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"If We Recant, Would We Qualify?": Exclusion of Religious Providers from State Social Service Voucher Programs

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"If We Recant, Would We Qualify?":[†] Exclusion of Religious Providers from State Social Service Voucher Programs

Rebecca G. Rees^{*}

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[†] *Columbia Union College v. Clarke*, 159 F.3d 151, 177 (4th Cir. 1998) (Wilkinson, C.J., dissenting), *cert. denied*, 119 S. Ct. 2357 (1999).

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I. Introduction

Suppose the legislature of State Z decides to implement welfare reform by cooperating with private-sector social service providers. The legislators have heard about other states that are pursuing cooperative relationships with private providers, including religious providers, of social services.¹ For example, states have contracted with faith-based drug-treatment programs,² have encouraged churches to mentor low-income families,³ have worked with private-sector housing programs,⁴ and have implemented voucher systems for training and job-placement services.⁵ The legislators of Z know that involving

1. See generally Joe Loconte, *The Bully and the Pulpit: A New Model for Church-State Partnerships*, POL'Y REV.: J. AM. CITIZENSHIP, Nov./Dec. 1998, at 28 (providing examples of social programs that faith-based community has created); Roy Maynard & Bob Jones IV, *Fighting Poverty in Jesus' Name: . . . and with Taxpayer Funds?*, WORLD, Aug. 15, 1998, at 12 (describing several state social service programs that utilize religious providers); Welfare Information Network, *Faith-Based Involvement* (visited Jan. 15, 1999) <<http://www.welfareinfo.org/faithbase.html>> (describing involvement of faith-based organizations and conferences held to explore developing similar programs in following states: Arkansas, California, Colorado, Florida, Georgia, Michigan, Minnesota, Mississippi, New Jersey, North Carolina, Ohio, Pennsylvania, Texas, Vermont, Virginia, and Washington). The new relationship between the government and religious organizations often differs from prior cooperative efforts. Compare THE CENTER FOR PUBLIC JUSTICE & THE CHRISTIAN LEGAL SOCIETY'S CENTER FOR LAW AND RELIGIOUS FREEDOM, A GUIDE TO CHARITABLE CHOICE: THE RULES OF SECTION 104 OF THE 1996 FEDERAL WELFARE LAW GOVERNING STATE COOPERATION WITH FAITH-BASED SOCIAL-SERVICE PROVIDERS 13-14 (1996) [hereinafter A GUIDE TO CHARITABLE CHOICE] (stating that although government partnerships with nonprofit organizations historically have included cooperation with religiously affiliated groups, government pressures to minimize religious character have caused charities to create independent, nonprofit subsidiaries to run government-funded social services) with Jonathan Friedman, Note, *Charitable Choice and the Establishment Clause*, 5 GEO. J. ON FIGHTING POVERTY 103, 104 (1997) (asserting that recent changes allow religious organizations to provide services "in an openly sectarian way").

2. See George W. Bush, *Faith in the Future of Texas* (explaining Texas legislation favorable to cooperation with Bible-based addiction-treatment programs), in Loconte, *supra* note 1, at 35. Welfare agencies in Texas have formal financial agreements with 16 faith-based organizations, nonfinancial agreements with 11 organizations, and informal agreements with 34 organizations. R.G. Ratcliffe, *Faithful Have a Place in Politics, Says Bush*, HOUS. CHRON., Mar. 7, 1999, at A1.

3. See Loconte, *supra* note 1, at 35 (stating that thousands of congregations work closely with welfare families to find jobs, to care for children, and even to budget and grocery shop); Welfare Information Network, *supra* note 1 (summarizing programs in several states through which volunteers from congregations "adopt" or mentor low-income families).

4. See Welfare Information Network, *supra* note 1 (reporting that Georgia city is considering involving faith-based nonprofits in establishing housing programs).

5. See Rich Harp, *Helping People Get Back to Work: Tool Chest Awards Get National Attention*, HURON DAILY TRIB., Mar. 21, 1997 (describing "Tool Chest" voucher system for job training implemented in Thumb Area of Michigan). See generally ANN LORDEMAN, CONGRESSIONAL RESEARCH SERVICE, EMPLOYMENT AND TRAINING: USING VOUCHERS TO PROVIDE SERVICES (1997) (describing legislation encouraging vouchers for job training).

religious, or "faith-based," providers of social services is popular across the political spectrum.⁶ Also, members of the legislature have learned that religious providers are among the most efficient social service providers and among the most successful at permanently changing lives.⁷

Instead of contracting directly with an independent provider, State Z decides to work with private providers by issuing vouchers redeemable with various social service providers.⁸ The distinctive characteristic of vouchers is that the individual beneficiary chooses among various qualified providers, whereas in a contracting system the government agency chooses the provider.⁹ The legislators of Z conclude that a voucher system has practical benefits because it will increase the autonomy of the beneficiaries by providing a range of choices and because a voucher system will reduce costs by creating a competitive market for services.¹⁰ Choosing a voucher system over a contracting

6. See STEPHEN V. MONSMA, *THE CENTER FOR PUBLIC JUSTICE, GOVERNMENT COOPERATION WITH SOCIAL MINISTRIES: HAPPY OR DYSFUNCTIONAL?* 1 (1998) (reporting that increasing use of faith-based agencies in addressing social needs is "the hot topic in public policy circles" and that supporters range from Republican Congressmen to President Clinton and Democratic state officials); Gore 2000, *Remarks as Prepared for Delivery by Vice President Al Gore on the Role of Faith-Based Organizations* (speech delivered May 24, 1999) (visited Sept. 21, 1999) <<http://www.AlGore2000.com/speeches/>> [hereinafter *Gore Remarks*] (promoting "the transformative power of faith-based approaches" to community reform).

7. See *A GUIDE TO CHARITABLE CHOICE*, *supra* note 1, at 13-14 (contending that religious character of organizations is "the very source of their genius and success"); HENRY G. CISNEROS, U.S. DEP'T OF HOUS. & URBAN DEV., *HIGHER GROUND: FAITH COMMUNITIES AND COMMUNITY BUILDING* 6-12 (1996) (summarizing efforts of faith-based community development); MONSMA, *supra* note 6, at 13 (asserting that compelling religious organization to abandon or to segregate religious components of its program might ruin much of its effectiveness); U.S. DEP'T OF HEALTH, EDUC., & WELFARE, *AN EVALUATION OF THE TEEN CHALLENGE TREATMENT PROGRAM* 10-11 (1977) (finding Teen Challenge achieved success rates of 70% to 80% while other drug-treatment programs seldom reached success rate of over 10%); Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 39 (1997) (asserting success of faith-based providers); John J. DiIulio, Jr., *Jeremiah's Call*, PRISM, Mar./Apr. 1998, at 18, 22-23 (summarizing early findings of social science studies); *Gore Remarks*, *supra* note 6 (asserting that "religious character . . . is so often the key to the [] effectiveness" of faith-based organizations).

8. See *While Congress Debates, Boards Test Vouchers Around the Country*, WORKFORCE ADVISOR, Nov./Dec. 1997, at 3, 3 [hereinafter WORKFORCE ADVISOR] (contrasting vouchers with traditional subcontracting for services).

9. See LORDEMAN, *supra* note 5, at 1 (contrasting voucher system in which individual chooses services with traditional system in which government agency chooses services); WORKFORCE ADVISOR, *supra* note 8, at 3 (explaining that individual can "spend" voucher on any certified program).

10. See LORDEMAN, *supra* note 5, at 3 (describing increase in autonomy of beneficiaries, shift of funds from bureaucracies to clients, and decrease in costs as result of competition); WORKFORCE ADVISOR, *supra* note 8, at 3 (asserting that vouchers increase beneficiaries' choices and at same time reduce costs).

system also has federal constitutional benefits because the Supreme Court repeatedly has allowed indirect benefits to flow to religious entities as part of a neutral program and as the result of the independent choice of private individuals.¹¹

But as the state legislature looks further into the state constitutional questions involved, someone mentions a little-known and little-used state constitutional provision that prohibits the use of any public funds to aid a religious organization or purpose.¹² Research of the state court's interpretation of the clause, known as the Blaine provision, reveals that Z's state constitution is even more restrictive than are the federal Constitution's religion clauses; at times Z's constitution prevents benefits from flowing to religious organizations even when the federal Constitution would allow it.¹³ In order to comply with the state constitution, the legislature decides to exclude religious social service providers from its voucher program.

The legislators of State Z then face the task of reconciling the voucher program with federal standards. Congress has encouraged states to use independent-sector providers to implement welfare reform and to include religious providers in those programs.¹⁴ For example, one provision of the Personal Re-

11. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) ("We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) (upholding "general government program that distributes benefits neutrally to any child qualifying . . . without regard to the sectarian-nonsectarian, or public-nonpublic nature of the school" (internal quotations omitted)); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 487-89 (1986) (finding no Establishment Clause violation in program in which government funds reach religious institution "only as a result of genuinely independent and private choices of aid recipients"); *Mueller v. Allen*, 463 U.S. 388, 399 (1983) (upholding program in which "public funds become available [to parochial schools] only as a result of numerous private choices of individual parents"); *infra* note 76 (explaining Supreme Court's distinction between direct and indirect funding).

12. See *infra* notes 34-35 and accompanying text (citing and explaining state Blaine provisions).

13. See *infra* notes 43-44 and accompanying text (giving examples of state court decisions interpreting state constitutions more restrictively than federal precedents on federal Constitution); see also Esbeck, *supra* note 7, at 39 (explaining that welfare programs that comply with First Amendment still could violate state constitutions that contain terms that are more separationist than Establishment Clause).

14. See MONSMA, *supra* note 6, at 1 (citing Senator John Ashcroft's "Charitable Choice" amendment to 1996 welfare act, Senator Dan Coats's "Project for American Renewal," and Representatives Jim Talent and J.C. Watts's "Community Renewal Project" as examples of encouraging utilization of faith-based agencies); see also H.R. CONF. REP. NO. 104-430, at 361 (1995) (commenting on language identical to that found in Charitable Choice provision of PRWORA and stating that "[i]t is the intent of Congress . . . to encourage States to involve religious organizations in the delivery of welfare services to the greatest extent possible").

sponsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)¹⁵ permits states to use contracts and vouchers to involve charitable, religious, and private organizations in social service programs.¹⁶ This provision, commonly known as "Charitable Choice," explicitly requires that states allow religious providers to participate on the same basis as other private providers.¹⁷ In State Z, the legislators initially fear a conflict between Charitable Choice's nondiscrimination principle and the state constitution's exclusion of religious groups.¹⁸ However, Charitable Choice specifically avoids a statutory conflict between the federal law and state constitutions by allowing the segregation of federal and state funds.¹⁹ Therefore, if State Z decides to create a voucher program that distributes federal funds, the federal standard will apply, but the State can apply its Blaine provision to segregated state funds without violating the federal statute.²⁰ In light of this, the state legislators decide to use only state funds and to open the voucher program to all qualified social service providers except for religious providers.

After reconciling its voucher program both with the state constitutional standard and with the federal statutory standard, the legislators face one final question: Will the federal Constitution allow State Z to exclude religious social service providers from its program, or does the Constitution itself require that State Z treat all independent social service providers equally?²¹ If the latter,

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

16. PRWORA § 104(a)(1), 42 U.S.C. § 604a(a)(1) (Supp. IV 1997); see Welfare Information Network, *supra* note 1 (reporting that although Charitable Choice has not yet brought about striking increase in states' utilization of religious social service providers, legislation has generated much debate); *infra* Part II.C (discussing Charitable Choice).

17. 42 U.S.C. § 604a(c). A similar Charitable Choice provision appears in the Community Service Block Grant Act of 1998. See Pub. L. No. 105-285, § 679, 112 Stat. 2702, 2749 (1998) (codified at 42 U.S.C.A. § 9920 (West Supp. 1999)) (stating that government must consider religious organizations on same basis as other nongovernmental organizations, provided such action is consistent with Establishment Clause).

18. See *infra* Part II.B (explaining Supremacy Clause of United States Constitution and statutory preemption).

19. 42 U.S.C. § 604a(k); see A GUIDE TO CHARITABLE CHOICE, *supra* note 1, at 25 (specifying that administration of segregated federal block-grant funds must comply with principles of § 604a, but state authorities can administer segregated state funds according to more restrictive state requirements); *infra* notes 80-84 and accompanying text (discussing exemption of subsection (k)).

20. See *infra* notes 83-84 and accompanying text (describing different standards for commingled and segregated state funds).

21. See *infra* Part III (considering Blaine provisions under Free Speech Clause); *infra* Part IV (applying Establishment Clause's principle of neutrality to Blaine provisions); see also *infra* note 50 (observing possibility of Free Exercise Clause challenge to Blaine provisions); *infra* note 71 (citing allegations of due process and equal protection violations by Blaine provision); cf. *infra* note 72 and accompanying text (explaining that Court never reached federal constitu-

then the federal Constitution's requirement of equal treatment will preempt the state constitution's requirement of exclusion.²²

Although the above scenario is hypothetical, it is not unforeseeable. Both including and excluding religious providers in government social service systems raises constitutional questions because of the limits that the First Amendment places on the relationship between the government and religion.²³ The Establishment, Free Exercise, and Free Speech Clauses of the First Amendment²⁴ each require neutrality toward religion, adding complexity to states' abilities to provide varied constitutional protections to their own citizens.²⁵ The United States Supreme Court has acknowledged the differences between federal and state religion clauses; however, it has never addressed the possibility of a conflict between First Amendment principles and a state Blaine provision that excludes a religious group or individual from a general government program or benefit.²⁶

tional issues in *Garnett v. Renton School District No. 403* because federal statute preempted state constitution). This Note includes only an analysis of the constitutionality of Blaine provisions under the Free Speech Clause's public forum doctrine and under the Establishment Clause's principle of neutrality. An analysis under the Free Exercise Clause and the Equal Protection Clause exceeds the scope of this Note. For a discussion of these approaches, see Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L., ETHICS & PUB. POL'Y 341, 365-72 (1999) (arguing that Free Exercise Clause, Free Speech Clause, Establishment Clause, and Equal Protection Clause mandate equal treatment for religion).

