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Faith and Federalism: Do Charitable Choice Provisions Preempt State Nondiscrimination Employment Law?

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I. Introduction

"We don't hire people of your faith."[1] Alan Yorker, the top candidate for a psychologist position at the United Methodist Children's Home in Decatur, Georgia, was not only disappointed that his job interview ended with this abrupt pronouncement about his Jewish faith—he was angry enough to file a lawsuit.[2] "'It's painful to have someone tell you they won't even interview you for a job because of your religion,'" Yorker explained, "'[b]ut the pain becomes greater when you realize your own taxes are supporting that discrimination.'"[3]

If the children's home were strictly a private religious charity financed by the United Methodist Church, there would be little question whether Yorker's religious beliefs could disqualify him as an employee.[4] Under Title VII of the Civil Rights Act of 1964,[5] religious organizations enjoy an exemption from the Act's general prohibition of religious discrimination in employment.[6] But the United Methodist Children's Home in Decatur, Georgia, like many religiously

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1. Adam Liptak, *A Right to Bias is Put to the Test*, N.Y. TIMES, Oct. 11, 2002, at A30 (quoting Alan Yorker's recollection of what Sherri Rawsthorn, supervisor at the United Methodist Children's Home in Decatur, Georgia, told him as she ended his job interview).

2. Alan Yorker first filed a complaint with the Equal Opportunity Employment Opportunity Commission (EEOC), and the EEOC gave him the right to sue. Plaintiffs' Complaint, para. 9, Bellmore v. United Methodist Children's Home (2002), *available at* http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/156.pdf [hereinafter Plaintiffs' Complaint] (on file with the Washington and Lee Law Review). Yorker was joined in his lawsuit by Aimee Bellmore, a youth counselor who lost her job at the Decatur United Methodist Children's Home when the directors learned she was a lesbian. *Id.* para. 3. Additional plaintiffs included child welfare professionals, clergy, and the mother of a gay youth—all Georgia taxpayers who opposed (and claimed to be injured by) the use of taxes to fund religious discrimination and indoctrination. *Id.* The case settled out of court. *See* Alice M. Smith, *Georgia Children's Home Settles Lawsuit; Questions Remain*, UNITED METHODIST NEWS SERVICE, *at* http://www.umc.org/umns (Nov. 17, 2003) (discussing the outcome of the dispute) (on file with the Washington and Lee Law Review).

3. Felix Hoover, *Case Opens Hiring-Bias Debate Again*, COLUMBUS DISPATCH, Nov. 15, 2002, at 01E; *see* Liptak, *supra* note 1, at A30 (quoting Yorker's claim that "[m]y money should be used for things that are not abridging my civil rights").

4. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 330 (1987) (applying the Title VII religious employer exemption to the secular nonprofit activities of a religious organization).

5. 42 U.S.C. § 2000e (2000). Title VII of the Civil Rights Act of 1964 is the major federal statute regarding employment discrimination; *see also infra* Part II.B (discussing Title VII exception for religious organizations).

6. 42 U.S.C. § 2000e–1 (2000) ("This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."); *see also infra* Part II.B (discussing the Title VII exemption for religious employers).

affiliated children's homes, receives a substantial amount of its funding from state social service contracts.[7] Should government funding affect the organization's exemption status?

"Tax-funded religious discrimination"[8] has become a rallying cry for opponents of "charitable choice," the informal title for laws and regulations that allow religious organizations to compete for government social service contracts on an equal basis with other private service providers without altering their religious character.[9] In this Note, "charitable choice" will refer to the original charitable choice provisions Congress enacted as part of the sweeping welfare reform legislation of 1996.[10] The 1996 charitable choice provisions applied primarily to welfare programs funded under block grants to states for Temporary Assistance for Needy Families (TANF).[11] The charitable choice provisions direct states distributing these funds to recognize certain safeguards protecting the religious freedom of faith-based service providers.[12] The

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7. *See* Plaintiffs' Complaint, *supra* note 2, at para. 18 (asserting that the United Methodist Children's Home received forty percent of its funding from "government payments in connection with its care of children assigned by the State to its facility"); *see also* Smith, *supra* note 2 (noting that "state contracts account for 57 percent of the home's operating budget"). At the time of the settlement, more than ninety percent of the 160 youth living at the Georgia Children's Home were wards of the state. *Id.* The home received a per diem amount from the state for each child in state custody residing at the home. *Id.*

8. *See* Press Release, American Civil Liberties Union, President Bush Puts Forward Final Installment of Faith-Based Plan, ACLU Opposes Tax-Payer Funded Religious Discrimination, *at* http://www.aclu.org (Sept. 22, 2003) (reacting to President Bush's extension of charitable choice through administrative regulation, the ACLU found the changes to be a "'sweeping affirmation of tax-funded religion and religious discrimination'") (on file with the Washington and Lee Law Review); Press Release, Americans United for Separation of Church and State, White House Launches Crusade to Promote Taxpayer-Funded Job Bias, *at* http://www.au.org (June 24, 2003) (characterizing the "Bush administration's heightened campaign to legalize religious discrimination with public funds" as "an appalling endorsement of government-approved job bias") (on file with the Washington and Lee Law Review). Reverend Barry W. Lynn, Executive Director of Americans United, declared that the White House Office of Faith-Based and Community Initiatives handbook for religious employers "feels more like a religious tract than sound policy analysis." *Id.*

9. *See* 42 U.S.C. § 604a (2000) (covering services provided by charitable, religious, or private organizations). *See generally infra* Part II.A (discussing charitable choice and the Faith-Based Initiative).

10. 42 U.S.C. § 604a (2000); *see also* BEN CANADA & DAVID ACKERMAN, FAITH-BASED ORGANIZATIONS: CURRENT ISSUES 3 (2003) (describing the original charitable choice provisions).

11. *See* 42 U.S.C. § 604a(a)(2) (2000) (describing the programs affected by charitable choice). The original charitable choice provisions also applied to Supplemental Security Income, Medicaid, and food stamps programs, to the extent that these programs contract with private organizations. *See id.* (same).

12. *See* 42 U.S.C. § 604a(d) (2000) (outlining safeguards for protecting the religious character and freedom of participating religious organizations).

provision addressing religious hiring freedom is the most controversial of these protections.[13] Section 604a(f) of the charitable choice statute expressly states that government funding does not affect a religious organization's Title VII exemption.[14]

President Bush entered the White House in 2001 aiming to expand the role of faith-based organizations in the delivery of social services.[15] In his first month in office, Bush created the Office of Faith-Based and Community Initiatives in the White House to facilitate faith-based participation in government-funded welfare programs.[16] Two months later, Representative J.C. Watts introduced the Bush Administration's most ambitious piece of legislation designed to expand charitable choice.[17] The "Charitable Choice Act of 2001," Title II of the Community Solutions Act of 2001, would have extended charitable choice protections for faith-based contractors to eight federal program areas.[18] The House passed the Charitable Choice Act in July 2001,[19] but the bill had a rougher time in the Senate.[20] The Senate's version of the Community Solutions Act, called the "Charitable Aid, Recovery and

13. *See* IRA C. LUPU & ROBERT W. TUTTLE, GOVERNMENT PARTNERSHIPS WITH FAITH-BASED SERVICE PROVIDERS: THE STATE OF THE LAW 43 (2002) (stating that "[w]hether [religious organizations] participating in service partnerships with government should be permitted in their employment practices to favor co-religionists is among the most hotly debated topics in this field").

14. *See* 42 U.S.C. § 604a(f) (2000) ("A religious organization's exemption provided under section 2000e–1 of this title regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described in subsection (a)(2) of this section.").

15. *See* RAM A. CNAAN, THE INVISIBLE CARING HAND: AMERICAN CONGREGATIONS AND THE PROVISION OF WELFARE 6 (2002) (calling the Faith-Based and Community Initiative President Bush's "key domestic policy").

16. *See* CANADA & ACKERMAN, *supra* note 10, at 3–4 (outlining President Bush's Faith-Based Initiative).

17. *See* Community Solutions Act of 2001, H.R. 7, 107th Cong. (2001) (providing incentives for charitable giving by individuals and businesses, improving government delivery of social services to needy individuals and families, and enhancing the financial security of low-income Americans).

18. *See* Community Solutions Act of 2001, H.R. 7, 107th Cong. Title II (2001) (expanding charitable choice provisions to the following program areas: juvenile justice, prevention of crime, federal housing laws, the Workforce Investment Act of 1998, Older Americans Act of 1965, domestic violence intervention and prevention, hunger relief, and the Job Access and Reverse Commute grant program); *see also* CANADA & ACKERMAN, *supra* note 10, at 4 (describing legislative attempts to extend charitable choice).

19. The House passed the Community Solutions Act of 2001 by a vote of 233 to 198. 107 Bill Tracking H.R. 7.

20. *See* CANADA & ACKERMAN, *supra* note 10, at 4 (describing legislative attempts to extend charitable choice).

Empowerment Act" (CARE),[21] did not address faith-based hiring rights or extend charitable choice provisions to specific federal programs.[22] The 107th Congress ended without a Senate vote on the CARE Act, and the scaled-back 2003 version of the bill is now in committee.[23]

Although the Senate has effectively stonewalled legislative attempts to extend charitable choice provisions, President Bush has continued to advance his Faith-Based Initiative via executive orders and administrative policy.[24] In December 2002, President Bush issued an executive order to "expand opportunities" for faith-based participation in a broad range of federally-funded social service programs.[25] In response, federal agencies have revised their regulations to reflect that faith-based organizations with government contracts retain their Title VII exemption.[26]

Critics of charitable choice, representing a broad range of political and religious viewpoints,[27] believe the government has opened a Pandora's Box of constitutional evils by encouraging partnerships between religious

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21. *See* CANADA & ACKERMAN, *supra* note 10, at 4 (same).

22. *See* Charitable Aid, Recovery, and Empowerment Act of 2002, S.1924, § 801(2002) (providing that nongovernmental service providers should not be required to alter or remove religious artwork, charter provisions addressing religion, or religious qualifications for membership on their governing boards). The section also notes that lack of prior experience in government contracts should not disadvantage private organizations applying for grants. *Id.* As introduced in the 108th Congress, the Senate's version of the Charitable Choice Act applied to all "nongovernmental organizations" and did not address the right of religious organizations to make employment decisions based on religion. *Id.*

23. 107 Bill Tracking S.1924; 108 Bill Tracking S.476.

24. *See generally* White House Office for Faith-Based and Community Initiatives, *at* http://www.whitehouse.gov/government/fbci/ (last visited Sept. 6, 2004) (tracking the success of the Bush Administration's Faith-Based Initiative) (on file with the Washington and Lee Law Review).

25. Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 16, 2002) (directing federal agencies to adopt policies that "further the national effort to expand opportunities for, and strengthen the capacity of, faith-based and other community organizations so that they may better meet social needs in America's communities, and to ensure the economical and efficient administration and completion of Government contracts").

26. *See* The White House Special Briefing on the President's Faith-Based Initiative Program, Fed. News Serv. (Sept. 22, 2003) (covering White House briefing with Faith-Based Initiative Director Jim Towey, Secretary Chao of the Department of Labor, and Secretary Martinez of Housing and Urban Development).

27. Charitable choice's critics include not only the usual civil rights groups, including the American Civil Liberties Union and American Anti-defamation League, but also religious organizations and leaders who worry about the negative effects of government involvement in religion. *See* JOHN P. BARTOWSKI & HELEN A. REGIS, CHARITABLE CHOICES: RELIGION, RACE AND POVERTY IN THE POST-WELFARE ERA 7–9 (2003) (discussing debates about the propriety of faith-based initiatives).

organizations and the government.[28] Critics have voiced special concern about the charitable choice provision that allows religious organizations receiving government funds to retain their hiring exemption under Section 702 of Title VII.[29]

One of these vocal critics of government-funded employment discrimination is Alan Yorker, whose lawsuit alleged that the partnership between the Georgia Department of Human Resources and the United Methodist Children's Home constituted government indoctrination of religion and religious discrimination in violation of Title VII of the Civil Rights Act, the Georgia Constitution's Separation of Church and State Clause, and the Establishment Clause of the First Amendment to the United States Constitution.[30] Yorker and his fellow plaintiffs eventually reached a settlement with the United Methodist Children's Home.[31] The complicated legal question of government funding and religious employment discrimination remains unanswered, however, and it is only a matter of time before another lawsuit challenges the statute.[32]

Although plaintiffs challenging charitable choice laws will likely frame their employment discrimination claims as First Amendment and Title VII

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28. Because charitable choice involves formal relationships between government and religion, the laws raise several questions under the Religion Clauses of the Constitution. The answers to these questions fall outside the scope of this Note. For lengthy discussions evaluating the constitutionality of charitable choice, see LUPU & TUTTLE, *supra* note 13, at 15–34; Carl Esbeck, *Charitable Choice and the Critics*, 57 N.Y.U. ANNUAL SURVEY OF AM. L. 17, 24–31(2000); Vernadette Ramirez Broyles, *The Faith-Based Initiative, Charitable Choice, and Protecting the Free Speech Rights of Faith-Based Organizations*, 26 HARV. J.L. & PUB. POL'Y 315 (2003).

29. *See, e.g.*, Andrew Mollison, *House Votes to Let Religious Groups Discriminate in Hiring; Republican Majority Pushes through Bill that Changes Job-Hiring Restrictions*, SAN MATEO COUNTY TIMES, May 9, 2003 (quoting Barney Frank, Democratic Congressman from Massachusetts: "If you as a religious institution want to hire who you want, that's your right. But don't ask Americans of all religions to give you tax dollars to do it with."); Laura B. Mutterperl, Note, *Employment at (God's) Will: The Constitutionality of Antidiscrimination Exemptions in Charitable Choice Legislation*, 37 HARV. C.R.-C.L. L. REV. 389, 391 (2002) (arguing that religious organizations choosing to receive government funds alter their constitutional status and forfeit their Title VII exemption).

30. *See* Plaintiffs' Complaint, *supra* note 2, at paras. 55–80 (outlining the claims for relief).

31. *See* Settlement Agreement with the State of Georgia's Department of Human Resources, http://www.lambdalegal.org (Nov. 11, 2003) (outlining provisions of the settlement agreement) (on file with the Washington and Lee Law Review).

