



The Roundtable

On Religion and Social Welfare Policy

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State of the Law

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RICHARD NATHAN: I have a confession to make -- that doesn't even interest people. (Laughter.) My confession that I want to make is that this field that we're working in, religion in government, is not a field that I have studied in depth in my career. So, I don't have the kind of grounding that you need to be really thoughtful about a subject like ours.

And to my great advantage, I can read this book. It is out today, out today from the Brookings Institution, *Faith in Politics*, by the man I'm introducing, Jim Reichley, an old friend of mine, a very good friend of mine. This is a Brookings book that stretches the canvas on religion and politics in America, going back to the Establishment Clauses. The colonies, most of them, had established churches. A lot of things have happened in the history of this nation that involve religion and government, and religion and hot politics, and this book covers it all, way beyond the subject of our focus, but very much contextual to what I need to know.

And I have a feeling that you know so much more than me that you don't need to know this. But if you're even a little bit guilty that, gee, maybe I need that historical sense, that deep historical sense, get a copy of Jim's book. And it is just out, and in a press release; he told me it comes out today.

Jim Reichley is a senior visiting fellow at Georgetown University Public Policy Institute. He served, as did somebody roughly his age, a friend and admirer did, as an assistant to Senator Kenneth B. Keating. Way back when Jim and I shared an office, his son, who is also running for office in Pennsylvania right now, was born when my son was born -- our firstborn, when Jim and I worked together. So, we have known each other for a very long time.

That is not why he is here. He's here because he really knows this subject. He served as legislative secretary to Governor Bill Scranton in Pennsylvania. He was a political editor at *Fortune* magazine. He served in the Ford White House, and he has written extensively, prior Brookings book, other books, particularly on religion and politics in America. He has his master's degree in American history from Harvard University.

While I am up here, and before Jim goes forward with this meeting, I want to just mention that he's going to introduce Bob, and Bob Tuttle will explain that Chip, unfortunately, is ill and we're all pulling for him. I'm sure he's going to be okay, but we miss him -- Chip Lupu. But we are going to have a national event here in Washington, March 6th and 7th -- mark it down in your calendar -- where we are going to have a longer full session on this subject we're about to take off, which is made more interesting by David Saperstein, and billing it as something you'd better listen hard to.

And we also -- and I should mention this at the same time -- are going to be -- I might have gotten the dates wrong -- December 11th for the event with Bob and Chip, and

March 6th and 7th, just because I want to mention it, is our joint research conference with the Independent Sector, the Roundtable and the Independent Sector also in Washington. So, you haven't heard the end of us even after today, and now you get to hear Jim Reichley introduce and moderate with Bob, Robert Tuttle, from George Washington University Law School.

A. JAMES REICHLEY: Thank you, Dick. Thank you for the plug for my book. Dick told me that after reading my book, he went back and read Jonathan Edwards. So, if it has that effect on all readers, why, that will have a very positive product, indeed.

When I first came down to Washington, lo, these many years ago, I met Dick, and he became my guide to Washington life and Washington politics, and I've been pretty much following him around ever since. And so, it's a pleasure for me, a particular pleasure for me to be here with him and with all of you today.

We have heard already several very illuminating and enlightening discussions on the relationship between faith-based organizations and government. All of these relationships, all of these interchanges are carried on within the context of structures formed by constitutional law at the state and, particularly, the federal level, and it is to that subject to which we now turn. David has already launched us onto it.

The most basic and fundamental of these structures are, of course, the Free Exercise Clause and the Establishment Clause in the Bill of Rights. It is significant, I think, that these clauses appear in the First Amendment to the Constitution, and indeed, are the first clauses in the First Amendment itself.

I think it's also significant that they are included in the First Amendment with freedom of speech, freedom of the press, and many other precious liberties, which are singled out by the founders as being not only good in themselves, but really essential basis' and foundations for democracy and republican government, going beyond such rights as right of privacy and right of travel, and so forth, which the founders believed were good things, but were not necessarily essential foundations as religious liberty and the other freedoms in the First Amendment are.

For about the first two thirds of our national life, it was generally assumed that the religion clauses in the First Amendment applied only to the federal government, and the states were permitted to do pretty much as they liked. As you know, several of the states maintained established churches well into the 19th century.

