. Dep't of Health, Educ. and Welfare, *An Evaluation of the Teen Challenge Treatment Program* (1977) (showing a materially higher success rate for faith-based over secular drug treatment programs for youth); Religious Institutions as Partners in Community Based Development, in *Progressions: A Lilly Endowment Occasional Report* (Feb. 1995) (noting success with community-based development that came only after involving the local church).

¹⁴⁵See *supra* notes 92–97 and accompanying text.

¹⁴⁶See *supra* notes 59–63, 78–79, 87, 93, *infra* notes 149–51 and accompanying texts.

¹⁴⁷"Inherent religious" means those intrinsic and exclusively religious activities of worship and the propagation or inculcation of the sort of matters that comprise confessional statements or creeds. In addition, the term includes the supernatural claims of churches, mosques, synagogues, temples, and other houses of worship, using those words not to identify buildings, but to describe the confessional community around which a religion identifies and defines itself, conducts its worship, teaches doctrine, and propagates the faith to children and adult converts.

Although a view of religion and life as an integrated whole is desirable, for purposes of the Establishment Clause it becomes necessary to recognize that some core beliefs and practices are "inherently religious." The necessity of a fixed boundary in church/state relations requires a uniform legal standard in drawing the line of church/state separation. The line of separation cannot be drawn differently for each religious organization based on its own unique definition of religion. That would amount to governmental discrimination among religions (a violation of the rule stated in *Larson*, 456 U.S. 228 (1982)).

This is not to say that the Supreme Court has resolved all the definitional problems by confining Establishment Clause analysis to matters "inherently religious." The Court's determination as to what is "inherently religious" inevitable will favor the philosophy of modern rationalism (its underlying tenets will appear arguably nonreligious) while disfavoring familiar theistic religions such as Christianity, Judasim, and Islam (their tenets and practices appearing inherently religious). See Phillip E. Johnson, *Concepts*

and *Compromise in First Amendment Religious Doctrine*, 72 Cal. L. Rev. 817, 834–35 (1984). But as stated above, this is a consequence of the impossibility of the Establishment Clause's being "neutral" as to all world views. See *supra* notes 10–11 and accompanying text.

¹⁴⁸The Supreme Court has found that prayer, devotional Bible reading, veneration of the Ten Commandments, classes in confessional religion, and the biblical story of creation are all inherently religious. See *Lee v. Weisman*, 505 U.S. 577 (1991) (prayer); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (creationism); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (prayer); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (Ten Commandments); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (creationism); *School Dist. v. Schempp*, 374 U.S. 203 (1963) (prayer and Bible reading); *Engle v. Vitale*, 370 U.S. 421 (1962) (prayer); *McCullum v. Board of Educ.*, 333 U.S. 203 (1948) (teaching religion).

On the other hand, legislation restricting abortion, Sunday closing laws, rule prohibiting interracial marriage, and teenage sexuality counseling are not inherently religious. See *Bowen v. Kendrick*, 487 U.S. 589 (1988) (teenage counseling); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (interracial marriage); *Harris v. McRae*, 448 U.S. 297 (1980) (abortion restrictions); *McGowan v. Maryland*, 366 U.S. 420 (1961) (Sunday closing law); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961) (Sunday closing law).

¹⁴⁹The Establishment Clause is not violated when a governmental social program merely reflects a moral judgment, shared by some religions, about conduct through beneficial (or harmful) to society. *Kendrick*, 487 U.S. at 604 n.8, 613; *Harris*, 448 U.S. at 319–20; *McGowan*, 366 U.S. at 442; *Hennington v. Georgia*, 163 U.S. 299, 306–07 (1896); see *Bob Jones Univ.*, 461 U.S. at 604 n.30. Thus, overlap between a law's purpose and the moral teaching of some religions does not, without more, render the law one "respecting an establishment of religion."

¹⁵⁰The Supreme Court has held that when a law of general public purpose has a disparate effect on various religious organizations, the Establishment Clause is not violated. *Hernandez v. Commissioner*, 490 U.S. 680, 696 (1989); *Bob Jones Univ.*, 461 U.S. at 604 n. 30; *Larson*, 456 U.S. at 246 n. 23.

¹⁵¹The Supreme Court has held that the Establishment Clause prohibits government from purposefully discriminating among religious groups. *Larson*, 456 U.S. 228; *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

¹⁵²See *F. William O'Brien, The Blaine Amendment 1875-1876*, 41 U. Det. L.J. 137 (1963); Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 Va. L. Rev. 625 (1985). Although dated, a useful work in the area of religion and state constitutions is *Chester James Antieau et al., Religion Under the State Constitutions* (1965).

¹⁵³See *supra* note 144.

¹⁵⁴See *Esbeck, supra* note 62; Stephen V. Monsma, *When Sacred and Secular Mix: Religious Nonprofit Organizations and Public Money* (1996).

¹⁵⁵456 U.S. 228. See *supra* notes 59–60 and accompanying text.

¹⁵⁶See *supra* notes 61–63 and accompanying text.

¹⁵⁷508 U.S. 520 (1993). See *supra* notes 26 and 134.

Madam Chairman, I yield back the balance of my time.

The CHAIRMAN pro tempore. The question is on the amendment, as modified, offered by the gentleman from Indiana (Mr. SOUDER).

The question was taken; and the Chairman pro tempore announced that the ayes appeared to have it.

Mr. EDWARDS. Madam Chairman, I demand a recorded vote, and pending that, I make the point of order that a quorum is not present.

The CHAIRMAN pro tempore. Pursuant to House Resolution 460, further proceedings on the amendment, as modified, offered by the gentleman from Indiana (Mr. SOUDER) will be postponed.

The point of no quorum is considered withdrawn.

Mr. LAZIO. Madam Chairman, I ask unanimous consent to strike the last word.

The CHAIRMAN. Is there objection to the request of the gentleman from New York?

There was no objection.

The CHAIRMAN. The gentleman is recognized for 5 minutes.

Mr. LAZIO. Madam Chairman, I yield to my friend, the gentleman from New York (Mr. WALSH), who was also the very able chairman of the Subcommittee on VA, HUD, and Independent Agencies of the Committee on Appropriations having jurisdiction over the vast majority of housing programs and all the housing programs through HUD concerning the process and prohibition against set-asides.

Mr. WALSH. Madam Chairman, I thank my good friend and colleague, the gentleman from New York (Mr. LAZIO), chairman of the Subcommittee on Housing and Community Opportunity. I thank the gentleman for the important work he is doing today. Homeownership is the American dream, and this legislation will help to make that American dream possible for many, many more.

Just one issue that I would like to discuss briefly. That is Section 402 of this important bill. Because the language of the appropriations bill funds several programs as set-asides within the CDBG account, the language could be construed to prohibit funds for authorized programs such as Youth Build, Habitat for Humanity, and so on.

I know that is not the gentleman's intent, but it is my understanding that the authorizing committee does not intend this as a result. I would just like to ask if my understanding of that is correct.