32. According to Yorker's Complaint, the United Methodist Children's Home admitted that two Jewish job applicants had filed claims of religious discrimination against the UMCH with the Equal Employment Opportunity Commission prior to Yorker and Bellmore's lawsuit. Plaintiff's Complaint, *supra* note 2, at para. 41.

violations,[33] they may be overlooking civil rights protections provided by state nondiscrimination laws. Most states have their own laws prohibiting religious discrimination, and many of these laws do not fully exempt religious organizations.[34] Even if the Supreme Court upholds the constitutionality of the charitable choice provisions, including the Title VII exemption,[35] faith-based organizations receiving government funds may still have to comply with state civil rights laws prohibiting religious discrimination.[36] Should religious organizations that receive charitable choice funds remain subject to state nondiscrimination laws? Or do the provisions of charitable choice preempt state law and allow faith-based organizations to retain their hiring freedom, regardless of their relationship with the state government?

No court has ruled on the preemption issue, and commentators disagree about the preemptive effect of charitable choice laws on state employment laws.[37] The Center for Public Justice and the Christian Legal Society, both strong advocates for charitable choice and the Faith-Based Initiative, assert that state nondiscrimination laws do not apply to religious employers receiving charitable choice funds.[38] Professors Ira Lupu and Robert Tuttle of the

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33. *See, e.g.*, Pedreira v. Ky. Baptist Home for Children, Inc., 186 F. Supp. 2d 757, 761 (W.D. Ky. 2001) (challenging government-funded children's home's religiously-motivated decision to fire youth counselor because of her sexual orientation). The facts in the *Pedreira* case mirrored Aimee Bellmore's experience with the United Methodist Children's Home. *See supra* notes 5–7 (discussing Bellmore's lawsuit against the UMCH). Like Bellmore, Pedreira lost her position as a counselor at the KBHC when the home learned that she was a lesbian. *Pedreira*, 186 F.Supp. 2d at 762; *see also* Plaintiffs' Complaint, *supra* note 2, at para. 65 ("UMCH acted with malice or reckless indifference towards Yorker's protected federal rights.").

34. *See infra* Part III.C (discussing state nondiscrimination laws).

35. This Note assumes that states are not constitutionally *required* to extend religious employment discrimination exemptions to nonministerial employees; otherwise, state nondiscrimination laws would fail regardless of preemption analysis outcome. For an argument that the nondiscrimination exemption for religious employers is neither constitutionally required nor constitutionally prohibited, see LUPU & TUTTLE, *supra* note 13, at 44 (asserting that "these matters must be decided as legislative policy, rather than be settled in constitutional adjudication").

36. *See id.* at 48 (arguing that "exemption from any portion of federal law of nondiscrimination does NOT create exemption from state or local law").

37. *See* WORKING GROUP ON HUMAN NEEDS AND FAITH-BASED AND COMTY. INITIATIVES, AGREED STATEMENT OF CURRENT LAW ON EMPLOYMENT PRACTICES, FAITH-BASED ORGANIZATIONS, AND GOVERNMENT FUNDING §§ 10.1–12.1 (2003), *available at* http://www.working-group.org (noting lack of judicial precedent or academic consensus on the preemptive effect of charitable choice provisions) (on file with the Washington and Lee Law Review).

38. *See* CHRISTIAN LEGAL SOC'Y., AS A MATTER OF LEGISLATIVE TEXT, FEDERAL FUNDS SUBJECT TO CHARITABLE CHOICE PREEMPT CONFLICTING STATE AND LOCAL NONDISCRIMINATION PROCUREMENT LAWS 2–4, *at* www.clsnet.org/clrfPages/advocacy/cChoiceAtt4.pdf (last visited Feb. 22, 2004) (stating that "[e]xisting Charitable Choice Law preempts state employment

Roundtable on Religion and Social Welfare Policy disagree and direct faith-based organizations that receive charitable choice funds to comply with state and local employment guidelines.[39] The Working Group on Human Needs and Faith-Based and Community Initiatives, an organization representing bi-partisan civil liberties and religious groups, aptly characterizes the preemption question as an issue "in dispute."[40]

The preemption question is crucial to faith-based employers participating in charitable choice programs, but as the split in opinions indicates, the answer is not immediately apparent from the face of the 1996 statute. In addition to highlighting important practical considerations facing faith-based organizations, the preemption question implicates larger issues of federalism and the interplay of federal and state laws. This Note applies traditional doctrines of federal-state preemption law to the original charitable choice provisions in 42 U.S.C. section 604a to determine whether faith-based organizations receiving charitable choice funds remain subject to state nondiscrimination laws. Part II of this Note provides a brief overview of charitable choice and the Faith-Based Initiative, examines the Title VII exemption for religious employers, and surveys the state nondiscrimination laws that may affect faith-based organizations contracting with the government. Part III examines federal preemption doctrines and anticipates how the doctrines will apply in the charitable choice context. Part IV outlines the policy questions Congress should consider before choosing to override state nondiscrimination laws. Part IV also addresses the possible implications of the Supreme Court's recent decision in *Locke v. Davey* on different federal and state standards regulating government funding of religious organizations. Part V concludes that the charitable choice provisions do not preempt state laws, with a caveat for religious organizations that receive indirect funding for inherently religious services. Finally, this Note calls for states to provide faith-

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nondiscrimination procurements rules—and local ordinances, if applicable—in order to secure the religious autonomy of [faith-based organizations] when these providers choose to compete for federal social service funding") (on file with the Washington and Lee Law Reivew); STANLEY W. CARLSON-THIES, CHARITABLE CHOICE FOR WELFARE & COMMUNITY SERVICES: AN IMPLEMENTATION GUIDE FOR STATE, LOCAL, AND FEDERAL OFFICIALS 19, www.cpjustice.org/charitablechoice/guide (last visited Feb. 22, 2004) (asserting that "state and local nondiscrimination laws that would encroach upon a provider's religious autonomy must give way to federal law") (on file with the Washington and Lee Law Review); *see also* Esbeck, *supra* note 28, at 20–22 (arguing for preemption).

39. LUPU & TUTTLE, *supra* note 13, at 48–49 (disagreeing with the Center for Public Justice's position on the preemption question).

40. WORKING GROUP ON HUMAN NEEDS AND FAITH-BASED AND COMTY. INITIATIVES, *supra* note 37, §§ 10.1–12.1 (analyzing competing statements about the preemptive effect of charitable choice provisions on state and local laws).

based specific contracts that outline how state and federal employment laws apply to religious organizations participating in charitable choice programs.

II. Background of the Issue

A. Charitable Choice and the Faith-Based Initiative

Congress introduced charitable choice in the Personal Responsibility and Work Opportunity Act of 1996[41] (Welfare Reform Act) to ensure that faith-based organizations[42] could compete for and receive government social service funding without diluting their religious character.[43] The concept of private service organizations formally contracting with the government has roots in Lyndon Johnson's Great Society programs—programs that encouraged partnerships between nonprofit community organizations and the government.[44] In the past, religious organizations receiving government funding for their social programs carefully separated secular services from their pervasively sectarian institutions.[45] Groups such as Catholic Charities and Lutheran Social Services took advantage of government funding by establishing separate nonprofit organizations and removing religious symbols from service areas.[46]

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41. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

42. The statute refers to "religious organizations," but "faith-based organizations" (FBO) is the more commonly used terminology. *See generally* LUPU & TUTTLE, *supra* note 13; CANADA & ACKERMAN, *supra* note 10, at 3. I use the phrases interchangeably to mean any religious organization, faith-based organization, or congregation that receives government funding for its social programs.

43. *See* 42 U.S.C. § 604a(b) (2000) (describing the purpose of the charitable choice section).

44. *See* BARTOWSKI & REGIS, *supra* note 27, at 55 (tracing the origins of formal collaborations between religious service providers and the government). Informal relationships between the government and religious service providers go back much further. For a short history of the role of religious organizations in American social welfare over the past four centuries, see *id.* at 27–59.

45. Religious organizations receiving social services may have believed that the Religion Clauses of the Constitution required them to take these measures. *See* U.S. GENERAL ACCOUNTING OFFICE, CHARITABLE CHOICE: FEDERAL GUIDANCE ON STATUTORY PROVISIONS COULD IMPROVE CONSISTENCY OF IMPLEMENTATION, GAO-02-887, at 1 n.1 (2002) (citing *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973)); *see also* BARTOWSKI & REGIS, *supra* note 27, at 55–56 (describing the practices of faith-based service providers such as Catholic Charities and Lutheran Social Services); CANADA & ACKERMAN, *supra* note 10, at 41 (listing service organizations that incorporated separately from their religious sponsors, including the Salvation Army, United Jewish Communities, and Habitat for Humanity).

46. *See* BARTOWSKI & REGIS, *supra* note 27, at 55–56 (describing the practices of Catholic Charities and Lutheran Social Services).

The charitable choice provisions in the 1996 Welfare Reform Act ensure that faith-based organizations can receive social service contracts without taking down religious artwork, altering their internal governance, or creating separate non-profit organizations.[47] The charitable choice statute also expressly stipulates that religious organizations maintain their Title VII exemption to use religious criteria in hiring when they receive specified government funds.[48] Charitable choice curtails the religious activities of the organizations, however, by prohibiting direct expenditure of government funds on proselytization or worship.[49] The statute further protects the rights of beneficiaries by requiring states to provide alternative assistance for any beneficiary who objects to the religious character of the service provider.[50] The statute also states that religious organizations receiving charitable choice funds cannot discriminate against beneficiaries on the basis of religious belief or "refusal to participate in a religious practice."[51]

Congress extended charitable choice to the Welfare-to-Work program in 1997,[52] the Community Service Block Grants in 1998,[53] and the Substance Abuse Prevention and Treatment Block Grants in 2000.[54] Upon taking office in January 2001, President Bush began to push for more participation by religious organizations in government-funded social programs,[55] giving the "Faith-Based and Community Initiative" an exalted position in his domestic policy.[56] Although Bush's legislative attempts to expand charitable choice have not survived the Senate,[57] he has issued four executive orders to "remove

47. *See* 42 U.S.C. § 604a(d)(2) (2000) (noting safeguards for religious organizations).

48. *See* 42 U.S.C. § 604a(f) (2000) (providing that a religious organization's Title VII exemption will not be affected by its receipt of government funding under the statute).

49. *See* 42 U.S.C. § 604a(j) (2000) (stating limits on use of funds).

50. *See* 42 U.S.C. § 604a(e) (2000) (outlining rights of beneficiaries to receive alternative assistance).

51. *See* 42 U.S.C. § 604a(g) (2000) (requiring nondiscrimination against beneficiaries).

52. 42 U.S.C. § 603 (2000).

53. *See* 42 U.S.C. § 9920 (2000) (treating religious organizations as nongovernmental providers).

54. *See* 42 U.S.C. § 290kk-1 (2000) (treating religious organizations the same as other nonprofit private providers).

55. *See* CNAAN, *supra* note 15, at 6 (calling the Faith-Based and Community Initiative President Bush's "key domestic policy").

56. *See id.* (same); CANADA & ACKERMAN, *supra* note 10, at 3 ("President George W. Bush has made a faith-based initiative a priority of his domestic agenda.").

57. The Community Solutions Act of 2001 would have extended charitable choice to most of the federal government's social services programs. *See* CANADA & ACKERMAN, *supra* note 10, at 4 (describing legislative attempts to expand charitable choice). The House adopted H.R. 7 by a vote of 233–198, but the Senate's version of the bill had a rougher time. *Id.* A

barriers" and "level the playing field" for faith-based organizations to seek federal grants for their social service programs.[58]

Buried within the larger Welfare Reform Act of 1996, the original charitable choice provisions received little attention when they were passed.[59] These newer initiatives to expand charitable choice, however, have sparked a debate over the constitutionality of government-funded religious service providers.[60] Of all the contentious issues in the debate, the right of faith-based organizations to make employment decisions based on religion has generated the most heated discussions.[61] Alan Yorker's experience with the United Methodist Children's Home in Georgia illustrates that "removing barriers" to religious hiring freedom necessarily results in new barriers to employment.[62]

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compromise version of the bill, the CARE Act of 2002 (S. 1924), did not address the religious organization employment discrimination exemption; the 107th Congress ended without a Senate vote on the bill. *Id.*

58. *See* White House Office of Faith-Based and Community Initiatives, *at* http://www.whitehouse.gov/government/fbci/ (last visited Sept. 6, 2004) (outlining President Bush's Faith-Based and Community Initiative and providing links to the executive orders) (on file with the Washington and Lee Law Review).

59. *See* CANADA & ACKERMAN, *supra* note 10, at 52–53 (commenting on the lack of legislative history addressing charitable choice).

60. CNAAN, *supra* note 15, at 7.

61. *See* IRA C. LUPU & ROBERT W. TUTTLE, THE STATE OF THE LAW 2003: DEVELOPMENTS IN THE LAW CONCERNING GOVERNMENT PARTNERSHIPS WITH RELIGIOUS ORGANIZATIONS 19 (2003) ("Of all the issues associated with the Faith-Based Initiative, none has proved more contentious than the freedom of [faith-based organizations] to favor coreligionists in employment decisions.").

62. The Bush administration emphasizes that allowing faith-based organizations to retain their Title VII exemption is not about discrimination, but rather about allowing religious groups to choose employees who share the same faith and religious mission. *See* White House Special Briefing on the President's Faith-Based Initiative, Fed. News Serv. (Sept. 22, 2003) (covering the press briefing announcing six new federal regulations expanding charitable choice). That allowing hiring preferences necessarily results in hiring discrimination seems like an unavoidable fact, however. These issues came out in a recent press conference announcing new regulations expanding the Title VII hiring exemption to religious employers contracting with the federal government. The following exchange between Secretary Chao of the Department of Labor and a member of the press ("Q") illustrates the confusion resulting from competing views on the hiring exemption:

> Q: Can I just follow up? But today's rule change provides federal funds to contractors who can . . . hire people based—not hire people based on their religion? . . .
>
> Sec. Chao: No, I think I made it quite clear. It removes the barriers from allowing a organization, a faith-based organization . . . to hire someone of their own faith. So—
>
> Q: But isn't the actual barrier against who you choose to hire in this case whether they are not of the same faith or perhaps in terms of sexual preference . . . . It's allowing an exclusion, is it not?

