



The Roundtable

On Religion and Social Welfare Policy

Government Relationships with Faith-Based Providers: The State of the Law Transcript

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RICHARD NATHAN: Good morning. My name is Dick Nathan, and I am proud to be the Director of the Rockefeller Institute of Government, which is conducting the Roundtable on Religion and Social Welfare Policy project. The Rockefeller Institute is the public policy research arm of the State University of New York, which is the nation's largest system of public higher education. The Institute is a think tank on state and local government, and domestic public policy management and finance are special areas of our concern and interest.

The role of the Roundtable is to be a knowledge network, to bring together the best expertise, the best information about what is happening in this important new field in which political leaders are urging, supporting and pushing to have faith-based organizations more involved in social services and social welfare activities. Our job is not to take sides but to help people know about and get good information about what is happening in this field. We see our job as to educate and not advocate; providing a service function by bringing together expertise and sharing information on this big, important subject facing the country.

Today we are presenting a paper we're very proud of: "Government Partnership With Faith-based Social Service Providers, the State of the Law," written by two professors at George Washington University Law School: Professor Ira "Chip" Lupu and Professor Robert Tuttle. Bob Tuttle is going to make the presentation. Chip Lupu, who's a wonderful close partner, is ill today. We're very sorry about that and wish him a speedy recovery. David Wright, Bryan Jackson, and Kathleen Campbell of our staff are here. David is the commissioner and director of all of our work for the Roundtable, and he's doing a bang-up job. We have a very active website and we are going to put up on our website a way in which you can query and get answers about today's paper and today's subject: the law, federal state and contractual laws and practices about how faith-based groups can operate in this field.

We have a number of guests here that we're very pleased to have joining us. I probably should mention everybody in the room, but I do want to mention Jill Schumann, CEO of Lutheran Services of America; John Porter, director of the Office of Faith-Based Initiatives, Department of Education who spoke at our last meeting; Jim Davids of the Department of Justice; Jack Calhoun and Rev. Mark Scott of the National Crime Prevention Council, a sister organization supported by the Pew religion program for its work in this area; Melissa Rogers of the Pew Forum on Religion and Civic Life; Roger Connor of Search for Common Ground, we've been getting a lot of wonderful help from the group that he's assembled, as a group of critics to help us make sure we're covering all sides of all the issues we reach into; and Julie Sulc from The Pew Charitable Trusts -- it's been wonderful working with Julie, and we're very indebted to The Trusts.

Chip Lupu, who is unable to be here today, is a research professor at G.W. Law School. He's been working with us in wonderful ways. Chip has a Harvard law degree, practiced law, was a professor in residence at the Department of Justice, and is a nationally recognized scholar in his field. And today's presenter is Robert Tuttle.

Bob Tuttle received his law degree from George Washington University Law School and got a Ph.D. in religion, religion ethics at the University of Virginia, Charlottesville. He is co-director with Chip of the legal tracking project of the Roundtable, and it's been wonderful working with them. Bob will present. I will then introduce our two interrogators, Paul Bather and Feather Houstoun, and following their questions to Bob, we'll open up to questions from our audience. Bob, we welcome you.

ROBERT TUTTLE: Thanks, Dick, for the kind introduction. I want to thank especially the folks at The Pew Charitable Trusts in the religion group, Julie Sulc, Kimon Sargent and Luis Lugo for first conjuring up the idea of the roundtable and generously supporting it. The Rockefeller Institute, Dick, David Wright, Bryan Jackson, Jim Feck, and Kathleen Campbell for the help and support that they give us. If you look at the first page of the report you'll see a listing of our student research assistants whom we've relied on greatly, and have contributed much to this report; Feather Houstoun and Paul Bather, who've generously agreed to read this report, to come here today and to grill us from several different perspectives, and we look forward -- I look forward to that; and to you all for braving the weather this morning and coming out. Chip is deeply sorry that he's not able to join us and we do hope that he will be well soon.

We've studied this project, this area for the past year, and we certainly don't know everything there is to know about this. But I think we have a coherent story to tell about the state of the law on the subject. I want to emphasize that it is a work in progress and we do invite your information, your critiques, and your analysis. We have benefited much from conversation with many of you in the room over the past year and really do look at this as an ongoing and iterative process of conversations.

The report has six major findings that are listed on the first and second page in the executive summary, and I'm going to run through those and try to unpack them a little bit, but mainly want to open it up for questions after we have comments and questions from Feather and Paul.

The first of our findings relates to the question of direct financing as a constitutional matter. If we'd been talking about this 25 years ago, it would have been a relatively simple story to tell. Largely through cases that focused on schools, courts had deemed any program that included funding to an institution that was pervasively sectarian -- that is, one where faith-intensive education is going on -- any such program was presumptively unconstitutional.

It's important to see that the court's focus, now thinking 25 years ago, was on the nature and character of the organization as a whole, not the specific activities carried out. And it asked questions of whether the aid given to such an institution would advance religion. If monitoring whether or not the aid was given to advance religion would excessively entangle state and church, it would be held unconstitutional, and indeed most such programs were held unconstitutional. Over the past 25 years a great deal has changed. Our report discusses the leading cases over the last 25 years: *Bowen v. Kendrick* in 1988 dealing with social service programs, specifically the Adolescent

Family Life Act; *Agostini v. Felton* in 1997 in the context of schools, which opens the way for a much more nuanced, some would say complicated or convoluted, reading of the Establishment clause, which allows direct aid given to religious institutions.

And then, two years ago in the very important, really transformative case of *Mitchell v. Helms*, a federal program that involved the loan of educational materials to schools. Earlier cases had involved textbook loans, textbook loans to parents, though still with some sense of the aid going to the schools. But *Mitchell* involved teaching materials that were not clearly restricted in the way they could be used. What I mean by that is they involved VCRs, computers, things that could be used for religious purposes, but of course could be used for secular purposes as well; a very close, complicated case.

The program was upheld six to three. The court splintered in its decision. As many of you know there were four neutralists who said whether or not there's a religious use of the property is irrelevant to the outcome, the real question is whether the aid is neutrally distributed. Three on the other side maintained the line of strict separation. They said that any aid that is divertible to a religious activity, and clearly the computers, the VCRs were divertible to religious activities, violated the constitution. And then two in the middle group, Justices O'Connor and Breyer, O'Connor wrote. They said you have to look carefully at the operation of the program. The key question is whether the activity is religious indoctrination -- the activity that's actually being supported -- not whether it is potentially so, and certainly not whether the institution is pervasively sectarian. The government may not authorize or permit diversion, in fact, but the materials in this program were restricted to secular uses, and the court said we're not going to strike down the program as a whole. That's a very important decision in that respect.

The *Mitchell* case, the four in the neutralist camp explicitly repudiated the old idea of pervasively sectarian institutions. O'Connor and Breyer don't repudiate the idea, but severely weaken its underpinnings by saying, "we're going to take a close look at the specific activity, not the overall nature of the institution." Is the doctrine of pervasively sectarian institutions dead? If not, it's as close as possible to being dead. The new law of direct financing, now in the present: There's no general bar, we believe, on financing organizations because of their sectarian character or degree. But government may not pay for religious activity, that is, activities that would make the government responsible for indoctrination, religious formation, or worship.

It's important to see here -- and if you get nothing out of this two hours this morning or at least the 35 minutes of my talking, get this one point. The constitutional limitation is not restricted to worship, instruction or proselytizing. Those are the three characteristics of religion that usually show up. I joke about them as being the marks of the church as far as the constitution is concerned. The constitution prohibits direct financing of those activities, yes, but a wider range of activities as well. Any place where the government could reasonably be imputed to have direct engagement with religious experience, to direct religious instruction, that's the prohibited field, not just things that are intrinsically, solely religious. So even if a program involves secular purposes, like

substance abuse treatment, if the program is thickly religious, direct public funding of it clearly still violates the constitution.

Indirect financing is a somewhat different story, also in flux over the past 25 years, but change that's less dramatic than the direct financing story. Vouchers or beneficiary choice financing is financing where the government, at least in one form, gives aid to an individual, the individual then has a choice of where that aid will be delivered. There are of course complications about this, but that's the general structure.