All of this changed, or began to change, in 1940, when the Supreme Court, through a decision written by Justice Owen Roberts, extended to the states not only the Free Exercise Clause, but also the Establishment Clause. It took several years for this momentous change to begin to have major impact, to build up steam. But in the late 1940s, the court began issuing a series of decisions, which had the effect of aiming to impose the strict law of separation between church and state, which had been called for by Thomas Jefferson, to the extent that many people, I think, now believe that the phrase

“wall of separation between church and state” appears in the constitution, which it, of course, does not. It was taken from a private letter that Jefferson wrote many years after the Bill of Rights was passed.

In the subsequent years, about the following 30 years, the court wavered back and forth between strict enforcement of the standard of separation between church and state or, on the other hand, moving toward the Chief Justice Warren Burger’s standard of benevolent neutrality. This produced a confusing hodgepodge of interpretations of the law and of the constitution, to the extent that Justice Byron White wrote, “Establishment Clause cases are not easy. We are divided among ourselves, perhaps reflecting the different views on this subject of the people of the country.”

Since 1980, the court has moved somewhat toward the benevolent neutrality standard with regard to the Establishment Clause. But in the 1990s, the court began to back away from expansive interpretation of the Free Exercise Clause. We are fortunate to have with us today -- we had thought we were going to have two major authorities, scholarly authorities on constitutional law, but as Dick has said, Chip Lupu is ill, and we certainly all hope for his quick recovery.

But his partner Bob Tuttle is with us today, and he is going to open up this subject and give us his views, which may differ slightly or somewhat from David’s views. Bob Tuttle graduated from George Washington Law School in 1994. He then went on to earn a PhD in religious ethics from the University of Virginia -- I guess he graduated in 1991, excuse me, and he joined the law faculty at George Washington in 1994.

He has written on legal ethics, law and religion, and law and philosophy. He serves on the board of the Division for Church in Society of the Evangelical Lutheran Church in America. With Professor Lupu, he is a co-director of the Legal Tracking Project of the Roundtable of Religion and Social Welfare Policy. And we welcome you, Bob.

(Applause)

ROBERT TUTTLE: Thanks very much, Jim. Thanks to David and Dick, and your folks up at Albany, for a wonderful conference today, and to the good folks, Luis, and Julie, and Kimon, and Lynn at Pew, for their support for our work. Chip greatly regretted his not being able to be here today, and I do too, because I have twice as much to talk about. But we do wish that he heals quickly.

What I’m going to talk through today is an outline of our long project, the first year study document that will be issued the 11th of December at an event here at the National Press Club. And you can obviously get a copy of it then, but you can glean most of what’s in this report from some ongoing studies that we have published on the Roundtable’s website. So, I do suggest that you take a look there as well.

Our document has six major findings, the first three of which were linked to the federal government, and the first of which is going to seem directly contradictory to something David Saperstein just said, but I'll go ahead and say it: direct financial support to faith-based organizations is now permitted by federal constitutional law. If I were to stop the sentence there, David would have good reason to say that I am wrong, but you've got to read this last clause. The last clause says, "But that support must be limited to secular activity."

"Must be limited" means more than just wishful thinking. It means you have to have the accounting and auditing ability; you have to have the kind of program segregation to let people know from the outside that this is transparently segregated activity. It still means something that is dramatically different from, at least what Chip and I believe, the law was even three or four years ago that, prior to that time, the category of pervasively sectarian institutions had greater salience in the law, such that direct grants of any sort to pervasively sectarian institutions were in deep jeopardy.

But now, so long as the funds are limited to secular activities, and again, limited with teeth, that seems to be okay under the current Supreme Court's interpretation. Second, and demonstrated most poignantly this summer in the *Zelman* case, indirect financial support to faith-based organizations, so-called beneficiary choice programs, is also permitted by federal constitutional law, and it need not have the same segregation of faith intensive versus secular service provided. The lynchpin here, of course, is whether there is or is not genuine beneficiary choice.

Third, as our first group of panelists this morning talked about, the Charitable Choice provisions that appear in a variety of federal programs, although not all, have continued to be expanded, sometimes through legislation since '96, but sometimes, either directly or indirectly, through the actions of the new faith-based offices. At the very least, the sense that the Charitable Choice provisions had of aggressively engaging, increasing the involvement of faith-based and community organizations has been captured by these offices.