B. Title VII Hiring Exemption for Religious Organizations

Title VII of the 1964 Civil Rights Act, the major federal antidiscrimination employment law that applies to private and public employers with fifteen or more employees, contains an express, limited exemption for religious organizations.[63] The exemption, section 702 of Title VII, allows religious organizations to make hiring decisions based on religion, but not on the other characteristics prohibited by the act (race, color, national origin, or sex).[64] The Title VII religious discrimination exemption is not limited to employees in ministerial positions; it applies to all employees of a nonprofit religious organization.[65]

The original Title VII exemption for religious employers in the 1964 Civil Rights Act had a narrower scope, limiting the exemption to employment related to "religious activities."[66] In 1972 Congress deleted the qualifier "religious" in front of "activities"; the amended exemption now applies to "its activities."[67] In a 1987 case interpreting the amended language, the Supreme Court applied the amended Title VII exemption for religious employers to a nonministerial position in the secular nonprofit arm of a religious organization.[68] In *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*,[69] the appellee, Arthur Mayson, worked as a building engineer at a gymnasium owned and operated by the Latter Day Saints (LDS) Church.[70] Although Mayson's duties were not even tangentially related to the religious

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Sec. Chao: No, it's not an exclusion at all. We're removing the barriers.

Id.

63. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e–1(a) (2000) (exempting religious employers). The exemption states:

> This subchapter shall not apply to an employer with respect to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Id.

64. *See id.* (containing no exemption besides religion).

65. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 330 (1987) (applying the Title VII religious employer exemption to the secular nonprofit activities of a religious organization).

66. Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000) (addressing the 1972 amendment).

67. 42 U.S.C. § 2000e–1(a) (2000).

68. *Amos*, 483 U.S. at 330.

69. *Id.*

70. *Id.*

beliefs or activities of the church, Mayson lost his job when he failed to qualify for a "temple recommend," a certificate representing standing as a participating member of the Church.[71] Mayson brought a lawsuit charging that the LDS Church discriminated on the basis of religion in violation of section 702 of the Civil Rights Act of 1964.[72] When the LDS Church moved to dismiss on the ground that section 702 exempted the Church from religious discrimination claims, Mayson argued that if the exemption were construed to allow religious employers to discriminate on the basis of religion in nonreligious jobs, section 702 would violate the Establishment Clause of the Constitution.[73] The Supreme Court disagreed.[74] After examining the legislative history of the amendment, the Court determined that Congress intended to minimize governmental interference in the decision-making process of religious organizations.[75] Deeming noninterference to be a legitimate legislative purpose,[76] the Court found "ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'"[77] Thus, Section 702 of Title VII allows religious organizations to make hiring decisions based on religious grounds, even when the employment is not related to the religious activities of the organization.

Section 604a(f) of the charitable choice statute states that religious organizations receiving government funds under specified programs retain their Title VII hiring exemption.[78] Although the Title VII exemption has not been particularly controversial when applied to private religious organizations, some argue that when those organizations choose to receive government funds for their programs they effectively waive their exemption.[79] Opponents of

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71. *Id.*

72. *Id.* at 331.

73. *Id.*

74. *See id.* at 339–40 (reversing the district court's determination that § 702 impermissibly "entangles church and state").

75. *Id.* at 339.

76. *Id.* at 336.

77. *Id.* at 334 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)).

78. *See* 42 U.S.C. § 604a(f) (2000) (stating that "[a] religious organization's exemption provided under section 2000e-1 of this title regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described in subsection (a)(2) of this section").

79. *See, e.g.*, Mutterperl, *supra* note 29, at 425 (suggesting that when religious organizations choose to accept government funds, they voluntarily cede a degree of organizational independence). According to Mutterperl's analysis, "The Title VII exemption that is permissible in the private sector is no longer permissible in the charitable choice context." *Id.* at 426.

charitable choice rail against what they perceive to be government-funded religious discrimination.[80]

The rhetoric sounds persuasive, but the position is probably not legally defensible under Title VII. The exemption for religious organizations appears to apply regardless of whether the organization receives government funding. The statute does not speak to the relationship between the religious organization and the government, and lower courts have ruled that government funding simply does not affect a religious organization's status under Title VII.[81] In *Hall v. Baptist Memorial Health Care Corp.*,[82] the United States Court of Appeals for the Sixth Circuit held that the Baptist Memorial College

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80. Many critics of the fusion between government funds and the religious hiring preferences *are* religious organizations. For example, Reverend Randy Day, chief executive of the United Methodist Board of Global Ministries, issued a press statement in response to the House of Representatives adoption of a job-training act that included the charitable choice hiring exemption for religious organizations. *See Senate Should Ban Discrimination in Hiring, Church Exec Says*, UNITED METHODIST NEWS SERVICE (May 23, 2003), *available at* www.umc.org/umns/news_archive2003 (discussing the Church's position on government funds and social service contracts) (on file with the Washington and Lee Law Review). Day stated that the United Methodist Church's official policy required that "'Skill, competence, and integrity in the performance of duties shall be the principle consideration in the employment of personnel and shall not be superceded by any requirement of religious affiliation.'" *Id.* He expounded on this position:

> I offer this tried and true open hiring policy as a model to any faith-based organization that is serious about the delivery of publicly funded services to the public. Religion has no business accepting government money to foster its own private interests, important as those may be; and government has no business offering money to religious groups with the suggestion that they may use it in ways that discriminate among clients and/or staff.

Id. Day's attack on religious hiring preferences starkly contrasts with the employment practices of the United Methodist Children's Home in Alan Yorker's case. *See supra* notes 2, 7, and accompanying text (describing hiring discrimination at the children's home).

81. *See* Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 625 (6th Cir. 2000) (finding religious organization did not waive its statutory exemptions under Title VII because it received federal funds).

82. *Id.* Baptist Memorial College terminated plaintiff Glynda Hall's position as a Student Services Specialist after learning that Hall had been ordained as a lay minister at Holy Trinity Community Church, a nondenominational church that believes homosexuality is not incompatible with Christianity. *Id.* at 622–23. The Southern Baptist Convention, the college's religious affiliate, formally views homosexuality as "an abomination in the eyes of God." *Id.* The college felt that Hall's views on homosexuality thus created a "conflict of interest" and disqualified her for her position of influence over the students. *Id.* at 623. Hall's subsequent complaint, alleging employment discrimination on the basis of religion, was dismissed on summary judgment by the district court. *Id.* She appealed to the Sixth Circuit, which found that the district court had not erred in finding that the college was entitled to a religious exemption, that the college had not waived its Title VII exemption, and that Hall did not state a prima facie case of religious discrimination. *Id.* at 623–27.

of Health Sciences did not waive its Title VII exemption from religious discrimination claims when it accepted federal funds.[83] The Sixth Circuit reasoned that religious organizations could never waive Title VII exemptions because they "reflect a decision by Congress that religious organizations have a constitutional right to be free from governmental intervention."[84] Contrary to the Sixth Circuit's intimation, the Supreme Court has never held that a religious organization has a constitutional right to discriminate in any job position.[85] Even without a constitutional mandate, however, the language of Title VII suggests that the exemption is absolute for employers who fall within the statute's broad category of "religious entities."[86] Following the line of reasoning in *Amos* and *Hall*, faith-based organizations that receive government funding under the charitable choice statute most likely can discriminate on religious grounds for any position without violating Title VII or jeopardizing their eligibility for federal funds.

C. State Nondiscrimination Laws

Although Title VII does not address government funding of religious groups, many states and municipalities have their own laws prohibiting government-funded religious discrimination.[87] According to a report from the Roundtable on Religion and Social Welfare Policy, forty-six states have laws prohibiting employment discrimination on the basis of religion.[88] All but three

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83. *Id.* at 625.

84. *Id.*

85. *Cf.* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 336 (1987) (evaluating Title VII exemption for religious nonprofit organizations). In *Amos*, the plaintiff argued that the pre-1972 exemption for religious organizations—which limited the exemption to employees carrying out religious activities—was adequate under the Constitution. *Id.* The Court assumed "for the sake of argument that the pre-1972 exemption was adequate in the sense that the Free Exercise Clause required no more." *Id.*

86. *See* 42 U.S.C. § 2000e–1(a) (2000) (providing an exemption for religious employers). The statute states that the prohibitions against religious discrimination are inapplicable to employees of religious entities, which the statute defines as "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." *Id.*

87. *See* LUPU & TUTTLE, *supra* note 13, at 47–48 (surveying state and local antidiscrimination laws that might apply in the charitable choice context).

88. *Id.* at 47. Appendix B of the Lupu and Tuttle report provides a "State-by-State Summary of Religious Exemption Statutes," showing which states have employment discrimination statutes, whether religious organizations are exempted, what happens to the exemption if a religious organization contracts with the government, and whether any cases

of those states provide an exemption for religious employers,[89] but the exemptions vary and may not apply to faith-based organizations that receive state funds. For example, eighteen states currently have laws stating that religious organizations contracting with the government waive their exemption from state nondiscrimination law.[90] Another set of state laws limits the exemption to "the purpose of carrying on . . . religious activities"[91] or "to promote . . . religious principles."[92] Because the charitable choice statute prohibits the expenditure of government funds on "sectarian worship, instruction, or proselytization,"[93] faith-based organizations may surrender their hiring freedom in states with limited, ministerial-type exemptions.[94]

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interpret the exemption statutes. *Id.* at 131–70.

89. *Id.* North Dakota has no stated exemption for religious organizations, but the Lupu and Tuttle report cites the state's Attorney General as saying that "absent evidence of legislative intent to the contrary they would probably follow federal example." *Id.* at 158. West Virginia has no exemption for religious employers, and there are no cases interpreting the statute. *Id.* at 168.

Ohio is the third state without an exemption, although "according to the State Equal Opportunity Department, the Civil Rights Comm. would take into account 'factors that could violate or infringe upon the First Amendment protection of freedom of religion' when evaluating a discrimination claim." *Id.* at 159. The Ohio appellate court affirmed that the state lacked a blanket religious employer exemption in *Ward v. Hengle*, 706 N.E.2d 392, 395 (Ohio App. 1997), finding that Ohio Rev. Code Ann. § 4112.02 prohibited religious discrimination and did not exempt religious organizations. *Id.* In that case, plaintiff Brother Gabriel Ward belonged to a community of monks not officially recognized by the Roman Catholic Church and held a clerical position at Our Lady of Victory Church in Cleveland. *Id.* at 394. Defendant Father Hengle informed Ward that he would have to stop dressing as a monk and using the title "Brother" while at work because the practices conflicted with church doctrine. *Id.* Ward refused to comply with Hengle's request, and Our Lady consequently fired Ward. *Id.* Brother Ward brought a lawsuit claiming that Father Hengle and the church had violated federal and state law by discharging him on the basis of religion. *Id.* The trial jury awarded Ward damages based on its finding that the church had violated both federal and state law. *Id.* The church appealed the verdict, and the Ohio Appellate Court found that the trial court had erred in ruling that the church had violated federal law because the church was exempt from liability based on Title VII's exemption for religious employers. *Id.* at 395. However, the court ruled that the error was harmless, and affirmed the trial court's verdict based on Ohio's state antidiscrimination law. *Id.* The court noted that although the state courts often looked to cases interpreting Title VII for guidance, the state legislature demonstrated a clear intent that religious organizations should fall within the ambit of the state's antidiscrimination statute. *Id.* at 396. The court further stated that the state antidiscrimination law did not violate the First Amendment because it required only a minimal inquiry into church doctrine to recognize the dispute between Ward and the church. *Id.*

90. LUPU & TUTTLE, *supra* note 13, at 47–48.

91. *Id.* at 145 (citing Kentucky law).

92. *Id.* at 148 (citing Massachusetts law).

93. *See* 42 U.S.C. § 604a(j) (2000) (outlining limits on the use of government funds).

94. *See* McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 852–53 (Minn. 1985)

Additionally, most major cities also have their own laws forbidding all organizations contracting with the city from exercising religious hiring preferences.[95]

With so much variation in federal, state, and local employment law, not to mention the confusion inherent in church-state relationships, it is not surprising that states and faith-based organizations are implementing charitable choice inconsistently. A 2002 report from the United States General Accounting Office (GAO) noted that some state, local, and faith-based organization officials were unaware of the religious employer exception to federal discrimination law, and that a number of the state and local officials who were aware of the exception nevertheless believed it "to be in conflict with local antidiscrimination laws."[96] Despite efforts in many states to create agencies or to appoint liaisons to facilitate the implementation of charitable choice,[97] the GAO study found that "few local and [faith-based organization officials] we interviewed recalled receiving any guidance on the safeguards, informal or otherwise, from state or local officials, respectively."[98]

The lack of clear guidelines in state social service contracts exacerbates this confusion. Currently, many state contracts for funding have employment discrimination provisions that require compliance with "federal and state law," and some contracts explicitly forbid religious discrimination and do not exempt religious organizations.[99] Because the language was not drafted with charitable choice and faith-based service providers in mind, the contracts confuse

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(deciding that the managers of a health club with a Christian mission could not discriminate on the basis of religion).

95. *See* LUPU & TUTTLE, *supra* note 13, at 48 (commenting on the prevalence of municipal ordinances forbidding contractors with the city to discriminate on the basis of religion).

96. U.S. GENERAL ACCOUNTING OFFICE, CHARITABLE CHOICE: FEDERAL GUIDANCE ON STATUTORY PROVISIONS COULD IMPROVE CONSISTENCY OF IMPLEMENTATION, GAO-02-887, at 20 (2002).

97. *See id.* at 17 (discussing the steps taken by different states to promote faith-based organization); *see also* CANADA & ACKERMAN, *supra* note 10, at 6 n.15 (naming fifteen states with official liaisons to improve communication and collaboration between the government and faith-based organizations). The nonexhaustive list includes Arizona, Arkansas, California, Colorado, Georgia, Indiana, Maryland, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Texas, and Virginia. *Id.*

98. U.S. GENERAL ACCOUNTING OFFICE, CHARITABLE CHOICE: FEDERAL GUIDANCE ON STATUTORY PROVISION COULD IMPROVE CONSISTENCY OF IMPLEMENTATION, GAO-02-887, at 21 (2002).