Mr. LAZIO. Reclaiming my time, Madam Chairman, I want to say to my friend, the gentleman from New York, that it is not the intention nor do we think it is the operation of the bill to prohibit the set-asides that have been authorized for programs like Youth Build or the NCDI, National Community Development Initiative, or self-help housing that helps so many Americans through Habitat for Humanity and other self-help programs.

It is not the intention nor do we think it is the operation of this bill to do that, but I would be happy to work with the gentleman to ensure that that intent is clearly reflected in the bill as signed by the President.

Mr. WALSH. I thank the gentleman for his very constructive response. I look forward to working with him as we go down the path towards the conference to make sure that our committee's responsibilities are not hamstrung. I thank the gentleman from New York.

Mr. LAZIO. I want to thank the gentleman also.

I want to take this opportunity to say that the gentleman from New York (Mr. WALSH) really, in the short time that he has been the chairman of the Subcommittee on VA, HUD, and Independent Agencies on the appropriations side, has just been doing a really remarkable job for America and for this Congress. He has proven to be a very able advocate for housing programs and for many of the programs he just referenced.

I want to take this opportunity to thank him.

The CHAIRMAN pro tempore. It is now in order to consider amendment No. 12 printed in House Report 106-562.

AMENDMENT NO. 12 OFFERED BY MR. GARY MILLER OF CALIFORNIA

Mr. GARY MILLER of California. Madam Chairman, I offer an amendment.

The CHAIRMAN. The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment 12 offered by Mr. GARY MILLER of California:

At the end of the bill add the following new title:

TITLE XII—PUBLIC AND ASSISTED HOUSING DRUG ELIMINATION PROGRAM
SEC. 1201. ELIGIBLE PUBLIC HOUSING AGENCIES.

Section 5125 of the Anti-Drug Abuse Act of 1988 (42 U.S.C. 11904) is amended—

(1) in subsection (b)—
(A) in paragraph (2)(B), by inserting “or (4)” before the period at the end;

(B) by redesignating paragraph (4) as paragraph (5); and

(C) by inserting after paragraph (3) the following new paragraph:

“(4) EFFECTIVE PHA’S.—The class established under this paragraph is the class of public housing agencies that demonstrate, to the satisfaction of the Secretary, that—

“(A) the agency, in cooperation with local law enforcement agencies, has largely eliminated drug and crime problems in the public housing project or projects for which the assistance will be used;

“(B) the agency needs assistance under this chapter to sustain the low incidence of crime and drug problems in and around such public housing; and

“(C) such assistance will be used to expand police services in and around such public housing.”; and

(2) in subsection (c)(1), by inserting before the semicolon the following: “except that this paragraph shall not apply in the case of agencies eligible for assistance under this chapter pursuant to subsection (b)(4)”.

The CHAIRMAN pro tempore. Pursuant to House Resolution 460, the gentleman from California (Mr. GARY MILLER) and a Member opposed each will control 5 minutes.

The Chair recognizes the gentleman from California (Mr. GARY MILLER).

MODIFICATION TO AMENDMENT NO. 12 OFFERED BY MR. GARY MILLER

Mr. GARY MILLER of California. Mr. Chairman, I ask unanimous consent to modify the amendment.

The CHAIRMAN pro tempore. The Clerk will report the modification.

The Clerk read as follows:

Amendment No. 12, as modified, offered by Mr. GARY MILLER of California:

The amendment as modified is as follows:
At the end of the bill add the following new title:

TITLE XII—PUBLIC AND ASSISTED HOUSING DRUG ELIMINATION PROGRAM
SEC. 1201. ELIGIBLE PUBLIC HOUSING AGENCIES.

Section 5125 of the Anti-Drug Abuse Act of 1988 (42 U.S.C. 11904) is amended—

(1) in subsection (b)—
(A) in paragraph (2)(B), by inserting “or (4)” before the period at the end;

(B) by redesignating paragraph (4) as paragraph (5); and

(C) by inserting after paragraph (3) the following new paragraph:

“(4) EFFECTIVE PHA’S.—The class established under this paragraph is the class of public housing agencies that demonstrate, to the satisfaction of the Secretary, that—

“(A) the agency received grants under this chapter to carry out eligible activities under this chapter, as in effect immediately before the effective date under section 503(a) of the Quality Housing and Work Responsibility Act of 1998;

“(B) the agency, in cooperation with local law enforcement agencies, has largely eliminated drug and crime problems in the public housing project or projects for which the assistance will be used;

“(C) the agency needs to maintain or expand police services in and around such public housing to sustain the low incidence of crime and drug problems in and around such public housing; and

“(D) the agency needs, and will use, assistance under this chapter to maintain or expand such police services;

except that such agencies shall be eligible under this paragraph only during the 5-year period beginning upon initial eligibility under this paragraph.”; and

(2) in subsection (c)(1), by inserting before the semicolon the following: “except that this paragraph shall not apply in the case of agencies eligible for assistance under this chapter pursuant to subsection (b)(4)”.

Mr. GARY MILLER of California (during the reading). Madam Chairman, I ask unanimous consent that the modification to the amendment be considered as read and printed in the RECORD.

The CHAIRMAN pro tempore. Is there objection to the request of the gentleman from California?

There was no objection.

The CHAIRMAN pro tempore. Is there objection to the modification of the amendment offered by the gentleman from California?

There was no objection.

The CHAIRMAN pro tempore. The amendment is modified.

Mr. GARY MILLER of California. Madam Chairman, I yield myself such time as I may consume.

Madam Chairman, I have worked with the chairman and the gentleman from New York (Mr. LAZIO), and have worked on a compromise to include my amendment in H.R. 1776. I would like to thank the chairman for his assistance in this.

Low-income housing tenants often become the victims of crime and drug operations. Oftentimes lax management and oversight give way to blight. As drug use and drug-related crimes rose alarmingly in the 1980s, Congress responded by authorizing the Public Housing Drug Elimination Program in 1998.

Historically, local housing authorities applied for these funds when HUD issued a notice of funds availability, and housing authorities competed with one another for the available funding. This is no longer the case. Instead, in 1999, the competitive application process was changed to a formula funding program. This new criteria for Public Housing Drug Elimination Program funds favor those agencies with severe problems in both public housing and in the community.

As a result, housing authorities in communities that run good public housing programs and have established successful drug prevention programs with these program funds are no longer eligible to receive funding under this program. HUD has pulled the rug from beneath the feet of all the programs that are successful.

My amendment will modify the “eligible local housing authority” definition for the HUD Drug Elimination Program grants to continue support for projects that are meeting their goals. Local housing authorities that can show evidence through local efforts between the housing authority and the police department that they are eliminating drugs and crime problems in their public housing will remain eligible.

However, instead of encouraging success, we are currently promoting failure. The city of Upland, California, Upland is a perfect example. Upland was one of many housing authorities which faced severe drug and crime problems. However, they chose to take control and started a program, with the full support of the Upland police department in 1980. Today Upland has one of the lowest crime rates in public housing in the country.