So that's the first three, basically, federal developments. Equally important and less obvious are the next three developments that really testify to the vibrant, dynamic federalism that we have here in the United States. First, although faith-based organizations are frequently exempt from the prohibition on religious discrimination in employment, that's true at the federal level; that is not necessarily true in states, or in cities. Sometimes it's true, sometimes it's not, but it requires close attention to the details of both the basic discrimination rules and the discrimination rules that apply to those who receive contracts or grants.

Second, many state constitutions differ from the federal constitution, as the gentleman from Florida this morning indicated. These state constitutions are often much more restrictive in the terms of aid from government to sectarian organizations that they permit, and indeed, that's an interesting part of the story that is only now beginning to come out. Another side part of that is whether or not these state constitutions may

themselves be vulnerable to federal constitutional challenge, and I'll talk a little bit about that in a minute.

And then, last, what's more silent than anything else, the contract and grant proposals that we have seen at, mainly, the state and local level, are conspicuously silent, with really three, maybe four exceptions -- are silent about the expectations that are imposed on faith-based organizations. Not expectations in terms of what are you going to deliver with this, but how are you going to account for what remain important legal questions? And we believe that this silence invites both confusion and legal controversy, confusion that could be avoided if the terms were made more specific.

So quickly, just into a little bit of the history that Jim started. But start with the text in front of you, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Relatively simple words, complicated story. The separationist period that we characterize from the mid 40s through the late 1970s had, as its lynchpin, a total prohibition on direct government financing of pervasively sectarian institutions, usually meaning parochial education, parochial elementary and secondary schools.

Along with this were significant doubts about whether voucher programs -- the kind that was ultimately upheld in *Zelman* -- significant doubts about whether any of those programs would survive constitutional scrutiny, even though not direct, even indirect financing. There was, however, some limited acceptance of indirect in-kind transfers -- textbooks, transportation to schools, other sorts of focused subsidy, not blanket subsidy to sectarian schools.

And then, finally, important to remember in this context, a very strong prohibition on official religious speech -- school prayer cases, the bible reading cases, all are as important a part of this separationist story as the financing.

So, then, we have this magical date in 1980, not for any single reason, but a confluence of things -- the beginning of the first Reagan Administration. At least in the courts, it was the emergence of a new paradigm that had been hinted at, as Jim said before, but hadn't really gained any significant purchase. The paradigm of neutrality began with equal access cases, where religious groups were excluded from using, first, colleges, and then high school, elementary school space, space that was otherwise available to other student groups or even community groups.

And the court said that's improper, but not improper as a violation of anything religion-specific: it's a violation of free speech. And the idea of neutrality is that religious speech deserves to be treated equally with non-religious speech in the public square.

The erosion of the total exclusion of pervasively sectarian institutions -- a lot of nouns in that: What we mean is an incomplete story, but a trajectory of cases that the court has taken over the last ten years, in particular, where the court has been more

willing to permit direct aid from government to pervasively sectarian institutions. In all these cases, the context has been a parochial school. And again, these were in-kind benefits, but in-kind benefits that went from publicly employed remedial schoolteachers, where the use was somewhat determined in front, to movie cameras and computers, where the use is very hard to determine in front and looks a bit more open, pushing in the direction of cash.

Direct financial support is only permissible for secular activities. That seems to be very clear from all these cases. The key concepts of worship, proselytizing, and religious instruction, they still need to be fleshed out in what they mean, but they are the marks of the church according to the Supreme Court. Those are the things that government clearly cannot subsidize.

Of course, any segregation of faith intensive activities, these marks of the church, marks of religiosity, from the permissible financing, requires significant monitoring. And that, we believe, is going to open up a concept of entanglement. When is too much monitoring a constitutional problem, a concept that really has not been much developed for the last 25 years? And so if we're looking at an area of law that either is likely to develop or should develop in the coming years, entanglement is one place.

Indirect financial support -- as I said earlier, the Zelman case is a really important landmark in this, because the court says that if there is genuine beneficiary choice, the constitutional concerns are dramatically lower. As long as people can choose where the funds are going to be used, then we are more comfortable with allowing government funds to be used for intensively religious activities; again, none of the concern about segregating secular from religious.