99. *See* LUPU & TUTTLE, *supra* note 13, at 71 ("With a few notable exceptions, the existing contracts between states and FBOs are conspicuously silent on the subject of the particular rights and responsibilities that attach to FBOs in such contracts.").

religious organizations.[100] Faith-based organizations have access to information about charitable choice and federal laws.[101] When it comes to state law, however, faith-based organizations are encouraged to consult an attorney to navigate the complicated questions about state laws and religious hiring freedom.[102]

The White House offers a solution to the confusion: simply permit faith-based organizations to retain religious hiring freedom.[103] Because the different patterns of exemptions in federal and state law have created a "patchwork quilt of conflicting approaches," the White House advocates changing conflicting federal standards to create a uniform federal exemption for religious organizations.[104] At the state level, however, "the President will urge the courts to provide guidance on whether faith-based organizations are required to comply with state and local ordinances that restrict their ability to participate in Federally funded formula and block grant programs."[105] President Bush has turned to the courts for guidance on the relationship between state and federal law, but the courts will look to Congress to determine whether charitable choice displaces state nondiscrimination statutes. Preemption is largely a question of congressional intent,[106] and as the Supreme Court has noted, "the courts should not assume the role which our system assigns to Congress."[107]

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100. *See* JOHN C. GREEN & AMY L. SHERMAN, EXECUTIVE SUMMARY; FRUITFUL COLLABORATIONS: A SURVEY OF GOVERNMENT-FUNDED FAITH-BASED PROGRAMS IN 15 STATES 7, *at* http://hudsonfaithincommunities.org (last visited Feb. 15, 2004) (noting that "[a]wareness of the charitable choice guidelines by [faith-based organizations] is less than ideal and only about half of the contracts written with the [faith-based organizations] actually include the specific language of the guidelines") (on file with the Washington and Lee Law Review).

101. *See, e.g.*, WHITE HOUSE FAITH-BASED AND CMTY. INITIATIVES, GUIDANCE TO FAITH-BASED AND COMMUNITY ORGANIZATIONS ON PARTNERING WITH THE FEDERAL GOVERNMENT, *at* http://www.whitehouse.gov/government/fbci/guidance_document.pdf (last visited Feb. 22, 2004) (providing religious organizations advice on federal charitable choice law) (on file with the Washington and Lee Law Review).

102. *See id.* at 13 (encouraging religious organizations to consult an attorney to find out more about specific requirement applying to their organizations, as well as their rights under the Constitution and federal law).

103. *See* WHITE HOUSE FAITH-BASED AND CMTY. INITIATIVES, PROTECTING THE CIVIL RIGHTS AND RELIGIOUS LIBERTY OF FAITH-BASED ORGANIZATIONS: WHY RELIGIOUS HIRING RIGHTS MUST BE PRESERVED 7, *at* http://www.whitehouse.gov/government/fbci/booklet.pdf (last visited Feb. 22, 2004) (noting that "[i]t is simply too difficult and costly for many faith-based organizations to navigate these uncertain regulatory waters") (on file with the Washington and Lee Law Review).

104. *Id.* (discussing need for uniform federal exemption).

105. *See id.* at 7–8 (explaining the Bush administration's position on religious hiring rights with respect to federal and state law).

106. *See* Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994) (stating that "[w]hether federal law pre-empts a state law establishing a cause of action is a question of

III. Federal-State Preemption Law

A. An Overview of the Preemption Paradigm

The question of whether state nondiscrimination laws apply in light of charitable choice implicates important issues of state sovereignty, federalism, and the doctrine of preemption, perhaps the "most frequently used doctrine of constitutional law in practice."[108] When evaluating preemption cases, the Supreme Court uses a standard framework for preemption that is easy to summarize but difficult to apply.[109] In brief, the Constitution's Supremacy Clause grants Congress the power to displace state laws in any area where Congress has the power to regulate.[110] However, the Court recognizes a presumption against preemption when states are regulating in their traditional areas of authority.[111] Congress may expressly exercise its powers to preempt by including a preemption clause in the statute.[112] If Congress does not specifically address preemption in the statute, it may implicitly achieve the same effect by occupying a field of regulation so completely that it leaves no room for the states to supplement it[113] or by passing legislation that conflicts with state law.[114] When deciding whether state and federal laws conflict, the Court will first consider the respective legislative purposes reflected by the statutes and then determine whether compliance with both federal and state law would be actually or legally impossible.[115] Finally, the Court will ask the broader

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congressional intent"); Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 604 (1991) (stating that "[t]he ways in which federal law may pre-empt state law are well established and in the first instance turn on congressional intent").

107. *See* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n., 461 U.S. 190, 223 (1983) (finding that Congress intended for the states to regulate the development of nuclear power).

108. *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994) (discussing the relevance of preemption to constitutional law scholarship).

109. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000) (calling modern preemption jurisprudence a "muddle").

110. *See* U.S. CONST art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

111. *See infra* Part III.B (discussing presumption against preemption).

112. *See infra* Part III.C (discussing express preemption).

113. *See infra* Part III.C.1 (discussing field preemption).

114. *See infra* Part III.C.2 (discussing conflict preemption).

115. *See infra* Part III.C.2 (same).

question of whether the state law acts as an impermissible obstacle to achieving the full purpose of the federal statute.[116]

Courts will likely apply this paradigm to a charitable choice preemption challenge. Predicting where the paradigm will lead jurists is more difficult to predict; the Supreme Court's preemption cases have created an enigmatic set of precedents.[117] As Professor Caleb Nelson observed, "Most commentators who write about preemption agree on at least one thing: Modern preemption jurisprudence is a muddle."[118] Working through the muddle, however, yields an indication of how courts should evaluate the charitable choice preemption question.

B. Presumption Against Preemption

The Supreme Court has routinely recognized a presumption against preemption, especially when the states are regulating in an area traditionally under their authority.[119] The presumption requires that courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[120] Furthermore, the presumption "provides assurance that 'the federal-state balance' . . . will not be disturbed unintentionally . . . by the courts."[121] Following this line of reasoning, courts should apply the presumption when determining whether the charitable choice statute overrides state nondiscrimination laws because the nondiscrimination laws flow from the states' police powers.[122] The states have traditionally enjoyed broad authority under their police powers to regulate all aspects of the employment relationship—including discrimination—to protect workers within the state.[123]

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116. *See infra* Part III.C.3 (discussing obstacle conflict preemption).

117. *See* Nelson, *supra* note 109, at 232–33 (commenting on the confusion surrounding recent preemption jurisprudence).

118. *Id.* at 232.

119. *See, e.g.*, Wis. Pub. Intervener v. Mortier, 501 U.S. 597, 605 (1991) (finding that the Federal Insecticide, Fungicide, and Rodenticide Act did not preempt municipal ordinances regulating the use of pesticide).

120. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

121. *See* Jones v. Rath Packing, Co., 430 U.S. 519, 525 (1977) (finding that federal labeling and packaging laws preempted conflicting state standards).

122. *See* Metro. Life Ins. Co. v. Mass., 471 U.S. 724, 756 (1985) (emphasizing state police power authority to regulate employment law).

123. *See id.* (same); *see also* Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American*

In his dissenting opinion in *Gade v. National Solid Wastes Management Association*,[124] a 1992 case dealing with the Occupational Safety and Health Act, Justice Souter argued that the preemption analysis should begin with the presumption against displacing state law.[125] He asserted, "If the statute's terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred."[126] If Souter's characterization of the presumption were accurate, a state nondiscrimination law would easily escape a preemption challenge in a charitable choice lawsuit. One could sensibly construe the provisions of 42 U.S.C. Section 604a to preserve the status quo regarding federal and state employment law. The statute could serve to protect the religious character of faith-based organizations and to prevent states from discriminating against faith-based service providers without requiring the preemption of state employment laws.[127] Of course, this reading is not the only possible construction of the statute,[128] but it is sensible and avoids preemption.

Workplace, 62 FORDHAM L. REV. 469, 537–41 (1993) (characterizing employment law as falling under state police power).

124. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992). In *Gade*, the Court evaluated the preemptive effect of federal safety and health standards promulgated under the Occupational Safety and Health Act (OSHA) on Illinois state laws regulating training for workers who handled hazardous waste. *Id.* at 91–92. The plaintiff, National Solid Wastes Management Association, sought to enjoin the enforcement of the state standards, which required the Association to take measures beyond those required by OSHA. *Id.* at 93–94. The United States District Court held that OSHA did not preempt the state laws because they were enacted with a purpose other than promoting job safety—namely, protecting the environment and general public safety. *Id.* at 94. The Court of Appeals reversed in part and concluded that OSHA preempted all state regulations that constituted health and safety regulation of workers. *Id.* at 95. In a five-four opinion, the United States Supreme Court affirmed that OSHA preempted the state regulations. *Id.* at 109. Four justices applied the implied preemption doctrine to find that the state regulations impermissibly conflicted with the purpose of OSHA. *Id.* at 100–08. Justice Kennedy wrote a separate concurring opinion arguing that the state laws did not "actually conflict" with OSHA to the degree required by the Court's preemption standards. *Id.* at 110. Kennedy instead relied on the express preemption language in OSHA to displace the state safety regulations. *Id.* at 109.

125. *See id.* at 116 (stating that "[a]nalysis begins with the presumption that 'Congress did not intend to displace state law'").

126. *Id.* at 116–17.

127. *Cf.* LUPU & TUTTLE, *supra* note 13, at 49 (arguing that the charitable safeguards for "religious character" and "independence from federal, state, and local governments" cannot be interpreted to preempt state antidiscrimination laws; rather, the provisions serve the "overall purpose of Charitable Choice legislation, which is to end categorical discrimination against [faith-based organizations] in the award of such contracts").

128. *Cf.* CHRISTIAN LEGAL SOC'Y, *supra* note 38, at 2–4 (interpreting 42 U.S.C. § 604a to require preemption of state nondiscrimination laws if they encroach on the religious liberty of

The presumption will probably not settle the question, however—at least not at the outset of the preemption analysis. Justice Souter's characterization of the presumption against preemption does not comport with the Court's recent preemption decisions.[129] In practice, the presumption does not consistently temper the Court's interpretation of statutes.[130] Indeed, several scholars have commented that the Court's usual recitation of the presumption against preemption is all but meaningless.[131]

Consider, for example, *Egelhoff v. Egelhoff*.[132] In this 2001 preemption case, the Supreme Court concluded that the Employment Retirement Income

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faith-based service providers); CARLSON-THIES, *supra* note 38, at 9, 19 (same); Esbeck, *supra* note 28, at 20–22 (same).

129. *See, e.g.*, Egelhoff v. Egelhoff, 532 U.S. 141, 151 (2001) (glossing over the presumption against preemption). *See generally* Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) (failing to address the presumption against preemption).

130. *See Egelhoff*, 532 U.S. at 151 (glossing over the presumption against preemption).

131. *See, e.g.*, Calvin Massey, *Federal Jurisprudence, State Autonomy: "Joltin' Joe has Left and Gone Away": The Vanishing Presumption Against Preemption*, 66 ALB. L. REV. 759, 759 (2003) (surmising that the Supreme Court's regular reference to the presumption against preemption "is devoid of force and no longer even hortatory"); Susan Raeker-Jordan, *A Study in Judicial Sleight of Hand: Did* Geier v. American Honda Motor Co. *Eradicate the Presumption Against Preemption?*, 17 BYU J. PUB. L. 1, 2–3 (2002) ("In fact, in numerous statements that reveal its approach, the Court evidences a predisposition toward preemption rather than a presumption against it. . . ."); Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 1013 (2002) ("[T]here is no meaningful presumption against preemption.").

132. Egelhoff v. Egelhoff, 532 U.S. 141 (2001). During their marriage, David Egelhoff designated Donna Egelhoff as the beneficiary of his life insurance policy and pension plan, both governed by the Employment Retirement Income Security Act of 1974 (ERISA). *Id.* at 144. The Egelhoffs divorced, and two months later David Egelhoff died intestate. *Id.* Because Donna Egelhoff remained the listed beneficiary for her former husband's insurance policy, she received the proceeds under the policy. *Id.* David's children from a previous marriage sued Donna for the proceeds under Washington state law, which provided that a divorce revokes the designation of the decedent's former spouse as the beneficiary for nonprobate assets, including life insurance policies and pension plans. *Id.* The children argued that because the state statute disqualified Donna as a beneficiary, they were entitled to the proceeds from their father's policies. *Id.* at 145. The trial court decided that the policy proceeds "'should be administered in accordance with ERISA'" and ruled in favor of Donna. *Id.* at 145. The Washington Court of Appeals reversed, concluding that ERISA did not preempt the state statute. *Id.* The Supreme Court of Washington affirmed, noting that the Washington statute lacked a "'connection with' an ERISA plan that would compel pre-emption." *Id.* The U.S. Supreme Court disagreed, and found that ERISA preempted the state statute. *Id.* at 147. The U.S. Supreme Court's rationale turned on the fact that the goal of ERISA was to create nationally uniform plan administration, and the Washington statute posed an impermissible threat to that goal. *Id.* at 148. The Court also relied on ERISA's preemption clause, which stated that the Act supercedes "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. *Id.* at 146. Justice Breyer, joined by Justice Stevens, dissented, and took issue with the majority's interpretation of the preemption clause. *Id.* at 153–54 (Breyer, J., dissenting).