22. See *infra* note 57 (quoting Supremacy Clause).

23. See The Center for Public Justice, *Introduction to WILLIAM J. TOBIN, THE CENTER FOR PUBLIC JUSTICE, LESSONS ABOUT VOUCHERS FROM FEDERAL CHILD CARE LEGISLATION* at i (1998) (explaining that service of faith-based charities and religious congregations in public square is "both suspect and risky" even when constitutional); *infra* text accompanying notes 92-94 (summarizing requirements of First Amendment). Specifically, under the Supreme Court's interpretation of the First Amendment, a government program must have a secular purpose and must not have the primary effect of advancing religion. See *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997) (asking whether purpose or effect of government action was to advance or to inhibit religion); *infra* Part IV.B.1 (explaining *Lemon* test). At the same time, the government can neither discriminate against religion nor communicate a message of disfavor toward religion. See *infra* note 50 (stating standard of Free Exercise Clause); *infra* Part III.B (summarizing free speech standard that forbids discrimination against religious viewpoint); *infra* Part IV.B.2 (setting out endorsement test).

24. See U.S. CONST. amend. I. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . ." *Id.*

25. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845 (1995) (stating that each separate clause of First Amendment requires neutrality); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion."); *infra* notes 56-57 and accompanying text (explaining relationship between state and federal constitutions).

26. See *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 489 (1986) (commenting that state court could consider "far stricter" standard of state constitution on

This Note examines whether applying the Blaine provisions of state constitutions to exclude religious providers from state social service voucher programs violates either the Establishment Clause or the free speech principles that the Supreme Court has applied in conjunction with the Establishment Clause. To narrow the discussion, this Note begins with the premise that the federal Constitution permits the inclusion of religious providers in social service voucher programs.²⁷ Part II summarizes the Blaine provisions of various state constitutions and recognizes that they may exclude religious providers from state-funded social service voucher programs.²⁸ It also considers the relationship between state constitutions and the federal statutory standard that Charitable Choice embodies.²⁹ Part III examines cases in which the United States Supreme Court has applied a dual analysis, finding both that the Establishment Clause permitted inclusion of a religious group on the same basis as other groups and also that the Free Speech Clause forbade their exclusion.³⁰ Part IV discusses the Establishment Clause's principle of neutrality.³¹ Part V concludes that the Blaine provisions conflict with the Supreme Court's decisions that require neutrality toward religion.³² Therefore, if a state chooses to use state funds to implement a voucher program involving independent providers of social services, it must apply the same neutral eligibility criteria to all organizations, including religious social service providers.

II. *Blaine Provisions and Social Service Voucher Programs*

A. *The Origin and Interpretation of State Blaine Provisions*

Religion clauses in state constitutions take several forms.³³ Many state

remand); *Widmar v. Vincent*, 454 U.S. 263, 275 (1981) (citing decision in which state supreme court held that state constitution required stricter separation of church and state than did federal Constitution); *see also Witters v. Washington Dep't of Servs. for the Blind*, 493 U.S. 850, 850 (1989) (denying petition for certiorari after state court prohibited grant under state constitution that Supreme Court had permitted under federal Constitution); *infra* notes 96-104 and accompanying text (discussing *Widmar* and *Witters* decisions).

27. *See supra* note 11 (citing cases upholding benefit that flowed to religious organization as part of neutral program and independent, private choices); *infra* notes 120-22 (same).

28. *See infra* Part II (setting forth Blaine provisions of state constitutions, and considering statutory and constitutional preemption of provisions).

29. *See infra* Part II.B-C (explaining statutory preemption and how Charitable Choice avoids conflict with state constitutions).

30. *See infra* Part III (examining Blaine provisions under neutrality standard of several Free Speech Clause cases in which Court also found that including religious groups did not violate Establishment Clause).

31. *See infra* Part IV (summarizing Establishment Clause's principle of neutrality).

32. *See infra* Part V (concluding that exclusion of qualified religious providers from state social service voucher program is unconstitutional).

33. *See generally* Linda S. Wendtland, Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV.

constitutions contain clauses that prohibit public funding of religious institutions and purposes in general³⁴ or of religious schools in particular.³⁵ These provisions parallel the language of the proposed Blaine Amendment to the federal Constitution,³⁶ although not all of the state provisions flowed directly

625 (1985) (surveying state constitutions' religion clauses and state courts' interpretations of them). The religion clauses in state constitutions often are more specific and more detailed than those in the federal Constitution and may contain several provisions. *Id.* at 631. Several state constitutions contain a general prohibition against the establishment of religion, in words that echo the First Amendment, as well as one or more additional clauses. *Id.* One type forbids compulsory attendance at or support of a ministry or a place of worship. *Id.* at 631-32. A second type forbids governmental preference for religion. *Id.* A third type follows the pattern of the original proposed Blaine Amendment. *Compare infra* text accompanying note 38 (quoting original proposed Blaine Amendment) with *infra* notes 34-35 and accompanying text (summarizing state Blaine provisions).

34. See IDAHO CONST. art. IX, § 5 ("[T]he legislature . . . shall [n]ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose . . ."); for other state constitutions prohibiting funding of religious institutions or purposes, see ARIZ. CONST. art. II, § 12, art. IX, § 10; CAL. CONST. art. XVI, § 5; COLO. CONST. art. V, § 34, art. IX, § 7; FLA. CONST. art. I, § 3; GA. CONST. art. I, § 2, para. 7; ILL. CONST. art. X, § 3; IND. CONST. art. I, § 6; MASS. CONST. amend. art. XVIII, § 2; MICH. CONST. art. I, § 4; MINN. CONST. art. I, § 16; MISS. CONST. art. IV, § 66; MO. CONST. art. I, § 7, art. IX, § 8; NEB. CONST. art. VII, § 11; NEV. CONST. art. XI, § 10; N.H. CONST. pt. 2, art. 83; OKLA. CONST. art. II, § 5; OR. CONST. art. I, § 5; PA. CONST. art. III, § 29; S.D. CONST. art. VI, § 3; TEX. CONST. art. I, § 7; UTAH CONST. art. I, § 4; VA. CONST. art. IV, § 16; WASH. CONST. art. I, § 11; WIS. CONST. art. I, § 18; WYO. CONST. art. I, § 19, art. III, § 36; Wendtland, *supra* note 33, at 632 & n.38 (listing state constitutions that forbid use of any public funds to aid religious organization or purpose). Four of these state constitutions explicitly prohibit indirect as well as direct funding. See *id.* at 632 & n.39 (citing FLA. CONST. art. I, § 3; MO. CONST. art. I, § 7; MONT. CONST. art. X, § 6; OKLA. CONST. art. II, § 5).

35. See DEL. CONST. art. X, § 3 ("No portion of any fund . . . shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school."); for other constitutions prohibiting funding of religious schools, see ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. IX, § 10; CAL. CONST. art. IX, § 8, art. XVI, § 5; COLO. CONST. art. IX, § 7; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 5; ILL. CONST. art. X, § 3; KY. CONST. § 189; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 2; MISS. CONST. art. VIII, § 208; MO. CONST. art. IX, § 8; MONT. CONST. art. X, § 6; N.H. CONST. pt. II, art. 83; N.M. CONST. art. XII, § 3; N.Y. CONST. art. XI, § 3; N.D. CONST. art. VIII, § 5; OHIO CONST. art. VI, § 2; PA. CONST. art. III, § 15; S.C. CONST. art. XI, § 4; S.D. CONST. art. VIII, § 16; TEX. CONST. art. VII, § 5(a); UTAH CONST. art. X, § 9; VA. CONST. art. VIII, § 11; WASH. CONST. art. IX, § 4; WYO. CONST. art. VII, § 8; Wendtland, *supra* note 33, at 632-33 & n.40 (listing state constitutions that proscribe state aid, maintenance, or support of denominational schools).

The purpose of this Note is not to analyze the variations in state religion clauses or their interpretation by state courts. For further analysis, see generally Frank R. Kemerer, Commentaries, *State Constitutions and School Vouchers*, 120 EDUC. L. REP. (West) 1 (Oct. 1997), which examines the application of state religion clauses to school vouchers; Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657 (1998), which considers school choice in the context of state and federal constitutional law; and Wendtland, *supra* note 33, which surveys state religion clauses.

36. See Viteritti, *supra* note 35, at 659 (describing original proposed Blaine Amendment

from it.³⁷ The proposed Blaine Amendment to the federal Constitution stated:

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.³⁸

The United States Congress considered the proposed Blaine Amendment in 1876 but failed to pass it.³⁹ However, over thirty states have adopted similar amendments or incorporated similar provisions into their own constitutions.⁴⁰

State courts have interpreted their constitutions' religion clauses in several ways.⁴¹ Some state courts have construed the state religion clauses to parallel the First Amendment, even though the language of the state and fed-

and its progeny). Compare *infra* text accompanying note 38 (quoting proposed Blaine Amendment to federal Constitution) with *supra* notes 34-35 (providing examples of religion clauses in state constitutions). For an explanation of the events surrounding the proposed Blaine Amendment, see generally F. William O'Brien, *The Blaine Amendment*, 41 U. DET. L.J. 137 (1963).

37. See *Kotterman v. Killian*, 972 P.2d 606, 624 (Ariz. 1999) (explaining that no recorded history links proposed Blaine Amendment and Arizona's 1910 constitutional convention); Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 43 (1992) (stating that by 1876, year in which Congress failed to pass proposed Blaine Amendment, 15 states had measures prohibiting public funding of religious schools); Viteritti, *supra* note 35, at 674 (reporting that in 1844, New York passed law prohibiting aid to religious schools and in 1894 added prohibition to state constitution).

38. See Green, *supra* at 37, at 38 n.2 (1992) (quoting 4 CONG. REC. 5453 (1876)) (providing text of Representative James G. Blaine's proposal).

39. See Viteritti, *supra* note 35, at 672 & n.72 (stating that amendment passed in House but failed by four votes to meet two-thirds majority required in Senate).

40. See Green, *supra* note 37, at 43 (stating that by 1890, 29 states had constitutional prohibitions against transfer of public funds); Michael J. Karman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 53 (1996) (reporting that by 1915, over 30 states had passed "Baby Blaine" amendments (citing H. Frank Way, *The Death of the Christian Nation: The Judiciary and Church-State Relations*, 29 J. CHURCH & ST. 509, 523 (1987))); *supra* notes 34-35 (highlighting state constitutions that forbid governmental aid to religious organizations and to religious schools). For example, some states incorporated the provisions by amendment, Green, *supra* note 37, at 43, and many territories incorporated Blaine-like provisions into their constitutions in order to gain congressional approval for statehood, Viteritti, *supra* note 35, at 673; Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 146-47 (1996). This Note refers to all state constitutional provisions that parallel the proposed Blaine Amendment as "Blaine provisions."

41. See *infra* notes 42-53 and accompanying text (summarizing interpretation of state Blaine provisions); see also G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169, 1170 (1992) (asserting that state constitutions contain features that distinguish them from federal Constitution and therefore merit separate theories of interpretation).

eral constitutions differs.⁴² Other states explicitly have rejected the United States Supreme Court's interpretation of the First Amendment when construing their own religion clauses.⁴³ Some states even have reached the opposite conclusion under their state constitutions from the conclusion that the Supreme Court has reached when applying the federal Constitution.⁴⁴ The language

42. See, e.g., *People ex rel. Klinger v. Howlett*, 305 N.E.2d 129, 130 (Ill. 1973) (finding state constitution's prohibition of any public funding in aid of religious purpose or school to be identical to restrictions of First Amendment); *Heritage Village Church & Missionary Fellowship, Inc. v. State*, 263 S.E.2d 726, 730 n.1 (N.C. 1980) (turning to jurisprudence of First Amendment's Establishment Clause for analytic guidance despite difference in terminology of state constitution); *Jackson v. Benson*, 578 N.W.2d 602, 620 (Wisc. 1998) (stating that court "interpret[s] and appl[ies] the benefits clause [of the state constitution] . . . in light of the United States Supreme Court cases interpreting the Establishment Clause of the First Amendment"); *Kemerer*, *supra* note 35, at 27 (observing that some state courts equate state and federal establishment clauses despite considerable variation in wording); *Wendtland*, *supra* note 33, at 634-35 & 635 n.51 (reporting that 11 states' courts declared their constitutions' church-state provisions no broader than federal Constitution's).

43. See, e.g., CAL. CONST. art. I, § 24 (stating that state constitutional rights are independent of federal Constitution); *Epeldi v. Engelking*, 488 P.2d 860, 865-66 (Idaho 1971) (asserting that framers of state constitution intended clearer separation of church and state than in federal Constitution and that interpretation of state constitution differs from that of federal); *Board of Educ. for Indep. Sch. Dist. No. 52 v. Antone*, 384 P.2d 911, 913 (Okla. 1963) (stating that *Everson* decision, which allowed funding of busing to parochial schools, does not change effect of state constitution); *Dickman v. School Dist. No. 62C*, 366 P.2d 533, 545 (Or. 1961) (declaring that even if Supreme Court's interpretation of federal Constitution were not distinguishable in this case, state court still would interpret state constitution to reach opposite conclusion); *Kemerer*, *supra* note 35, at 4-20 (surveying states with restrictive constitutional provisions); *Wendtland*, *supra* note 33, at 634 & n.49 (stating that approximately 20 states do not follow Supreme Court's interpretation of religious freedom); *id.* at 643-46 (summarizing state decisions rejecting all federal standards).