One last point on this list about the trajectory of neutralism in the court is that the constitution, at one point, is decidedly non-neutral. The same day that the Mitchell case came down, which is, we believe, to be quite an important case about direct financing or direct support for parochial schools, the court also handed down the case of Santa Fe v. Doe, about prayer at a Texas football game. Talk about a community religious event. You know, this is football in Texas.

The court said, no, you cannot have a government sponsored prayer that, just as much as at the height of separationism, official religious speech is still perceived to be a violation of the constitution. And that is an important thing to remember when we still talk the language of neutrality, because neutrality does not explain across the board the way that the law is going, although, in important respects with financing it does.

The faith-based initiative in the lower courts -- Last year, when we started into this work -- so, January, actually, of this year -- we were quite concerned when the folks at Pew said, we want you to follow the cases, because we said, well, there's Bowen v. Kendrick in 1988, and it's 14 years later; there really are no cases. There are a couple, little things that trickle through that make it to a circuit court in some county in Georgia, but nothing is really attracting national attention.

Almost every month since January, a week after we started this work, we have been greeted with a new decision, and there are some quite important decisions that have come down over the past year. Early January of 2002, a week after we were cautioning people not to expect much, *Freedom from Religion Foundation v. McCallum* was decided, a case that held unconstitutional a direct grant from the Department of Workforce Development in Wisconsin to the Faith Works program run by Mr. Polito. And the court said this is one of these things that just clearly can't be done. You were giving a direct government grant to support what is effectively mission work. This is evangelizing folks in the course of substance abuse, thickly religious substance abuse training.

The little debate -- I'm not even going to call it a debate -- the difference that David Saperstein and I have, or that Chip and David Saperstein and I have over what we think about direct financing is not part of this case: this case imposed no controls on how the money was going to be used. The money was simply given to the organization to do what it did, and what it did was change souls and provide substance abuse treatment in the course of it. It seemed to be effective over time, but it clearly involved core religious transformation.

The next case, a couple months later, *ACLU of Louisiana v. Foster*, again a program that had transformative implications. Here, it's sexual abstinence education, and the governor's program on abstinence was giving a variety of grants to organizations, both secular and faith-based, and a number of those organizations, even in their reports back to the state, said they were using these things for mission work, for teaching people about abstinence by using quite thickly religious events, and language, techniques.

And the court said, first, just like *Freedom from Religion v. McCallum*, you've got to have controls; there are no controls here, so these expenditures are bad. But the court did something important, and something the courts really haven't done enough of. It went ahead and gave them some guidance. If you want to keep doing this program, here's some steps you've got to take.

First, you have to establish some guidelines. Give people some guidance on what they can do and what they can't do. Second, you have to monitor. And by monitor, we mean more than just accept reports once a month that you don't read, which they had been doing, or if you think you want to talk to somebody, just pick up the phone. You're going to have to go out onsite; you're going to have to have some way of checking what these folks are doing if you are going to give money to groups that are religious, because the government cannot spend money on religious speech, as this core, non-neutral, preserved part of the constitution, even in this age of neutralism.

The third case, *Freedom from Religion II*: There were two grants that were given to Faith Works Wisconsin. The first was a direct grant from social services. The second was a program coming out of the Department of Corrections where offenders were able

to choose from a variety of substance abuse programs. Faith Works was one of them; it happened to be the only long-term treatment program, but it was one of them.

And in a decision that came down just weeks after the Zelman case on the Cleveland school voucher program, the court said Zelman tells us indirect funding is fine so as long as there's beneficiary choice; I'm going to say this program is constitutional. Now, the decision starkly illustrates this difference between direct and indirect financing streams; that's the first point. The second point, though, and I think it's something that's going to have to get worked out, is the level or quality of inquiry into the nature of the choice. The court doesn't spend a whole lot of time thinking about what the moment of choice looked like for these offenders. The choice was presented to them by their parole officer, who had the capacity to sanction them, and that means place them in custody.

So not a whole lot of attention to that. On the other hand, they did have some protections in place that assured that folks were given an actual secular alternative that said, look, here's the other place you can go to, this is going to qualify for what I want you to do. So some attention given to it, but that's an area of law that really has to be fleshed out.

And again, going back to the same point from the ACLU of Louisiana v. Foster case, what's going to be crucial in these programs is guidance. People need to have some idea about where the lines are to be drawn, not just lines that are drawn ex post by a court, when a court has seen thousands, and thousands, and thousands of dollars worth of litigation build up to some decisions that a judge is making, where this is the only time the judge has ever seen one of these programs. It's up to folks who are like us in this room to think about where these lines can responsibly be drawn and to think about how they're to be worded.