Security Act of 1974 (ERISA) displaced a Washington statute providing that a divorce automatically revokes the designation of a spouse as a beneficiary in a life insurance plan.[133] Because the Washington statute regulated family property law, an area of law traditionally governed by the states, the presumption against preemption should have shaped the Court's interpretation of the state and federal statutes.[134] In his dissent, Justice Breyer argued that the Court could have read the state law to supplement ERISA, thereby honoring the presumption against preemption.[135] Justice Thomas's majority opinion took note of the presumption against preemption, but he quickly dismissed the presumption in light of Congress's "clear" intent to preempt state law.[136] The majority's casual treatment of the presumption in *Egelhoff* prompted Professor Calvin Massey to lament, "If the national motto 'In God We Trust' is a 'ceremonial deism,' the presumption against preemption is a ceremonial federalism."[137]

Massey's characterization may overstate the declining value of the presumption. As long as the Court continues to acknowledge the presumption against preemption in its opinions, the presumption may yet prove conclusive in close cases.[138] Because the charitable choice statute presents a difficult preemption challenge, the presumption could be the deciding factor in determining whether the federal provisions override state laws. The Supreme Court's recent applications of the presumption, however, indicate that the Court will not allow the presumption to solve the question at the outset of the preemption analysis. The Court will first evaluate the charitable choice statute and state nondiscrimination laws under the other preemption doctrines.

Justice Breyer argued that the ERISA preemption clause did not lead to the conclusion that the Act preempted all state laws governing inheritance; he asserted that the Washington statute did not conflict with ERISA—it simply "fill[ed] in the gaps" of the plan regarding what happens when a beneficiary designation is invalid. *Id.* at 156 (Breyer, J., dissenting).

133. *Id.* at 143.

134. *See id.* at 157 (Breyer, J., dissenting) (stating that "[i]n answering [the preemption question], we must remember that petitioner has to overcome a strong presumption *against* preemption. That is because the Washington statute governs family property law—a 'field of traditional state regulation' . . . .").

135. *See id.* (Breyer, J., dissenting) (same).

136. *See id.* at 151 (finding that the presumption can be overcome when Congress clearly expresses its intent to preempt state law).

137. Massey, *supra* note 131, at 759.

138. *But see* Raeker-Jordan, *supra* note 131, at 43 (stating that "[p]erhaps the most that one can say is that the presumption exists in name only; otherwise, its applicability and even the acknowledgment of its existence are dependent on the whims of the Court and the Court's desired outcome in any particular case").

C. Congressional Intent and Implied Preemption

Congressional intent is the touchstone of the preemption inquiry.[139] When determining congressional intent, courts first turn to the language, structure, and purpose of the statute.[140] Even when Congress includes a clause expressly addressing preemption, as it did in ERISA,[141] questions remain about the extent to which Congress intended to displace state law.[142] In the charitable choice statute, however, Congress included no clause expressly preempting state law.[143] Thus, courts will look to the implied preemption doctrines to discern Congress's intent. The Supreme Court has recognized two general ways Congress may implicitly override state law—field preemption and conflict preemption.[144]

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139. *See* Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994) ("Whether federal law pre-empts a state law establishing a cause of action is a question of congressional intent."); Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 604 (1991) ("The ways in which federal law may pre-empt state law are well established and in the first instance turn on congressional intent.").

140. Gade v. Nat'l Solid Wastes Mgmt. Ass'n., 505 U.S. 88, 96 (1992) (applying preemption analysis to determine that state laws must yield when they interfere with the federal Occupational Safety and Health Act of 1970).

141. 29 U.S.C. § 1144(a) (2000) (stating that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by the Act).

142. *See, e.g.*, Egelhoff v. Egelhoff, 532 U.S. 141, 152 (2001) (Scalia, J., concurring) (noting uncertainty about what exactly "triggers the 'relate to' provision" of the ERISA preemption section).

143. The charitable choice statute does contain a clause addressing preemption, but it is actually a savings clause *preserving* state law. Section 604a(k) states: "Nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations." 42 U.S.C. § 604a(k) (2000). Although the legislative history does not provide any information about the purpose of this clause, it is likely intended to address the thirty-seven state constitutional provisions and amendments that restrict the flow of state funds to religious organizations. The Roundtable on Religion and Social Welfare Policy, Roundtable Research Page on *Locke v. Davey*, *at* http://www.religionandsocialpolicy.org (Dec. 2, 2003) (on file with the Washington and Lee Law Review). The Supreme Court recently upheld the constitutionality of the State of Washington constitutional provision that prohibits the flow of government funds to religious institutions. *See* Locke v. Davey, 124 S.Ct. 1307, 1315 (2004) (stating that nothing in the state law demonstrated an animus toward religion).

144. *See, e.g.*, *Gade*, 505 U.S. at 98 (noting that absent express preemption language, the Court has recognized the doctrines of field and conflict preemption).

1. Field Preemption and the Title VII Exemption

Congress may choose to regulate a field of law so completely that state authority is necessarily preempted.[145] Congress may occupy the field by passing legislation in an area where the federal interest is so superior to the state interest that the federal law overrides any state laws touching on the same subject. For example, in a 1941 preemption case[146] the Supreme Court found that the federal government's supremacy in the general field of foreign affairs superseded a state's interest in regulating aliens within its borders, and therefore Congress's comprehensive plan for alien registration preempted more restrictive state registration laws.[147] Similarly, Congress may occupy a field of law by passing legislation that regulates a field so pervasively that it "leaves no room for the states to supplement it."[148] The Nuclear Energy Act, for example, illustrates Congress's intent to regulate the field of nuclear safety concerns except for limited powers expressly retained by the states.[149] The Supreme Court determined in a 1983 preemption case that Congress intended for the federal government to maintain "complete control of the safety and 'nuclear' aspects of energy generation," while allowing states to retain their traditional authority over the general regulation of energy production.[150]

Neither type of field preemption applies to the charitable choice dilemma. Congress has not expressed the intention to occupy the field of law addressing social service contracts or governing the relationship between religious service providers and the state. In fact, welfare programs are largely a matter of state concern.[151] As welfare policy researchers noted, the 1996 reforms to TANF "expressed a theory of federalism, in which states were given flexibility in designing policies and dealing with

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145. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (outlining various ways Congress may preempt state laws).

146. Hines v. Davidowitz, 312 U.S. 52 (1941).

147. *Id.* at 74. In *Hines*, field preemption informed the Court's decision that Pennsylvania's act conflicts with the federal scheme. *Id.* The case stands for the fact that the categories of preemption are not discrete.

148. *Rice*, 331 U.S. at 230.

149. *See* Pac. Gas and Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n., 461 U.S. 190, 212–13 (1983) (finding that the federal government has occupied the field of nuclear safety concerns).

150. *Id.* at 212.

151. *Cf.* Thomas L. Gais et al., *Implementation of the Personal Responsibility Act of 1996*, *in* THE NEW WORLD OF WELFARE 38 (Rebecca Blank & Ron Haskins eds., 2001) (surveying state experiences in the implementation of Temporary Assistance for Needy Families).

clients in exchange for state accountability to financial penalties and bonuses attached to program goals."[152] Far from occupying the field of welfare law, Congress created a broad framework within which states are expected to legislate.

With respect to the field of antidiscrimination employment law, although the federal government has passed important pieces of antidiscrimination law that apply to employers, the states retain authority to regulate employment within their borders.[153] Specifically, the charitable choice statute preserves a religious organization's exemption under Title VII of the Civil Rights Act of 1964.[154] However, Congress did not intend for Title VII to occupy the field of antidiscrimination employment law.[155] In fact, the language of Section 1104 of Title XI of the Civil Rights Act of 1964 supports the idea of state supplementation. That section provides that no part of the Act should be construed to indicate "an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter."[156] Although Section 1104 goes on to provide that the Act may override state laws "inconsistent with any of the purposes of this Act, or any provision thereof," Congress provided an even narrower preemption inquiry for Title VII.[157] According to Section 708, Title VII preempts only state laws that would result in a violation of Title VII.[158]

In other words, Congress has preserved the states' authority to enact nondiscrimination laws that provide more protection for employees.[159] For example, the Supreme Court upheld state employment laws that provide greater

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152. *Id.*

153. *See supra* notes 123–24 and accompanying text (discussing state police power to regulate employment).

154. 42 U.S.C. § 2000e (2000).

155. *See* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987) ("Congress has explicitly disclaimed any intent categorically to pre-empt state law or to 'occupy the field' of employment discrimination law.")

156. 42 U.S.C. § 2000h-4 (2000).

157. *Id.*

158. 42 U.S.C. § 2000e-7 (2000).

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

Id.

159. *See* Drummonds, *supra* note 123, at 537–41 (explaining that Title VII is part of a tradition of shared federal and state regulation of employment standards, and noting that Congress has set federal standards to be minimums, rather than maximums).

protection for pregnant workers than Title VII requires.[160] Additionally, some states have chosen to prohibit discrimination on the basis of sexual orientation, which is not protected by Title VII.[161] Applying this reasoning to the charitable choice context, it appears that Section 702 of Title VII does not mandate religious hiring freedom for religious organizations—it simply states that the federal prohibitions on religious discrimination do not apply to religious employers.[162] A state law prohibiting government-funded religious employers from discriminating on the basis of religion provides additional protection for employees. In this sense, the state law does not violate Title VII, it supplements Title VII. Thus, Title VII does not preempt state laws providing greater protection against religious employment discrimination.

2. Actual Conflict Preemption

Although Congress has not preempted state antidiscrimination law by its pervasive regulation of the field of employment law, courts will also examine whether state laws conflict with the charitable choice statute. In *Perez v. Campbell*,[163] the Supreme Court stated that "[d]eciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy

160. *See Guerra*, 479 U.S. at 280 (affirming that "Title VII does not preempt a state law that guarantees pregnant women a certain number of pregnancy disability leave days, because this is neither inconsistent with, nor unlawful under, Title VII").

161. *See, e.g.*, MASS. GEN. LAWS ch. 151B, § 4(1) (2002) (prohibiting employment discrimination based on sexual orientation); MINN. STAT. § 363A.08 (2000) (same); N.J. STAT. ANN. § 10:5–12(a) (2001) (same); VT. STAT. ANN. tit. 21, § 495(a) (2001) (same). For a comprehensive list of state employment statutes, see LUPU & TUTTLE, *supra* note 13, at app. B (indexing state and local antidiscrimination laws).

162. *See* 42 U.S.C. § 2000e–1 (2000) ("This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.").

163. Perez v. Campbell, 402 U.S. 637 (1971) (finding that the federal Bankruptcy Act preempted a provision of Arizona's Motor Vehicle Safety Responsibility Act that did not discharge judgment debts). In *Perez*, the petitioners sustained a tort damage judgment resulting from a car crash. *Id.* at 638. A federal district court discharged in bankruptcy the petitioners' judgments, including the tort judgment. *Id.* at 639. Under the Arizona Motor Vehicle Safety Responsibility Act, the petitioners were still liable for the tort damages, however, and the state suspended their drivers' licenses as a result of failure to satisfy the judgment. *Id.* at 641–42. The Supreme Court found that while the purpose of the Arizona act was to secure compensation for motor vehicle accident victims, the state's failure to recognize the discharge of judgment in bankruptcy interfered with one of the primary purposes of the federal Bankruptcy Act—to grant debtor a new start clear of preexisting debts, including some kinds of tort damages. *Id.* at 648. Therefore, the Court decided that the conflict between the laws impermissibly frustrated the federal scheme and the state law stood preempted. *Id.* at 651–52.

Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict."[164] If compliance with both the state and federal law would be physically impossible, the federal law preempts the state law.[165] In *Perez*, the court applied conflict preemption to a situation where compliance with both statues was logically impossible.[166] In that case, the state statute required an uninsured negligent driver to pay tort damages and withheld driving privileges until the driver satisfied the judgment.[167] The state law specifically noted that the obligation to pay damages could not be discharged in bankruptcy,[168] contrary to the federal Bankruptcy Act, which granted debtors a broad discharge from tort damages.[169] The Supreme Court found that the state law conflicted with the federal statute's broad discharge for debtors and thus concluded that the Bankruptcy Act preempted the state law.[170]

Applying the *Perez* reasoning to 42 U.S.C. Section 604a, if the charitable choice provisions imply that religious organizations do not have to comply with laws restricting their hiring freedom, contrary state nondiscrimination laws would be preempted due to actual conflict with the federal statute. The relevant provisions of the charitable choice statute are the subsections outlining charitable choice's purpose[171] and the safeguards for religious character and

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164. *Id.* at 644.

165. *See* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991) (discussing "[t]he ways in which federal law may pre-empt state law").

166. *See Perez*, 402 U.S. at 651–52 (noting that the state statute would effectively nullify the federal law).

167. *Id.* at 641–43.

168. *See id.* at 641–42 (quoting the provision of the Arizona Motor Vehicle Safety Responsibility Act: "A discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of this article").

169. *See id.* at 648 ("This Court on numerous occasions has stated that 'one of the primary purposes of the bankruptcy act' is to give debtors 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'").

170. *See id.* at 656 (finding the Arizona Safety Responsibility Act constitutionally invalid); *see also* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n., 461 U.S. 190, 216 n.28 (1983) (distinguishing present case from *Perez* because *Perez* involved an actual conflict). *Perez* illustrates the questionable usefulness of labeling preemption doctrines. The Court in *Perez* focused on the fact that the state statute frustrates the purpose of the federal statute, which sounds like obstacle conflict analysis. *See* Perez 402 U.S. at 651–52 ("We can no longer adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration."). In *Pacific Gas*, however, the Court referred to *Perez* as an actual conflict case, noting that the state law was preempted because it operated contrary to the provisions of the federal Bankruptcy Act. *Pac. Gas*, 461 U.S. at 216 n.28.

171. 42 U.S.C. § 604a(b) (2000).

freedom.[172] The stated purpose of the federal charitable choice statute "is to allow States to contract with religious organizations . . . without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under [charitable choice programs]."[173] The statute safeguards the religious character of the organizations by providing that a religious organization with a charitable choice contract "shall retain its independence from Federal, State and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs."[174] The statute further provides that a religious organization shall not be required by either a state or the federal government to "alter its form of internal governance" to receive funding.[175]

Proponents of preemption believe these charitable choice sections demonstrate Congress's intent to preempt state employment or procurement laws that would inhibit religious hiring freedom.[176] According to the Christian Legal Society's (CLS) construction of the statute, the provision that religious organizations retain independence from state and local governments over the definition and development of their religious beliefs includes the implied right to discriminate in hiring if the organization "has a sincere religious belief concerning religious staffing."[177] Additionally, CLS argues that the provision stating that religious organizations need not alter their "internal governance" must refer to the organization's employment practices regarding "officers and other key personnel."[178] The CLS reading of the statue thus construes an actual conflict between the 42 U.S.C. Section 604a and state laws that would restrict religious hiring freedom for organizations receiving funds under charitable choice.[179]

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172. 42 U.S.C. § 604a(d) (2000).