Neither *Wendtland* nor *Kemerer* explicitly distinguished state constitutional provisions patterned after the proposed Blaine Amendment. Also, both *Wendtland* and *Kemerer* focused on the implications of these state constitutional provisions for school vouchers. The question of school vouchers differs slightly from the question of social service vouchers because many states specifically address sectarian education in their religion clauses, *supra* note 35, but few state constitutions specifically mention charities, and none of them distinguish religious charities. See COLO. CONST. art. V, § 34 (proscribing appropriation for charitable, educational, or benevolent purpose to corporation not under absolute control of state); MASS. CONST. amend. art. XVIII, § 2 (prohibiting appropriation of public money for charitable or religious undertaking that is not publicly owned and under exclusive control of public officers); MONT. CONST. art. V, § 11(5) (forbidding appropriation for religious, charitable, educational, or benevolent purpose to any private individual or association not under control of state); VA. CONST. art. IV, § 16 (banning appropriation of public funds by General Assembly to any charitable institution not owned or controlled by Commonwealth, but permitting General Assembly to authorize political subdivisions to appropriate funds to any charitable institution or association); WYO. CONST. art. III, § 36 (disallowing appropriation for charitable, educational, or benevolent purpose to corporation not under absolute control of state).

44. See, e.g., *Conrad v. City & County of Denver*, 656 P.2d 662, 667, 678 (Colo. 1983) (finding that plaintiff had established prima facie case that public display of nativity scene

that state courts interpret as more restrictive than the Supreme Court's interpretation of the First Amendment almost always parallels the language of the proposed Blaine Amendment.⁴⁵

State courts have applied Blaine provisions to various forms of funding for religious groups.⁴⁶ Typically, state court decisions address aid to parochial schools; they often forbid the inclusion of parochial schools in programs that contribute textbooks to various schools or the provision of public busing to parochial school students on the same basis as to other students.⁴⁷ The Washington Supreme Court applied its state religion clause to a program of educational grants for the blind and excluded a blind student studying to be a minister.⁴⁸ Recently, the application of Blaine provisions has arisen in the context of school choice.⁴⁹ The application of the Blaine provisions to parochial

violated state constitution and implying that contrary opinion under federal Constitution would not change outcome under state constitution); *Epeldi v. Engelking*, 488 P.2d 860, 865-66 (Idaho 1971) (rejecting child benefit theory and denying public funds for transportation of students to parochial schools); *Bloom v. School Comm. of Springfield*, 379 N.E.2d 578, 581-83 (Mass. 1978) (declaring that although Supreme Court upheld direct textbook loans to parochial school students, state constitution does not distinguish between religious and secular purpose of aid and therefore program violated state constitution); *Viteritti*, *supra* note 40, at 149 (asserting that state courts' interpretations of state religion clauses do not always follow Supreme Court's guidance); *Wendtland*, *supra* note 33, at 634 (stating that most states that have not followed Supreme Court's reasoning under First Amendment have issued directly contrary decisions under state provisions).

45. See *Wendtland*, *supra* note 33, at 639-41 (finding that state constitutions barring aid to religious institutions in general or to sectarian schools in particular are more predictive of state court activism than are clauses forbidding state to compel person to support any ministry or forbidding governmental preference toward religion). Although *Wendtland* does not specifically label the clauses "Blaine provisions," the language that *Wendtland* finds to be the crucial variable in predicting an activist decision that prohibits aid to a religious purpose, organization, or school, *id.* at 638, parallels the language of the proposed Blaine Amendment. *Wendtland* reported that only the California and Colorado courts have based activist decisions on the more general clauses, *id.* at 640, that do not parallel the proposed Blaine Amendment. *Wendtland* also observed that "state provisions that expressly proscribe 'indirect' aid do not seem to result in more activist decisions than those that merely proscribe aid." *Id.* at 641.

46. See *infra* notes 47-53 and accompanying text (providing examples of programs challenged under state religion clauses).

47. See *Wendtland*, *supra* note 33, at 635-36 (explaining role of public aid to sectarian schools in defining religion clauses). Several states forbid public transportation of students to parochial schools. See *id.* at 636 & n.54 (citing, for example, *McVey v. Hawkins*, 258 S.W.2d 927 (Mo. 1953); *Board of Educ. for Indep. Sch. Dist. No. 52 v. Antone*, 384 P.2d 911 (Okla. 1963); *Visser v. Nooksack Valley Sch. Dist.*, 207 P.2d 198 (Wash. 1949)). Several states prohibit direct textbook loans. See *id.* at 636 & n.55 (citing, for example, *Bloom v. School Comm. of Springfield*, 379 N.E.2d 578 (Mass. 1978); *In re Advisory Opinion*, 228 N.W.2d 772 (Mich. 1975); *Dickman v. School Dist. No. 62C*, 366 P.2d 533 (Or. 1961)).

48. See *Witters v. State Comm'n for the Blind*, 771 P.2d 1119, 1121 (Wash. 1989) (finding that state payment towards a religious course of study "falls precisely within the clear language of the state constitutional prohibition").

49. See *Kotterman v. Killian*, 972 P.2d 606, 617-21 (Ariz. 1999) (finding that tax credit

school aid reflects the history of the original proposed Blaine Amendment and the specific language in many state constitutions,⁵⁰ but Blaine provisions have arisen in other contexts as well. For example, a New York court applied its state constitution to refuse state funding of a sectarian orphanage.⁵¹ An Indiana court cited the state establishment clause when it invalidated a program reimbursing private religious missions for providing emergency shelter.⁵² Litigants in Washington used the state Blaine provision in an attempt to invalidate bonds that the state issued for religiously affiliated hospitals.⁵³ In light of the broad language of the Blaine provisions, it is likely that some of them will present a barrier to the inclusion of religious providers in state social service voucher programs, even when the programs comply with the federal Constitution.⁵⁴

for school tuition donations did not violate federal Establishment Clause or state constitution's prohibitions against applying appropriations to religious worship or to aid church, or private or sectarian school); *Jackson v. Benson*, 578 N.W.2d 602, 620-22 & 620 n.20 (Wisc. 1998) (finding that amended school choice program that included religious schools violated neither federal Establishment Clause nor state constitution's prohibition of using money "from the treasury for the benefit of religious societies, or religious or theological seminaries" (quoting WIS. CONST. art. I, § 18)); *Viteritti*, *supra* note 35, at 659 (asserting that legal opposition to school choice centers around Blaine provisions).

50. See *Green*, *supra* note 37, at 41-42 (asserting that motivation of Protestants in promoting Blaine provisions was to preserve their influence over public school curricula and at same time to prevent public funds from reaching Catholic schools); *Viteritti*, *supra* note 35, at 670 (reporting Protestant fear of "Catholic menace" in school policy); *id.* at 659 ("In fact, the Blaine Amendment is a remnant of nineteenth-century religious bigotry promulgated by nativist political leaders who were alarmed by the growth of immigrant populations and who had a particular disdain for Catholics.").

A Free Exercise Clause argument exists against the Blaine provisions because of their discriminatory purpose. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."). The Establishment Clause, the Free Exercise Clause, the Free Speech Clause, and the Equal Protection Clause each "require the same outcome: the neutral treatment of religious speech." Brief for Pet'rs at 49, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (No. 94-329). However, the application of the Free Exercise Clause and the Equal Protection Clause exceeds the scope of this Note.

51. See *Viteritti*, *supra* note 40, at 150 n.203 (citing *Sargent v. Board of Educ. of Rochester*, 69 N.E. 722 (N.Y. 1904)).

52. See *Center Township v. Coe*, 572 N.E.2d 1350, 1360 (Ind. 1991) (finding that contracting with religious missions violated state constitution's provision that prohibited taking "money . . . from the treasury, for the benefit of any religious or theological institution" (citing IND. CONST. art. I, § 6)).

53. See *Wendtland*, *supra* note 33, at 645 & n.103 (citing *Washington Health Care Facilities Auth. v. Spellman*, 633 P.2d 866 (Wash. 1981)) (explaining that Washington court averted decision by ruling that bonds were not public money or property).

54. See H.R. CONF. REP. NO. 104-430, at 361 (1995) (stating that Congress included subsection (k) in Charitable Choice provision so that religious organizations could fully partici-

Differences among state constitutional standards are "a natural outgrowth of American federalism."⁵⁵ States are free to grant their citizens greater rights than those that the United States Constitution guarantees.⁵⁶ However, a federal court will not uphold a state constitution or a state statute that conflicts with the United States Constitution or with the federal law.⁵⁷ Therefore, were there a conflict, federal law or the federal Constitution would preempt a state Blaine provision.

B. Federal Statutory Preemption

*Garnett v. Renton School District No. 403*⁵⁸ presents an example of a situation in which a federal statute superseded a state constitution's Blaine provision.⁵⁹ In *Garnett*, a school district refused to grant a student religious

pate in programs, despite state constitutional provisions prohibiting expenditure of public funds in or by sectarian institutions).

55. Viteritti, *supra* note 35, at 680.

56. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (confirming state's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution"); *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (expressing that state law can impose greater restrictions on police activity than does federal Constitution); *State v. Fuller*, 374 N.W.2d 722, 726 (Minn. 1985) ("It is axiomatic that a state supreme court may interpret its own state constitution to offer greater protection of individual rights than does the federal constitution."). In a law review article, Justice Brennan wrote:

[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law – for without it, the full realization of our liberties cannot be guaranteed.

William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

57. See U.S. CONST. art. VI, § 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."); see also *Hoppock v. Twin Falls Sch. Dist. No. 411*, 772 F. Supp. 1160, 1163 (D. Idaho 1991) ("A state constitutional grant is adequate if it is more protective of a right than an analogous provision of the federal constitution – provided that protection of the state constitutional right does not infringe a competing federal guarantee."); Eugene C. Bjorklun, Commentary, *The Equal Access Act and State Constitutions: The Final Chapter*, 86 EDUC. L. REP. (West) 1, 6 (Dec. 1993) ("It does not matter that a state constitution prohibits the practice. If it is mandated and upheld as constitutional, it must take precedence over the state constitution under the Supremacy Clause.").

58. 987 F.2d 641 (9th Cir. 1993).

59. See *Garnett v. Renton Sch. Dist. No. 403*, 987 F.2d 641, 646 (9th Cir. 1993) (deciding that state law must yield to student group's federal right that Equal Access Act created). In *Garnett*, the United States Court of Appeals for the Ninth Circuit considered whether the Equal Access Act (EAA) preempted the Washington Constitution. *Id.* at 644. School officials claimed

club permission to meet on school grounds before school hours.⁶⁰ The school district contended that allowing the meeting would violate both the Washington Constitution and the United States Constitution.⁶¹ The student group sued the school, arguing that the Equal Access Act (EAA)⁶² required the school to allow their meeting on the same basis as the school's other noncurriculum-related clubs.⁶³ The District Court initially found for the school district, agreeing that the Washington Constitution governed the decision.⁶⁴ The United States Court of Appeals for the Ninth Circuit ruled that the statutory right created by the EAA preempted the state constitutional provision that prohibited the religious club from accessing school grounds.⁶⁵ The Supreme Court denied certiorari.⁶⁶

The *Garnett* decision and others reaching the same conclusion⁶⁷ have implications far beyond the EAA.⁶⁸ The implications expand even past the realm of education because, although the EAA applies only to schools, it mirrors the equal access standard of *Widmar v. Vincent*,⁶⁹ a federal constitu-

that allowing a religious club to meet on school grounds during noninstructional time violated the state and federal constitutions. *Id.* at 643. Students argued that the EAA required that the school allow them access and that the Free Speech, Free Exercise, Free Association, Equal Protection, and Due Process Clauses also protected their right to meet. *Id.* The *Garnett* court explained that under the EAA, if a public secondary school allows any noncurriculum-related student group to meet, it may not deny other clubs access on the basis of the content of their speech. *Id.* at 644 (citing *Board of Educ. of the Westside Community Schs. v. Mergens*, 496 U.S. 226, 236 (1990)). Thus, even though the Washington Constitution prohibited student religious groups from meeting on school grounds, the court found that the EAA created a federal right for religious student groups and that the state constitution must defer to the statutory right. *Id.*

60. *See id.* at 643 (explaining school district's denial of students' request for permission to form religious club).

61. *See id.* (explaining schools district's defense). The Washington Constitution states: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." WASH. CONST. art. I, § 11. Another provision specifies: "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." *Id.* art. IX, § 4.

62. Equal Access Act (EAA), 20 U.S.C. §§ 4071-74 (1994).

63. *See Garnett*, 987 F.2d at 643 (summarizing students' EAA claim).

64. *Id.* at 643-44.

65. *See id.* at 646 (finding that state law must yield to EAA).

66. *Garnett v. Renton Sch. Dist. No. 403*, 510 U.S. 819 (1993).

67. *See Cenicerros v. Board of Trustees of San Diego Unified Sch. Dist.*, 106 F.3d 878, 883 (9th Cir. 1997) (maintaining that rights that EAA created "exceed, and therefore supersede" rights under California Constitution); *Hoppock v. Twin Falls Sch. Dist. No. 411*, 772 F. Supp. 1160, 1164 (D. Idaho 1991) (finding that under Supremacy Clause, Idaho Constitution does not prevent application of EAA).

68. *See Bjorklun, supra* note 57, at 8 ("If the Ninth Circuit Court's decision in *Garnett* stands and becomes the settled law on the issue, its significance will lie not so much in regard to equal access, but for the precedent it may set in other church-state issues in education.").

69. 454 U.S. 263 (1981).

tional standard that defines the protections of free speech and applies to all government actions.⁷⁰ Although the plaintiffs in *Garnett* challenged the federal constitutionality of Washington's state constitutional provision,⁷¹ the *Garnett* court never reached that question because it based its decision on the federal statute.⁷² In contrast to the EAA, the federal statute allowing for the creation of state social service vouchers intentionally avoids a similar conflict between its statutory principle of nondiscrimination and the Blaine provisions' exclusion of religious organizations.⁷³

C. Charitable Choice's Avoidance of Statutory Preemption

The purpose of the Charitable Choice provision of the PRWORA is to allow a religious organization to participate in providing welfare services on the same basis as any other nongovernmental provider without affecting the religious character of the organization or burdening the religious freedom of

70. See *Widmar v. Vincent*, 454 U.S. 263, 270-75 (1981) (requiring that school allow religious student group access to public forum because equal access does not violate Establishment Clause); see also *Board of Educ. of the Westside Community Schs. v. Mergens*, 496 U.S. 226, 235 (1990) ("In 1984 [through the EAA], Congress extended the reasoning of *Widmar* to public secondary schools."); Esbeck, *supra* note 7, at 22 (asserting that Congress enacted EAA to extend equal access right of *Widmar* to secondary schools). In applying the EAA, the United States Court of Appeals for the Ninth Circuit observed: "With respect to the federal Constitution, the Supreme Court has recently addressed strikingly similar Establishment Clause challenges." *Ceniceros*, 106 F.3d at 882 (citing *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Mergens*, 496 U.S. 226; *Widmar*, 454 U.S. 263). But see *Mergens*, 496 U.S. at 242 (clarifying that Congress's use of phrase "limited public forum" did not incorporate *Widmar's* definition of "limited public forum").