In 1997 and 1998, Upland's police department handled 27,000 cases. Of those cases in those 2 years, only 31 cases occurred in the housing authority. That is a tremendous improvement over what it was prior to their becoming proactive in trying to eliminate the problem.

Now the city is facing financial difficulties, and it is becoming increasingly difficult for the police department to give the program the same level of service it has in the past. Under HUD's definition, they are no longer eligible to compete for the funds they used to receive for the program to fight drugs simply because they have done a great job.

I applaud the city of Upland for this tremendous achievement, but it is not the only success story now that is now on the verge of failure. Every Member of Congress is faced with the same challenge in their district, and we cannot leave them in the cold.

In conclusion, this is a simple case of HUD rewarding housing authorities for doing a bad job, and punishing those who have worked hard to reduce or eliminate the drug problem in their communities. These successful communities should be able to continue their programs using the Public Housing Drug Elimination Program funds.

If they are unable to continue the drug prevention efforts, the problem will return. Would we only allow a doctor to give enough medicine to reduce the illness, or would we give enough medicine to cure the disease?

I would like to thank the chairman, the gentleman from New York (Mr. LAZIO), for his help in working on this bill.

Madam Chairman, I reserve the balance of my time.

The CHAIRMAN pro tempore. Does any Member claim the time in opposition?

Mr. LAFALCE. Madam Chairman, I rise not in opposition, but ask unanimous consent to comment on the amendment.

The CHAIRMAN pro tempore. Is there objection to the request of the gentleman from New York?

There was no objection.

The CHAIRMAN. The gentleman from New York (Mr. LAFALCE) is recognized for 5 minutes.

□ 1445

Mr. LAFALCE. Madam Chairman, I yield myself such time as I may consume.

Madam Chairman, I certainly understand the purposes of the amendment and it is a noble purpose. We do not want to penalize any organization that has been successful. On the other hand, we must recognize that the amendment will also raise some significant issues that I hope we can address in a collegial way in conference. In a zero-fund game, this is going to mean that other PHAs with higher crime rates would not be able to get funds. This reverses the direction of the program.

It is nice to have something that is objective. Whenever we start getting subjectivity into it, we make the judgmental process as to who gets funds much more difficult. I hope we can work on this in conference.

Mr. GARY MILLER of California. Madam Chairman, I yield myself such time as I may consume.

Madam Chairman, I would like to respond to that. This does not reverse the direction of the program. The program always did this for years until about May of 1999 when HUD changed the program. What we are saying here is the program worked before. We were working with communities that were being funded. They were eliminating drug and crime problems.

We changed that situation in May of last year. It is wrong. Now we are punishing those programs that are successful. We are saying let us change the program back to cover them for a 5-year period once they have it under control to eliminate this problem.

Madam Chairman, I yield back the balance of my time.

Mr. LAFALCE. Madam Chairman, I yield back the balance of my time.

The CHAIRMAN pro tempore (Mrs. EMERSON). The question is on the amendment, as modified, by the gentleman from California (Mr. GARY MILLER).

The amendment, as modified, was agreed to.

Mr. LAZIO. Madam Chairman, I ask unanimous consent to strike the last word.

The CHAIRMAN pro tempore. Is there objection to the request of the gentleman from New York?

There was no objection.

Mr. LAZIO. Madam Chairman, I yield to the gentlewoman from New York (Mrs. KELLY), who has a concern which she would like to address.

Mrs. KELLY. Madam Chairman, I rise to enter into a brief colloquy with my friend, the gentleman from New York (Mr. LAZIO). As a strong supporter of the manufactured housing section of this legislation, especially the Manufactured Housing Consensus Committee, I want to clarify the intent of who the members of this committee should be.

To be in line with the guidelines of the American National Standards Institute, there must be a balance of interest represented on the manufactured housing committee. While the revised language of the bill strives to achieve such a balance so that all affected interests have the opportunity for a fair and an equitable participation without the dominance of any single interest, it is unfortunate that examples of such representation, namely industry groups such as home builders, architects, engineers and the like, were removed from the final legislative language.

Madam Chairman, I know it was not the intent of the committee to exclude representation by such groups. I want to make clear my understanding that the committee fully supports and endorses their participation. It is vital that industry groups, such as home

builders, who in many cases are actual users of manufactured housing in that they develop sites for the placement of manufactured homes, have a place on the committee. It is vital that industries involved in the purchase, construction or site development of manufactured housing, such as the home building industry, be members of the committee to ensure that the intent of ANSI's requirements for due process are met.

Madam Chairman, I ask my friend, the gentleman from New York (Mr. LAZIO), to confirm what the intent of the committee was on the possible membership of the Manufactured Housing Consensus Committee.

Mr. LAZIO. Madam Chairman, I want to thank the gentlewoman from New York (Mrs. KELLY) and I want to say that I wholeheartedly agree with her understanding of the possible membership of the Manufactured Housing Consensus Committee. It was the intent of our committee that home builders, architects, and engineers would be eligible to participate in the committee.

Mrs. KELLY. Madam Chairman, I thank my friend, the gentleman from New York (Mr. LAZIO), and I urge the passage then of this important legislation.

Mr. LAZIO. Madam Chairman, I again ask unanimous consent to strike the last word.

The CHAIRMAN pro tempore. Is there objection to the request of the gentleman from New York?

There was no objection.

Mr. LAZIO. Madam Chairman, I want to say to this House that we have the opportunity here to do what I think America wants to see us do, to come together and to find solutions to difficult problems. They call it the American dream, this idea of homeownership, that Americans have embraced from its earliest years, the sense of a yearning for self-sufficiency and independence; for a place which they could gather their family together.

I would say to this House, as important as it is that we focus on education, and we do that in this bill, as important as it is that we deal with health care or a job, if at the end of the day one does not have a place to go to to have a roof over their head, to organize their life, to bring their family together, to discuss their problems and to talk about their dreams, it is very difficult to walk down that pathway of opportunity.

That is what this bill is about in the end. It is about local flexibility and empowerment. It is about opportunity for more Americans who want to achieve homeownership to move out of that basement apartment and to go to their very first closing to get that key that opens their front door and to have that sense of satisfaction that they can say this is mine; this is the place where my children are going to play in the

backyard; where we are going to go over homework at the kitchen table; this is a place where we are going to dream for the future; it is going to be the main investment that we ever make that we will draw against to send our children to college, to get a better school education than maybe we ever dreamed of, maybe to adopt the dream of starting their own business.

It is the engine of the American dream. It is no mystery why America leads the world in the rate of homeownership. It is not just a fiscal restraint. It is not just the way we treat housing in the Tax Code. It is something very deep inside America.

For many years we have tried to provide assistance to Americans for homeownership and in many ways we have succeeded, but there are still so many, so many Americans that are left behind. So we are trying to embrace these new tools. We are saying to Americans who qualify for Federal rental assistance that they will be able to use that rental assistance to actually own their own home.

We are saying to Americans, who look at the barrier of closing costs or down-payment needs or the points up front, that we are going to create these loan pools that even the private sector can contribute to, that they will be able to draw from so that they can get over the obstacle of closing to own their own home.