173. 42 U.S.C. § 604a(b) (2000).

174. 42 U.S.C. § 604a(d)(1) (2000).

175. 42 U.S.C. § 604a(d)(2)(A) (2000).

176. CHRISTIAN LEGAL SOC'Y, *supra* note 38, at 3 (asserting that subsections (b), (d)(1), and (d)(2)(A) of the charitable choice statute, 42 U.S.C. § 604a, reflect the congressional purpose to override conflicting state laws).

177. *Id.*

178. *Id.* at 2.

179. *Id.* at 3 ("If [subsections (b), (d)(1), and (d)(2)(A)] did not preempt conflicting procurement laws, the language seemingly would have little or no effect."). The Christian Legal Society does not use the term "actual conflict" and does not apply any preemption cases in its analysis; it simply reads the charitable choice statute to preempt state law because it would be impossible for the charitable choice statute to operate otherwise. *Id.* This seems analogous to physical impossibility or actual conflict.

Although the CLS reading of the statute is plausible, the language of the statute is more ambiguous than the CLS analysis suggests. First, the charitable choice statute provides that religious organizations are not required to alter their "internal governance,"[180] but the statute does not define this phrase. Congress may have been referring to the religious organization's governing board rather than its employees—the statute is not clear on this point. Additionally, though charitable choice preserves a religious organization's independence from state and local government, including control over "the definition, development, practice, and expression of its religious beliefs,"[181] the term "religious beliefs" appears to limit this grant of independence. Arguably, religious organizations do not define or express their religious beliefs when they offer secular social services funded by charitable choice.

For insight on this point, return to the Supreme Court's opinion in *Amos*.[182] *Amos* is not controlling in the preemption context, but the decision sheds some light on how a court might interpret a religious organization's right to define its religious beliefs. In his concurring opinion, Justice Brennan agreed with the majority's decision to apply the Title VII religious employer exemption to the seemingly secular nonprofit activities of the Latter Day Saints Church, but his justification for the exemption rested on the fact that it would be too difficult for courts to distinguish between the religious and nonreligious activities of a religious organization.[183] Ideally, religious organizations should be permitted "to discriminate on the basis of religion *only* with respect to religious activities, so that a determination should be made in each case whether an activity is religious or secular."[184] In Brennan's opinion, "the infringement on religious liberty that results from conditioning performance of *secular* activity upon religious belief cannot be defended as necessary for the community's self-definition."[185]

Although Brennan believed that religious discrimination in employment should be limited to religious activities, he recognized that the autonomy of religious organizations required courts to refrain from evaluating the religious character of their activities on a case-by-case basis.[186] The problem of

180. 42 U.S.C. § 604a(d)(2) (2000).

181. 42 U.S.C. § 604a(d)(1) (2000).

182. *See supra* notes 68–77 and accompanying text (discussing the Supreme Court's opinion in *Amos*).

183. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 340 (1987) (Brennan, J., concurring).

184. *Id.* at 343 (Brennan, J., concurring).

185. *Id.* (Brennan, J., concurring).

186. *Id.* at 345 (Brennan, J., concurring) (noting that the nature of the religious

characterizing the nature of the activity as religious or secular served as the primary justification for a categorical exemption for religious nonprofit organizations. The categorical exemption allows courts to avoid excessive entanglement and relieves religious organizations from trying to anticipate whether a court would consider its activities religious or secular.[187]

a. Direct Funding

The charitable choice statute, however, addresses Brennan's concern in *Amos* by delineating how religious organizations receiving direct government funding may use the money. Section 604a (j) expressly prohibits organizations that receive direct government funds from spending the funds on "sectarian worship, instruction, or proselytization."[188] These prohibitions should reduce ambiguities about the religious nature of an organization's activity. To receive direct government funds, the religious organization must provide "inherently secular" social services.[189]

The charitable choice prohibitions against direct expenditures of government funds on religious instruction require religious organizations to assess the religious nature of their social service programs. The organizations, rather than the courts, bear the responsibility of characterizing their nonprofit activities as religious or secular. This separation should ameliorate concerns about excessive entanglement. The distinction between religious and secular activities also weakens the Christian Legal Society's broad construction of a religious organization's right to define, practice, and develop its religious beliefs through its employment decisions.[190] For example, a faith-based

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organization's activity is not always self-evident).

187. *Id.* at 345–46 (Brennan, J., concurring).

188. 42 U.S.C. 604a(j) (2000).

189. The White House Faith-Based and Community Initiatives created a handbook for faith-based organizations that supports this interpretation of the separation between religious and secular activities. *See* WHITE HOUSE FAITH-BASED AND COMTY. INITIATIVES, GUIDANCE TO FAITH-BASED AND COMMUNITY ORGANIZATIONS, *supra* note 101, at 10. The handbook states, "Basically . . . you can not [sic] use any part of a direct Federal grant to fund religious worship, instruction, or proselytization. Instead organizations may use government money only to support the *non-religious social services* that they provide." *Id.* (emphasis added). "Therefore," the handbook advises, "faith-based organizations that receive direct governmental funds should take steps to separate, in time or location, their inherently religious activities from the government-funded services that they offer." *Id.*

190. *See supra* notes 176–79 and accompanying text (discussing the Christian Legal Society argument that the statutory provisions protection an organization's right to define its religious beliefs conflicts with restrictions on hiring freedom).

organization operating a government-funded soup kitchen is providing a secular service. Even if some of the organization's employees view their work as fulfilling a religious duty or advancing the organization's religious mission, the service it provides is not inherently religious—assuming the employees are not providing spiritual instruction along with the soup. In most direct funding cases, it will be clear that the religious service provider does not need to discriminate on the basis of religion to effectively carry out its secular program. Therefore, state nondiscrimination laws would not actually conflict with the charitable choice statutory grant of religious autonomy to faith-based service providers.

b. Indirect Funding

Charitable choice's prohibition on proselytization and religious instruction applies only to organizations that receive direct government funds.[191] Some religious service providers receive charitable choice funds only through indirect channels such as vouchers.[192] For these service providers, the primary restraint on the religious content of their programs, at the federal level,[193] is the Establishment Clause of the Constitution.[194] The Supreme Court has interpreted the Establishment Clause to allow broad freedom for religious expression, regardless of government funding.[195] Thus, faith-based organizations receiving only indirect funding have more flexibility in designing the spiritual content of their programs.

In a recent charitable choice case, *Freedom from Religion Foundation v. McCallum*,[196] the United States Court of Appeals for the Seventh Circuit

191. *See* 42 U.S.C. § 604a(j) (2000) ("No funds provided directly to institutions or organizations to provide services and administer programs under subsection (a)(1)(A) of this section shall be expended for sectarian worship, instruction, or proselytization.").

192. *See* Ira C. Lupu and Robert W. Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, 18 J.L. & POL. 539, 575 (2002) (discussing methods of direct and indirect funding, including vouchers).

193. State versions of the Establishment Clause present different obstacles to faith-based service providers. *See supra* note 143 (discussing 42 U.S.C. § 604a (k) savings clause and *Locke v. Davey*).

194. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

195. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002) (upholding tax-funded vouchers for religious schools); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 845–46 (1995) (requiring state university to allow student newspaper with a religious viewpoint the same access to printing subsidies as other student groups).

196. Freedom from Religion Found., Inc. v. McCallum, 324 F.3d 880 (7th Cir. 2003).

followed the Supreme Court's lead and concluded that Wisconsin did not violate the Establishment Clause when it provided indirect funding to an inherently religious addiction recovery program.[197] Under Wisconsin's program, a convicted criminal who violated his parole or probation could, as an alternative to returning to prison, choose to enroll in one of the several halfway houses authorized by the state.[198] The state's list of halfway houses included Faith Works, a Christian rehabilitation program.[199] Parole officers who recommended Faith Works to parolees were required to explain that the program had a significant religious component.[200] Parole officers also informed parolees that they were free to choose a secular alternative.[201] For every parolee who enrolled in Faith Works, the state reimbursed the program for an amount specified in its contract.[202] The plaintiff taxpayers argued that the state's funding arrangement with Faith Works constituted a violation of the Establishment Clause of the Constitution.[203]

At trial, Faith Works emphasized the secular nature of Faith Work's program and argued that it could separate the religious aspects of its program from the secular components.[204] The district court rejected the argument and noted that Faith Works won the state contract because of its "unique long-term, faith-based approach."[205] The district court would not permit Faith Works to disavow its inherently religious character, but it concluded that the religious components of Faith Works did not affect the program's eligibility for state funding.[206] The district court reasoned "simply because a state-funded program engages in indoctrination does not mean that the program's funding is unconstitutional."[207]

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197. *Id.* at 882.

198. *Id.* at 881.

199. *Id.*

200. *Id.* at 882.

201. *Id.*

202. *Id.*

203. *Id.* at 881.

204. *See* Freedom from Religion Found. v. McCallum, 179 F. Supp. 2d 950, 968–70 (W.D. Wis. 2002) (outlining the argument that Faith Works is not a pervasively religious organization).

205. *See id.* at 969–70 (stating that "Faith Works cannot now try to excise religion from its offerings, saying that it contracted with the state to provide the wholly secular services of room and board without any reference to religion. This assertion rings hollow in light of the literature Faith Works provided the state.").

206. *Id.* at 970.

207. *Id.*

Instead of focusing on the religious nature of the program, both the district court and the Seventh Circuit scrutinized the state's contractual relationship with Faith Works.[208] The courts agreed that the state's practice of reimbursing Faith Works for each parolee who voluntarily enrolled in the program was effectively the same as providing vouchers to the parolees—the state simply skipped the intermediate step of putting the voucher in the hands of the parolee.[209] Judge Posner analogized Wisconsin's indirect funding of Faith Works with state voucher programs that fund parochial schools, a practice that the Supreme Court has upheld under the Establishment Clause.[210]

If *McCallum* reflects a sound application of Establishment Clause principles,[211] it may stand for a narrow situation in which charitable choice provisions preempt state nondiscrimination employment laws. The Christian Legal Society argument for actual conflict preemption becomes more persuasive in the indirect funding context because the Section 604a(j) constraints on proselytization and religious teaching no longer apply.[212] Without statutory restrictions on religious expression, the provisions in charitable choice protecting the religious organization's right to define, develop, and practice its religious beliefs could conflict with state laws that deny religious organizations the right to make religiously motivated hiring decisions.

The preemption question did not arise in *McCallum* because Wisconsin law expressly states that government social service funding does not affect a religious organization's freedom to make employment decisions based on religion.[213] Imagine that Wisconsin had a law forbidding any organization receiving state funds from discriminating on the basis of religion in employment decisions. If the state law applied to Faith Works, the results

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208. *Id.*; *see McCallum*, 324 F.3d at 882 (comparing state reimbursement to Faith Works with school vouchers).

209. *McCallum*, 179 F. Supp. 2d at 970; *McCallum*, 324 F.3d at 882.

210. *McCallum*, 324 F.3d at 882.

211. The Supreme Court's recent decision in *Locke v. Davey* suggests that the Court will continue to recognize a constitutionally significant distinction between direct and indirect funding of religious training. *See* Locke v. Davey, 124 S.Ct. 1307, 1311–12 (2004) (applying the Establishment Clause to state scholarships for students pursuing ministerial careers). Justice Kennedy noted, "Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients." *Id.* at 1311.

212. *See* 42 U.S.C. § 604a(j) (2000) (limiting the use of funds directly provided to religious organizations).

213. *See* WIS. STAT. § 46.027(5) (2000) (providing that the religious exemption under 42 U.S.C. § 2000e is not affected by receipt of government funds for social service programs).

would be illogical. The federal charitable choice provisions protect Faith Works's independence from state laws affecting its "control over the definition, development, practice and expression of its religious beliefs."[214] The entire Faith Works program is infused with the organization's Christian beliefs, and the organization expects its employees to proselytize and offer spiritual guidance to program participants on an as-needed basis.[215] Faith Works could not carry out these aspects of its program if the state nondiscrimination law prohibited it from assembling a Christian staff.[216] In other words, Faith Works has a legitimate need to make hiring decisions based on religious criteria to "define, develop, and practice" the organization's religious beliefs.[217] According to the doctrine of conflict preemption, the federal charitable choice laws would displace the conflicting state law. This preemption is narrow, however, and would only apply to an organization such as Faith Works that receives indirect funding and demonstrates a concrete need to define, develop, practice, and express its religious beliefs through its employment decisions.

3. Obstacle Conflict Preemption

If no actual conflict exists between the charitable choice statute and the state nondiscrimination law, courts will ask whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[218] Because the obstacle conflict doctrine requires courts to "consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written,"[219] courts evaluating a preemption challenge will look at the express purposes of the statutes and at how the laws operate in practice.

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214. *See* 42 U.S.C. § 604a(d)(1) (safeguarding the religious character of religious organizations).

215. *See* Freedom from Religion Found. v. McCallum, 179 F. Supp. 2d 950, 973 (W.D. Wis. 2002) (describing duties of Faith Works staff).

216. *See id.* (same).

217. *See id* (same). The time the employees spent on secular service could not be distinguished from the time they spent providing religious instruction because Faith Works expected its staff to serve as spiritual mentors on an as-needed basis. *Id.*

218. *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (applying this standard to a Pennsylvania statute); *see also* Geier v. Am. Honda Motor Co., 529 U.S. 861, 882 (2000) (deciding that federal agency objectives preempted state tort law regulating airbags because state imposition of liability imposes an obstacle to the federal goal of gradually phasing in airbags).

219. *See* Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977) (finding that state packaging laws prevented the objectives of the federal Fair Packaging and Labeling Act).