In *Widmar*, the Supreme Court addressed the issue of whether a state university could deny a registered student group access to facilities to hold religious meetings once the university had made its facilities generally available to registered student groups. *Widmar*, 454 U.S. at 264-65. The *Widmar* Court applied the standard of review for content-based exclusions in a public forum: The regulation must serve a compelling state interest and be narrowly drawn to achieve that end. *Id.* at 270. Acknowledging that the university had a compelling interest in fulfilling its obligations under the United States Constitution, the Court nevertheless found that an "equal access" policy would not violate the Establishment Clause. *Id.* at 271. The open forum clearly had a secular purpose and avoided entanglement with religion even if it did not exclude religious activities. *Id.* at 271-72. Moreover, the incidental benefits received by religious groups would not have the primary effect of advancing religion. *Id.* at 273. In conclusion, the *Widmar* Court asserted that in light of the limitations of the Free Exercise and Free Speech Clauses, the state's interest in securing greater separation of church and state was not compelling. *Id.* at 276.

71. See *Garnett*, 987 F.2d at 643 (stating that students also argued that forbidding them to meet on school grounds violated Free Speech, Free Exercise, Free Association, Equal Protection, and Due Process Clauses of federal Constitution).

72. See *id.* at 643 n.1, 646 (stating that because court reached its decision on statutory grounds, court did not address federal constitutional claims).

73. See *infra* notes 80-84 and accompanying text (explaining how subsection (k) of Charitable Choice avoids statutory conflict).

the beneficiaries.⁷⁴ The Charitable Choice provision not only allows the inclusion of religious providers, it also explicitly prohibits religious discrimination or the exclusion of religious providers when a state chooses to work with independent providers of social services.⁷⁵ Under one subsection of Charitable Choice, states may provide individual beneficiaries of social services with certificates, vouchers, or other forms of disbursement redeemable with eligible service providers.⁷⁶ The Charitable Choice provision covers

74. See PRWORA § 104(b), 42 U.S.C. § 604a(b) (Supp. IV 1997) (stating purpose of Charitable Choice). The Charitable Choice provision protects the free exercise rights of the religious provider by allowing the organization to display religious art, *id.* § 604a(d)(2)(B), by forbidding government interference in the independence and governance of the organization, *id.* § 604a(d)(2)(A), and by maintaining the organization's exemption from employment discrimination standards, *id.* § 604a(f). Compare *id.* §§ 604a(d), (f) (guaranteeing religious freedom of recipient religious organizations) with STEVEN V. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY 81-99, 128-29, 154-61 (1996) (surveying government pressures and disputes regarding religious character and expression of religious service-providers who receive government assistance).

The provisions protect the welfare recipient's free exercise rights by forbidding discrimination by the religious provider, 42 U.S.C. § 604a(g), and by requiring the state to provide an alternative provider upon request, *id.* § 604a(e)(1). Although the objecting beneficiary has a right to an alternative provider who is not of that particular religion, the beneficiary does not have a right to a provider of his or her own faith. See A GUIDE TO CHARITABLE CHOICE, *supra* note 1, at 24 n.13 (stating that subsection (e)(1) simply requires alternative provider, not one sharing beneficiary's faith).

75. 42 U.S.C. §§ 604a(a)(1), (c); see A GUIDE TO CHARITABLE CHOICE, *supra* note 1, at 18 (observing that state may decide to limit social service providers to government agencies, but once state decides to use private-sector providers, it cannot bar religious providers from eligibility); Esbeck, *supra* note 7, at 9 (same); cf. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (stating that although state can choose not to create substantive right, once state creates property right, deprivation of that right must comply with federal constitutional due process standards (citation omitted)).

76. 42 U.S.C. § 604a(a)(1)(B). In addition to allowing states to establish voucher programs, Charitable Choice also allows states to contract with charitable, religious, or private organizations to provide welfare services. *Id.* § 604a(a)(1)(A).

The Supreme Court has distinguished direct and indirect funding. Characteristics of indirect funding include that the benefit is available under neutral eligibility criteria, without regard to the sectarian or nonsectarian nature of the institution; that the funds flow through an independent party; and that the funds reach the institution only as a result of private decision-making. See *Agostini v. Felton*, 521 U.S. 203, 223-26 (1997) (summarizing *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) and *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)). The Court has so widely accepted the constitutionality of indirect funding of religion that even the dissenters in *Rosenberger* agreed that benefits given to individuals on a religion-neutral basis and then used to aid religious activity do not violate the Establishment Clause. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 873-75 (1995) (Souter, J., dissenting) (characterizing funding as direct and therefore unconstitutional); Esbeck, *supra* note 7, at 7 (commenting that even more liberal Justices of Supreme Court agree with distinction between direct and indirect assistance). This Note begins with the assumption that the Establishment Clause permits the redemption of social service vouchers with

a variety of government-funded social service programs.⁷⁷

In anticipation of the constitutional issues raised by allowing religious providers to participate in the government program, the Charitable Choice provision stipulates that the implementation of these programs must conform to the Establishment Clause.⁷⁸ The legislative history indicates that Congress specifically considered Establishment Clause case law when it drafted the voucher provision.⁷⁹ In addition to addressing federal constitutional concerns, Charitable Choice also recognizes and addresses the potential state constitutional barrier to supplying social services through religious providers.⁸⁰ In

religious providers. See *supra* note 11 (citing cases upholding benefit that flowed to religious organization as part of neutral program and independent, private choices); *infra* notes 120-22 (same); *infra* text accompanying notes 197, 199 (distinguishing action that Establishment Clause permits from action that Establishment Clause requires). Because direct funding of religious organizations by contracts raises threshold questions separate from indirect funding through vouchers, this Note addresses only the indirect funding of religious social service providers.

77. See 42 U.S.C. § 604a(a)(2) (applying provision to Temporary Assistance for Needy Families (TANF) program, to Supplementary Security Income (SSI) program, and to food stamps and Medicaid programs); A GUIDE TO CHARITABLE CHOICE, *supra* note 1, at 3-4, 16-17 (describing programs to which Charitable Choice applies). Charitable Choice allows vouchers for the following services, among others: subsidized jobs and community service positions, job-skills training, food pantries, maternity homes, abstinence education, drug and alcohol treatment programs, health clinics, AIDS hospices, adolescent counseling centers, battered women's shelters, literacy and English-as-a-second-language programs, dispute resolution and legal aid centers, and retreat centers for youths and adults. See Carl H. Esbeck, *The Neutral Treatment of Religion and Faith-Based Social Service Providers: Charitable Choice and Its Critics*, in WELFARE REFORM & FAITH-BASED ORGANIZATIONS 173, 200 n.33 (Derek Davis & Barry Hankins eds., 1999) (listing programs to which Charitable Choice applies); A GUIDE TO CHARITABLE CHOICE, *supra* note 1, at 17 (same).

78. 42 U.S.C. § 604a(c). The statute specifies:

In the event a State exercises its authority under subsection (a) of this section, religious organizations are eligible, on the same basis as any other private organization, as contractors to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, under any program described in subsection (a)(2) of this section so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution.

Id.

79. See H.R. CONF. REP. NO. 104-430, at 361 (1995) (explaining that Supreme Court has found that allowing individual to redeem government-provided voucher with religious entity does not violate Establishment Clause, despite indirect benefit to religion, provided that individual has genuine choice (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983))); A GUIDE TO CHARITABLE CHOICE, *supra* note 1, at 1 (stating that Charitable Choice clarifies and codifies constitutional requirements); Memorandum from Senator John Ashcroft's Office, *Ashcroft Charitable Choice Provision Triumphs in New Welfare Reform Law* (Oct. 1996) (on file with *Washington and Lee Law Review*) (asserting that Charitable Choice "embodies existing U.S. Supreme Court case precedents").

80. See PRWORA § 104(k), 42 U.S.C. § 604a(k) (Supp. IV 1997) ("Nothing in this section shall be construed to preempt any provision of a State constitution or State statute that pro-

order to avoid a conflict between the *state constitutional prohibition* against including these groups and the *federal statutory requirement* to include religious providers,⁸¹ Charitable Choice specifically allows the segregation of federal and state funds in welfare programs.⁸² In essence, a state cannot exclude qualified religious providers from programs financed by federal funds or by commingled state and federal funds because the nondiscrimination principle applies to these funds.⁸³ Segregated state funds, however, are free from the *statutory* nondiscrimination requirement.⁸⁴ Nevertheless, in avoiding the statutory conflict, Charitable Choice opens the door to a constitutional conflict between the federal Constitution and the state Blaine provisions, another confrontation that could lead to the preemption of the Blaine provisions.⁸⁵ If a state decides to use independent providers of welfare services but excludes all religious providers of welfare services from the state program, the state still risks violating the federal constitutional prohibitions against viewpoint discrimination and against hostility toward religion.⁸⁶

hibits or restricts the expenditure of State funds in or by religious organizations."); H.R. CONF. REP. NO. 104-430, at 361 (1995) (stating that Congress did not intend subsection (k) to require segregation of state and federal funds but rather to allow states to segregate funds so that religious organizations could fully participate in programs, despite state constitutional provisions prohibiting expenditure of public funds in or by sectarian institutions); *supra* notes 34-35 and accompanying text (summarizing state constitutions' Blaine provisions).

81. See U.S. CONST. art. VI, § 2 (providing that under Supremacy Clause, Constitution and congressional laws preempt state and local laws); *supra* Part II.B (addressing federal statutory preemption of state provisions); *infra* Part II.D (considering federal constitutional preemption of state provisions).

82. 42 U.S.C. § 604a(k); see Friedman, *supra* note 1, at 106 (explaining that states that commingle state and federal funds must comply with standards of Charitable Choice in disbursing any funds); cf. Mark Greenberg, *HHS Policy Guidance on Maintenance of Effort, Assistance, and Penalties: Summary and Discussion*, 4 GEO. J. ON FIGHTING POVERTY 315, 317 (1997) (explaining that if family receives assistance through combined federal and state moneys, federal TANF rules apply, but if state chooses to segregate funds, then state funds are free from certain TANF requirements).

83. See A GUIDE TO CHARITABLE CHOICE, *supra* note 1, at 25 (explaining coverage of Charitable Choice principles); cf. TOBIN, *supra* note 23, at 7-8 (describing provisions in Child Care and Development Block Grant Amendments Act of 1996 that guarantee federal nature of funds and thereby avoid "Blaine-amendment-like" provisions of state constitutions and laws).

84. See A GUIDE TO CHARITABLE CHOICE, *supra* note 1, at 25 (specifying that administration of segregated federal block-grant funds must comply with principles of § 604a, but state authorities can administer segregated state funds according to more restrictive state requirements).

85. Cf. *Romer v. Evans*, 517 U.S. 620, 635-36 (1996) (invalidating amendment to Colorado's Constitution because amendment violated Equal Protection Clause of federal Constitution); Kemerer, *supra* note 35, at 2 ("A ruling by a federal court that exclusion of sectarian private schools from a state voucher program violates the Free Exercise Clause and/or the Equal Protection Clause of the federal constitution would have the same effect [as the EAA did in *Garnett*].") (citation omitted).

86. See *infra* Part III (explaining Free Speech Clause's requirement of neutrality); *infra* Part IV (setting out Establishment Clause's requirement of neutrality).

D. Federal Constitutional Preemption

As explained above, the federal Constitution guarantees certain basic rights upon which state constitutions may expand.⁸⁷ However, the United States Supreme Court's interpretation of the First Amendment creates a unique situation that other amendments do not present: Because each of the three clauses of the First Amendment requires neutrality toward religion,⁸⁸ states are left with less flexibility to define or to interpret state-provided religious liberties differently from the Supreme Court's interpretation of the federal guarantees.⁸⁹ The complex interaction between state and federal religious freedoms arises from the balance among the three clauses of the First Amendment⁹⁰ and from the balance that the Establishment Clause itself requires.⁹¹ For example, the Free Exercise and Establishment Clauses of the First Amendment limit the government's creation of burdens and benefits for religion.⁹² The Establish-

87. See *supra* notes 56-57 and accompanying text (explaining relationship between federal and state constitutions); see also William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, N.Y.U. L. REV. 535, 548 (1986) (reporting that between 1970 and 1984, state courts rendered over 250 opinions interpreting state constitutional requirements as more stringent but not contrary to federal constitutional standards).

88. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845 (1995) (stating that each separate clause of First Amendment requires neutrality).

89. See *Viteritti*, *supra* note 40, at 148 ("Unlike other rights guaranteed by the Constitution, securing religious liberty is a matter of striking the proper balance between the Establishment and Free Exercise Clauses – a zero sum equation."); *infra* Part III (explaining that Free Speech Clause might require government access or benefit that Establishment Clause does not forbid); *infra* Part IV (explaining balance within Establishment Clause).

90. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 271, 277 (1981) (considering exclusion of religious student organization under both Establishment and Free Speech Clauses and finding that first allowed access and second required access); *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."); Ralph D. Mawdsley, Commentary, *Agostini v. Felton: Is Establishment of Religion Moving Toward a Nondiscrimination Model?*, 127 EDUC. L. REP. (West) 13, 16 (1998) (referring to free speech rights as counterbalance to Establishment Clause). The question of whether the Establishment Clause and the Free Exercise Clause conflict or whether they actually complement each other when understood correctly is a subject of considerable debate among scholars. See ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY* 43, 72 (1990) (criticizing dichotomy between Free Exercise and Establishment Clauses and asserting that clauses complement each other); Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L., ETHICS & PUB. POL'Y 285, 300-04 (1999) (asserting that Establishment Clause neither conflicts with nor overrides Free Speech Clause or Free Exercise Clause).