Early Establishment clause cases upheld some forms of in-kind benefits, such as bus tokens for schools, textbooks. But in the early 1970s in a case called *Nyquist*, the court struck down a program that gave massive indirect aid. This was a beneficiary -- this was a tuition plan that gave parents of students in New York the chance to redeem vouchers at any number of parochial or other private schools, mainly parochial schools. The court struck that down and said there's no way to see this except as a direct -- or as a functional channeling of money to sectarian institutions. Since the *Nyquist* case, however, the court has in a number of decisions started to say, well, certain kinds of beneficiary choice programs might be fine. We know that in some form this is okay because we've allowed higher education through the GI bill and other uses of government funds to end up through beneficiary choice in the hands of sectarian institutions.

But now it's crept back from higher education into secondary education, and then this past summer in *Zelman v. Simmons-Harris*, upholding the Cleveland voucher case, the court says that as long as there is a formally neutral program and as long as there is true beneficiary choice, it doesn't matter if money ends up in the hands of sectarian institutions. The crucial point in this, in contrast to the direct program, is what happens with the money when it gets into the hand of the religious institution. In the direct grant program or direct financing program it's clear that money cannot be used for religious activities. In the indirect financing programs, the court places no such restriction on the use of funds. To the extent that the Bush administration or others are interested in a true level playing field where religious activities in religious institutions can be supported, as long as they are focused on the secular purpose of the social service, that would be, it seems to me, the place to look.

So where do these developments leave a charitable choice movement? Well, there really isn't a whole lot of speculation you need to do because we've had a rich array of cases over the last year in ways that none of us could have expected last January.

The most important such case actually involves two decisions. It's hard not to think of this case, *Freedom From Religion v. McCallum*, as a law professor's dream. This is something you'd write as an exam question. There are two different financing streams given to Faith Works, Wisconsin. The first financing stream is direct payment. It is for a substance abuse treatment program and the substance abuse treatment program was thickly religious. The court said, when the program was challenged, that the government couldn't provide direct aid to a program that is essentially religious indoctrination. It has obviously a secular purpose, but the means of getting to that secular

purpose are so thickly religious that the government is imputed the indoctrination. That program was held unconstitutional.

In contrast, and a sharp and lovely contrast it was, at least for us who were looking at these through law professor's eyes, there was also an indirect financing scheme through the Department of Corrections. Drug offenders with a certain profile were given the choice among a number of substance abuse treatment programs. The money that they were entitled to use for their substance abuse treatment would then be directed to the program they chose. In contrast to the direct financing program, which was unconstitutional, the court upheld the indirect financing program in light of *Zelman v. Simmons-Harris*. The case is on appeal.

Chip and I have some questions about whether there was true beneficiary choice in the Faith Works case. The probation officer, who had the authority to send the person to jail, presented the choice. There wasn't a wide array of choices. As a matter of fact, the Faith Works program was the only long-term residential program. Nevertheless, it starkly illustrates the distinction between direct and indirect financing. At least on that principle, the court's decision was sound.

Another case, *American Civil Liberties Union v. Foster*, in Louisiana, involved the governor's program on abstinence. A number of directly financed parties used the money to teach explicitly religious lessons about abstinence. The court had no trouble finding that this was a violation of the constitution. It issued a preliminary injunction back in the summer and said the program first off has to make sure that its funds are not being directed to specifically religious messages, and second has to establish some mechanism for monitoring, and third, it excluded pervasively sectarian institutions.

That preliminary injunction was dissolved by a settlement in mid-November that does two things that are important. First, it crystallizes the prohibitions on religious use of the money and the requirement of monitoring. But second, for our purposes, it simply drops the whole reference to pervasively sectarian institutions, which we think to be a fair reflection of the state of the law. The government can fund faith-based institutions, it cannot fund religious activities. It must monitor the institutions to make sure that the funds are used for non religious activities, but the pervasively sectarian bar, at least as far as federal constitutional law is concerned, is largely a thing of the past.

Finally, *American Jewish Congress v. Bost* -- again perfecting the law professor idea of last year's cases, now we're going to deal with remedies. The case said, yes, we know in the past there was an improper use of funds for a thickly religious program, but now we want -- American Jewish Congress and other plaintiffs in the case wanted the faith-based institution to repay the money they had received under the program. You can imagine the fear that that would have sent through faith-based organizations across the country had this remedial order actually been issued. The court said the appropriate form of relief is injunctive. 'You can stop people from doing bad things. As long as the faith-based institution uses the money for the purposes it was supposed to, it's not diverting the

money into entirely different purposes, we will not order them to repay the money.’ And, again, a solid decision, we think, in light of the law.

The bottom line: Government funded activities must be secular in their content. That's something that there is a good deal of certainty, no lack of clarity about. Government may not pay for worship instruction, proselytizing, but it also may not pay for social services with an explicitly religious content. The cases this past year have made that clear. I don't see the courts changing direction on that. Government needs to clarify the rules, enforce them as well.

On the indirect financing, the real question here is whether there is adequate choice provided to program beneficiaries. As long as there is such choice, FBOs may participate and they may maintain the religious content of their messages so long as it furthers the secular goals. Zelman I think makes that clear.

The second part, once we've gone through federal constitutional law, is state constitutional law. What's playing out now is the story of what many of you know as the baby or little Blaine amendments. Named for Senator James Blaine, a Republican from Maine who as part of his platform for president in the 1870s wanted to amend the federal constitution to explicitly ban any payments to sectarian organizations. He was trying to maintain Protestant schools and to block public support for Catholic education. The movement failed at a federal level but the movement associated with his name bore substantial fruit in the states.

Why are these only now getting attention? Well, as long as the federal Establishment clause was read in a separationist light, there was no need to have recourse to state constitutions, although there are some cases in areas where the federal constitutional interpretation had given a bit of leeway that state establishment clause -- the stricter version of state establishment clause has been affected. There are some Kentucky cases from the 1940s where public support for transportation to parochial schools is banned, even though the United States Supreme Court in *Everson* had said that such support was constitutional.

There's a great variety among the state constitutions. Pages 77 to 79 of our report give a general chart and then Appendix A lists all of the relevant clauses of state constitutions, so you can read through them for yourselves and look at this typology that we've set up. Ten of the states maintain First Amendment type clauses. Alabama's, for example, has no religion shall be established by law. The interpretive tendency in these states has been to track federal law, although one might expect some time lag or perhaps even a bit of resistance to movements in federal law. But those will tend to have predictably consistent results with the federal constitution.

Thirty-seven states have broader prohibitions on the direct financing of religious organizations. Some are narrow and targeted to worship or ministry; ministry specifically in relationship to worship. But others are broader, specifying no grants to religious organizations for any sectarian purpose, period.

Twenty-nine states have an education focus in their religion clauses, the prohibition on state financing of religious schools. And six states extend explicit prohibitions to both direct and indirect financing, for example, Georgia's and Florida's constitutions. Obviously, if you're doing your math you see that these don't add up to 50. It's because a number of states have more than one type of clause. Some of them have three relating to the Establishment clause problems.

Then there's another layer of complication. State supreme courts interpret these constitutions in quite different ways. Some of them that have incredibly separationist -- sort of the strongest version of the Blaine Amendment -- have interpreted them even in recent years consistent with the federal constitution. Ohio's is a good example. Ohio has a much more separationist constitution, but its court upheld the Cleveland school voucher plan under that constitution before the U.S. Supreme Court did.

Some states will ignore their little Blaine amendments. They've been doing it, likely doing it for years and these places are open to attack. We've seen a couple of them this year. *Holmes v. Bush* in Florida challenging Florida's school voucher program, which has now been held invalid by a lower court and is on appeal. And in Georgia, *Bellmore v. the United Methodist Homes*, also coming from a state with a very separationist constitution, challenging the state's grants, among other things, to sectarian - faith-based institutions.

It is possible that in a great variety of other states -- again, there are a lot of states with these baby Blaines -- that the states are relying on those to -- as a reason not to enter into contracts with FBOs. This report is very much a work in progress and we are just now beginning the task of trying to figure out state law interpretation at the administrative level.

Charitable choice provisions of the 1996 Federal Welfare Reform Act have an explicit non-preemption provision. What that means is the federal government's rule does not override the state constitutional bar on financing. The federal government's rule says federal government's money can flow to faith-based organizations under these programs, but the state need not attribute its matching funds to such programs. Indeed, the state may segregate state and federal funds altogether in that respect.