According to Section 604a(b), the purpose of the charitable choice statute is to allow religious organizations to compete for government contracts without "impairing their religious character."[220] The statute does not formally define "religious character," but the Supreme Court's decision in *Geier v. American Honda Motor Co., Inc.*[221] indicates that the Court is willing to rely on information extrinsic to the statute to better understand the federal objective.[222] In *Geier*, the plaintiff sued American Honda under District of Columbia tort law claiming that Honda had negligently manufactured the plaintiff's car because it did not include a driver's side airbag.[223] The federal regulation in question was a Federal Motor Vehicle Safety Standard (FMVSS) promulgated by the Department of Transportation under the authority of the National Traffic and Motor Vehicle Safety Act of 1966.[224] The FMVSS required auto manufacturers to equip some, but not all, of their 1987 vehicles with passive restraints.[225] The plaintiff characterized the federal safety standard as a minimum requirement meant to encourage the auto industry to install more airbags.[226] The Supreme Court, however, looked to the history of the safety standard and determined that the Department of Transportation had considered the effect a passive restraint requirement would have on the auto industry and public before the agency decided to impose gradual implementation.[227] The Department of Transportation experimented with different requirements for the auto industry to implement passive restraint technology.[228] Devices such as ignition locks were unpopular with the public, however, and airbags were especially expensive and posed safety risks to small women and children. Based on these findings, the Department of Transportation concluded that a step-wise requirement would give manufacturers more time to improve passive restraint technology while allowing the public to warm up to the idea of passive restraints, thus reducing the backlash that an expensive mandatory requirement would likely produce.[229] After considering the Department of Transportation's

220. *See* 42 U.S.C. § 604a(b) (2000) (stating the purpose of the charitable choice section).

221. Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861 (2000).

222. *See id.* at 883 (relying on contemporaneous reports in the Federal Register to deduce the Department of Transportation's objectives when adopting its standards for requiring auto manufacturers to install passive restraints).

223. *Id.* at 865.

224. *Id.* at 864.

225. *Id.* at 864–865.

226. *Id.* at 874.

227. *Id.* at 875.

228. *Id.*

229. *Id.*

explanation, the Court decided that FMVSS 208 reflected the agency's intent to gradually develop passive restraint devices for "safety-related" reasons, and, thus, FMVSS 208 preempted the state tort law cause of action because it stood as an "'obstacle' to the accomplishment of that objective."[230] *Geier* indicates that the Court will consider extrinsic information both to discern a more complete picture of Congress's intent and to anticipate the state law's effect on the overall federal objective.

The reasoning in *Geier* could have implications for charitable choice if courts choose to take a comprehensive view of faith-based participation in social welfare programs. Empirically, religious hiring freedom appears to be an important element of increasing the role of religious organizations in the delivery of government-funded social services.[231] In a survey of four hundred faith-based organizations participating in government contracts, sixty-seven percent of participants reported that being able to exercise religious hiring preferences was "very" or "somewhat" important to them.[232] Significantly, eighty-nine percent of "fully expressive" faith-based organizations said that the religious hiring preference was somewhat/very important, as did seventy-three percent of congregations and seventy-one percent of new participants.[233] Thus, the survey results indicate that the hiring exemption is most important to the contractors who began contracting with the government after Congress enacted charitable choice. These organizations are also the most religiously expressive and, interestingly, appear to be the most aware of charitable choice law and the most active in trying to comply with the statute.[234] Additionally, seventy-five percent of the faith-based contractors polled indicated that they had plans to seek other sources of funding if government or local requirements began threatening the "religious character" of their organizations.[235] These survey results suggest that many faith-based organizations—especially organizations

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230. *Id.* at 886.

231. *See* GREEN & SHERMAN, *supra* note 100, at 6 (examining the importance of charitable choice provisions to different categories of faith-based contractors).

232. *Id.*

233. *Id.*

234. *Id.* This may be because congregation and pervasively sectarian organizations are more conscious of the need to keep government funds separate and prevent their religious activities from interfering with their government-funded social services. Organizations like Catholic Charities and Lutheran Social Services—groups that had collaborated with the government before charitable choice—are probably less self-conscious about the appearance of misapplying government funds. *See supra* notes 44–45 (discussing the practices of religious service providers prior to charitable choice).

235. *See* GREEN & SHERMAN, *supra* note 100, at 6 (examining the importance of charitable choice provisions to different categories of faith-based contractors).

that began participating in government contracts after Congress enacted charitable choice—value the freedom to base their hiring decision on religious grounds.

Inspired by the fact that religious organizations value hiring freedom, some advocates of preemption suggest that state laws that curtail hiring freedom are an impermissible obstacle to Congress's purpose in enacting charitable choice.[236] For example, in his article *Charitable Choice and the Critics*, Professor Carl Esbeck argues that state and local nondiscrimination laws should not apply to faith-based organizations receiving charitable choice funds because "the federal statutory guarantees in charitable choice that promise to protect the 'religious character' and 'internal governance' of FBOs preempt contrary provisions in state and local laws."[237] Although Esbeck does not directly address the preemption doctrines in his argument for why charitable choice trumps state laws, he makes, in effect, an obstacle-conflict argument for preemption. Esbeck asserts that if religious organizations are not permitted to make hiring decisions based on their "sense of mission, then they will not be able to sustain the impressive record they now have of successfully helping the poor and needy."[238] If Esbeck's assessment is correct—religious organizations cannot both comply with nondiscrimination laws and operate effectively as service providers—then state laws would indeed act as impermissible stumbling blocks to charitable choice objectives. Surely, Congress did not intend to protect the "religious character" of faith-based organizations receiving government funds only to permit state laws to render the organizations completely ineffective.

There are two flaws, however, in these arguments for obstacle conflict preemption. First, arguments such as Esbeck's tend to focus solely on how religious organizations view the right to exercise religious hiring preferences and thereby lose sight of the fact that congressional intent is the touchstone of the preemption analysis.[239] It is the federal objective that ultimately determines whether state laws stand preempted, not the consensus of charitable choice advocates.

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236. *See, e.g.*, CHRISTIAN LEGAL SOC'Y, *supra* note 38, at 3 (arguing that state nondiscrimination laws interfere with the purpose of charitable choice); Esbeck, *supra* note 28, at 20–21 (same). These commentators do not make formal "obstacle conflict doctrine" arguments because they do not address preemption jurisprudence—their analyses are based on logical arguments about how the laws would operate. This Note uses the underlying rationale of their justifications for preemption to anticipate how the arguments would fare under the preemption doctrines the Supreme Court traditionally applies.

237. *See* Esbeck, *supra* note 28, at 20–21 (same).

238. *Id.* at 21.

239. *See supra* Part III.B (discussing congressional intent).

In *Geier*, the Supreme Court's most expansive application of the obstacle-conflict doctrine to date,[240] the Court considered the empirical findings about public reaction to the passive restraint devices because the evidence influenced the agency's decision to enact a gradual implementation requirement.[241] In contrast, there is no indication that Congress considered the value of religious hiring freedom to faith-based service providers when it enacted the 1996 charitable choice provisions.[242] Though relevant to a policy discussion, empirical evidence indicating that faith-based organizations value hiring freedom does not carry legal significance in the preemption analysis, unless the state laws restricting hiring freedom would actually interfere with the fulfillment of Congress's purpose in enacting charitable choice.

This point leads to the second flaw with the obstacle preemption argument: the arguments advanced by proponents of preemption assume that the purpose of charitable choice is to remove all legal barriers that might deter faith-based participation in government services.[243] For example, the Christian Legal Society asserts that if state nondiscrimination laws applied to faith-based service providers, "[t]he consequence would be that the all-out attempt to draw [faith-based organizations] into the nation's effort to make welfare delivery more effective and efficient would fail."[244] Although it is clear that President Bush's Faith-Based Initiative seeks to expand faith-based participation in social service contracts, his strong push for more participation began five years after Congress passed the charitable choice provisions in the Welfare Reform Act.[245] The more salient questions for the preemption inquiry address Congress's intent when it initially passed the legislation.[246] Did Congress intend to boost overall participation by religious groups at all costs? Or did Congress intend

240. *See* Davis, *supra* note 131, at 1012 (claiming that "Geier represents a seismic shift in the Court's preemption doctrine").

241. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 875–81 (2000) (examining Department of Transportation's study of the effects of passive restraint devices on the public).

242. *See* CANADA & ACKERMAN, *supra* note 10, at 52–53 (commenting on the lack of legislative history addressing charitable choice prior to the 107th Congress).

243. *See, e.g.*, CHRISTIAN LEGAL SOC'Y, *supra* note 38, at 2–3 (arguing that the consequence of allowing states to restrict religious hiring freedom would be an obstacle to the purposes of charitable choice).

244. *Id.* at 3.

245. *See supra* Part II.A (discussing the Faith-Based Initiative).

246. *See* Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994) (stating that "[w]hether federal law pre-empts a state law establishing a cause of action is a question of congressional intent"); Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 604 (1991) (stating that "[t]he ways in which federal law may pre-empt state law are well established and in the first instance turn on congressional intent").

merely to prevent states from discriminating against faith-based applicants for government service contracts?[247]

Because the language of the statute allows room for debate,[248] courts will likely turn to legislative history to discern Congress's purpose.[249] Unfortunately, legislative history for the 1996 charitable choice statute does not provide any additional information about Congress's intent when it enacted charitable choice.[250] No congressional committee meeting addressed the charitable choice provisions, much less the state law preemption implications.[251] In light of the current buzz over charitable choice and the employment question, the lack of attention to its initial enactment appears strange. Congress's silence appears less mystifying, however, when one considers that the 1996 charitable choice provisions constituted a comparatively miniscule subchapter in the massive legislative overhaul of the welfare system.[252]

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247. *Cf.* LUPU & TUTTLE, *supra* note 13, at 49 (noting that the "overall purpose of Charitable Choice legislation . . . is to end categorical discrimination against [faith-based organizations] in the award of such contracts").

248. 42 U.S.C. 604a(b) (2000) (outlining purpose of the statute). According to the statute:

> The purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described in subsection (a)(2) of this section, on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.

Id.

249. *See* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991) (relying on legislative history to aid in interpreting the language of the statute and congressional intent). The court defended its resort to legislative history:

> As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it. . . . Legislative history materials are not generally so misleading that jurists should never employ them in a good-faith effort to discern legislative intent. Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past. . . . We suspect that the practice will likewise reach well into the future.

Id.

250. *See* CANADA & ACKERMAN, *supra* note 10, at 52–53 (2003) (commenting on the lack of legislative history addressing charitable choice prior to the 107th Congress).

251. *Id.*

252. *See* Ron Haskins & Rebecca M. Blank, *Welfare Reform: An Agenda for Reauthorization*, *in* THE NEW WORLD OF WELFARE 3 (Rebecca Blank & Ron Haskins eds., 2001) (describing the passage of the 1996 welfare reform legislation). "On August 22, 1996, President Bill Clinton signed a revolutionary welfare reform bill crafted in Congress over the previous eighteen months. . . . Everyone agreed that the law constituted a major break with the past, although there was substantial disagreement about whether these changes were for the better." *Id.*

Congress passed legislation extending charitable choice provisions to other federal programs during Clinton's presidency, but none of these measures generated useful legislative history.[253] President Bush's Faith-Based Initiative brought the latent divisions over government funding of religious organizations to light, both in the media and on the floor of Congress. The legislative history of the House Charitable Choice Act of 2001 and the Senate CARE Act reveal that it is impossible to articulate a congressional objective regarding the role of faith-based organizations in the delivery of government social services.[254]

Recent legislative activity indicates that the House is willing to pass strong charitable choice laws aimed at expanding the role of faith-based organizations as service providers.[255] Those provisions, however, will not survive in the Senate. The Senate's scaled-back version of the CARE Act does not seek to expand charitable choice and instead focuses on tax incentives for charitable giving.[256] Three years after passing the Charitable Choice Act of 2001, House supporters of charitable choice gave up on advancing the Faith-Based Initiative through legislation and have agreed not to reintroduce the controversial provisions when the bill returns from the Senate.[257] Thus, the Senate's stonewalling of efforts to expand charitable choice suggests that Congress does not have the same no-holds-barred enthusiasm for charitable choice that the Bush administration has championed. Absent a congressional objective to

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253. *See* CANADA & ACKERMAN, *supra* note 10, at 52 ("Notwithstanding the enactment of four charitable choice measures in the 104th, 105th, and 106th Congresses, no congressional committee had held a hearing on charitable choice prior to the first session of the 107th Congress."); *see also supra* Part II.A (discussing the extension of charitable choice provisions to other federal program areas).

254. In a 1983 preemption case, the Supreme Court considered subsequent legislative history to better understand Congress's intent in an earlier version of the statute. *See* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n., 461 U.S. 190, 220 (1983). In that case, the more recent legislative history indicated that Congress did not intend to preempt state law because the Senate deleted language from the House bill that might suggest preemption. *Id.* The Court noted, "While we are correctly reluctant to draw inferences from the failure of Congress to act, it would, in this case, appear improper for us to give a reading to the Act that Congress considered and rejected." *Id.*

255. *See* Community Solutions Act of 2001, H.R. 7, 107th Cong. Title II (2001) (expanding charitable choice provisions, including the hiring exemption, to eight federal areas of federal social services).

256. CARE Act of 2003, S.272, 108th Cong. (2003).

257. *See* Rob Boston, *Faith-Based Victory! Senate Approves Scaled-back CARE Act Without Controversial Church-State Provisions—But Other Fights Remain*, CHURCH & STATE May 1, 2003, at 10 (describing compromise over the charitable choice legislation). Senator Rick Santorum, the sponsor of the CARE bill and an advocate of charitable choice, told the press, "I would have liked to have gotten the whole enchilada, . . . but in the United States Senate this year, you're lucky to get anything, and I'll take anything." *Id.*

remove legal barriers in order to increase faith-based social services, state laws do not pose an impermissible obstacle to the stated purpose of the charitable choice statute: to allow religious organizations to compete for government funds while retaining their religious character.