Then, finally, American Jewish Congress v. Bost involved yet another program with transformative implications. This was the Jobs Partnership, an employment training and employment skills preparation program down in Texas. And the court said that, again, a direct grant to one of those transformative programs, where the service purchased by the government was clearly religious transformation, or that was inescapably bound up the service purchased, would be unconstitutional.

Although, importantly there, they said that they were not going to require the faith-based ministry, the social ministry organization to repay the money that had been spent, because they had done exactly what they had promised to do, which is to use these methods to help folks get jobs.

Okay. So that's the developments in the case law in this year. I think what's useful to note about all three of the programs that were held unconstitutional is that they involved transformative services. This is not a food bank; this is not a homeless shelter where folks are getting a place to stay and a meal. These are services where the religious institution has long-term contact with somebody and contact that is supposed to effect a personal transformation.

I haven't seen the cases outside of that context; I'm sure they're coming up. I mean, we know that some of them are starting to bubble up now. But I think that these are going to be the places where there are lightning rods. These are the places where the protections need to be greatest for the constitutional values, for a variety of reasons. First, because these are the things that are likely to get litigated by the groups that litigate these things. But, second, to the extent that we are concerned about religious coercion of folks, these are the contexts in which we really do have reason to pay attention.

Federal programs: Most of the stuff in our section on federal programs, I think, has been covered already today. I'll just say a brief word about it. Of course, faith-based organizations have long been providing social services. They were providing social service before government started providing social services. That's not a question. The only issue, really, that is on the table is whether government can finance faith intensive social services. That's the question.

And we can talk about things that have always and already been done, fine, but we've got to focus on the question that raises the constitutional difficulties, at least for lawyers. You all have lots of reasons for paying attention to this. We as lawyers, that's the one we should be keeping our eyes on.

The Charitable Choice provisions, I think you're all quite aware of, permit FBOs not to establish a separate 501(C) (3) unless the state law otherwise required it, permit faith-based organizations to retain their religious statements of governance, the religious conditions for selections of officers and directors who will oversee the mission of the organization, permit them to maintain religious imagery, and permit them to retain the employment preference given under federal law. That is, you don't have to give up your right to discriminate in favor of co-religionists.

The requirement that is present there, and importantly present, of course, is a requirement that FBOs who participate may not use public funds for proselytizing, worship, religious instruction -- again, the marks of a religious entity according to the courts, and now Congress. Charitable Choice applies to a wide variety of programs, but, importantly, not all federal programs, and indeed you have to look closely at not only the legislation, but at the regulations, because sometimes things that are permitted to Charitable Choice programs are specifically denied to non-Charitable Choice programs.

For example, the Childcare Development Fund specifically says that if you receive a direct grant under this program, you cannot favor your co-religionists in hiring caregivers. It is position limited, but it still says you can't favor co-religionists. If you receive more than 80 percent of your money through indirect grants under the Childcare and Development Fund, you cannot discriminate in favor of co-religionists for hiring. So you have to pay attention to not just the sort of broader language of each of the agencies, but program-specific.

And, again, I think you have a pretty good idea from the first panel about what has happened over this year in terms of the work of the federal offices, the agency offices on the Faith-Based and Community Initiative and the funding streams that have come through the Department of Labor and the Compassion Capital Fund. In looking at this, I think the most important things that we would see are, first off, the need for transparency; that it's important for the integrity of the government process that people have an idea about exactly what's happening.

I think one of the real trouble points for this happened with both the labor program and also with HHS's Compassion Capital Fund, where all of the language said: we're giving money to intermediaries to build capacity. And then you read the fine print, and a lot of the money is destined to be passed through by the intermediary organizations to faith-based organizations and community organizations.

Now, look, I happen to think that's a good thing to do. But if you do things in fine print, you destroy the trust you need to build. And this is true for macro level with administrations; this is true for the micro level with individual programs. I think it's an important lesson; I hope they've learned it. Let's be up front about this. Let's say this is a part of what we intend to do. We think it's an important part of the study of building up this area, but it still needs to be done explicitly.