It is a wonderful thing that this House can do today, to bring the joy of homeownership to more Americans.

Madam Chairman, I remember one Habitat for Humanity event that I was at where a woman in tears grabbed the dirt in front of this home to be and she held it up in her fist and she said, I cannot believe this is going to be mine.

It is not a give-away. It is a partnership. It is giving a little bit of help to the people most in need so we can make stronger communities, healthier communities, a better life and a better America. So I ask this House, in a bipartisan fashion, the way this bill was put together, to come together and pass this bill overwhelmingly; to send a message to America that we can do very good things that affect the quality of life; that we can overcome challenges; that we can put our political differences aside; that we can choose empowerment and opportunity; that we can choose consumer choice and flexibility and local control; that we can choose healthier communities and a healthier America.

I urge this House to pass this bill with a resounding yes vote.

SEQUENTIAL VOTES POSTPONED IN COMMITTEE OF THE WHOLE

The CHAIRMAN pro tempore. Pursuant to House Resolution 460, proceedings will now resume on those amendments on which further proceedings were postponed in the following order: Amendment No. 4 offered

by the gentleman from Oklahoma (Mr. COBURN), Amendment No. 7 offered by the gentlewoman from California (Ms. WATERS) of California, Amendment No. 10 by the gentleman from Ohio (Mr. TRAFICANT) of Ohio, and Amendment No. 11 offered by the gentleman from Indiana (Mr. SOUDER).

The Chair will reduce to 5 minutes the time for any electronic vote after the first vote in this series.

AMENDMENT NO. 4 OFFERED BY MR. COBURN

The CHAIRMAN pro tempore. The pending business is the demand for a recorded vote on Amendment No. 4 offered by the gentleman from Oklahoma (Mr. COBURN) on which further proceedings were postponed and on which the noes prevailed by voice vote.

The Clerk will redesignate the amendment.

The Clerk redesignated the amendment.

RECORDED VOTE

The CHAIRMAN pro tempore. A recorded vote has been demanded.

A recorded vote was ordered.

The vote was taken by electronic device, and there were—ayes 72, noes 355, not voting 7, as follows:

[Roll No. 106]
AYES—72

Aderholt
Archer
Barton
Bliley
Blunt
Boehner
Borski
Brady (TX)
Bryant
Buyer
Callahan
Cannon
Chabot
Chenoweth-Hage
Coburn
Collins
Cooksey
Cunningham
DeLay
DeMint
Doolittle
Dreier
Duncan

Goode
Goodlatte
Gordon
Goss
Graham
Gutknecht
Hastings (WA)
Hayes
Hayworth
Hill (MT)
Hoekstra
Hostettler
Hunter
Jones (NC)
Kasich
Kingston
Largent
Latham
Lewis (KY)
Linder
Manzullo
McIntosh
Miller (FL)
Moran (KS)

Nussle
Pease
Peterson (PA)
Pitts
Pombo
Portman
Radanovich
Riley
Rogan
Rohrabacher
Ryun (KS)
Sanford
Scarborough
Schaffer
Shadegg
Smith (MI)
Stump
Sununu
Tancredo
Thomas
Tiaht
Toomey
Watts (OK)
Wolf

NOES—355

Abercrombie
Ackerman
Allen
Andrews
Baca
Bachus
Baird
Baker
Baldacci
Baldwin
Ballenger
Barcia
Barr
Barrett (NE)
Barrett (WI)
Bartlett
Bass
Bateman
Becerra
Bentsen
Bereuter
Berkley
Bertram
Berry
Biggart
Bilbray
Bilirakis

Bishop
Blagojevich
Blumenauer
Boehler
Bonilla
Bonior
Bono
Boswell
Boucher
Boyd
Brady (PA)
Brown (FL)
Brown (OH)
Burr
Burton
Calvert
Camp
Canady
Capps
Capuano
Cardin
Carson
Castle
Chambliss
Clays
Clayton
Clement

Clyburn
Coble
Combest
Condit
Conyers
Costello
Cox
Coyne
Cramer
Crowley
Cubin
Cummings
Danner
Davis (FL)
Davis (IL)
Davis (VA)
Deal
DeFazio
DeGette
Delahunt
DeLauro
Deutsch
Diaz-Balart
Dickey
Dicks
Dingell
Dixon

Doggett
Dooley
Doyle
Dunn
Edwards
Ehlers
Ehrlich
Emerson
Engel
English
Eshoo
Etheridge
Evans
Everett
Ewing
Farr
Fattah
Filner
Fletcher
Foley
Forbes
Ford
Fossella
Fowler
Frank (MA)
Franks (NJ)
Frelinghuysen
Frost
Gallegly
Ganske
Gejdenson
Gekas
Gephardt
Gibbons
Gilchrest
Gillmor
Gilman
Gonzalez
Goodling
Granger
Green (TX)
Green (WI)
Greenwood
Gutierrez
Hall (OH)
Hall (TX)
Hansen
Hastings (FL)
Hefley
Herger
Hill (IN)
Hilleary
Hilliard
Hinchey
Hinojosa
Hobson
Hoeffel
Holden
Holt
Hooley
Horn
Houghton
Hoyer
Hulshof
Hutchinson
Hyde
Inslee
Isakson
Istook
Jackson (IL)
Jackson-Lee (TX)
Jefferson
Jenkins
John
Johnson (CT)
Johnson, E.B.
Johnson, Sam
Jones (OH)
Kanjorski
Kaptur
Kelly
Kennedy
Kildee
Kilpatrick
Kind (WI)
King (NY)
Klecicka
Klink
Knollenberg
Kolbe
Kucinich

Kuykendall
LaFalce
LaHood
Lampson
Lantos
Larson
LaTourette
Lazio
Leach
Lee
Levin
Lewis (CA)
Lewis (GA)
Lipinski
LoBiondo
Lofgren
Lowey
Lucas (KY)
Lucas (OK)
Luther
Maloney (CT)
Maloney (NY)
Markey
Martinez
Mascara
Matsui
McCarthy (MO)
McCarthy (NY)
McCollum
McCrery
McDermott
McGovern
McHugh
McInnis
McIntyre
McKeon
McKinney
McNulty
Meehan
Meek (FL)
Meeks (NY)
Menendez
Metcalf
Mica
Miller
Miller, Gary
Miller, George
Minge
Mink
Moakley
Mollohan
Moore
Moran (VA)
Morella
Murtha
Myrick
Nadler
Napolitano
Neal
Nethercutt
Ney
Northup
Norwood
Oberstar
Obey
Olver
Ortiz
Ose
Owens
Oxley
Packard
Pallone
Pascarella
Pastor
Paul
Payne
Pelosi
Peterson (MN)
Petri
Phelps
Pickering
Pickett
Pomeroy
Porter
Price (NC)
Pryce (OH)
Quinn
Rahall
Ramstad
Rangel
Regula