Just a brief word here about the ongoing campaign, ongoing, that is just really starting this year, of federal constitutional attack on the little Blaine amendments. This is a complicated question to interpret, one in which Chip and I don't even entirely agree. We have hashed out our arguments in shorter form in the annual report. We also have a law review article coming out next spring in the *Notre Dame Law Review* that is available now on the Roundtable's website that goes into more detail on those kinds -- the federal constitutional limits to state Blaine amendments.

The bottom line on state constitutions and charitable choice: It's really hard to tell how the ongoing campaign against the little Blaine amendments is going to play out.

There are very close and many undecided constitutional questions right at the nexus of state and federal constitutions. Part of this is simply the makeup of the court. Those members of the court who have been most sympathetic to the increasing role of faith-based organizations in government programs also are the ones who are generally most deferential to state law and so -- stranger things have happened, but they are the ones on the court who are most likely to support the independent role taken by states in federal policy, which may include an independent establishment clause theory for each state under the state constitution. In any case, the Supreme Court most likely wouldn't hear any such case until 2004 at the earliest, and probably not until 2005.

Next, on to the law of employment discrimination: The question here, of course, is can faith-based organizations that receive government funds maintain their exemption under Title VII to prefer co-religionists in hiring. The case has been much in the news, not just of late, but for years now. It was the centerpiece of debates over House Resolution VII. And the broad or mega charitable choice provisions surfaced again in recent months in the Georgia case I mentioned a couple of minutes ago involving Methodist Homes.

As a preliminary matter, we don't think the federal constitution resolves this issue one way or the other. We don't believe that the federal constitution requires that faith-based organizations forfeit their exemption in return for receiving government grants. Nor, with a minor exception for religious leaders, do we believe that the federal constitution requires that faith-based organizations be exempted from employment discrimination laws when they participate in government programs.

So our findings here -- first, FBOs are frequently exempt from federal prohibition on religious discrimination in employment, but they are not exempt in every federal program, so you have to look closely at the programs. The charitable choice provisions do contain an exemption under Title VII -- I mean, do maintain the exemption under Title VII allowing FBOs to prefer co-religionists. The charitable choice provisions are contained in a number of federal programs, but not in all.

Grantees need to pay close attention to the funding sources because there are a number of funding sources with charitable choice provisions that allow the exemption, but those funding streams are intertwined with other federal programs that are not so protected. For example, Workforce Investment Act funds don't enjoy the exemption from the co-religionists hiring rule, but those are often bound up with welfare-to-work funds which do. Now, I'll say a little bit more about this later, but the Department of Labor has done a very good job in its questions and answers on their website in trying to explain this interaction. And it's a good model that I think other agencies would be advised to follow, or at least to contemplate.

Second part of the finding under employment discrimination: States and cities vary in their laws on this subject a great deal. A considerable number of states and cities do not extend the exemption to FBOs that receive city or state funds. Our report Appendix B provides the numbers and some detail about the state exemptions and

employment discrimination rules. Nearly all states that do have employment discrimination provision of their own have an exemption for faith-based organizations.

In 18 of those states, however, entities that enter into contracts with the state government lose the exemption that would otherwise allow them to prefer co-religionists. We've looked at a range of major cities. Most of these cities had non-discrimination provisions for contractors and none of them specifically provided exemption for FBOs, although between the city and state law such an exemption could be construed in a couple of contexts.

Congress can preempt local and state law on this subject as it applies to federally funded programs, but we don't believe that it has done so thus far. This is an argument that we know is somewhat controversial among folks. It relies on a close reading of the charitable choice provisions. The charitable choice provisions do clearly exempt faith-based organizations from any federal rule in those programs that would require them to hire without discrimination, but the specific provision for employment is separated from the more generic rule relating to character and we believe that applying ordinary principles of statutory construction, one should not, or a court would not likely construe the exemption contained in the charitable choice provision to preempt state and local law. We can talk more about that later.

To specific federal programs: To anyone who has even a passing familiarity with government welfare programs, the involvement of faith-based organizations is really old news. What's new about this? First, in the negative sense -- not negative bad, but -- it's removing any unnecessary obstacles, unnecessary exclusion of faith-based organizations simply because of their generic religious character. This is sort of a correlate of the demise of the pervasively sectarian standard in constitutional law. We're not going to exclude institutions simply because of their general character. It's going to be a more fine-grained analysis about eligibility.

Second thing that's new is the government is specifically reaching out to faith-based organizations along with community-based organizations' grass roots programs. The idea behind this is an idea of devolution: Get folks who are more in touch with the community, who are better integrated, who are more likely to be responsive to the needs of a local community.

At the margins, the new involvement of FBOs and community based organizations has some concern that volunteers be included, or volunteers be supported in their activities. Good sense for leveraging resources to get more services if you're able to use volunteers, but there's also some that's, of course, political in this, some suspicion that some social welfare professionals have actually perpetuated the welfare cycle rather than taken steps to break it. Again, just some general observations about what's new.

The '96 Act that introduced the charitable choice language did so in order to first make it clear that the character bar -- religious character bar did not need to apply to faith-based organizations. They could maintain their religious imagery, the religious

quality of their leadership. It also, at least in many of the provisions, was designed to ensure that the religious liberty of recipients was protected. It's not included in all and we can talk about why it's not included in some, but in most programs the religious liberty provisions are included.

Also the employment discrimination issue had become quite significant by 1996 as a reason that some FBOs were concerned about participating, so the charitable choice provisions dealt with that. And then it includes this prohibition on the use of funds for sectarian worship, instruction or proselytizing, in directly financed activities and says that such limitations do not apply to indirectly financed activities. Again, we think a core statement of the law, but not as capacious to indicate the full range of prohibited activities.

The Bush administration in the last two years now has, since its early days, operated under two executive orders that establish a White House Office of Faith-Based and Community Initiatives and agency centers and we hear some rumors that there may be expansion to that. The outreach effort has been quite robust particularly over the last six months with seminars about a month and a-half ago in Atlanta, tomorrow in Philadelphia but also some quite helpful resources that are starting to emerge from the agency centers. I mentioned the Department of Labor's website. I think that the more concrete question and answer, concrete guidance that can be done through those mechanisms the better.

Not all government programs however are covered under charitable choice. I mentioned that earlier with the employment matter, but it also is true with respect to a number of the concerns, including some programs that maintain bars on funding for basically sectarian institutions. So those who seek to receive funds through either direct federal grants or more commonly through the block grants that go through state and local governments need to pay close attention to the particulars of the government programs. Our report gives as an example six programs where we walk through and look at what relevant features of these programs might be important for faith-based organizations and try to describe some complications of the interplay, such as the example I mentioned--the questionable relationship between Workforce Investment Act and welfare-to-work programs.

The greatest need in these programs, it seems to me, is clarity where FBOs are involved about the scope of permissible government finance services. It is true that worship, proselytizing and religious instruction are impermissible activities, but so are a variety of other services that are provided with a religious, thickly religious, explicitly religious content.

Last, and really trying to crystallize this in more concrete form, we examined social service contracts. Now, we've looked at three-quarters of the states and this is even more than the rest of it really work in progress because we have had a hard time tracking down the contracts that are used. What we found -- and this is a quite tentative judgment -- what we found is that very little attention is being paid to working out the nuts and

bolts of relationships between government funders and faith-based organizations through the ordinary vehicles for doing that: the contract or other kind of guidance through requests for proposals. The federal government is far ahead of state governments in giving that kind of guidance.

At least three states have FBO specific provisions. Actually we know that there are a few more than that, but three have them developed in fairly good detail. Our report has identified some common needs in these contracts, not just in the ones that say nothing, but even in the three that have explicit FBO provisions. First, we have to have clearer definition of the religious character that is preserved. Tell people what they can keep, but make clear that there is a distinction between character and content of the service. Too often folks who are advocates on one side of the issue tend to think that the religious character provision and charitable choice regulation covers everything from allowing religious content to be included to allowing employment discrimination, notwithstanding state law, and we think that that is too broad a reading of the character provision.

Second, we think it's important that the relationship between the providers and program recipients be clarified. In a voucher program is it permissible to serve only those who are willing to engage in religious activity as part of the service? The constitution seems to suggest it is but more clarity needs to exist both between the funding agency and the FBO and between the FBO and individual service recipients about their rights to receive alternative services.