Nowhere, I think, is this more needed than in making clear what these marks, proselytizing, worship, and religious instruction, mean. And I think this offers a wonderful opportunity to do something called notice and comment rule making. Let's try to figure out what these rules look like. Let's have discourse among people who are learned in these areas, not just theologians, but folks who have experience administering programs, who are trying to draw these lines.

This is not an area where playing ostrich helps anybody. It doesn't help folks who want to deliver the services; it doesn't help folks who want to administer the programs at the grants and contract level. But, again, it remains to be seen whether that's the avenue that either the administration or even the states want to take.

Okay, onto three topic areas, employment, state constitutions, and then to the contracts themselves, and then we'll try to wrap up so we can have some time for questions. First, where there has been much, much heat, and occasionally light, the area of employment discrimination. The first point under this is employment of clergy. There is strong constitutional protection for religious groups to choose whomever they would like, free from regulations by employment discrimination, of their clergy.

Of course, clergy chosen because they are clergy are in an ambiguous relationship with recipients of government grants. Are their positions funded through grants, if they're really clergy and chosen for that perspective? Nevertheless, that's the only area that we believe the constitution speaks strongly to. I know there are lots of folks that we respect greatly who disagree with us on whether the constitution should have broader

implications. But as far as Chip and I believe, the constitutional concerns extend only to the right of religious institutions to choose their clergy free from employment regulation.

All non-clergy hiring laws, so everybody else, all the other employees, from the caregivers down to the janitors, under federal law, as you all know, title seven does provide a very broad exemption for religious institutions to prefer co-religionists in hiring, not just when they can give a good reason; it's simply jurisdictional autonomy. We get to decide, you don't get to ask when we hire based on our religious preference.

First question: does the receipt of government funding, in itself, without any other language attached to it -- in itself, does that cause people to lose their exemption under federal law? The question is disputed; it's been litigated a couple times. All courts but one have said no, that simply by virtue of receiving government funds you do not thereby, automatically, simply by implication of receiving the funds, lose your ability to prefer co-religionist in hiring.

That said, Congress has the power to require, as a condition of your receiving government funds, that you give up that exemption. We believe that is also unquestioned. That is, Congress wants to say, take this money. You now have to give up that right to discriminate. Congress is free to do that. And as I mentioned, the Childcare and Development Fund does expressly that.

Now, that's only one part of the story, and we believe that's a part of the story many of you all already know. That, for us, is not the most interesting part of the story. The interesting story is what happens when you throw in the joys of federalism. State law is not preempted by Charitable Choice. Some people would like to think it is, but it's not. All Charitable Choice says is that under the federal rules, you are exempt, you retain your exemption.

State statutes often do recognize an exemption; 43 states do recognize some form of exemption under their own state employment discrimination rules, but a number of them do not. Simply by virtue of receiving government funds, do you lose the automatic exemption? As far as we can tell in states, courts have answered the same way they've answered at the federal level. No, if you had an exemption, you don't lose it just by virtue of receiving government funds.

That said, in our survey of the law, 18 states, either explicitly or by unavoidable implication, say that FBOs entering into contracts with states do not retain their exemption from state non-discrimination law. Most of the major cities that we surveyed forbid all entities, including FBOs that do business with the states, from engaging in employment discrimination, including on the basis of religion.

Now, this doesn't mean that that's the way it's going to play out in those states. State contracting officers sometimes make side deals without anybody else ever knowing about them. We know this is true in some cities, that a number of religious organizations work out for themselves deals with the city. Nevertheless, this is the environment that

FBOs work in. And in my other hat of advising Lutheran social service organizations, this is the law that I'm interested in. I want to know what's really going to affect them on the ground, and here I think there is more uncertainty that folks often acknowledge.

The points about the relationship between state and federal law, I think, are important to remember. The exemption from federal law does not give an immediate exemption from state or local law. Some states say they simply track federal law. Fine, then whatever exemption you get, you maintain. But Congress has the authority to override that state and local law. If it wants to do so, it has to do so explicitly. It often has not wanted to do so. In Congress's silence, the state and local law remains in effect.

Next, on to the state constitutions, an area that really has just opened up significant inquiry over the last six months or so, so a lot of this stuff is still being sorted out. Many states have constitutional limitations that are far more broad than the federal constitution. Some state constitutions have more than one such provision that is broader than the federal constitution. A lot of them have constitutional provisions that affect schools -- say, no aid to any sectarian school at all. Twenty-one states have such a provision.