4. Summary of Preemption Analysis

In light of Congress's current division over charitable choice objectives, it seems artificial to read the ambiguous language of the statute as the "clear and manifest" intent of Congress to displace state nondiscrimination law. Under the doctrine of field preemption, it is clear that Congress did not intend for the charitable choice statute to occupy a field of law to the exclusion of the states.[258] For directly funded faith-based organizations, the actual conflict doctrine results in the preservation of state employment laws—the provisions in charitable choice do not conflict with state employment laws because faith-based organizations are restricted to providing inherently secular services.[259] However, the prohibitions on religious activity do not apply to indirectly funded service providers.[260] The recent Seventh Circuit decision in *Freedom of Religion Foundation v. McCallum* indicates that the actual conflict doctrine may lead to the preemption of state nondiscrimination laws as applied to faith-based organizations that receive indirect funding for pervasively religious social service programs.[261] Otherwise, the lack of a clear congressional objective to increase the participation of religious organizations in government-funded social programs requires that state nondiscrimination laws remain in effect.[262]

IV. Policy Considerations

Congress has the power to preempt state and local laws to further its charitable choice objectives, but it has not yet done so. This Note offers several related arguments for why Congress should continue to allow states the freedom to develop their own laws regulating government funding and religious hiring rights. First, leaving the question to the states complements the current structure of the welfare system. The 1996 Welfare Reform Act

258. *See supra* Part III.B (discussing field preemption).

259. *See supra* Part III.C.2.a (discussing actual conflict for directly funded organizations).

260. *See supra* Part III.C.2.b (discussing indirectly funded faith-based organizations).

261. *See supra* Part III.C.2.b (discussing *Freedom from Religion Found. v. McCollam*).

262. *See supra* Part III.C.3 (discussing obstacle conflict preemption).

overhauled the system to give states flexibility in designing programs and administering funds.[263] The devolution of welfare allows states to serve as laboratories for testing different methods of providing social services.[264] Wisconsin's relationship with Faith Works is one example of a state experimenting with alternative programs to meet the needs of its disadvantaged citizens.[265] The general concept of encouraging contracts between the government and religious service providers produces many questions that academic discussions can answer only partially: Do religious organizations have the capacity to deliver professional-quality social services? Will congregations participating in government programs unintentionally encroach on the religious freedom of beneficiaries? Do faith-based organizations that make hiring decisions based on religious grounds have more effective programs? Less effective programs? The best answers to these questions will emerge not from abstract debates over charitable choice, but rather from studies of real programs as states implement them.[266] Keeping the welfare decision-making process largely at the state level allows the nation to yield results from fifty models of welfare policy, instead of trial and error on a national scale.

The arguments supporting the devolution of welfare control to states also support state control over employment discrimination laws for government service providers. Some states may follow Wisconsin's example and encourage faith-based organizations to participate in government-funded service programs by expressly allowing them to retain their right to hiring preferences.[267] The state of Georgia, however, has taken steps in the opposite direction. Alan Yorker's lawsuit against Georgia's Department of Human Resources and United Methodist Children's Home led the DHR to change its policies. The agency now prohibits child welfare service providers with state contracts from practicing religious employment discrimination for nonministerial positions.[268]

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263. *Cf.* Gais, *supra* note 151, at 38 (noting that the welfare system expresses a "theory of federalism").

264. Justice Brandeis applauded this aspect of our federal system in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932), stating: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiences without risk to the rest of the country." *Id.*

265. *See supra* Part III.C.2.b (discussing Wisconsin's indirect funding of the Faith Works halfway house).

266. *See generally* CNAAN, *supra* note 15 (calling for more social science studies evaluating the effectiveness of faith-based delivery of social services).

267. *See supra* Part III.C.2.b (discussing Wisconsin's hiring exemption for religious service providers).

268. *See* Settlement Agreement with the State of Georgia's Department of Human Resources, para. 2, http://www.lambdalegal.org (Nov. 11, 2003) (outlining provisions of the settlement agreement) (on file with the Washington and Lee Law Review).

The contrasting state approaches to religious hiring freedom reflect the states' different experiences with government funding of faith-based service providers. The flexibility of state control over discrimination laws will provide more information about the role religious hiring freedom plays in charitable choice programs.

Second, state and local governments are in a better position to address their citizens' particular concerns about government partnerships with religion. For example, some states and cities have greater concerns about the nexus between religious hiring preferences and the rights of gay and lesbian employees.[269] Several lawsuits have challenged the right of religious organizations to make religiously motivated employment decisions based on sexual orientation, an unprotected classification under Title VII.[270] A preemptive congressional mandate permitting religious organizations to hire only people subscribing to particular religious beliefs would effectively displace state and local laws prohibiting discrimination on the basis of sexual orientation. Given the lack of consensus on gay rights at the national level, it seems prudent to allow states the option to provide more protection to their citizens. Before choosing to preempt state laws in the name of charitable choice, Congress should carefully consider the inadvertent effect religious hiring freedom could have on other forms of discrimination.

Finally, allowing states the freedom to maintain their own nondiscrimination laws will allow a grassroots response to the more controversial aspects of charitable choice. A public opinion survey indicates that a majority of Americans are receptive to the concept of religious organizations participating in government-funded social services.[271] The survey also indicates, however, that Americans are concerned about specific aspects of the relationship between the government and religious organizations.[272] Significantly, an overwhelming segment of the surveyed

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269. *See, e.g.*, MASS. GEN. LAWS ch. 151B, § 4(1) (2002) (prohibiting employment discrimination based on sexual orientation); MINN. STAT. § 363A.08 (2000) (same); N.J. STAT. ANN. § 10:5–12(a) (2001) (same); VT. STAT. ANN. tit. 21, § 495(a) (2001) (same). For a comprehensive list of state employment statutes, see LUPU & TUTTLE, *supra* note 13, at app. B (indexing state and local antidiscrimination laws).

270. *See, e.g.*, Pedreira v. Ky. Baptist Home for Children, Inc., 186 F. Supp. 2d 757, 761 (W.D. Ky. 2001) (challenging religiously-motivated decision to fire employee because of her sexual orientation); Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 6232, 618 (6th Cir. 2000) (same); Plaintiff's Complaint, *supra* note 2, at para. 9 (same).

271. *See* PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, FAITH-BASED FUNDING BACKED, BUT CHURCH-STATE DOUBTS ABOUND 1 (Apr. 10, 2001) ("Three-quarters of Americans say churches, synagogues and other houses of worship contribute to solving important social problems.").

272. *See id.* at 8–9 (describing concerns over government's involvement in religion). The

population—seventy-eight percent—objected to the idea of allowing religious organizations that receive government funds to hire only those who share their religious beliefs.[273] Unfortunately, the survey did not test for differences in opinion based on geography.[274] The results do demonstrate, however, that in the year 2001 there was no national consensus supporting hiring freedom for government-funded religious organizations. The legislative deadlock over the hiring issue in Congress over the intervening years suggests that Americans are no closer to reaching an agreement on the issue.[275] States, therefore, should have the freedom under the charitable choice laws to ameliorate their constituents' concerns about government-funded religious discrimination.

Furthermore, the Supreme Court's recent decision in *Locke v. Davey*[276] affirms that there is room for different federal and state standards governing church-state relations. In this 2004 case, the Supreme Court upheld the State of Washington's policy of denying state-funded Promise Scholarships to students pursuing devotional theology degrees.[277] The state policy complied with the Washington State Constitution, which states that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."[278]

The plaintiff, Joshua Davey, was awarded a Promise Scholarship and enrolled in a private religious college, an eligible school under the state program, where he intended to pursue a major in theology that would train him for pastoral ministry.[279] When Davey shared his major with the college's financial aid officer, he learned that he could not use his state scholarship money while pursuing a devotional theology degree.[280] In his subsequent legal

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survey results indicated that despite general support for government funding for faith-based welfare programs, a large sector of the public worries that government will become too involved with religious organizations (68%); that beneficiaries may be forced to participate in religious practices (60%); that government funding would interfere with separation between church and state (52%); that funding might increase religious divisions (48%); and that the religious programs would not meet the same standards as other government-based programs (47%). *Id.*

273. *Id.* at 11. The survey tested several variations of the question and found the negative response to be relatively consistent. *Id.*

274. The Pew Research Center analyzed the data to trace response patterns across different demographics (including income and level of education) and political and religious groups. *Id.* at 1.

275. *See supra* Part II.A and Part III.C.3 (discussing legislative debates over charitable choice initiatives).

276. Locke v. Davey, 124 S. Ct. 1307 (2004).

277. *Id.* at 1309.

278. *See id.* at 1312 n.2 (quoting Art. 1 § 11 of the Washington State Constitution).

279. *Id.* at 1310.

280. *Id.* at 1311.

action, Davey argued that the state of Washington's denial of his scholarship on the basis on his decision to pursue a theology degree violated "the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment, as incorporated by the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment."[281]

A seven-justice majority of the United States Supreme Court rejected Davey's constitutional claims.[282] Writing for the Court, Chief Justice Rehnquist observed that the Establishment Clause of the United States would have allowed the State of Washington to fund Davey's ministerial education.[283] In accord with the Supreme Court's Establishment Clause precedent, Rehnquist explained, "the link between government funds and religious training is broken by the independent and private choice of recipients."[284] Rehnquist went on to find, however, that the Washington Constitution's firmer stance on government funding of religion was permissible under the United States Constitution.[285] He reasoned that "[e]ven though the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution, the interest it seeks to further is scarcely novel. In fact, we can think of few areas in which a State's antiestablishment interests come more into play."[286] The majority concluded that the Washington policy advanced a substantial state interest in not funding the pursuit of "devotional degrees."[287]

The Court's decision in *Locke v. Davey* may have a considerable effect on charitable choice and President Bush's Faith-Based Initiative.[288] Thirty-seven states have constitutional provisions prohibiting the flow of state funds to religious institutions.[289] Further, the 1996 charitable choice statute expressly

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281. *Id.*

282. *Id.* at 1315.

283. *See id.* at 1311–12 (evaluating the Promise Scholarship Program under the United States Constitution).

284. *Id.* at 1311.

285. *Id.* at 1313–14.

286. *Id.* at 1313.

287. *Id.* at 1315 (emphasizing that that the state allowed scholarships to religious institutions as long as the student did not pursue a degree in "devotional theology").

288. *See* The Roundtable on Religion and Social Welfare Policy, Roundtable Research Page on Locke v. Davey, *at* http://www.religionandsocialpolicy.org (Dec. 2, 2003) (anticipating the possible impact of *Locke v. Davey* on President Bush's Faith-Based Initiative) (on file with the Washington and Lee Law Review).

289. *Id.* "Thirty-seven states, including the State of Washington, have constitutional provisions that explicitly forbid state financing of religious organizations, and ten states have constitutional provisions that extend these limitations to both 'direct' and 'indirect' financing." *Id.*

states that "[n]othing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations."[290] By upholding the validity of Washington's constitutional prohibition on government funding of religion, the Supreme Court signaled that states may be able to choose not to abide by charitable choice provisions in their administration of government social service funds.

Regardless of the decision's larger implications for the Faith-Based Initiative, *Locke v. Davey* affirms that there is room for states to navigate between the Establishment and Free Exercise Clauses of the United States Constitution.[291] Indeed, the Court noted that Washington had a substantial state interest in asserting a stronger separation between government funding and religion than required by the United States Constitution.[292] It seems that the Court may also be receptive to an argument that states have a substantial interest in separating government funding from employment practices that discriminate on the basis of religion.

V. Conclusion

The right of faith-based organizations to make employment decisions based on religion is currently at the center of controversy over charitable choice and the Faith-Based Initiative.[293] The debate has largely focused on federal laws, but the Supreme Court's recent decision in *Locke v. Davey* may draw attention to state law protections against religious employment discrimination.[294] This Note has demonstrated that, apart from a caveat for organizations that receive indirect funding, federal charitable choice provisions do not preempt state employment laws that prohibit religious discrimination.[295] States should, therefore, consider how their current nondiscrimination laws affect the implementation of charitable choice. Some states may decide that fully exempting religious organizations from restrictions on hiring freedom is the best way to implement charitable choice. States retain the authority, however, to decide that Alan Yorker's experience at the United Methodist

290. 42 U.S.C. § 604a(k) (2000).

291. *See* Locke v. Davey, 124 S. Ct. 1307, 1311 (2004) (describing the "room for play in the joints" between the Religion Clauses of the First Amendment).

292. *Id.* at 1315.

293. *Supra* note 61.

294. *Supra* notes 288–89.

295. *See supra* Part III.B.4 (summarizing preemption analysis).

Children's Home should not be a necessary outcome of allowing faith-based organizations to participate in the provision of social services.

Regardless of the stance they adopt, states should communicate with faith-based service providers to ensure that the organizations understand their rights and duties as partners with the state.[296] One important step states should take is to redraft their social service contracts to address the legal issues affecting religious organizations.[297] These contracts should clearly outline the effect that government funding has on the organization's right to exercise religious hiring preferences for nonministerial employees. The current confusion over hiring rights at both the federal and the state levels serves as an unnecessary stumbling block to faith-based organizations seeking to participate in the delivery of government-funded social services.[298] Communication, not preemption, is the key to improving valuable partnerships between the government and religious service providers.

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296. Appointing faith-based liaisons to facilitate the administration of funds to religious organizations is a start, but studies show that more communication is needed. *See supra* notes 96–97 and accompanying text (discussing GAO report evaluating inconsistencies in charitable choice implementation, despite the appointment of liaisons and the creation of offices to handle charitable choice issues).

297. In their 2002 report, Professors Lupu and Tuttle offer a model outlining the faith-based specific provisions states should include in their contracts. *See* LUPU & TUTTLE, *supra* note 13, at 73–76. In 2003, Lupu and Tuttle's updated report noted that five states now have faith-based specific contracts: Indiana, Maryland, Oklahoma, Wisconsin, and Texas. IRA C. LUPU & ROBERT W. TUTTLE, STATE OF THE LAW 2003: DEVELOPMENTS IN THE LAW CONCERNING GOVERNMENT PARTNERSHIPS WITH RELIGIOUS ORGANIZATIONS viii–viv (2003).

298. *Cf.* WHITE HOUSE FAITH-BASED AND COMTY. INITIATIVES, PROTECTING THE CIVIL RIGHTS AND RELIGIOUS LIBERTY OF FAITH-BASED ORGANIZATION, *supra* note 103, at 7 (suggesting that the "tangle of laws" governing hiring rights has discouraged many effective faith-based providers from competing for government funds).

SYMPOSIUM