Finally, clarifying the accounting and monitoring responsibilities of the agency and the provider, there's some language about accounting contained in charitable choice. The Louisiana case in *ACLU v. Foster*, I think, has done a very good job of outlining what kind of monitoring is a model for relationships between government and faith-based organizations.

That's where we are right now. We really do ask your input on this. For those of you who are engaged in day-to-day operations we hope to get some sense of the usefulness of the model provisions that we've drafted, but from all just your sense of how our analysis has worked.

So thank you.

(Applause.)

RICHARD NATHAN: -- Thank you, Bob. I'm going to introduce both our respondent/questioners but first, let me remind the audience that there are cards in your packets on which you can write out your questions and David or Kathleen will bring them up to me, or you can come to one of the microphones and ask your question in person. After our two respondent/questioners serve out their helpful role, I'll open up to questions from the audience.

We are honored today -- and I will ask him to go first - to have Paul Bather here who has a wonderful history: chief financial officer for the organization One Church—One Family; a representative in the Kentucky state legislature, where he's currently drafting legislation in the very areas we're talking about; a former alderman in the city of Louisville, where he wrote legislation on inner city urban programs; and he has been a banker—this is a man for all seasons—a community reinvestment officer, of the Bank of Louisville. He has a Masters degree from Hunter College School of Social Work, and a masters in business administration from the University of Louisville.

Our second respondent and questioner is Feather Houstoun. We particularly thank Feather because she does triple duty. She's a member of our advisory council. If you look in the back of our brochure, we have an advisory council that's been very active and helpful in this program. Feather's been a terrific part of that. She spoke and served a valuable important moderating role, some of you may remember, at our October 23 conference, and she'll go second. Feather, whom I've known a long time, has worked at every level of government in American federalism. She's a living --

FEATHER HOUSTOUN: Marble cake.

RICHARD NATHAN: A what?

FEATHER HOUSTOUN: Marble cake.

RICHARD NATHAN: Marble cake. She's a marble cake all in her own life, for Feather is currently the secretary of public welfare in Pennsylvania. She served in HUD in Washington, where I first knew her as a senior policy officer in charge of budget and program analysis. And she also, and this is a big deal, was the financial officer for SEPTA, South Eastern Pennsylvania Transportation Authority, and she was state treasurer in New Jersey under Governor Kean when I was there teaching at the Woodrow Wilson School at Princeton. She also was executive director of the state's Housing and Mortgaging Agency, has a masters degree from the University of Texas.

So, Paul, I'm going to invite your comments and questions for Bob, then we'll go to Feather and then the audience. Paul?

MR. PAUL BATHER: Good morning. First of all let me clarify one thing. It's Lou-ah-ville, not Louie-ville.

(Laughter.)

But that's okay. See, I'm originally from New York. I was born and raised in New York and I used to call it Louie-ville too, until I moved to Lou-ah-ville, and it's Lou-ah-ville. And as an elected official, it's definitely Lou-ah-ville. (Laughter.) In fact, I don't even know where New York is. (Laughter.) Most people think I was born and raised there, you know, that's politics.

I'm really glad to be here today. It's a great honor and privilege, and I really appreciate it. This issue is obviously a very important one, but I think there is a lot of confusion on it because people on both sides of the issue feel very passionately about it. And, I mean, we've all been taught that there's this separation between church and state, and that's America.

And now suddenly there's a blurring of lines, and so whenever there's a blurring of lines and we're moving into new law, it definitely in policy and in administrative regulations, and particularly if you put money into it, then people want to watch where the money's going, right? And so, working for One Church-One Family – which is one church, one child, one church, one addict, one church, one inmate – I have a very personal interest in this legislation, because, you know, we're funded by the federal government. At the same time as a state policy maker who's trying to look at the role of state government in this issue and funding those things, I want to make sure I don't get into trouble and the state doesn't get into trouble in terms of moving in this direction. So I'm really conflicted.

My questions are pretty straightforward. In the eligibility issue, which I think is a real important one -- there's a lot of big agencies out there, Catholic Charities and others like that, that have been getting state and federal level money for a long time, and the faith-based initiative's not new in that regard. But it's really now the small FBOs, and we're talking about the small grants that really are new and different and we have people who have never received these dollars, who don't have a sense of what's possible.

And at the state level, there are many different policies, constitutional and state laws these small groups will have to navigate -- what are the best practices that we need to put together at that level, is it 501(c)(3)s, so that we can create that firewall? And if we have small grants which a lot of churches are really going to get, is it really feasible for the churches, if you're getting a \$5,000 grant to give out some food, to spend \$15,000 to go through and become a 501(c)(3), hire an accountant firm, you know, get a lawyer and create this new board and everything else?

So from a practical point of view, where the rubber hits the road, what are some of the things we need to do to make this simpler and so that the little guys really get the help, get the assistance and do it right? Because it's the little guys that are going to wind up messing it up. Like I say, Catholic Charities, they're going to know what to do. But the little organizations, the small churches, what can we do to clear up this ambiguity and create some policies, best practices models, so that we can get some certainty in this issue?

ROBERT TUTTLE: Thanks, that's a very good question. It seems to me that apart from the law professors' high level theoretical questions, which really interest us and pretty much nobody else, that's the question, right? And the question is really one of stewardship. It's stewardship of public resource, stewardship of the times and talents of the faith-based organizations rolled into one.

Question: Best practices? We can outline some of the prophylactics: have separate bank accounts, separate organizations, separate incorporated entities providing all of these services, clearly defined job roles and responsibilities of all those involved. At some point, that's really wishful thinking for smaller grants. It's wishful thinking that I continue to wish for and I hope we can establish some mechanisms for doing it. Part of our work is cooperating with Jack Calhoun, Mark Scott, Valerie Munson and the folks at the FASTEN project – faith and service technical education network – that is designed to provide in pretty good detail some of these best practices in a way that a pro bono lawyer can spend a couple of hours and put together this structure. So you wouldn't be talking about \$15,000 to do it if you have model papers for non-profit incorporation, if you have model bylaws, if you have model structures that people can adapt with very little work and then get some decent advice on implementing them, I think we can solve some of those problems.

Now, we talk about bare minimums. And one of the bare minimums that doesn't cost that much money is getting a separate checking account. So as long as that -- the bare minimum is being able to separately account for the money, because that's the place that from the stewardship of the organization is concerned, that's the place that you are likely to get into grave trouble because government watchdogs look for poor uses of money, unaccountable uses of money. And I think that the more you can assure that the money that's received is put to the proper purpose, the less you're going to have to be defending things that really imperil the organization. That may be a challenge to some specific practices, but if you can account for the money, you're going to have solved a good chunk of the real core issues that are in front of you.

PAUL BATHER: So watch the money, okay. Segregate the funds. And that's an important issue. As a former county treasurer, segregation of funds is a really important principle. And as a follow-up on that, you know, once we get the money, now, in terms of the activities, let's say on a lot of these issues you're dealing with a situation where I'm running a homeless shelter or running a soup kitchen or running some kind of a daycare center or an after school program and it comes down to the time when we're eating.

Now, I'm really into prayer, and I've got to pray, I mean, we don't eat, we don't move this program, without praying. And this is a publicly funded operation here. What's -- can you give us some guidance on that? And in that homeless shelter, I have a chapel -- am I allowed to have worship services for the residents of that homeless shelter? Can I require it or does it have to be voluntary--what are the issues there?

And I guess the other thing is this whole issue of proselytization. Allow me to put it right on the table. Can I try to, you know, can I do an altar call? Can I really say, come to Jesus and find redemption, because I know a lot of Baptist ministers that -- not just Baptist ministers, Catholics, whoever -- who really feel strongly about, passionately about the best way to fight drug addiction, and it's been shown it works, is to find Jesus Christ. So how does that fit in terms of the Center for Substance Abuse Treatment and

SAMHSA, and all these other programs that are -- and a president that's saying, "I like faith-based initiatives"?