Reyes
Reynolds
Rivers
Roemer
Rogers
Ros-Lehtinen
Rothman
Roukema
Roybal-Allard
Royce
Rush
Ryan (WI)
Sabo
Salmon
Sanchez
Sanders
Sandlin
Sawyer
Saxton
Schakowsky
Scott
Sensenbrenner
Serrano
Sessions
Shaw
Shays
Sherman
Sherwood
Shimkus
Shows
Simpson
Sisisky
Skeen
Skelton
Slaughter
Smith (NJ)
Smith (TX)
Smith (WA)
Snyder
Souder
Spence
Spratt
Stabenow
Stark
Stearns
Stenholm
Strickland
Stupak
Sweeney
Talent
Tanner
Tauscher
Tauzin
Taylor (MS)
Taylor (NC)
Terry
Thompson (CA)
Thompson (MS)
Thornberry
Thune
Thurman
Tierney
Towns
Traficant
Turner
Udall (CO)
Udall (NM)
Upton
Velazquez
Visclosky
Vitter
Walden
Walsh
Wamp
Waters
Watkins
Watt (NC)
Waxman
Weiner
Weldon (PA)
Weller
Wexler
Weygand
Whitfield
Wicker
Wilson
Wise
Woolsey
Wu
Wynn
Young (AK)
Young (FL)

NOT VOTING—7

Campbell Rodriguez Weldon (FL)
Cook Shuster
Crane Vento

□ 1516

Messrs. HEFLEY, GANSKE, SHAYS, BARR of Georgia, CRAMER and SAM JOHNSON of Texas changed their vote from “aye” to “no.”

Mr. ROGAN and Mr. MORAN of Kansas changed their vote from “no” to “aye.”

So the amendment was rejected.

The result of the vote was announced as above recorded.

ANNOUNCEMENT BY THE CHAIRMAN PRO TEMPORE

The CHAIRMAN pro tempore (Mrs. EMERSON). Pursuant to the House Resolution 460, the Chair announces that she will reduce to a minimum of 5 minutes the period of time within which a vote by electronic device may be taken on each amendment on which the Chair has postponed further proceedings.

AMENDMENT NO. 7 OFFERED BY MS. WATERS

The CHAIRMAN pro tempore. The pending business is the demand for a recorded vote on the amendment offered by the gentlewoman from California (Ms. WATERS) on which further proceedings were postponed and on which the noes prevailed by voice vote.

The Clerk will redesignate the amendment.

The Clerk redesignated the amendment.

RECORDED VOTE

The CHAIRMAN pro tempore. A recorded vote has been demanded.

A recorded vote was ordered.

The vote was taken by electronic device, and there were—ayes 60, noes 367, not voting 7, as follows:

[Roll No. 107]

AYES—60

Abercrombie	Hall (TX)	Owens
Bishop	Hastings (FL)	Paul
Brady (PA)	Hastings (WA)	Payne
Brown (FL)	Jackson (IL)	Pease
Carson	Jackson-Lee (TX)	Rangel
Chenoweth-Hage	Jefferson	Rush
Clay	Johnson, E. B.	Sanders
Clayton	Johnson, Sam	Sanford
Clyburn	Jones (OH)	Scarborough
Coburn	Kasich	Shadegg
Conyers	Kilpatrick	Slaughter
Cox	LaFalce	Stark
Cummings	Lee	Sununu
Davis (IL)	Lewis (GA)	Thompson (MS)
DeGette	McCarthy (MO)	Thurman
Dixon	McDermott	Toomey
Engel	McIntosh	Towns
Fattah	McKinney	Waters
Filner	McNulty	Watt (NC)
Gephardt	Meek (FL)	
Gutknecht		

NOES—367

Ackerman	Baldwin	Bentsen
Aderholt	Ballenger	Bereuter
Allen	Barcia	Berkley
Andrews	Barr	Berman
Archer	Barrett (NE)	Berry
Armey	Barrett (WI)	Biggert
Baca	Bartlett	Bilbray
Bachus	Barton	Bilirakis
Baird	Bass	Blagojevich
Baker	Bateman	Billey
Baldacci	Becerra	Blumenauer

Blunt	Green (TX)	Minge
Boehert	Green (WI)	Mink
Boehner	Greenwood	Moakley
Bonilla	Gutierrez	Mollohan
Bonior	Hall (OH)	Moore
Bono	Hansen	Moran (KS)
Borski	Hayes	Moran (VA)
Boswell	Hayworth	Morella
Boucher	Hefley	Murtha
Boyd	Herger	Myrick
Brady (TX)	Hill (IN)	Nadler
Brown (OH)	Hill (MT)	Napolitano
Bryant	Hilleary	Neal
Burr	Hilliard	Nethercutt
Burton	Hinchey	Ney
Buyer	Hinojosa	Northup
Callahan	Hobson	Norwood
Calvert	Hoefel	Nussle
Camp	Hoekstra	Oberstar
Canady	Holden	Obey
Cannon	Holt	Olver
Capps	Hookey	Ortiz
Capuano	Horn	Ose
Cardin	Hostettler	Oxley
Castle	Houghton	Packard
Chabot	Hoyer	Pallone
Chambliss	Hulshof	Pascarell
Clement	Hunter	Pastor
Coble	Hutchinson	Pelosi
Collins	Hyde	Peterson (MN)
Combest	Inslee	Peterson (PA)
Condit	Isakson	Petri
Cooksey	Istook	Phelps
Costello	Jenkins	Pickering
Coyne	John	Pickett
Cramer	Johnson (CT)	Pitts
Crowley	Jones (NC)	Pombo
Cubin	Kanjorski	Pomeroy
Cunningham	Kaptur	Porter
Davis (FL)	Kelly	Portman
Davis (VA)	Kennedy	Price (NC)
Deal	Kildee	Pryce (OH)
DeFazio	Kind (WI)	Quinn
Delahunt	King (NY)	Radanovich
DeLauro	Kingston	Rahall
DeLay	Kleczka	Ramstad
DeMint	Klink	Regula
Deutsch	Knollenberg	Reyes
Diaz-Balart	Kolbe	Reynolds
Dickey	Kucinich	Riley
Dicks	Kuykendall	Rivers
Dingell	LaHood	Roemer
Doggett	Lampson	Rogan
Dooley	Lantos	Rogers
Doolittle	Largent	Rohrabacher
Doyle	Larson	Ros-Lehtinen
Dreier	Latham	Rothman
Duncan	LaTourrette	Roukema
Dunn	Lazio	Roybal-Allard
Edwards	Leach	Royce
Ehlers	Levin	Ryan (WI)
Ehrlich	Lewis (CA)	Ryun (KS)
Emerson	Lewis (KY)	Sabo
English	Linder	Salmon
Eshoo	Lipinski	Sanchez
Etheridge	LoBiondo	Sandlin
Evans	Loftis	Sawyer
Everett	Lowey	Saxton
Ewing	Lucas (KY)	Schaffer
Farr	Lucas (OK)	Schakowsky
Fletcher	Luther	Scott
Foley	Maloney (CT)	Sensenbrenner
Forbes	Maloney (NY)	Serrano
Ford	Manzullo	Sessions
Fossella	Markey	Shaw
Fowler	Martinez	Shays
Frank (MA)	Mascara	Sherman
Franks (NJ)	Matsui	Sherwood
Frelinghuysen	McCarthy (NY)	Shimkus
Frost	McCollum	Shows
Gallely	McCrery	Shuster
Ganske	McGovern	Simpson
Gejdenson	McHugh	Sisisky
Gekas	McInnis	Skelton
Gibbons	McIntyre	Smith (MI)
Gilchrest	McKeon	Smith (NJ)
Gillmor	Meehan	Smith (TX)
Gilman	Meeks (NY)	Smith (WA)
Gonzalez	Menendez	Snyder
Goode	Metcalf	Souder
Goodlatte	Mica	Spence
Goodling	Millender-	Spratt
Gordon	McDonald	Stabenow
Goss	Miller (FL)	Stearns
Graham	Miller, Gary	Stenholm
Granger	Miller, George	