91. See *Rosenberger*, 515 U.S. at 846 (confirming "the very neutrality the Establishment Clause requires"); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (stating that statute's "principal or primary effect must be one that neither advances nor inhibits religion" (emphasis added) (citations omitted)); *infra* Part IV (describing Establishment Clause's principle of neutrality).

92. See ADAMS & EMMERICH, *supra* note 90, at 40-41 (stating that Supreme Court has

ment Clause prohibits advancing or endorsing religion, and at the same time, it forbids inhibiting or disfavoring religion.⁹³ The Free Speech Clause curtails the restrictions that the government can place on religious speech.⁹⁴

Although the Supreme Court has had the opportunity to consider the constitutionality of a state Blaine provision, it specifically has declined to address the issue.⁹⁵ For example, in *Widmar v. Vincent*, the Supreme Court recognized that the state constitution required a stricter separation of church and state than did the federal Constitution.⁹⁶ However, the Missouri courts had not yet decided whether allowing religious student groups to use university facilities on an equal basis as nonreligious student groups violated the state constitution.⁹⁷ Therefore, the Supreme Court framed the issue not as a conflict between the federal and state constitutions, but rather as a conflict between the federal Constitution and the university's asserted interest in a greater separation of church and state.⁹⁸ The *Widmar* Court decided that the Free Exercise Clause and the Free Speech Clause limited the university's interest; but the Court limited its holding in the case, refusing to decide whether a state's interest in complying with its own constitution could ever outweigh the First Amendment's Free Speech Clause.⁹⁹

*Witters v. Washington Department of Services for the Blind*¹⁰⁰ presented a clearer example of a state constitution prohibiting benefits to a religious group when the federal Constitution permitted funds indirectly to reach a religious institution.¹⁰¹ When the United States Supreme Court initially heard

interpreted tension between Free Exercise and Establishment Clause so that attempts to exempt religion from government burden often face challenge as government establishment of religion).

93. See *infra* Part IV (discussing neutrality requirement of Establishment Clause).

94. See *infra* Part III (explaining cases in which Supreme Court applied forum analysis to exclusion of religious group or religious speech).

95. See *supra* note 26 and accompanying text (explaining issue of state constitutions in *Widmar* and *Witters*); *infra* notes 96-104 and accompanying text (same).

96. See *Widmar v. Vincent*, 454 U.S. 263, 275 (1981) (citing *Americans United v. Rogers*, 538 S.W.2d 711, 720 (Mo. 1976), for proposition that state constitution required greater separation of church and state than did federal Constitution).

97. *Id.* at 275.

98. See *id.* at 275-76 (refusing to determine how Missouri courts would decide state constitutional question and focusing instead on public university's asserted interest in greater separation of church and state).

99. See *id.* (finding it unnecessary to decide whether Supremacy Clause would ever allow state interest in own constitution to outweigh free speech interests).

100. 474 U.S. 481 (1986).

101. See *infra* text accompanying notes 102-04 (describing *Witters* decisions). In the Supreme Court's first consideration of *Witters*, the Court addressed whether the First Amendment prohibited a state from awarding a vocational grant to a visually handicapped student who attended a Christian college where he studied to become a pastor, missionary, or youth director. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 482-83 (1986). Applying

the case, the Court found that, when an educational grant was otherwise available to blind students, providing a grant to a blind student who was pursuing a religious degree did not violate the Establishment Clause.¹⁰² On remand, the Washington Supreme Court found that the program violated the state constitution's religion clause even though the program complied with the federal Establishment Clause.¹⁰³ By refusing to grant certiorari on the second appeal, the Supreme Court failed to take advantage of the opportunity to consider the potential conflict between the state constitutional provision and the First Amendment.¹⁰⁴ However, *Widmar* and *Witters* laid a foundation for considering the conflict between the state and federal constitutions.¹⁰⁵ The

the first prong of the *Lemon* test, the United States Supreme Court found an "unmistakably secular purpose" in the vocational grant program. *Id.* at 485-86. In considering the second prong, the Court concluded that the grant was not an impermissible "direct subsidy" of religion because the vocational assistance went directly to the student; flowed to the religious institution as a result of private, independent choice; and created no financial incentive to attend a religious school. *Id.* at 487-89. Because of the neutral availability of the grants, the recipient's choice to use it for a religious education communicated no state endorsement of religion. *Id.* at 489. Without considering the entanglement prong of the *Lemon* test or petitioner's free exercise claim, the Supreme Court unanimously concluded that giving a vocational rehabilitation grant to the petitioner did not violate the Establishment Clause. *Id.* at 489 & n.5. In closing, the Court remarked: "On remand, the state court is of course free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution." *Id.*

102. See *Witters*, 474 U.S. at 489 (finding no prohibited state support of religion).

103. See *Witters v. State Comm'n for the Blind*, 771 P.2d 1119, 1119-20 (Wash. 1989) (holding that Commission did not err in denying funds to visually handicapped student to obtain religious education because Washington Constitution prohibited that financial assistance). On remand, the Washington Supreme Court considered whether allowing the grant violated the Washington Constitution, and if so, whether denying the grant violated the Free Exercise Clause of the First Amendment or the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1121. The state court decided that petitioner's request fell "precisely within the clear language of the state constitutional prohibition against applying public moneys to any religious instruction," distinguishing the state constitution from the federal as forbidding both the appropriation and the application of funds. *Id.* at 1121-22. According to the state court, the denial of the grant did not violate the applicant's free exercise rights because it neither compelled nor pressured him to act in violation of his beliefs. *Id.* at 1122-23. Additionally, because of the state's compelling interest in securing the strict separation of church and state that the state constitution required, the Commission did not violate the Equal Protection Clause. *Id.* at 1123.

104. See *Witters v. Washington Dep't of Servs. for the Blind*, 493 U.S. 850, 850 (1989) (denying petition for certiorari). Justice White dissented, stating that *Witters* presented important Supremacy Clause questions because if the Establishment Clause permitted the individual's private religious choice, the Free Exercise Clause might require it. See *McMonagle v. Northeast Women's Ctr., Inc.*, 493 U.S. 901, 903-04 (1989) (White, J., dissenting) (expressing dissent regarding denial of certiorari in several cases, including *Witters*).

105. Cf. David H. McClamrock, Note, *The First Amendment and Public Funding of Religiously Controlled or Affiliated Higher Education*, 17 J.C. & U.L. 381, 408 (1991) ("The *Witters* litigation . . . provides a valuable focal point for examining possible conflicts between the [F]irst [A]mendment and state restrictions on educational funding.").

Supreme Court's decisions since *Witters* have developed the understanding of the First Amendment in such a way that the constitutionality of the state Blaine provisions is ripe for consideration.¹⁰⁶

III. *The Free Speech Clause's Requirement of Viewpoint and Content Neutrality*

In several cases, the Supreme Court has applied both the Establishment Clause and the Free Speech Clause to evaluate the government's treatment of a religious group.¹⁰⁷ In each of these cases, the inclusion of a religious group in a government-provided location or program invoked the Establishment Clause,¹⁰⁸ and the group's religious expression in that forum implicated the Free Speech Clause.¹⁰⁹ In these dual analysis cases, the Court determined that

106. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997) (stating that although Establishment Clause principles have not changed, Supreme Court's understanding of criteria has changed, and recent cases have undermined assumptions of former cases); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845-46 (1995) (implying equivalency of Free Speech and Establishment Clauses' requirements of neutrality); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390-94 (1993) (applying free speech requirements to determine that school must allow religious group access); Hugh Baxter, *Managing Legal Change: The Transformation of Establishment Clause Law*, 46 U.C.L.A. L. REV. 343, 350-57 (1998) (reporting recent clarification of Establishment Clause doctrine); *infra* notes 136-37 and accompanying text (discussing *Rosenberger's* application of forum doctrine to meta-physical forum of funding); *infra* note 200 (mentioning recent focus on neutrality in Establishment Clause cases).

107. See generally *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (finding that Free Speech Clause requires disbursement of Student Activities Funds to third-party contractor on behalf of student publication regardless of religious viewpoint and also that disbursement does not violate Establishment Clause); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (applying precedents of *Lamb's Chapel* and *Widmar* to determine that private religious expression in public forum does not violate Establishment Clause); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (concluding that denying church access to school facilities to show film on family issues constitutes viewpoint discrimination under Free Speech Clause and that allowing access does not violate Establishment Clause); *Widmar v. Vincent*, 454 U.S. 263 (1981) (determining that allowing religious student organization access to facilities does not violate Establishment Clause but that denying access violated Free Speech Clause).

108. See *Rosenberger*, 515 U.S. at 837-46 (evaluating disbursements from Student Activities Fund on behalf of student newspaper with religious viewpoint under Establishment Clause analysis); *Pinette*, 515 U.S. at 759-60 (addressing unattended cross located in plaza by state capitol building as implicating Establishment Clause); *Lamb's Chapel*, 508 U.S. at 386, 394-96 (considering church's use of school facilities to show film series under Establishment Clause analysis); *Widmar*, 454 U.S. at 265, 270-75 (examining use of university buildings by religious student group and analyzing under Establishment Clause).

109. See *Rosenberger*, 515 U.S. at 828-37 (conducting free speech analysis); *Pinette*, 515 U.S. at 760-63 (explaining forum analysis); *Lamb's Chapel*, 508 U.S. at 390-94 (applying free speech principles); *Widmar*, 454 U.S. at 267-70, 277 (setting forth free speech requirements).

the Establishment Clause *permitted* the inclusion of the religious groups in a government program or forum.¹¹⁰ Furthermore, the Court asserted that the Free Speech Clause *required* that the religious groups have equal access to government funds or facilities.¹¹¹

Under the First Amendment, religious speech receives the same constitutional protection as other forms of speech.¹¹² As explained further below, the

The distinction between individual and government speech is crucial. *See* *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) ("[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-41 (1982) (asserting that financial dependence on government does not change acts of private individuals into acts of state); *see also Rosenberger*, 515 U.S. at 841 (recognizing difference between government and private speech); *Pinette*, 515 U.S. at 763-66 (plurality) (same). This distinction between individual and government actors determines the standard that the Court applies. First, government speech endorsing religion violates the Establishment Clause, and individual speech endorsing religion does not. *See* *Board of Educ. of the Westside Community Schs. v. Mergens*, 496 U.S. 226, 250 (1990) (highlighting "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect"). Second, when the government itself is the speaker, it is exempt from the Free Speech Clause's requirement that the government not discriminate against the content or the viewpoint of speech. *Cf. infra* note 147 (summarizing *Rust v. Sullivan*, 500 U.S. 173 (1991)).

110. *See Rosenberger*, 515 U.S. at 845 (finding no Establishment Clause violation by including student publications with religious viewpoint in funding program); *Pinette*, 515 U.S. at 770 (plurality) (concluding that allowing private religious speech equal access to public forum conformed with Establishment Clause standard); *Lamb's Chapel*, 508 U.S. at 395 (labeling fears of Establishment Clause violation "unfounded"); *Widmar*, 454 U.S. at 271 (stating that "equal access" policy is not incompatible with Establishment Clause).

111. *See Rosenberger*, 515 U.S. at 837 (concluding that regulation facially and effectively denied right of free speech); *Pinette*, 515 U.S. at 763 (finding precedent of *Lamb's Chapel* and *Widmar* determinative); *Lamb's Chapel*, 508 U.S. at 394 (finding denial of access to be in violation of viewpoint neutrality); *Widmar*, 454 U.S. at 277 (concluding that action violated requirement of content neutrality); *see also Viteritti*, *supra* note 40, at 138 ("This Court strives to assure that religious affiliation will not serve to deny entitlements to some that are made available to all as a matter of general public policy. This approach [is most apparent] . . . in conjunction with those First Amendment freedoms that do not exclusively apply to religion.").

112. *See Pinette*, 515 U.S. at 760 (contending that private religious speech receives same protection as private secular speech (citing *Lamb's Chapel*, 508 U.S. 384 (1993); *Board of Educ. of the Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981))); *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment) ("Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally."); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1278 (10th Cir. 1996) ("The Supreme Court . . . has rejected the notion that speech about religion, religious speech designed to win converts, and religious worship . . . should be treated differently [than other forms of protected speech] under the First Amendment." (citing *Lamb's Chapel*, 508 U.S. at 394-96; *Widmar*, 454 U.S. at 269 n.6)).

Court applied a free speech analysis because once the government creates a forum, any limitation of expression within that forum must comply with constitutional standards.¹¹³ In these cases, the Court looked for content discrimination, a denial of access because of the religious subject matter of the group's expression.¹¹⁴ In every instance in which the Court detected content discrimination, it found the reasons for the discrimination insufficient to justify the discrimination.¹¹⁵ The Court also looked for viewpoint discrimination, an exclusion of the religious group because of its religious standpoint.¹¹⁶ When the Court found viewpoint discrimination, it presumed that the discrimination was unconstitutional.¹¹⁷ Therefore, in each case, the Court applied the Free Speech Clause to require the government to allow the religious group access to the government benefit on an equal basis with other participants.¹¹⁸

Under these principles, a state's exclusion of religious organizations from state social service voucher programs appears to require this dual analysis, asking both if the Establishment Clause permits the inclusion of these groups and if the Free Speech Clause forbids their exclusion.¹¹⁹ As the Supreme Court's precedents indicate and as Congress observed when enacting Charitable Choice, making religious organizations equally eligible to receive social service vouchers does not violate the Establishment Clause.¹²⁰ In a social

113. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (asserting that when forum is open, government must comply with Constitution); see also *infra* Part III.A (describing forum analysis).

114. See *infra* Part III.C (considering content discrimination); *infra* note 157 and accompanying text (defining content as substance or subject matter of presentation).

115. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-63 (1995) (striking down state action that excluded speech precisely because of content); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (finding university unable to satisfy constitutional standard for content-based exclusion).

116. See *infra* Part III.B (explaining analysis of viewpoint discrimination); *infra* note 158 and accompanying text (defining viewpoint as motivating ideology, opinion, or perspective).

117. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (stating that Court presumes viewpoint discrimination unconstitutional when otherwise within forum's limits); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (stating that government violates First Amendment when it excludes speech solely to suppress viewpoint).

118. See *supra* note 111 (summarizing outcomes of cases requiring equal access for religious groups to government facilities or funds).

119. See *infra* text accompanying notes 120-25 (comparing exclusion of religious providers from social service voucher programs with exclusion of religious groups from other government benefits).

120. See H.R. CONF. REP. NO. 104-430, at 361 (1995) (contending that Supreme Court has found no Establishment Clause violation in permitting individual to redeem government-provided voucher with religious entity, despite indirect benefit to religion, provided that individual has genuine choice (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S.

service voucher program, the benefit flows primarily to the beneficiaries, not the providers, and any benefit a religious provider receives is a result only of the independent choices of beneficiaries.¹²¹ As the Supreme Court itself observed, the Court has "consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."¹²²

Free speech standards also apply to social service vouchers: Although not all the programs to which vouchers apply serve informational purposes, many of them do educate, train, and counsel.¹²³ Drug-treatment programs, legal aid centers, and abstinence education inherently involve speech, and other social services, such as AIDS hospices, job-skills training, and maternity homes may involve a substantial speech component.¹²⁴ Because the reason for the exclusion is the providers' and the recipients' religious viewpoint, the exclusion implicates the Free Speech Clause.¹²⁵ The remainder of Part III of

388 (1983)); *see also* *Zobrest*, 509 U.S. at 8 (asserting that Court has never stated that First Amendment disables religious institutions from involvement in publicly sponsored social welfare programs); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 44, 67 (1997) (stating that Supreme Court has not limited government funding of church-affiliated social services aside from in education and that ultimate constitutionality of Charitable Choice depends on its implementation); *cf.* Eugene Volokh, *Vouched For*, THE NEW REPUBLIC, July 6, 1998, at 12 (stating that only constitutional gray area regarding school vouchers is not whether neutrality *permits* inclusion of parochial schools but whether it *requires* their inclusion).

121. *Cf. supra* note 11 (citing language of *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 487-89 (1986); *Mueller v. Allen*, 463 U.S. 388, 399 (1983)).

122. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (citing *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983)).

123. *See supra* note 77 (listing various programs to which Charitable Choice applies).

124. *See supra* note 77 (giving examples of services that Charitable Choice covers); *see also* MONSMA, *supra* note 6, at 13 (asserting that many organizations take holistic approach, including spiritual dimension, to problems such as spouse abuse, homelessness, poverty, abuse and neglect of children, and drug abuse).

125. *See* *Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970) ("[C]hurches as much as secular bodies and private citizens have that right [to take strong positions on public issues]."); Esbeck, *supra* note 7, at 4 n.9 (stating that rights of religious organization are similar to individual rights as long as organization can demonstrate injury-in-fact to its purposes or activities); Michael W. McConnell, *Equal Treatment and Religious Discrimination*, in EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY 30, 32 (Stephen V. Monsma & J. Christopher Soper eds., 1998) ("Religious citizens should not be required to engage in self-censorship as a precondition to participation in public programs. Public programs [are] open to all [controversial secular ideas and viewpoints that] satisfy the objective purposes of the program. . . . [This] should be the rule for religious ideas and viewpoints as well.").

this Note considers whether *excluding* religious organizations from eligibility in a state program solely on the basis of religion violates the Free Speech Clause.

A. *Funding as a Forum*

In the free speech portion of the dual analysis cases, the Court has applied the public forum analysis.¹²⁶ Under the forum analysis, if the government through its policy or practice intentionally has opened a forum for public assembly and speech or for the use of specific speakers or the discussion of particular subjects,¹²⁷ the federal Constitution forbids certain exclusions.¹²⁸ Any time, place, and manner regulations must be content-neutral, must be narrowly tailored to a significant government interest, and must leave open ample alternative means of communication.¹²⁹ All content-based exclusions must be narrowly tailored to the achievement of a compelling government interest.¹³⁰ Furthermore, the Court presumes that any viewpoint-based exclusion is

126. See *Rosenberger*, 515 U.S. at 828-30 (setting out standard for limited public forum); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (finding courthouse square to be traditional public forum); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993) (declining to label type of forum but citing standard of *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 806 (1985) and *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 49 (1983)); *Widmar v. Vincent*, 454 U.S. 263, 267-70 (1981) (summarizing standard for "a forum generally open for use by student groups").

127. See *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (defining designated public forum). The *Cornelius* Court stated that it would not infer that the government intended to create a forum if the nature of the property was inconsistent with the expressive activity. *Id.* at 803. In the case of social service providers, the expressive activity of religious providers is not incompatible with the purpose of the forum; in fact, in certain instances, such as drug rehabilitation or legal aid centers, speech activities even may be the purpose of the forum.

128. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (stating that although state had no obligation to create forum, Constitution forbids certain exclusions once forum is open to public).

129. See *id.* at 45 (explaining that time, place, and manner regulations must be "content-neutral, . . . narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication").

130. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995) (considering content discrimination permissible if it preserves purpose of limited forum); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (asserting that if property has status of public forum, state may regulate expressive content only if restriction is necessary to serve compelling state interest and is narrowly drawn); *Perry Educ. Ass'n*, 460 U.S. at 45 (stating that any content-based exclusion from forum must be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end"); *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981) (stating that standard of review for discrimination on basis of religious content in public forum requires that regulation be necessary to serve compelling state interest and narrowly drawn to achieve that end).

unconstitutional.¹³¹ The Court's goal in applying the forum analysis is to provide all with equal access to a government-created forum.¹³²

Although a forum analysis often focuses on a physical location,¹³³ the Court has applied the forum analysis to nonspatial forums as well.¹³⁴ For example, in *Rosenberger v. Rector and Visitors of University of Virginia*,¹³⁵ the Supreme Court refused to recognize a distinction between funding and access to a physical location.¹³⁶ The *Rosenberger* Court equated the funds

131. See *Rosenberger*, 515 U.S. at 829-30 (considering viewpoint discrimination impermissible if it bans speech otherwise within limited forum's boundaries); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (stating that discrimination against religious viewpoint fails constitutional test unless Establishment Clause provides defense).

132. See *Widmar*, 454 U.S. at 271 (expressing "equal access" policy).

133. See generally, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (considering New York City Central Park); *Perry Educ. Ass'n*, 460 U.S. 37 (1983) (evaluating teacher mailboxes); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (examining fairgrounds); *Police Dep't v. Mosley*, 408 U.S. 92 (1972) (addressing sidewalk around public school).

134. See generally, e.g., *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (concerning local political debate on state-funded television station); *Rosenberger*, 515 U.S. 819 (1995) (evaluating Student Activities Fund); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (addressing charity drive aimed at federal employees). Although the Court found no violation in denying access to the charity drive in *Cornelius*, the importance of the case lies in that the Court "defined as the relevant forum an instrumentality of communication that had no physical existence." Steven G. Gey, *Reopening the Public Forum – From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1566 (1998).

135. 515 U.S. 819 (1995).

136. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 832 (1995) (rejecting university's argument that scarcity distinguished provision of funds from access to facilities). The question before the *Rosenberger* Court involved how the principles of the Free Speech and Establishment Clauses applied to the University of Virginia's denial of funds to a student group publishing a newspaper with a religious perspective. *Id.* at 823. The university made disbursements from the Student Activities Fund (SAF) to third-party creditors of many student organizations, but the University Guidelines prohibited SAF support for religious activities. *Id.* at 824-25. In considering the free speech claim, the *Rosenberger* Court first distinguished content discrimination and its subset viewpoint discrimination: It declared that the Court may allow content discrimination if it preserves the purpose of a limited public forum but that it presumes viewpoint discrimination is unconstitutional if the speech is within the limited forum. *Id.* at 829-30. The Court considered the fund to be a forum and found the denial of funds was viewpoint-based. *Id.* at 830-31. Therefore, the denial violated the organization's free speech rights. *Id.* at 837. The Court then addressed whether compliance with the Establishment Clause required the violation of free speech. *Id.* First, the Court emphasized that a significant factor in passing Establishment Clause scrutiny is the neutrality of the program toward religion. *Id.* at 839. The purpose of the activities fund, to open a forum for speech and to support student enterprises, was neutral toward religion. *Id.* at 840. Second, the Court emphasized the critical difference between private and governmental speech, observing no real likelihood of governmental endorsement nor coercion because the group received only an incidental benefit on a religion-neutral basis. *Id.* at 841-44. Therefore, the Establishment Clause did not require the denial of funds. *Id.* at 843. In closing, the Court declared that denying free speech risks

made available for student activities with a metaphysical forum.¹³⁷ As a result, under *Rosenberger*, even when the question is access to funding rather than access to a situs, equal access principles apply.¹³⁸

Lower courts have required government programs to include religious providers when they involve other nongovernmental providers.¹³⁹ These lower courts have extended *Rosenberger* to other funding situations, and in the same way, vouchers for social service providers resemble a metaphysical forum.¹⁴⁰ As in *Rosenberger*, the purpose of the voucher program is not to support a church but rather to increase and to improve the resources available to the state for providing social services.¹⁴¹ Additionally, in a manner analogous to

hostility toward religion, possibly frustrating the neutrality that the Establishment Clause itself demands. *Id.* at 845-46.

137. See *Rosenberger*, 515 U.S. at 830 ("The SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable."). The majority in *Rosenberger* appeared to find nothing radical in this extension of the public forum doctrine; rather, they saw it as a natural outgrowth of *Lamb's Chapel* and *Widmar*. Gey, *supra* note 134, at 1563-65.

138. See *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (acknowledging that "the First Amendment certainly has application in the subsidy context"); *Rosenberger*, 515 U.S. at 829 ("Once it has opened a limited forum, however, the State . . . may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,' nor may it discriminate against speech on the basis of its viewpoint." (citations omitted)); *id.* at 828 ("[T]he government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression."); Viteritti, *supra* note 40, at 140 (stating that government generally cannot deny religious citizens access to resources otherwise available to everyone).

139. See *Peter v. Wedl*, 155 F.3d 992, 997 (8th Cir. 1998) (finding that regulation granting aid to special education student unless student attended religious school violated Free Exercise Clause and Free Speech Clause); *Hartmann v. Stone*, 68 F.3d 973, 986 (6th Cir. 1995) (finding that under Free Exercise Clause, United States Army cannot exclude religious daycare providers from certification); see also *Columbia Union College v. Clarke*, 159 F.3d 151, 156, 169 (4th Cir. 1998) (deciding that under *Rosenberger*, denying state-funded grant on basis of college's religious perspective presumptively violated First Amendment but remanding case for inquiry if college was pervasively sectarian), *cert. denied*, 119 S. Ct. 2357 (1999).

140. See *Columbia Union College*, 159 F.3d at 156 (asserting that *Rosenberger* controls claim that denial of funding curtails free speech right); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1278, 1280-81 (10th Cir. 1996) (stating that funds can be forum as in *Rosenberger* and finding that prohibition of religious instruction and worship in senior center supported in part by federal funds was unconstitutional viewpoint discrimination); Gey, *supra* note 134, at 1596-610 (arguing in support of considering government subsidies programs as public forums). Gey defined a "metaphysical" public forum as an instrumentality of communication created to facilitate the dissemination of information or ideas. *Id.* at 1604. As mentioned above, many social service providers serve informational and educational purposes. See *supra* text accompanying notes 123-24.

141. Compare Esbeck, *supra* note 7, at 36 (stating that one purpose of cooperation between government and faith-based social service providers is to enhance quality or quantity of services) with *Rosenberger*, 515 U.S. at 824 (asserting that basis for Student Activities Fund

the student activities fund in *Rosenberger*, social service vouchers benefit the individual recipients by supporting various social service programs.¹⁴²

A key aspect of the forum analysis is that the state has no obligation to open a forum to the public¹⁴³ or to keep a forum open indefinitely.¹⁴⁴ Also, the state is under no obligation to subsidize the exercise of fundamental rights¹⁴⁵ or to involve independent providers in its government programs.¹⁴⁶ The Supreme Court has distinguished the following situations in which the government may selectively aid and regulate private speech: when the governmental

was recognition that range of opportunities enhanced environment of university). The *Rosenberger* Court specified that its decision did not reach an expenditure from a general tax fund levied for the direct support of a church. See *Rosenberger*, 515 U.S. at 841 (distinguishing expenditure from Student Activity Fund of public university from general tax fund levied for direct support of church); see also *id.* at 853-55 (Thomas, J., concurring) (stating that intention of Founders was that Establishment Clause forbid tax earmarked for religion). Some critics of Charitable Choice argue that the Establishment Clause requires the exclusion of religious social service providers from welfare programs that disburse moneys collected by general taxation. See Esbeck, *supra* note 77, at 188-93 (responding to criticism of Charitable Choice). However, in *Flast v. Cohen*, the Supreme Court rejected a federal taxpayer claim of religious coercion or offense. *Id.* at 188 (citing *Flast v. Cohen*, 392 U.S. 83 (1968)); see *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 17 (1947) (asserting that Establishment Clause does not forbid spending tax funds to pay for busing of parochial students as part of general program that extends to public and other schools). Taxpayers often support policies and programs with which they disagree: pacifists pay for weapons of mass destruction, opponents of the death-penalty finance execution of capital offenders, and taxpayers finance "the salaries of government officials whose policies [they] despise." Esbeck, *supra* note 77, at 188.

142. Compare Esbeck, *supra* note 7, at 36 (stating that one purpose of cooperation is to meet temporal needs of beneficiaries), and *supra* note 77 (providing examples of programs that states can implement through vouchers), with *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 824 (1995) (explaining that Student Activities Fund "supported a broad range of extracurricular activities . . . related to the educational purpose of the University" (internal quotations omitted)).

143. See *Cornelius v. NAACP Defense & Educ. Fund*, 473 U.S. 788, 799 (1985) (maintaining that not all protected speech is equally permissible on every type of government property); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (observing that First Amendment creates no right of access to property simply because government owns property (quoting *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981))).