ROBERT TUTTLE: These are important, practical questions. A lot of the answers depend on the nature of the funding stream. If the funding is by voucher, so that folks have an opportunity to select from a number of substance abuse treatment programs and they are sort of reasonably equivalent -- I don't know what equivalent means yet, we don't have any case law, but I can make rough predictions about it: reasonably accessible, reasonably parallel success rates over time, reasonably equal support...there are all kinds of things we can talk about in terms of whether they are necessary sufficient conditions -- but as long as there are reasonable choices, a voucher finance program is going to give you infinitely greater latitude in the content of the service provided. That said, most financing is not voucher financing. Voucher programs are relatively complicated to get started. They're not so hard to administer once they're started, but they're complicated to get off the ground, and certainly more complicated than an ordinary direct grant or direct contract scheme. So if we're in the land of direct grants or contracts, I want to know what the money was paid for. If the money was paid for the food that folks are eating, I'm not as worried about the prayer.

Do we have any case law on that? No. So we're making predictions about how the tea leaves will be read the next time the courts confer on something like this. What I do think would be out of bounds is for someone whose salary itself is financed to be using part of that service to engage in religious worship. So this happened in *American Jewish Congress v. Bost*, the case in Texas that I said handled the remedial question. The underlying fact in that case was that the money was paid for the salary of the pastor of the congregation, and the pastor spent part of his time in providing the jobs preparation program, part of his time ministering, and had a hard time accounting for where the time was spent in either one. That's clearly going to be more problematic than the money going simply for the food.

If the money goes for the food, then we're going to think about things like the coercion element. Is this a two minute, three-minute prayer? Is this a thirty-five minute sermon, masquerading as a prayer? That's going to make a difference, right? If there is a sense that people are required to attend worship before coming to the food service, that's going to be problematic. Is worship held open as a possibility for folks? "Anybody who wants to stick around, come to church, join us in there, we really hope you will, we think your life will be enriched, if you don't want to, your bed's over there or you know, have a nice night" -- If it is held out to people as something that's voluntary, it's hard to see how that's objectionable.

There are really, really tough lines to draw on this. Nobody's pretending that there aren't. Thinking as a lawyer for an agency, for a social ministry organization, I'm going to suggest relatively clear lines. I'm going to suggest that if they want to have some prayer, ask one of the people who are receiving the food to pray, right? "Somebody share a prayer with us." Not coercing anybody, but rather than having it be sort of the organization. I'm going to want to make sure that any time there's a religious activity that

it's separated in time or space or both from the place where the government-provided service goes on. Again, these are prophylactics; they are probably more than is necessary to defeat a challenge, although it's hard to tell.

The real problem that's sitting behind this is that lack of clarity is no one's friend in this. It's not a friend to the state that's going to have to spend lawyer time. State lawyers may have their salary paid already but it's still a burden on state resources. It's a burden on the social ministry organization that may have to go out and get a lawyer. It's a lot easier to get a lawyer -- I speak from personal experience -- it's a lot easier to get a lawyer for planning stuff than it is for litigation. Litigation is time consuming. It really does sort of suck your energy in a way that planning helping people do something good doesn't. Those are some general observations. We can get to some more specific questions as well.

RICHARD NATHAN: Okay. Paul, if you would ask one more question, then I'm going to turn to Feather and then allow time to get to at least some of the many interesting questions we're already getting from this obviously sophisticated, interested audience.

PAUL BATHER: Thank you. My last question has to do with the whole issue of how to -- you've raised the issue of litigation, and how do we come up with some practices that really move towards dispute resolution at a local, state and federal level so that there's some mechanisms in place to kind of resolve these things so that people -- I mean, sometimes people intentionally do things wrong, sometimes people accidentally don't follow policies. And so in your mind, what kind of administrative structure can we put in place or should be put in place that can deal with these issues on a practical matter, on a day-by-day, week-by-week basis?

ROBERT TUTTLE: Thanks. Just a quick response to that. The first is it's hard to deal with these things once litigation has arisen unless the parties are willing to negotiate: sometimes they are, sometimes they aren't. It is far more important to do planning and education up front, which is why I really do applaud the efforts the federal agency centers are starting to make down this road. There's a long way to go but they haven't been at it for that long. Also, the work that Valerie and Mark and Jack are doing at FASTEN, which should provide some good best practices, will be able to fend off litigation.

I said this before at the last event: litigators do not like complicated cases. The ones who are bringing these suits want the low-hanging fruit, things that are obviously unconstitutional or at least clear enough to make a good case. If you take steps to protect against that you can be better off.

RICHARD NATHAN: Feather, now to you...

FEATHER HOUSTON: One of the great values this project has had is the amount of -- I may not be paying for it, but it is very good legal advice. As a state administrator I really appreciate the participation and the Pew funding for this.

I would just make an observation that I think this distinction between direct funding and indirect funding -- I think people have gotten pretty clear that the definitions of what's okay, what's not okay to do in direct funding need to be clear. I don't think that we fully explored where this "beneficiary choice" or indirect funding goes and I would suggest that even though the organizations, even though it is more difficult to do a voucher funded entity, the day care business is full of it, the Work force Investment Act is moving toward a voucher system. And I guess the specific question I would ask you is, if you think about the Medicaid program which funds a great deal of residential treatment, drug and alcohol, et cetera, through qualified vendors, Medicaid providers who are certified or licensed or whatever the state might do, the potential in terms of the government paying for highly faith infused treatment is huge. I mean billions of dollars are associated with that and many organizations which -- I guess my question is, where do you think that line will go because Medicaid is essentially a client choosing a provider?

Home- and community-based services for people with developmental disabilities are increasingly moving to a self-determined choice of provider. Nursing homes are selected by the client. I'm just wondering what you think is going to happen on appeal and whether we'll get -- how far is that rubber band going to stretch?

ROBERT TUTTLE: Well, they're two different questions about the rubber band stretching. The first is, how you define something as indirect rather than direct financing. The Cleveland case is relatively easy because parents actually got in their hand the voucher they took. The Faith Works, Wisconsin, Part Two case, is not so easy. The offenders did not receive in their hands a lot of cash or even a voucher. The program was financed on a per capita basis. The court didn't think that was a constitutionally significant distinction. Reading tea leaves, it's hard to tell what Justice O'Connor thinks is a significant distinction and her vote is the difference in whether you have a direct or an indirect finance program. So in that respect, I really can't say how we define direct versus indirect financing.

The second aspect of the stretching rubber band concerning what are permissible activities is really going to come more at the question of who gets included as a certified provider. And we have some history of the disputes over Christian Science and others in the Medicare pool that will be at least instructive to look at, but that's something we really haven't spent that much time working on so far.

FEATHER HOUSTON: In the discussion about the availability of equivalent services you made a passing reference to reasonably equivalent outcomes. I think that triggers a lot of the question about many of these issues because a great many social services are input and no outcome measure and no performance standard. When you get to employment and training programs you have a much more explicit set of contractual standards and vendors basically rise or fall on the basis of how they do.

Do you think there's any basis or any reason or any authority by which if there are any standards, that they should or could or would be different for an organization that is either faith-based or has a faith-infused program? And the reason I'm pressing this is that what we have found even where we have performance contracts provided to organizations that are community-based organizations, some of them are unwilling to narrow their program to the specific outcomes that we want and they run into real trouble because they see their mission as much broader in the community. And we've made our choice with regard to that issue.

But I think the more you go to the issue of outcomes and equivalent outcomes and specific outcomes for the purpose of that voucher, you run into more difficulty with that. And I just wonder what you meant when you said equivalent outcomes because I don't think most of these programs have outcomes to look at. I don't mean that they don't have outcomes... I don't think that we have a rigorous way of evaluating and selecting vendors as a result of that.

ROBERT TUTTLE: The outcome measurement question arose as part of an exchange that some of us had about what we'd count as a reasonably equivalent program and one of the hypotheticals is, what about a program that looks nice from all its trapping but fails utterly to deliver the service provided? Should that count as the one reasonable secular alternative and most of us said no, but we're not sure how to draw the line beyond that.

In terms of developing outcomes and measures, I think a lot of that goes back to the real question about how you define the eligible class of providers in the voucher program. These are secular measures, secular in the sense of aimed at achieving something related to the common good rather than the religious welfare of participants -- a government program couldn't be designed to save souls; I think most of us would assume that is an impermissible object of government. Beyond that, the goals should not be gerrymandered in a way to generate only certain applicants in the pool or eligible providers or to exclude other providers in the pool: if they are, there may be a problem. But apart from that, if they are reasonably developed outcome measures then the faith-based provider is on the same grounds with others in either being able to meet or not. And I think that the level playing field image is a good response to that.