Strickland	Tiahrt	Weiner
Stump	Tierney	Weldon (PA)
Stupak	Trafficant	Weller
Sweeney	Turner	Wexler
Talent	Udall (CO)	Weygand
Tancredo	Udall (NM)	Whitfield
Tanner	Upton	Wicker
Tauscher	Velazquez	Wilson
Tauzin	Visclosky	Wise
Taylor (MS)	Vitter	Wolf
Taylor (NC)	Walden	Woolsey
Terry	Walsh	Wu
Thomas	Wamp	Wynn
Thompson (CA)	Watkins	Young (AK)
Thornberry	Watts (OK)	Young (FL)
Thune	Waxman	

NOT VOTING—7

Campbell Danner Weldon (FL)
Cook Rodriguez
Crane Vento

□ 1527

Mr. HILLIARD and Mr. PALLONE changed their vote from “aye” to “no.”

Mr. STARK, Ms. LEE, Mr. KASICH, Mrs. CHENOWETH-HAGE, and Mr. SCARBOROUGH changed their vote from “no” to “aye.”

So the amendment was rejected.

The result of the vote was announced as above recorded.

AMENDMENT NO. 10 OFFERED BY MR. TRAFICANT

The CHAIRMAN pro tempore. The pending business is the demand for a recorded vote on the amendment offered by the gentleman from Ohio (Mr. TRAFICANT) on which further proceedings were postponed and on which the noes prevailed by voice vote.

The Clerk will redesignate the amendment.

The Clerk redesignated the amendment.

RECORDED VOTE

The CHAIRMAN. A recorded vote has been demanded.

A recorded vote was ordered.

The vote was taken by electronic device, and there were—ayes 225, noes 201, not voting 8, as follows:

[Roll No. 108]

AYES—225

Ackerman	Cardin	Fattah
Aderholt	Chenoweth-Hage	Fletcher
Andrews	Clement	Foley
Archer	Clyburn	Forbes
Armey	Coburn	Ford
Baca	Collins	Fossella
Ballenger	Cooksey	Fowler
Barcia	Costello	Frost
Bartlett	Cramer	Gallely
Bass	Crowley	Gephardt
Biggert	Cubin	Gibbons
Bilbray	Cunningham	Gilchrest
Bilirakis	Davis (VA)	Gillmor
Bishop	Deal	Gilman
Bilely	DeFazio	Goodling
Blunt	Delahunt	Gordon
Boehner	DeLay	Granger
Bonilla	Deutsch	Green (TX)
Bonior	Diaz-Balart	Gutknecht
Borski	Dickey	Hall (OH)
Brady (PA)	Doolittle	Hall (TX)
Brown (FL)	Doyle	Hinojosa
Brown (OH)	Dreier	Hobson
Bryant	Duncan	Horn
Burr	Edwards	Houghton
Burton	Ehrlich	Hoyer
Buyer	Emerson	Hunter
Callahan	Engel	Hyde
Calvert	English	Istook
Camp	Evans	Jackson-Lee (TX)
Canady	Everett	Jenkins
Cannon	Ewing	

Johnson, E. B. Mica
 Jones (OH) Millender-
 Kanjorski McDonald
 Kaptur Miller, Gary
 Kasich Mink
 Kelly Moakley
 Kennedy Mollohan
 Kildee Murtha
 King (NY) Nadler
 Kingston Napolitano
 Klink Neal
 Knollenberg Nethercutt
 Kucinich Ney
 Kuykendall Norwood
 LaFalce Nussle
 Lampson Oberstar
 Latham Ortiz
 LaTourette Ose
 Lazio Owens
 Lee Packard
 Levin Pallone
 Lewis (CA) Pascarell
 Lewis (KY) Pastor
 Lipinski Payne
 Lofgren Pease
 Lowey Peterson (PA)
 Lucas (OK) Pickering
 Maloney (CT) Portman
 Maloney (NY) Pryce (OH)
 Manzullo Quinn
 Markey Radanovich
 Martinez Rahall
 Mascara Rangel
 McCarthy (NY) Regula
 McCollum Reynolds
 McCreery Riley
 McGovern Rogan
 McHugh Rohrabacher
 McIntosh Ros-Lehtinen
 McKeon Rothman
 McKinney Ryan (WI)
 McNulty Ryun (KS)
 Menendez Sawyer
 Metcalf

NOES—201

Abercrombie Doggett
 Allen Dooley
 Bachus Dunn
 Baird Ehlers
 Baker Eshoo
 Baldacci Etheridge
 Baldwin Farr
 Barr Filner
 Barrett (NE) Frank (MA)
 Barrett (WI) Franks (NJ)
 Barton Frelinghuysen
 Bateman Ganske
 Becerra Gejdenson
 Bentsen Gekas
 Bereuter Gonzalez
 Berkley Goode
 Berman Goodlatte
 Berry Goss
 Blagojevich Graham
 Blumenauer Green (WI)
 Boehlert Greenwood
 Bono Gutierrez
 Boswell Hansen
 Boucher Hastings (FL)
 Boyd Hastings (WA)
 Brady (TX) Hayes
 Capps Hayworth
 Capuano Hefley
 Carson Herger
 Castle Hill (IN)
 Chabot Hill (MT)
 Chambliss Hilleary
 Clay Hilliard
 Clayton Hinchey
 Coble Hoeffel
 Combest Hoekstra
 Condit Holden
 Conyers Holt
 Cox Hooley
 Coyne Hostettler
 Cummings Hulshof
 Davis (FL) Hutchinson
 Davis (IL) Inslee
 DeGette Isakson
 DeLauro Jackson (IL)
 DeMint Jefferson
 Dicks John
 Dingell Johnson (CT)
 Dixon

Scarborough Roukema
 Schakowsky Roybal-Allard
 Serrano Royce
 Sessions Rush
 Shaw Sabo
 Sherman Salmon
 Sherwood Sanchez
 Shimkus Sanders
 Shuster Sandlin
 Siskiny Sanford
 Sken Saxton
 Skelton Schaffer
 Smith (NJ) Scott
 Smith (TX) Sensenbrenner
 Souder Shadegg
 Spence Shays
 Stabenow Shows
 Strickland Simpson

NOT VOTING—8
 Campbell Danner
 Cook Pombo
 Crane Rodriguez
 Thornberry Tiahrt
 Tierney Turner
 Toomey Udall (CO)
 Turner Udall (NM)
 Upton Velazquez
 Vitter Walden
 Watt (NC) Waxman
 Waxman Weygand
 Whitfield Wise
 Woolsey Wu

□ 1537

Mr. HOLT and Mr. EHLERS, changed their vote from “aye” to “no.”
 Messrs. DEFAZIO, KASICH, PALLONE, STRICKLAND, Mrs. WILSON, Mrs. MALONEY of New York, and Ms. SCHAKOWSKY, changed their vote from “no” to “aye.”
 So the amendment was agreed to.
 The result of the vote was announced as above recorded.