144. See *Perry Educ. Ass'n*, 460 U.S. at 46 (stating that although state has no obligation to maintain open forum indefinitely, while forum is open, state is bound to constitutional obligations).

145. See *Rosenberger*, 515 U.S. at 834 (acknowledging absence of requirement that government subsidize exercise of fundamental rights (citing *Regan v. Taxation With Representation*, 461 U.S. 540, 545-46 (1983))); see also *infra* note 148 (summarizing *Regan*).

146. See *Laycock*, *supra* note 120, at 61 (stating that discrimination between public and private institutions is "rarely if ever" unconstitutional); *cf. id.* (asserting that funding only public schools discriminates between public and private schools and only incidentally between secular and religious schools).

actor employs private speakers to convey a government message,¹⁴⁷ when the refusal of a subsidy flows from a nonspeech classification,¹⁴⁸ and when the governmental actor awards funds through a highly competitive and discretionary process.¹⁴⁹ However, aside from these instances in which the government in essence has not opened a forum for speech, once the state creates a forum

147. See *Rosenberger*, 515 U.S. at 833 (stating that government can make content-based choices only when it is speaker (distinguishing *Rust v. Sullivan*, 500 U.S. 173 (1991)). But see *Gey*, *supra* note 134, at 1598-603 (arguing that *Rosenberger* and *Rust* are fundamentally inconsistent and concluding that *Rust* violates standard set in *Rosenberger*).

In *Rust*, the Court permitted a government prohibition on funding projects that engaged in abortion counseling, referral, and activities. See *Rust*, 500 U.S. at 179-80, 203 (describing Title X's conditions and finding no constitutional violation). The situation in *Rust* is distinguishable from social service vouchers for two reasons. First, the *Rust* Court recognized that the government may make a value judgment favoring childbirth over abortion. *Id.* at 192 (citing *Maher v. Roe*, 432 U.S. 464, 474 (1977)). In sharp contrast, the government may not favor or disfavor religion. See *infra* notes 232-41 and accompanying text (stating that government may not endorse or disfavor religion). Second, the *Rust* Court reasoned that the regulations ensured that participants observed the limits of the federal program and that the program necessarily discouraged alternative goals in order to advance its own. *Rust*, 500 U.S. at 193-94. In contrast, social service vouchers serve the purpose of improving welfare services, and the exclusion of religious providers is not essential to that end. See *Gey*, *supra* note 134, at 1604 ("[T]he government would be prohibited from imposing any restrictions on the private expressive use of public subsidies unless such expression would significantly and directly interfere with the legitimate nonexpressive operations of the government."). Although the government "is entitled to define the limits of [its] program," *Rust*, 500 U.S. at 194, the limits themselves must conform with constitutional standards.

148. See *McClamrock*, *supra* note 105, at 417 (distinguishing denying government subsidy of speech itself for nonspeech reason from denying another benefit on basis of speech (comparing *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) with *FCC v. League of Women Voters*, 468 U.S. 364 (1984))). In *Regan*, the Court permitted a distinction between veterans' organizations and other lobbying groups, but it cautioned that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'" *Regan*, 461 U.S. at 545-56 (internal quotations and citations omitted). The *Rosenberger* Court distinguished *Regan* because in *Regan*, the government classified speakers by veteran status, not by the content or the message of their speech, but the university's regulation had as its "sole rationale and operative principle" a speech-based restriction. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995). In the same way, the exclusion of religious providers from state social service programs serves to suppress viewpoint.

149. See *National Endowment for the Arts v. Finley*, 524 U.S. 569, 586 (1998) (recognizing exception for highly competitive and discretionary grant funding). Like the subsidies in *Rosenberger* and in *Columbia Union College*, social service vouchers are "made available generally" through a noncompetitive process. *Columbia Union College v. Clarke*, 159 F.3d 151, 171 (4th Cir. 1998) (Wilkinson, C.J., dissenting), *cert. denied*, 119 S. Ct. 2357 (1999). Unlike NEA financing, creating a voucher program in which religious social service providers may participate "is not a situation where there are a variety of different programs each seeking to achieve a desired result and the government has elected to subsidize some programs and not others." *Esbeck*, *supra* note 77, at 181.

either through funding or through a situs, it cannot discriminate against individuals within the forum on the basis of their viewpoints,¹⁵⁰ and the state can discriminate on the basis of content only if it has sufficient justification.¹⁵¹

Just as the states have no obligation to create a forum, the states have no obligation to use the private sector in the provision of welfare services.¹⁵² Moreover, just as the government may set reasonable, content-neutral time, place, and manner restrictions on speech within a public forum, the government also may create content-neutral eligibility criteria for social service providers.¹⁵³ Therefore, religious providers of social services would be subject to the same eligibility criteria as other nongovernmental providers.¹⁵⁴ Yet once a state creates a forum by funding vouchers for independent providers of social services, under free speech standards, a state's exclusion of religious providers is subject to constitutional standards regarding viewpoint and content discrimination.¹⁵⁵

150. See *Rosenberger*, 515 U.S. at 829, 835 (asserting that targeting speech on basis of speaker's views is blatant violation of First Amendment); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (declaring that regulation cannot be "an effort to suppress expression merely because public officials oppose the speaker's view").

151. See *Rosenberger*, 515 U.S. at 829-30 (explaining that once state has opened limited public forum, it may discriminate by content only to preserve purpose of limited forum); *Widmar v. Vincent*, 454 U.S. 263, 267-70 (1981) (finding that once university created forum for student groups, any content-based restriction required justification by compelling state interest and means narrowly drawn to achieve that end); *infra* note 182 (explaining debate concerning standard for content discrimination).

152. See *Esbeck*, *supra* note 7, at 8 (confirming absence of right to equal treatment between governmental and independent-sector providers); *Laycock*, *supra* note 120, at 61 ("Discrimination between public and private institutions is rarely, if ever, unconstitutional . . .").

153. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (allowing reasonable restrictions on time, place, and manner of protected speech, provided that restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information" (citations omitted)).

154. See *A GUIDE TO CHARITABLE CHOICE*, *supra* note 1, at 5 (asserting that although state cannot rule out any group on basis of its religious character, it may set criteria for participation in program); *Esbeck*, *supra* note 77, at 191 ("The criteria [are] secular. There [are] no other criteria. Charitable Choice does not guarantee that some or all religious providers will be [allowed to participate in voucher programs]. Rather, it guarantees that they will not be discriminated against on account of religion.").

155. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995) (stating that once university offered to pay third-party contractors on behalf of private speakers, it could not silence selected viewpoints); *Columbia Union College v. Clarke*, 159 F.3d 151, 156 (4th Cir. 1998) (pointing out that prohibition of viewpoint discrimination applies whether government subsidizes or penalizes private speech (citing *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993))), *cert. denied*, 119 S. Ct. 2357 (1999); *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 362 (8th Cir. 1988) ("The University need not supply funds to student organizations; but once having decided to do so, it is bound by the

B. Religion as a Viewpoint

The Supreme Court has distinguished viewpoint and content discrimination, labeling viewpoint discrimination as a subset of content discrimination.¹⁵⁶ In certain situations the Court permits *content discrimination*, that is, excluding the substantive content or the subject matter of the speech.¹⁵⁷ In contrast, the Court presumes that *viewpoint discrimination* is unconstitutional because discrimination based upon motivating ideology, opinion, or perspective is impermissible when otherwise within the forum's limits.¹⁵⁸

Although religion arguably always constitutes a viewpoint, ideology, or perspective,¹⁵⁹ courts have debated whether religion constitutes the particular viewpoint of the speaker or if it describes the content of the speech.¹⁶⁰ For

First Amendment to act without regard to the content of the ideas being expressed."); Esbeck, *supra* note 7, at 9 (explaining that although providing assistance through only government-operated agencies does not violate Constitution, if state chooses to involve independent sector, it cannot specifically disqualify religious providers); *infra* Part III.B-C (discussing viewpoint and content discrimination).

156. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (labeling viewpoint discrimination "an egregious form of content discrimination"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (finding that ordinance went beyond content discrimination to viewpoint discrimination).

157. See *Rosenberger*, 515 U.S. at 828 (equating content discrimination with discriminating by subject matter); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (stating that in traditional or designated public forum, content-based regulation must be necessary to serve compelling interest and narrowly drawn to achieve that end, but in nonpublic forum such limitations need only be reasonable in light of forum's purpose); *infra* Part III.C (discussing content discrimination).

158. See *Rosenberger*, 515 U.S. at 828-30 (defining viewpoint and creating presumption that viewpoint discrimination is impermissible when speech is otherwise within limitations of forum); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-96 (1993) (asserting that First Amendment prohibits government from favoring one viewpoint over another and from discriminating against religious standpoint or perspective); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (contending that denying access to speaker simply in order to suppress speaker's point of view on otherwise includible subject violates First Amendment).

159. See *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996) ("Any prohibition of sectarian instruction where other instruction is permitted is inherently non-neutral with respect to viewpoint. . . . Because there is no nonreligious sectarian instruction (and indeed the concept is a contradiction in terms), a restriction prohibiting sectarian instruction intrinsically favors secularism at the expense of religion."); Brief for Pet'rs at 41, *Rosenberger* (No. 94-329) ("[T]he belief that 'religion' is a separate and distinct subject matter rather than a 'perspective' . . . on any number of issues . . . evinces a serious misunderstanding of the nature of religion . . . [which] competes in the marketplace of ideas with scores of secular philosophies, ideologies, and worldviews . . ."); Dhananjai Shivakumar, *Neutrality and the Religion Clauses*, 33 HARV. C.R.-C.L. L. REV. 505, 521 (1998) ("Assuming that a religious perspective can be given on almost any subject matter, it is virtually impossible for a state to create secular, limited public fora.").

160. See, e.g., *Rosenberger*, 515 U.S. at 831 (finding viewpoint of speaker to be religious);

example, in *Lamb's Chapel v. Center Moriches Union Free School District*,¹⁶¹ a school district refused a church's request to show a film series in school facilities.¹⁶² The United States Court of Appeals for the Second Circuit found that the film's *content* was religion, whereas the United States Supreme Court determined that the content of the film consisted of family issues presented from a religious *viewpoint*.¹⁶³ The Court has stated that the distinction between viewpoint and content is imprecise,¹⁶⁴ and it has provided little explanation for this differentiation.¹⁶⁵ In *Lamb's Chapel*, for instance, the Court simply asserted that the standard that the school district applied discriminated on the basis of viewpoint because it granted access to presentations of any view on the family except a religious view.¹⁶⁶

Despite the imprecision inherent in drawing lines between viewpoint and content discrimination, the characterization of religion as viewpoint or as con-

Lamb's Chapel, 508 U.S. at 394 (same); *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 693-94 (2d Cir. 1991) (same). *But see, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (characterizing content of expression to be religion); *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981) (same); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1370 (3d Cir. 1990) (same); *Concerned Women for Am., Inc. v. Lafayette County*, 883 F.2d 32, 34 (5th Cir. 1989) (same).

161. 508 U.S. 384 (1993).

162. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 388 (1993) (stating that school district denied church access to show film series featuring Dr. James Dobson). The Court in *Lamb's Chapel* addressed the issue of whether denying a church access to school grounds to present a film series violated the Free Speech Clause. *Id.* at 387. Although the parties had debated which standard to apply to content restrictions in the public forum in the lower court, the Supreme Court declined to address this question. *Id.* at 391-92. The Court decided that even if the property was not a designated public forum, restrictions within the forum must be viewpoint neutral. *Id.* at 392-93. Therefore, denying access only on the grounds of the film's religious standpoint violated the First Amendment's prohibition of the government's favoring some viewpoints or ideas at the expense of others. *Id.* at 394. Additionally, the *Lamb's Chapel* Court asserted that the school district's alleged fears of violating the Establishment Clause by allowing a showing of the film were unfounded. *Id.* at 395.

163. *See id.* at 393-94 (disagreeing with court of appeals's finding that denial was viewpoint neutral because sole basis for denial was religious standpoint). The Supreme Court explained that the lower court had found the exclusion viewpoint neutral because all religions received like treatment. *Id.* at 393. However, excluding all presentations with a religious standpoint was not viewpoint neutral when all other views on family issues had access to the forum. *Id.*

164. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) (asserting that distinction between content and viewpoint is not precise).

165. *See Lamb's Chapel*, 508 U.S. at 394, 396 (asserting, without explanation, disagreement with lower court's characterization, and labeling speech viewpoint without defining term).

166. *See id.* at 393 (finding that standard applied by school district "discriminates on the basis of viewpoint [because it] permit[s] school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint").

tent can determine the outcome of a case.¹⁶⁷ As mentioned above, the United States Court of Appeals for the Second Circuit in *Lamb's Chapel* decided that the denial of access to the religious group was simply content discrimination, not viewpoint discrimination.¹⁶⁸ The appellate court therefore applied a reasonableness test to the church's exclusion from the forum, a test that the school's decision passed.¹⁶⁹ In contrast, once the Supreme Court determined that the exclusion hinged on the religious viewpoint of the material, it found the exclusion unconstitutional because the government may not favor one viewpoint at the expense of another.¹⁷⁰ The Supreme Court therefore reversed the appellate court's decision because to exclude a group that qualified for funding or access "save for its religious purpose" violated the free speech guarantee of viewpoint neutrality.¹⁷¹

As applied to social service vouchers, Blaine provisions discriminate on the basis of viewpoint in that they allow the redemption of vouchers with all eligible service providers except those who offer a religious perspective.¹⁷² The choice to redeem a social service voucher with a religious provider involves the individual viewpoint – the specific motivating ideology, opinion, or

167. See *infra* notes 168-70 and accompanying text (describing how characterization as viewpoint discrimination proved outcome determinative in *Lamb's Chapel*).

168. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 959 F.2d 381, 386-87 (2d Cir. 1992) (finding exclusion of group with religious purpose acceptable in limited public forum in which exclusions based on subject matter are permissible but exclusions by viewpoint are not), *rev'd*, 508 U.S. 384 (1993); see also *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 386 (1993) (stating that attorney general defended exclusion as permissible exclusion of subject matter and that court of appeals apparently agreed).