FEATHER HOUSTON: I just have one more question, Dick, and then I'll yield to your question cards from the audience. I would just make the observation that we use both federal and state funds in Pennsylvania to support alternatives to abortion as an explicit program. So I'm not -- but they're not allowed to promote religion. So I think it's an interesting question. But my specific question is: can you envisage a situation where it is permissible to create a set-aside within a program for funding strictly faith-based organizations?

ROBERT TUTTLE: That's the first easy question I've gotten, and the answer has to be "no." No question. Anything that lifts up religious institutions as the only permissible object of funding has to violate a number of provisions of the federal

constitution. We can talk about what those might be, equal protection, Establishment clause, but just starting with those.

FEATHER HOUSTON: Thank you.

RICHARD NATHAN: Thank you, Feather, and thank you, Paul. There's a lot of interest and a lot of questions here. We have a message board on our website with a section there on legal issues, where we'll take up and answer questions we can't get to today. Bob and Chip will be working closely with us as always to pursue the refinement of this analysis and take into account your ideas and practice.

Here's a question that I would have asked, and there are several versions of it. Professor Tuttle, you describe increasing complexity of the legal environment and definition of what is and isn't permissible, but please assess the monitoring effort accompanying this. Without real on-the-ground work, who knows who's following the rules, and that's similar of course to what you were just talking about with Feather.

ROBERT TUTTLE: This is a huge and very little explored question. As a matter of fact, the next legal research project related to this that Chip and I are undertaking is a study of the doctrine of entanglement of church and state, that is largely a monitoring question from the 1970s school cases that mysteriously disappeared from Establishment clause law, and we think it belongs back at the center of it. Indeed, it makes more sense than some other parts of Establishment clause law. So first place is, it needs to be studied, we're going to start doing it.

The second thing is that if you take a look at the consent decree or the settlement negotiated in *ACLU v. Foster*, the Louisiana abstinence case, they really are trying to work out what concrete monitoring looks like in a program that has all of the earmarks of being problematic. It is funding religious organizations to talk about sexual abstinence. There were programs that were going out and saying, you know, "get saved by Jesus, sponsored by the governor's program on abstinence." No surprise that's a problem. So, how are you going to monitor this? What steps will be used, going down to the administration of the office? Now, that's at least a good framework for starting to think about the monitoring. It is an equally important part of this analysis as having the roles in place at first.

Q: If I could just -- that was my question. I should have worded it more bluntly. Isn't that, though, the key to solving many of your problems, whether it falls on the ground? If you don't know what's happening, you can't answer your question --

RICHARD NATHAN: Let me add a codicil to that. One of the most important things that's happening in almost every area of government we study is more and more emphasis on performance measurement and performance monitoring. So there is something going on around you that affects what you are just talking about, both of you.

ROBERT TUTTLE: I think it's, well, two things. First, in response to Dick, it's more than performance and outcomes monitoring. We're not talking about ends, we're talking about means. And that's the thing that's hard to gauge in this, because it's hard to have a close look inside an agency, inside a social ministry organization, when the government agency doesn't have the resources to even begin to take a look, so that's a problem. But I think we started in the right place, because it doesn't make much sense to ask people what they know if you don't have some sense of what they should know, or what they should be asking, and that's why we started with trying to get clear on the definitions of permissible and impermissible.

FEATHER HOUSTON: I mentioned alternatives to abortion because more than abstinence, I think it is a program that raises the questions of being problematic. But interestingly, we have a major contract with a bunch of subcontracts. We have riders that are very explicit, we require a set of materials and codicils built into all of the organizational manuals, and I think -- with regard to promotion of religion. And who knows what goes on. But I think that -- in reality. But I think the test, the proof of the pudding, is that while many religious organizations including Catholic charitable organizations are subcontractors, there are organizations, faith-based organizations which refuse to accept the money, because they see the restriction.

And as an administrator, I think that's about as far as we will ever be able to know what goes on in the intimate relationship of a counseling session, in that way.

RICHARD NATHAN: "A faith-based organization receives funding for a crime victims assistance program. When a residential crime is committed, volunteers visit with the victim, provide counseling and make minor repairs. Sometimes the victim asks the volunteer to pray with him. The program receives federal funding, but the victim requests prayer. Is this allowed?"

ROBERT TUTTLE: The example I use for that question is my father in Walter Reed Hospital. My father is a retired general in the Army. He was in for some very serious cancer surgery about five years ago. Thankfully he's recovered from that. But his doctor, who was a colonel in the United States Army, wearing his full regalia and all that, in the office, the two of them prayed together before he went into surgery. Is there anything impermissible about that? No. It's hard to see that as anything more than when the president says -- has a prayer said at his inauguration. These are personal events. If on the other hand, the people were going out in the name of the government and everybody's house they went in to, they said, "Before we start our conversation, let's say a prayer." That's a very different experience than something that's invited by participants.

We don't think that people cease to be human, even fully human, when they become government officials. On the other hand, when they use the government office for the purpose of engaging others in the faith, and they see that as an intensive part of their work, then there's a problem. Again, is this a possible line to draw? In theory, yes. In practice, that's why there are lawyers.

(Laughter.)

RICHARD NATHAN: Next question is, "Nowhere does federal charitable choice law use the phrase faith-based organization. Why is it used so widely in place of religious organization, the legal term. What is a faith-based organization?"

ROBERT TUTTLE: We use the term sort of by default, because everybody else uses it. A religious organization can be any number of things. What we're trying to convey -- and we've used at times faith-intensive organization -- is an organization that has more than sort of the residue of religious background the way that many colleges might, at some distant point in the past, may have had a religious affiliation. We're trying to capture a sense that the organization in its ongoing practice, faith is very present. And so, we tried faith-intensive for a while, but nobody seemed to like that. So to distinguish from groups that have a religious tradition, but not extensive present religious character is at least what we mean by that term.

RICHARD NATHAN: David Wright has done a lot of work on faith intensity and how you'd classify different levels of faith intensity which we're very proud of and you can get through our website. Next question: "What problem or dangers, if any, do you see in the neutralist approach of Justice Rehnquist, Thomas, et al?"

MR. TUTTLE: We're in a little bit different territory with that question because part of the work that we try to do for the Roundtable is simply to describe where the law is, which is complicated. And of course, because the law is normative, it involves normative judgments, and we have lots of good conversations with David about how we can express the law's normative judgments without being seen to endorse them as a sort of moral or political matter.

To answer that question, I have to put a little bit of a different hat on, and I happen to think that there are some dangers in the neutralist position with forgetting the jurisdictional limitation that I believe the state has. The state is not a religious institution. The state doesn't define itself as a community of the saints. The state does not act for the welfare of its citizens' souls; it acts for the temporal common good. If neutralism were taken to its sort of extreme, one could see the state adopting sort of extra-temporal welfare as among its ends. Apart from that, we can have a sort of pretty rich conversation about the last 800 years of Western history. But that's a short answer.

RICHARD NATHAN: "Could you briefly elaborate on your findings regarding religious discrimination? In practice, religious discrimination can mean racial, sex and sexual orientation discrimination. To what extent do your findings take this into account?"

ROBERT TUTTLE: Our findings are almost exclusively paper findings. What we're looking for, in this first year, we were trying to figure out what the paper says. So we don't have any information about how people are actually experiencing most of this stuff, apart from those things that arise in cases. We hope to take a much closer look at

existing state, particularly at states, next year, in the way that federal money and some state money flows out through state agencies. But apart from that we don't have any specific information about religious discrimination one way or the other.

RICHARD NATHAN: “The Supreme Court decided that an atheist was covered only under the conscientious objector law, because his belief system, in quotes ‘serve the purpose of religion.’ If any belief system is a religion, this could have tremendous implications for government funding of religion. Science, for instance, could be considered a religion. Please discuss the implications of whether religion is defined broadly or narrowly for government funding of FBOs.”

ROBERT TUTTLE: The definition of religion, if you looked at law review articles 20 years ago, every year you could count on four or five articles trying to define religion under the constitution. And they stopped. People got so frustrated. There are some very interesting cases involving Congress's draft exemption statute during the Vietnam War about who qualifies as someone holding a belief entitling them to be considered a conscientious objector under the selective service laws. And the court was not elegant in its solution to them, and it came up with something that said sort of if you have something that fills the functional place.