Twenty-five states have constitutional provisions that explicitly forbid state financing of any religious organization. Six states have rules that go beyond and say, not only do we forbid direct financing, we forbid even indirect financing, including Florida's constitution, article one, section three, "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or religious denomination, or in aid of any sectarian institution."

All right, so that's what the texts say. What do the texts mean? As you saw from Florida today, notwithstanding that aggressively separatist constitution, they're still giving grants to faith-based organizations. Now, what do we glean from that? First, I would want to know a lot more about the character of those organizations receiving grants. Because even when the federal constitution was at the height of its separationist interpretation, faith-based organizations still received government contracts, but they had to do so in a way that assured the separation of church and state, which meant they had to assure that not only is this a separately incorporated entity, and the audit can be done to ensure that no funds received from the government are put back into the sectarian institution, but that the services provided, themselves, are done in a way that is secular.

So, again, you would want to know more than that, at least that much, before you'd know whether Florida is simply ignoring its constitution, or whether it, in fact, does have a way of providing social services that are consistent with that constitution.

The federal constitutional challenges are this summer's sort of new event on the jurisprudential horizon. Folks who have reason to believe that the state constitutions that restrict grants to faith-based organizations may themselves be amenable to attack on a variety of quite complicated grounds, some because they were enacted back in the late

19th Century out of distinctly anti-Catholic animus, others for equal protection or free exercise reasons that the state constitutions single out, impermissibly, religion as a category.

Chip and I have an article that we just posted to the Roundtable website yesterday that goes through some of these arguments in excruciating detail. I'm sure if Chip were here, he'd want to talk to you a lot more about it, but I'll just pass on. Needless to say, that is an interesting area, and an area that deserves to be watched closely.

Finally, on the social service contracts: We've collected 36 states' basic social service contracts, and most of those contracts have some form of employment discrimination provision in them, and I've talked a little bit about those. Very, very few of the contracts, even the ones that would ordinarily be given to a faith based organization, very few of them have anything specific about the service to be provided by the FBO. The exceptions that are the starkest are Oklahoma, Texas and Wisconsin.

I know there are a few contracts out of Indiana. I know there are a few -- I'm blanking now on the fifth state. But these three are the ones that, in their basic state contract provision, have provided for FBOs with language that in many ways tracks the Charitable Choice language, permission to avoid setting up a separate 501 (C) (3), the permission to retain religious imagery, the religious identity of the organization, and also the prohibition on sectarian worship, instruction, or proselytizing.

Again, what's remarkable about them is that those three terms, the things that are supposed to delimit the constitutionally impermissible activities are not defined. And you don't have to have spent a lot of time taking theology to know that those are tough terms to define, and what's really important is not saying the words, but what the words mean. And again, we will look forward to trying to figure out how that definition is established over the next, we hope, year or so. It will probably take longer.

The contractual silence in this area is really a special concern to FBOs, not just to folks who think that the whole move is wrongheaded, but to folks who really do support greater involvement of faith-based organizations.

(TAPE CHANGE.)

ROBERT TUTTLE: -- Anyone who tries to answer these questions is going to have to deal with some quite basic things. First, what does it mean to preserve the religious character of the FBO? We certainly want people to be able to continue to look religious, to talk religious among themselves. But at what point does the imagery in place become unfriendly for folks who are not of that faith? And -- we're not talking about a beneficiary choice program, we're talking about a direct grant program -- should government be a place that has the character of unfriendliness when it uses faith-based organizations?

The continued protection of the ability of groups to serve a broad variety of folks, not just their own co-religionists: so far, what we have seen is that faith-based organizations do that. They do continue to serve a wide variety of folks, not just their own co-religionists, and try to make sure that that continues.

You have to think of a method of alerting beneficiaries to the secular options that are provided. The way the first conversation with a social worker goes, or in the Freedom from Religion case II about the Department of Corrections, the way that conversation with the parole officer goes, these are things that are of vital importance. Are these secular options given only when requested? Are they given at the outset, that says here are some options, and if you're not comfortable with the religious option, here are, or is the secular alternative?