AMENDMENT NO. 11, AS MODIFIED, OFFERED BY MR. SOUDER

The CHAIRMAN pro tempore (Mrs. EMERSON). The pending business is the demand for a recorded vote on Amendment No. 11, as modified, offered by the gentleman from Indiana (Mr. SOUDER) on which further proceedings were postponed on which the ayes prevailed by voice vote.

The Clerk will designate the amendment.
 The Clerk designated the amendment.

RECORDED VOTE

The CHAIRMAN pro tempore. A recorded vote has been demanded.
 A recorded vote was ordered.
 The vote was taken by electronic device, and there were—ayes 299, noes 124, not voting 11, as follows:

[Roll No. 109]

AYES—299

Aderholt Bonilla
 Archer Bono
 Armey Borski
 Baca Boucher
 Bachus Boyd
 Baker Brady (PA)
 Ballenger Brady (TX)
 Barcia Bryant
 Barr Burr
 Barrett (NE) Burton
 Bartlett Buyer
 Barton Calvert
 Bass Camp
 Bentsen Canady
 Bereuter Cannon
 Berkeley Capps
 Berman Castle
 Berry Chabot
 Biggert Chambliss
 Bilbray Clement
 Bilirakis Coble
 Bishop Coburn
 Bliley Collins
 Blunt Combest
 Boehlert Condit
 Boehner Cooksey

Everett Ewing
 Fattah Fletcher
 Fletcher Foley
 Forbes Fossella
 Fowler Franks (NJ)
 Franks (NJ) Frelinghuysen
 Gallegly Ganske
 Ganske Gekas
 Gekas Gibbons
 Gibbons Gilchrest
 Gilchrest Gillmor
 Gilman Gilman
 Goode Goodlatte
 Goodlatte Goodling
 Goodling Gordon
 Gordon Goss
 Goss Graham
 Graham Granger
 Granger Green (TX)
 Green (TX) Green (WI)
 Green (WI) Greenwood
 Gutknecht Hall (OH)
 Hall (OH) Hall (TX)
 Hall (TX) Hastings (WA)
 Hastings (WA) Hayes
 Hayes Hayworth
 Hayworth Hefley
 Hefley Herger
 Herger Hill (IN)
 Hill (IN) Hill (MT)
 Hill (MT) Hilleary
 Hilleary Hinojosa
 Hinojosa Hoekstra
 Hoekstra Holden
 Holden Horn
 Horn Hostettler
 Hostettler Houghton
 Houghton Hulshof
 Hulshof Hunter
 Hunter Hutchinson
 Hutchinson Hyde
 Hyde Isakson
 Isakson Istook
 Istook Jackson-Lee
 Jackson-Lee (TX)
 (TX) Jefferson
 Jefferson Jenkins
 Jenkins John
 John Johnson (CT)
 Johnson (CT) Johnson, Sam
 Johnson, Sam Jones (NC)
 Jones (NC) Kanjorski
 Kanjorski Kasich
 Kasich Kelly
 Kelly Kildee
 Kildee King (NY)
 King (NY) Kingston
 Kingston Klink
 Klink Knollenberg
 Knollenberg Kolbe
 Kolbe Kucinich
 Kucinich Kuykendall
 Kuykendall LaFalce
 LaFalce LaHood
 LaHood Lampson
 Lampson Lantos
 Lantos Largent
 Largent Latham
 Latham LaTourette
 LaTourette Lazio
 Lazio Leach
 Leach Lewis (CA)
 Lewis (CA) Lewis (KY)
 Lewis (KY) Linder
 Linder Lipinski
 Lipinski LoBiondo
 LoBiondo Lucas (KY)
 Lucas (KY) Lucas (OK)
 Lucas (OK) Lucas (TX)
 Lucas (TX) Maloney (CT)
 Maloney (CT) Maloney (NY)
 Maloney (NY) Maloney (NY)
 Maloney (NY) Manzullo
 Manzullo Markey
 Markey Martinez
 Martinez Mascara
 Mascara McCarthy (NY)
 McCarthy (NY) McCollum
 McCollum McCreery
 McCreery McGovern
 McGovern McHugh
 McHugh McIntosh
 McIntosh McKeon
 McKeon McKinney
 McKinney McNulty
 McNulty Menendez
 Menendez Metcalf

NOES—124

Abercrombie Chenoweth-Hage
 Ackerman Clay
 Allen Clayton
 Andrews Clyburn
 Baird Conyers
 Baldacci Coyne
 Baldwin Cummings
 Barrett (WI) Davis (FL)
 Bateman Davis (IL)
 Becerra DeFazio
 Blagojevich DeGette
 Blumenauer DeLauro
 Bonior Deutsch
 Boswell Dingell
 Brown (FL) Dixon
 Brown (OH) Doggett
 Capuano Edwards
 Cardin Engel
 Carson Etheridge

Farr
 Filner
 Ford
 Frank (MA)
 Frost
 Gejdenson
 Gephardt
 Gonzalez
 Gutierrez
 Hansen
 Hastings (FL)
 Hilliard
 Hinchey
 Hoeffel
 Holt
 Hooley
 Hoyer
 Inslee
 Jackson (IL)

Johnson, E.B. Minge
 Jones (OH) Mink
 Kaptur Morella
 Kennedy Nadler
 Kilpatrick Oberstar
 Kind (WI) Obey
 Kleczka Olver
 Larson Owens
 Lee Strickland
 Levin Pallone
 Lewis (GA) Pastor
 Lofgren Paul
 Lowey Payne
 Luther Pelosi
 Matsui Pickett
 McDermott Pomeroy
 McGovern Rivers
 McKinney Rothman
 Meek (FL) Roybal-Allard
 Menendez Sabo
 Millender Sanchez
 McDonald Sanders
 Miller, George Sawyer
 Schakowsky

NOT VOTING—11

Callahan Danner
 Campbell Hobson
 Cook Rangel
 Crane Rodriguez

□ 1544

So the amendment was agreed to.

The result of the vote was announced as above recorded.

The CHAIRMAN pro tempore (Mrs. EMERSON). The question is on the committee amendment in the nature of a substitute, as amended.

The committee amendment in the nature of a substitute, as amended, was agreed to.

The CHAIRMAN pro tempore. Under the rule, the Committee rises.