Chip and I, in this approach, have taken a different perspective. In the definitional section we first sort of had this -- at the same moment in a conversation, had this sort of flash of insight. Wait a minute, they're not trying to do anything theological. This is law, this is something -- what is religion for the purposes of the state?

(TAPE CHANGE.)

But if the state is going to administer its laws, it has to come up with something with specific reference to its purposes. So in this area what's problematic? What's problematic is at some point in an imperceptible line, but still you can see night and day, when some belief and practice goes over from being sort your formation for getting through the next few days or new few years of your life and to some extra temporal reference, something that makes a total or a more full claim on the person.

Are there programs that are funded that involve things like this? Yes. Think of the huge problem that the drug court movement has had with realization by almost every court that has looked at it that 12 step programs are religious. Can you sentence people into religious re-formation? Gee, that sounds Maoist, that's a problem. But that's where we are. The antiabortion counseling that Feather was talking about, sexual abstinence programs, all of them are going to involve at some place some pretty broad claims about somebody's life and purposes.

There's no way to draw a clear line. We shouldn't expect the state to draw exactly the same line across the board. At least for our purposes here, most of what we're talking

about in terms of permitted activities or permitted institutions doesn't really depend on that because what we're talking about is neutrality anyway. However you define your thing, you're going to be allowed to participate. The place where it bites, the place where it becomes a problem is when we talk about not permitted activities, and then there are always going to be problems of whether somebody's involvement of somebody in a New Age ritual, of everybody joining hands and singing, is a religious experience or not.

We'll see them the way we always see life, case-by-case. Try to do the best job we can analogizing from one to the other. But the core things we're talking about here actually have to do with neutrality of the broader inclusion and then bars on specific -- bar inclusion of institutions, specific bars on certain activities

RICHARD NATHAN: "Should faith-based organizations consider the element of coercion in a different light when the program beneficiaries are children who may not realize or be able to exercise their right to decline invitations to worship?"

ROBERT TUTTLE: Yeah, I think that Feather's response -- go ahead.

FEATHER HOUSTON: The parents put them there and I think the parents have the right to make those choices for their children, by law and by moral authority.

ROBERT TUTTLE: Right. I mean there are debates particularly as you get into adolescents about who controls what when it comes to children, but by and large parents have the say. Now, that does require a degree of transparency between the service provider and the parents. And where service providers are engaging in intensive religious activity, even where permitted by law but without getting the consent of the parents, I think there are serious issues there particularly when those children have been placed in the care of the agency by the state. And that's a little bit of what's going on in the *Bellmore v. United Methodist Homes* case in Georgia.

RICHARD NATHAN: "With regard to your written comments about religion and employment discrimination, does the law consistently distinguish between employees that are paid for services in the social service program and other employees of the religious organization? Are there additional issues when funds are co-mingled?"

ROBERT TUTTLE: The law is not consistent, but that again is something we should aspire to create as we have some time now to look at regulations. Take, for example, the childcare development fund activities. The childcare program does permit co-religionist preference in certain aspects. But then at the 80 percent funding level -- whether it's direct or indirect financing -- at the 80 percent funding level if that money is received from the government then a non-discrimination rule kicks in. The non-discrimination rule is targeted only to caregivers. It says that you can continue to prefer for the people who run the program or the leaders, but for those who are financed as caregivers then you can't discriminate.

There are a number of other state general contracting rules that are specific to funds provided with this entity. There are others that are not specific and if I were working as the lawyer for the agency receiving funds, I would want to make sure that I got that clear in the contract. Does this only require us to abide by these hiring rules with respect to those in this funded entity or does it apply across the board?

This is one place where I think you could make a little bit of headway in arguing or interpreting the charitable choice provision designed to protect the character of faith-based organizations. My sense is that part of what that is trying to do is to keep from leveraging things that are program specific to be agency-wide, but again, there has really not even been any decent discussion whether by lawyers or academics of that, and Chip and I are only now starting to work on the specific interpretation of the charitable choice provisions in that broader sense.

RICHARD NATHAN: That's an interesting question. It ties into your point about avoiding litigation and doing things before it occurs. "What do you suggest as venues and mechanisms for clarification of these issues so that some consistency emerges? At what level ought that to occur?"

ROBERT TUTTLE: I think it is starting to occur with some quite positive results at the federal level right now. Compared to where things were in terms of developed materials in May of this past year and where they are now, there is quite a lot of good, solid information -- sort of background information about programs and even starting to do some good, solid legal advice. Some of it simply replicates what's in the charitable choice literature, but some more of it is trying to think in a quite program specific, problem specific light. And I think that's the direction that individual federal agencies should be moving in, to try to anticipate and answer the kinds of questions from direct grantees and the questions that will follow the program in block grants.

At a state level, it really has got to start at the contract -- individual contract level -- to start thinking about how you formalize the relationships because the greatest problem at that level is a real sense that we're just sort of giving you a one size fits all contract that doesn't fit this relationship, doesn't fit it well. And I think that uncertainty is likely to be problematic. So the federal level agencies are sort of more robust in the direction they're going. State level focus on contracts and requests for procurement at that individual specific level: I think that would be good.

RICHARD NATHAN: "Some people resent the use of the word 'sectarian.' What word do you suggest -- what makes a group sectarian?"

ROBERT TUTTLE: I try hard not to use it. Although, having been formed in this legal literature it's hard not to just as a matter of habit. Sectarian in the old sense of being one who differs from the orthodox obviously has some concern about whether it's pejorative. But we try to use -- at least we hope to use "religious" more often or "faith-based" than "sectarian." But what we're trying to describe, as I said earlier, is some

entity where religion is really apparent and part of the ongoing life, rather than just a sort of historical holdover or resonance.

RICHARD NATHAN: This question is dedicated to David Wright. “Tuttle mentioned the idea of devolution. However, there is a limited pool of government funds which are being diverted from established programs to new recipient faith-based programs with no evidence that the faith-based programs are more effective. What is the justification between this and the recent conferences tailored to FBOs? Isn't the government creating a leg up rather than a level playing field?”

ROBERT TUTTLE: As I responded to Feather's question earlier, any program -- and a few have been proposed but none followed through -- that singles out religious institutions as the only recipients has to be unconstitutional and I think has not been pursued as a general matter of policy. So the only question then is whether the outreach efforts are themselves problematic. To the extent that the outreach efforts are aimed at more than faith-based institutions, are generally aimed at faith-based and community organizations focusing on grassroots, it passes constitutional muster. I would think this is true of the welfare-to-work grants that have been made this summer, the Compassion Capital Fund grants that have gone out. Now, we haven't talked about them at all. We have some serious concern about Compassion Capital Fund monies, but more because of the lack of transparency about relationships between grantees and sub-grantees than about the target pool.

So, right, we don't have any evidence of effectiveness. But, for that matter, we don't have a lot of evidence of effectiveness of non-religious organizations over the last 20 years either. So it's hard to see that as a chief point of objection.

RICHARD NATHAN: I'm going to ask two more questions and then in reverse order give Feather and Paul a chance to comment.

Q: -- Will I get a chance for --

RICHARD NATHAN: You've been standing there so patiently, how could I not? Why don't you go next?

Q: On page 41 I see you're talking about the little Blaines and focusing on the anti-Catholic animus. You're saying this looks the most promising. I'm curious. Have the state Blaine amendments had similar histories in each state and how successful do you see that they were in their original intention? Do you see them in each case being specifically anti-Catholic? And I just did want to mention too that someone, I think, like Marvin Olasky, has correctly identified what you're identifying as the problem, is actually the solution. Anyone that has experienced or witnessed firsthand the saving grace of Jesus Christ believes that that is the only way and anything else may just be something temporary.

ROBERT TUTTLE: Well, I was not making a theological claim for penultimacy over ultimacy. I would lose my standing in the Lutheran Church were I to do that. Nevertheless, the question is not about what is true in the absolute sense. The question is about this limited truth that we call temporal government. What can temporal government do? And one of the things that I believe to be core about liberal politics is that it does not make ultimate claims on people the way that Jesus or the Mosaic Covenants or Mohammed's witness all make ultimate claims on people. "This is what the truth is about you and your life," and the state doesn't make that claim. When it does, it exceeds its appropriate jurisdiction. That's response number one.