Finally, two things: First, as I've said before, specifying exactly what constitutes worship, proselytizing, and religious instruction -- those things that the state is forbidden to support. And second, providing adequate accounting -- Again, this goes back to the point about transparency. To the extent that the accounting for this and the activities can be done in a way that are accountable to folks on the outside, that they're transparent, the level of trust can only rise, I think.

To the extent that things are done without significant ability for folks to know what happened, suspicions will predictably increase, and with suspicions, litigation. That's just an overview. I look forward to some questions if we have some time.

A. JAMES REICHLEY: Thank you, Bob, for that very full, and acute, and penetrating discussion. We have time for only a few questions in order to keep Dick's train moving on time, but we'll get in as much as we can, and I'm sure Bob will be glad to respond to you if you approach him after the program. Let's see. There're quite a number of questions that we're not going to get to, but the first one: how does your reading of Mitchell square with Justices O'Connor and Breyer's explicit language distinguishing the loan of computers and the direct payment of money to pervasively religious institutions?

ROBERT TUTTLE: Justice O'Connor was faced with a decision that was relatively easy in that case. I don't mean that she didn't wrestle with it; she, I think, does with most of these cases. But this is not a place where she drew a line and said: "this is impermissible." She was able to say: "this is permissible, but I want to draw the line someplace pretty close to here."

So for those of you that are court watchers, what that means is we don't really know where the line is yet. We just know that this fell into the camp that, at least with her, was okay. I would really be surprised if, in a case that came down anywhere in the next couple years, she found that a segregated direct financing program was unconstitutional. Of course, this is like going to Delphi every other year -- you know, we get a few words. We're arguing about, well, which tense did they use?

I would be surprised if she saw a case where there was clear segregation -- here's where the money's coming in, here's what it's being used for, here's how we're going to account for it, here's why this is being used for a secular activity. I would be surprised if she were to hold that unconstitutional. I may be wrong, but I don't think that I am on this.

Think of the in-kind benefit provided in the Mitchell case. It's audiovisual equipment and computers, where there is no way to make sure that the equipment is not used for sectarian purposes. They can make guarantees; they all signed their contracts -- this is what we're going to do with this equipment. That case was a big departure from the previous in-kind cases, which had involved things that were quite fixed in their form at the time that they were given to the sectarian institution.

School books or, in *Agostini v. Felton*, the loan of public school special education teachers. These things are not easily divertible. These things are pretty fixed in form; we know how they're going to be used, or at least we have a good idea of how they're going to be used. With computers and audiovisual equipment, it starts to look an awful lot like cash. They can be used for a multitude of purposes.

So I know that she drew that line in that case. It's just a line that I don't think has any legal stability to it, nor did it do anything than make her look like she wasn't really diverging that far from the dissenters, even though she did uphold the decision of the court. She didn't sign the majority's opinion, of course, but she did uphold the decision of the court.

A. JAMES REICHLEY: I think we really have time for just one more. Can you discuss the legality of intermediaries, specifically religious NGOs, administering federal funds to social service providers for their operations and the potential for favoritism or discrimination?

ROBERT TUTTLE: Yes, I think that this is something that sort of came up and went by very quickly in the celebration of the use of intermediaries. There were some folks who believed that you would avoid legal problems, the constitutional problems, by using an intermediary. We just give them the money; it's not the government giving out money anymore.

But there is an incredibly developed law on the government contract side, government procurement law, about the status of grantees and sub-grantee relationships, which has every reason to believe that the same constitutional implications follow all the way down the lines in these grants and re-grants of government money. That's something that really needs to be attended to.

Part of what's going on, though, is not just people willfully ignoring it. Part of it is the comparative development of the government procurement contract side and the grant law side. The law relating to grants is, let's just say, charitably, undeveloped, that

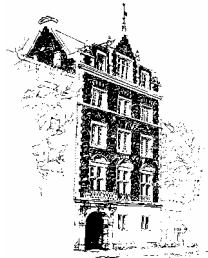
there are lots and lots of gaps in that law. But normally, when you try to figure out gaps, you look at a closely analogous area of law. If you looked at the contract side of procurement law, it wouldn't be a whole lot of question that the intermediaries do, then, themselves assume the obligations of government actors, in many ways, not across the board, but in many ways that are important for this debate.

A. JAMES REICHLEY: Thank you, Bob. And again, I'm sure Bob will be glad to answer the questions that we haven't got to if you approach him individually.

(END OF SESSION.)



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