Accordingly, the Committee rose; and the Speaker pro tempore (Mr. LAHOOD) having assumed the chair, Mrs. EMERSON, Chairman pro tempore of the Committee of the Whole House on the State of the Union, reported that that Committee, having had under consideration the bill (H.R. 1776) to expand homeownership in the United States, pursuant to House Resolution 460, she reported the bill back to the House with an amendment adopted by the Committee of the Whole.

The SPEAKER pro tempore. Under the rule, the previous question is ordered.

Is a separate vote demanded on any amendment to the committee amendment in the nature of a substitute adopted by the Committee of the Whole? If not, the question is on the amendment.

The amendment was agreed to.

The SPEAKER pro tempore. The question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed and read a third time, and was read the third time.

The SPEAKER pro tempore. The question is on the passage of the bill.

The question was taken; and the Speaker pro tempore announced that the ayes appeared to have it.

RECORDED VOTE

Mr. LINDER. Mr. Speaker, I demand a recorded vote.

A recorded vote was ordered.

The vote was taken by electronic device, and there were—ayes 417, noes 8, not voting 9, as follows:

[Roll No. 110]

AYES—417

Abercrombie DeGette
 Ackerman Delahunt
 Adersholt DeLauro
 Allen DeLay
 Andrews DeMint
 Archer Deutsch
 Arney Diaz-Balart
 Baca Dickey
 Bachus Dicks
 Baird Dingell
 Baker Dixon
 Baldacci Doggett
 Baldwin Dooley
 Ballenger Doolittle
 Barcia Doyle
 Barr Dreier
 Barrett (NE) Duncan
 Barrett (WI) Dunn
 Bartlett Edwards
 Barton Ehlers
 Bass Ehrlich
 Bateman Emerson
 Becerra Engel
 Bentsen English
 Bereuter Eshoo
 Berkley Etheridge
 Berman Evans
 Berry Everrett
 Biggert Ewing
 Bilbray Farr
 Billakis Fattah
 Bishop Filner
 Blagojevich Fletcher
 Bliley Foley
 Blumenauer Forbes
 Blunt Ford
 Boehlert Fossella
 Boehner Fowler
 Bonilla Frank (MA)
 Bonior Franks (NJ)
 Bono Frelinghuysen
 Borski Frost
 Boswell Gallegly
 Boucher Ganske
 Boyd Gejdenson
 Brady (PA) Gekas
 Brady (TX) Gephardt
 Brown (FL) Gibbons
 Brown (OH) Gilchrest
 Bryant Gillmor
 Burr Gonzalez
 Burton Goode
 Buyer Goodlatte
 Calvert Goodling
 Camp Gordon
 Canady Goss
 Cannon Graham
 Capps Granger
 Capuano Green (TX)
 Cardin Green (WI)
 Carson Greenwood
 Castle Gutierrez
 Chabot Gutknecht
 Chambliss Hall (OH)
 Chenoweth-Hage Hall (TX)
 Clay Hansen
 Clayton Hastings (FL)
 Clement Hastings (WA)
 Clyburn Hayes
 Coble Hayworth
 Collins Hergert
 Combest Hill (IN)
 Condit Hill (MT)
 Conyers Hilleary
 Cooksey Hilliard
 Costello Hinchey
 Cox Hinojosa
 Coyne Hobson
 Cramer Hoeffel
 Crowley Hoekstra
 Cubin Holden
 Cummings Holt
 Cunningham Hooley
 Davis (FL) Horn
 Davis (IL) Houghton
 Davis (VA) Hoyer
 Deal Hulshof
 DeFazio Hunter

Mollohan
 Moore
 Moran (KS)
 Moran (VA)
 Morella
 Murtha
 Myrick
 Nadler
 Napolitano
 Neal
 Nethercutt
 Ney
 Northup
 Norwood
 Nussle
 Oberstar
 Obey
 Olver
 Ortiz
 Ose
 Owens
 Oxley
 Packard
 Pallone
 Pascrell
 Pastor
 Payne
 Pease
 Pelosi
 Peterson (MN)
 Kind (WI)
 Peterson (PA)
 Petri
 Phelps
 Pickering
 Siskis
 Pickett
 Pitts
 Pombo
 Pomeroy
 Porter
 Portman
 Price (NC)
 Pryce (OH)
 Quinn
 Radanovich
 Rahall
 Ramstad
 Rangel
 Regula
 Reyes
 Reynolds
 Riley
 Rivers

Roemer
 Rogan
 Rogers
 Rohrabacher
 Ros-Lehtinen
 Rothman
 Roukema
 Roybal-Allard
 Royce
 Rush
 Ryan (WI)
 Ryun (KS)
 Sabo
 Salmon
 Sanchez
 Sanders
 Sandlin
 Sawyer
 Saxton
 Scarborough
 Schaffer
 Schakowsky
 Scott
 Serrano
 Sessions
 Shaw
 Sha's
 Sherman
 Sherwood
 Shimkus
 Shows
 Shuster
 Simpson
 Siskis
 Skeen
 Skelton
 Slaughter
 Smith (MI)
 Smith (NJ)
 Smith (TX)
 Smith (WA)
 Snyder
 Souder
 Spence
 Spratt
 Stabenow
 Stark
 Stearns
 Stenholm
 Strickland
 Stump
 Stupak

Sununu
 Sweeney
 Talent
 Tancredo
 Tanner
 Tauscher
 Tauzin
 Taylor (MS)
 Taylor (NC)
 Terry
 Thomas
 Thompson (CA)
 Thompson (MS)
 Thornberry
 Thune
 Thurman
 Tiahrt
 Tierney
 Toomey
 Towns
 Traficant
 Turner
 Udall (CO)
 Udall (NM)
 Upton
 Velazquez
 Visclosky
 Vitter
 Walden
 Walsh
 Wamp
 Waters
 Watkins
 Watt (NC)
 Watts (OK)
 Waxman
 Weiner
 Weldon (PA)
 Weller
 Wexler
 Weygand
 Whitfield
 Wicker
 Wilson
 Wise
 Wolf
 Woolsey
 Wu
 Wynn
 Young (AK)
 Young (FL)

NOES—8

Coburn Istook
 Hefley Paul
 Hostettler Sanford

NOT VOTING—9

Callahan
 Campbell
 Cook

Crane
 Danner
 Gilman

Rodriguez
 Vento
 Weldon (FL)

□ 1602

So the bill was passed.

The result of the vote was announced as above recorded.

A motion to reconsider was laid on the table.

AUTHORIZING THE CLERK TO MAKE CORRECTIONS IN THE EN-GROSSMENT OF H.R. 1776, AMERICAN HOMEOWNERSHIP AND ECONOMIC OPPORTUNITY ACT OF 2000

Mr. LAZIO. Mr. Speaker, I ask unanimous consent that in the engrossment of the bill, H.R. 1776, just passed, the Clerk be authorized to make technical corrections and conforming changes to the bill.

The SPEAKER pro tempore (Mr. LAHOOD). Is there objection to the request of the gentleman from New York?

There was no objection.