The anti-Catholic bias story about the Blaine amendments is complicated for every state. There are some states where that really was the reason this thing got into the state constitution because there are a lot of people who are afraid of Catholic schools and Catholics showing up and either overwhelming Protestant schools or, having gotten some political influence, gaining their own funding. So that's part of the story. But there are a lot of states that could have cared less and Congress made it a condition of their entry into the union and it's hard to say that was motivated at the state level by any particular animus at all. They could have cared less. So that's going to be a very complicated argument for the litigants to take that in any particular state. Some states will have more success than others. That is something that we try to explore at greater length in the Law Review article that's available on the website and coming out in Notre Dame.

RICHARD NATHAN: You want to ask a question...let me do this: I'm going to ask the other two questions on cards, give you the next question, and ask Feather and Paul to comment and try to end roughly on time. Next question: "Do any major cases explicitly address the issue of fungibles? Since government money for non-sectarian purposes can free up money -- organization money for sectarian, explicitly religious purposes?"

ROBERT TUTTLE: This is really what was going on, we believe, in Mitchell against Helms. The dissenters said that because of the nature of the things that were provided, they were divertible to religious uses and that was problematic. The resources used could be used in another way.

Six members of the court said that's not determinative, and we believe that that's true not just for divertible goods but for cash. There are all kinds of academic arguments about what Justice O'Connor would have thought in that case. But if you're looking at what the decision does and her logic generally in these cases, it's hard to see that -- whether it's cash or potentially divertible in-kind goods -- decides the constitutional question. The question is whether the resources are actually used for an improper purpose. As long as they are not used for an improper purpose, we believe that her test -- and given that that's the deciding vote in Mitchell against Helms, just like Justice Powell's was in Bakke -- the narrowest possible ground gets the last word. We believe that's the state of the law right now.

Look, all this stuff could change. We don't know who's going to be appointed next. These are four to two-to-three/five to four decisions. But we do have some sense of the trajectory and the trajectory that we see makes it hard to believe that that is going to be the tipping point: the question of whether support is in the form of cash or divertible goods.

RICHARD NATHAN: Last written question and one standup question and then final comments. "How is it possible for a church whose bylaws are fairly specific about proselytizing and serving a specialized constituency to be expected to implement a secular program without changing its bylaws?"

ROBERT TUTTLE: Much of my time is spent as a church lawyer. Churches regularly ignore their bylaws. (Laughter) That's the short answer. Most of them don't even know they have bylaws if they're incorporated. Change them? I doubt it, because they don't pay attention to them in the first place. They're going to do -- and if they want to provide the service and they want to receive the money for providing the service, then no matter what their bylaws or other governing documents say, as long as the requirements are clear enough to follow, they have at least the chance of following them and more importantly they can be held to have followed them. So --

RICHARD NATHAN: Final question and final comments.

Q: The whole thrust of a lot of your presentation was on being able to distinguish between programs and institutions and one of your bright comments was that the -- you claimed that rules about supporting sectarian organizations were essentially dead. That was sort of the way you phrased it. I think you meant something on the order of, it's now okay for pervasively sectarian organizations to provide secular services, and that's really a very important thing. It's very easy when what we're talking about is a single distinguishable service. People show up for that single service and they leave and that's that.

But when you're going to school you're in a whole activity and if the whole thrust of that school is character formation and you're supporting it by school buses or by computers or whatever thing, you're still supporting the establishment of that whole institution. And one of the ways that that plays out in social services, again picking on the childcare example, you can't rebuild a wing of your church on the premise that it's going to be used five days a week for providing childcare if indeed on Sunday it's going to be used for your Sunday School.

A lot of capital improvement activities really endure to the organization in part because a church could rebuild a wing of its church and then next week cancel its childcare program, and it goes on with the beautiful new wing of its church for its activities. So there are still a lot of standards against supporting institutions as a way of supporting services. So I think you need to be a little sharper when you make the comment --

ROBERT TUTTLE: I think if you read the report you will find that sharpness.

Q: Well, I'm just saying the way I heard it this morning.

ROBERT TUTTLE: I know. And what we said was you can support secular activities of sectarian organizations, faith-based religious organizations. You heard straight. The things that last over time, buildings, very few of these programs allow capital improvement money anyway. The childcare programs have very restrictive rules about what program dollars can be used, even in direct grantees. TANF does TOO. The HUD programs that seem from the outside to look most traditionally separationist are because a lot of them deal with bricks and mortar. Bricks and mortar raises difficult questions because it's very hard to segregate continuing uses. And so for reasons that make a lot of sense, they continue to have bans on using money to improve the structures, which even if they're occasionally used for secular services, do continue to benefit.

And there are a whole lot of Supreme Court cases on money for college buildings even, about restrictions on their later use that can't even end in time. They have to sort of continue for the life of the structure itself. So that's an area that we're quite aware of and I think have addressed.

Q: -- for examples like orphanages and other things that churches operate for a particular service, but also have the fully sectarian quality to them. So there are individual congregations that own an institution and they get 99 percent of their funding from the government. So some of these lines are not quite as sharp and there is an entanglement.

ROBERT TUTTLE: We would be the first to concede that there are not sharp lines.

Q: Okay.

RICHARD NATHAN: Thank you very much for that question.

Feather, then Paul, comments that you wish to make and that will cover a lot for this morning and close our program.

Feather?

FEATHER HOUSTON: I would just make the observation as an administrator of human services that we really need to start with the client, and what we're trying to get a client to do or help them to do. And if that path takes us to faith-based organizations, so be it. Particularly in welfare and I think in substance abuse, but very much in the welfare to work arena, it is very evident when you talk to women who've changed their lives, the vast majority of them have a faith element in their life that's been a very important part of how they've gotten themselves together and supported their families.

So it is natural to us to see that there are organizations that somehow are contributing to that, whether they run secular programs or vouchered, faith-induced programs. So this has been very illuminating for us and I'm very grateful to have been a part of it.

MR. BATHER: Thank you. I just came back last night, got in about 1:00 this morning from Houston, Texas. And I was at a church called Brentwood Baptist Church, which is one of those mega churches in Texas. And there was a pastor, Pastor Ratliff, who got some money from HUD to set up a transitional housing program for men who have HIV/AIDS -- who are affected by HIV/AIDS. And the neighborhood was opposed, half his congregation was opposed. But he, through a lot of leadership, withstood all that heat and has got a transitional program for these men, who I visited yesterday and talked to, that, you know, is just wonderful and so necessary.

I think that's an example of what we're talking about here today. I think we can get caught up in all these legalisms, which I understand, and I'm not at all questioning the importance of the law or the constitution and I have a great respect for it. But, again, as I said, as Feather said, the bottom line is service. I think there's a distinction between worship and service. And legally as well as in the Bible -- I mean, the reality is the Bible talks about service and the Bible talks about worship, and there is this distinction. That's really the heart and soul of this. The worship service is the worship service, is the worship opportunity to practice your religion. But out of that religion there is this service mandate, this ministry to do good.

And there is a distinction. And sometimes it does even conflict with the religion perception. And so there's this total conflict that we have to look at both from the governmental side as well as the religious side. I think we need to look at that and explore that, because there are some inherent conflicts here which are even coming out today in terms of, you know, national, international policy, war. I mean, I don't want to get into Islam and Christianity, but these are fundamental issues that I think I applaud you, the Rockefeller Institute, for studying. It's like I said, I'm really pleased to be part of this, and -- but I really fundamentally support this. I believe this is good public policy, it's important, and we've got to make our country a better country by resolving this issue in a positive way.

RICHARD NATHAN: Let me ask you, David. Is there anything further I should say or we should say to the group, about anything about the roundtable program or process?

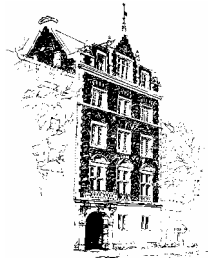
DAVID WRIGHT: We should remind everyone that in their packets we have a web card which describes what's on our website and provides our web address, which is www.religionandsocialpolicy.org. We are creating a creating a legal issue forum. If you go to our address, look at the message board, under "legal issues," we'll have questions that we did not have time to get to today, answers from Bob Tuttle and his partner Chip Lupu will be on there. If other issues, questions occur to you, please raise them there and we'll respond.

RICHARD NATHAN: Thank you, David. Let me thank our -- particularly the authors of the paper that was the basis for today's meeting. I thank you and I thank you all for coming.

(Applause and end of event.)



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