169. See *Lamb's Chapel*, 508 U.S. at 390, 393 n.6 (pointing out that although court of appeals "apparently" found exclusion reasonable, lower court "uttered not a word in support of its reasonableness holding").

170. See *id.* at 394 (stating that First Amendment forbids government to regulate speech so as to favor some ideas or viewpoints and thereby to disadvantage others); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.").

171. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 832 (1995) (explaining that in *Lamb's Chapel*, discrimination was invalid because group would have qualified "save for its religious purposes"); *Lamb's Chapel*, 508 U.S. at 393-94 (finding no indication in record that school district denied or would have denied access for any reason other than religious perspective).

172. See *Rosenberger*, 515 U.S. at 832 (comparing denial of funds in *Rosenberger* to denial of access in *Lamb's Chapel* because in both instances only justification given was religious views of group). Compare *supra* notes 34-35 (summarizing state Blaine provisions), and *supra* text accompanying note 38 (quoting original proposed federal constitutional amendment), with *Rosenberger*, 515 U.S. at 825 (quoting university guidelines that excluded religious activity, defined as any activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality" (internal quotations omitted)), and *Lamb's Chapel*, 508 U.S. at 387 (quoting school district's rule that provided that "[f]he school premises shall not be used by any group for religious purposes").

perspective¹⁷³ – of both the provider and the recipient.¹⁷⁴ For the provider, the religious viewpoint may be a primary motivation and an essential element of the program.¹⁷⁵ The recipient's agreement with the provider's viewpoint may not be central to the recipient's decision, but the recipient must at least find the viewpoint inoffensive enough so as not to request an alternative provider.¹⁷⁶

A state that excludes religious providers from its social service program and that permits individuals to redeem vouchers only with nonreligious service providers creates a preference for secular or nonreligious viewpoints at the expense of religious viewpoints.¹⁷⁷ Additionally, when a state classifies expression by its religious viewpoint, it creates a danger of chilling individual thought and expression.¹⁷⁸ Therefore, excluding religious providers from eligibility in state social service voucher programs constitutes impermissible viewpoint discrimination.¹⁷⁹

173. See *Rosenberger*, 515 U.S. at 829 (equating viewpoint discrimination with "regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction").

174. See *LORDEMAN*, *supra* note 5, at 1 ("The most distinguishing characteristic of a voucher is that it is a payment mechanism for services chosen by *an individual* rather than by *an agency*."); see also *Hartmann v. Stone*, 68 F.3d 973, 985 (6th Cir. 1995) (finding that to prohibit any religious practices in on-base daycare program was "extraordinary and unprecedented" application of governmental authority to private acts of religion and that it failed standard set by religion clauses); *infra* notes 175-76 and accompanying text (explaining involvement of viewpoints in provision of services).

175. See *MONSMA*, *supra* note 6, at 13 ("Many organizations are convinced if ills of a hurting society – spouse abuse, homelessness, poverty, abuse and neglect of children, drug abuse, and more – are to be successfully dealt with, a holistic approach that includes the spiritual dimension of human beings needs to be followed."); *supra* note 7 (asserting success of providers with religious viewpoint); cf. Charles Murray, *Preface to MARVIN OLASKY, THE TRAGEDY OF AMERICAN COMPASSION* at xi, xvii (1992) (asserting that social problems result from needs of human spirit, not from economics or inequality).

176. Cf. *PRWORA* § 104(g), 42 U.S.C. § 604a(g) (Supp. IV 1997) (protecting beneficiary's free exercise of religion); *A GUIDE TO CHARITABLE CHOICE*, *supra* note 1, at 16 (explaining that beneficiary who objects to religious character of provider has statutory right to service from another provider); *supra* note 74 (explaining Charitable Choice's protection of beneficiary's free exercise of religion).

177. See *supra* note 170 (citing *Lamb's Chapel's* prohibition of preferring one viewpoint at expense of another); cf. *infra* Part IV.B.2 (describing endorsement test and prohibition of communicating message of disfavor toward religion).

178. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995) ("Vital First Amendment speech principles are at stake . . . [G]ranting the State the power to examine [speech for religious perspectives creates a] danger . . . to speech from the chilling of individual thought and expression."); cf. *id.* at 844 ("[I]t raises the specter of governmental censorship[] to ensure that all student writings meet some baseline standard of secular orthodoxy.").

179. See *Columbia Union College v. Clarke*, 119 S. Ct. 2357, 2358 (1999) (Thomas, J., dissenting) ("[O]ur decisions . . . have prohibited governments from discriminating in the

C. Religion as Content

Even if a court departs from *Lamb's Chapel* and *Rosenberger* by labeling the religious aspect of the social services as content rather than as viewpoint,¹⁸⁰ disqualifying an organization on that basis still fails the federal constitutional test.¹⁸¹ The government must have a compelling interest and narrowly tailored means of achieving that interest in order to justify content-based discrimination within a forum.¹⁸² Government entities have alleged various justifications for the exclusion of religious groups from a forum, but the only justification the Court has recognized as compelling is compliance with the Establishment Clause.¹⁸³ For example, the respondents in *Widmar v.*

distribution of public benefits based upon religious status or sincerity." (citing *Rosenberger*, 515 U.S. 819; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981)).

180. See *Bronx Household of Faith v. Community Sch. Dist. No. 10*, 127 F.3d 207, 213-15 (2d Cir. 1997) (finding that exclusion of church seeking access for religious worship service in limited public forum was limit on subject matter that was reasonable and viewpoint neutral, despite Supreme Court's suggestion in *Lamb's Chapel* that such exclusion is not reasonable (citing *Lamb's Chapel*, 508 U.S. at 393 n.6)), *cert. denied*, 118 S. Ct. 1517 (1998).

181. See *infra* notes 182-95 and accompanying text (discussing content discrimination).

182. See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) ("[A] designated public forum, whether of a limited or an unlimited character, . . . is subject to the same limitations as that governing a traditional public forum." (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983))); *Perry Educ. Ass'n*, 460 U.S. at 45-46 (stating that in traditional or designated public forum, content-based exclusion must be necessary to serve compelling interest and narrowly drawn to achieve that end, but in nonpublic forum such limitations need only be reasonable in light of forum's purpose); *Widmar v. Vincent*, 454 U.S. 263, 270 (1981) (applying standard of review for content-based exclusions in public forum: regulation must serve compelling state interest and be narrowly drawn to achieve that end). *But compare Rosenberger*, 515 U.S. at 829 ("Once [the state] has opened a limited forum, . . . [t]he State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.'") with *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 750 (1996) (stating that Court had not determined whether "government's decision to dedicate a public forum to one type of content or another [thereby creating a limited public forum] is necessarily subject to the highest level of scrutiny"). As the above quotations demonstrate, the Court's public forum doctrine is "notoriously confused." Jessica A. Roth, *It Is Lawyers We Are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation*, 33 HARV. C.R.-C.L. L. REV. 107, 131 (1998). However, in *Larson v. Valente*, the Court applied the strict scrutiny standard in an Establishment Clause case, providing an additional reason to analyze the question under the compelling interest standard. See *Larson v. Valente*, 456 U.S. 228, 246 (1982) (applying strict scrutiny to denominational preference).

183. See *Widmar*, 454 U.S. at 271 (finding that although university had compelling interest in complying with Establishment Clause, equal access policy is not incompatible with Establishment Clause); *infra* notes 184-90 and accompanying text (summarizing justifications that government entities have cited). The *Widmar* Court did not consider the sufficiency of an interest in complying with the state constitution because the state courts never had decided that

Vincent alleged that creating a degree of separation between church and state even greater than the separation that the Establishment Clause required was a compelling interest that justified content discrimination.¹⁸⁴ The Court disagreed and did not find this interest in greater separation compelling.¹⁸⁵

Another possible asserted justification for the exclusion of religious groups is the state constitution itself.¹⁸⁶ The rules and regulations in *Rosenberger*, *Lamb's Chapel*, and *Widmar* contained prohibitions similar to those in the state Blaine provisions, and the Court invalidated each regulation.¹⁸⁷ Nevertheless, a state might argue that the state constitution creates a more compelling interest for content discrimination than did mere regulations.¹⁸⁸ However, if even a federal statute can preempt a state constitution under the Supremacy Clause's hierarchy,¹⁸⁹ courts are likely to reject the argument that simply complying with a state constitution creates a compelling interest in discriminating against religion in violation of the federal Constitution.¹⁹⁰

allowing a religious student group access violated the Missouri Constitution. *Widmar*, 454 U.S. at 275-76.

184. See *Widmar*, 454 U.S. at 276 (stating that respondents asserted state interest in securing greater separation of church and state than separation that Establishment Clause already ensured).

185. See *id.* (finding that in constitutional context of case, state lacked sufficiently compelling interest to justify content-based discrimination against respondents' religious speech); see also *Witters v. State Comm'n for the Blind*, 771 P.2d 1119, 1134-35 (Wash. 1989) (Dolliver, J., dissenting) ("The importance of *Widmar* to the case before this court is that the Court did *not* find it a compelling reason that the State wanted greater separation of church and state under its state constitution than was required by the federal establishment clause.").

186. See *Widmar v. Vincent*, 454 U.S. 263, 275-76 (1981) (asserting interest in complying with state constitution).

187. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 825 (1995) (stating that university's guidelines prohibited funding of religious activities, and quoting definition of religious activity as any activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality"); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387 (1993) (quoting district rule that provided that "school premises shall not be used by any group for religious purposes"); *Widmar*, 454 U.S. at 265 (quoting university regulation that prohibited use of university buildings or grounds "for purposes of religious worship or religious teaching").

188. Cf. *Widmar*, 454 U.S. at 275-76 (stating that Court did not need to reach issue that respondents raised of whether state interest in complying with state constitution could outweigh Free Speech Clause). In *Rosenberger* and *Lamb's Chapel*, the Court considered the regulations to be viewpoint discrimination and therefore did not look for content discrimination. See *Rosenberger*, 515 U.S. at 831 (finding viewpoint discrimination); *Lamb's Chapel*, 508 U.S. at 394 (same).

189. See *supra* notes 56-57 and accompanying text (discussing Supremacy Clause and statutory preemption).

190. See *supra* notes 187-89 and accompanying text (comparing interest in complying with regulation, with state constitution, and with federal statute); see also *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1280 (10th Cir. 1996) (finding that compliance with federal

As stated above, the Court has recognized compliance with the Establishment Clause as a compelling state interest.¹⁹¹ However, because the inclusion of religious providers in social service voucher programs does not violate the Establishment Clause,¹⁹² states have no compelling interest to exclude them from the state voucher programs.¹⁹³ The private religious expression of the social service provider does not interfere with the program's purpose of providing a social service, as long as the provider complies with other constitutional, content-neutral criteria.¹⁹⁴ The state simply cannot set the criteria according to religious viewpoint or content.¹⁹⁵

IV. *The Establishment Clause's Principle of Neutrality*

Aside from the fact that the state's exclusion of religious organizations from state voucher programs violates the free speech principles set out in the dual analysis cases, it also risks violating the neutrality requirement of the Establishment Clause.¹⁹⁶ The Supreme Court often has applied the Establish-

statute did not justify discrimination against religious presentation because state's interest in receiving federal funds was not compelling).

191. See *supra* note 183 and accompanying text (stating Court has found compelling interest in compliance with Establishment Clause).

192. See *supra* notes 11, 120-22 and accompanying text (asserting that allowing religious provider to participate in social service voucher program on same basis as other independent providers does not violate Establishment Clause).

193. See Shivakumar, *supra* note 159, at 521 ("[D]isfavoring religion, unless mandated by the Establishment Clause, could not justify content-based discrimination against religious speech.").

194. See *Gey, supra* note 134, at 1566 ("[P]ublic forum determinations should be governed by assessments of whether private expression will interfere with legitimate government activities."); *supra* notes 74-78 and accompanying text (citing Charitable Choice requirement that program comply with Establishment Clause and also preserve free exercise rights of provider and beneficiary).

195. See *Columbia Union College v. Clarke*, 159 F.3d 151, 156 (4th Cir. 1998) (finding that in comparison to *Rosenberger*, "[t]he Sellinger program similarly infringed on Columbia Union's free speech rights by establishing a broad grant program to provide financial support for private colleges that meet basic eligibility criteria but denying funding to Columbia Union solely because of its alleged pervasively partisan religious viewpoint"), *cert. denied*, 119 S. Ct. 2357 (1999); Esbeck, *supra* note 77, at 191 (asserting that in religion-neutral welfare program, faith-based providers will face same secular criteria as other providers).

196. See *Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995) ("A rule that uniformly bans all religious practice is not neutral. . . . [T]he Supreme Court has made it clear that 'neutral' also means that there must be neutrality *between* religion and nonreligion."); see also *Lee v. Weisman*, 505 U.S. 577, 598 (1992) ("A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution."); *Columbia Union College*, 159 F.3d at 172 (Wilkinson, C.J., dissenting) (observing that state's attempt to avoid any promotion of religion actually violated "a different core principle of the Establishment Clause, the requirement of nondiscrimination among religions" and that all religious viewpoints should receive similar, neutral treatment).

ment Clause either to *permit*¹⁹⁷ or to *forbid*¹⁹⁸ the inclusion of a religious group or religious speech, but never to *require* it.¹⁹⁹ Despite this fact, throughout its decisions the Supreme Court consistently has recognized neutrality as one of the core principles of the Establishment Clause and has emphasized neutrality in its recent opinions.²⁰⁰ For example, in *Rosenberger*, the Court

197. See *supra* note 110 and accompanying text (explaining that in each of dual analysis cases, Establishment Clause permitted inclusion of religious group).

198. See generally, e.g., *Wallace v. Jaffree*, 472 U.S. 38 (1985) (determining that statute authorizing period of silence "for meditation or voluntary prayer" in public schools constituted establishment of religion); *Larson v. Valente*, 456 U.S. 228 (1982) (concluding that exempting only religious organizations that received over half their contributions from members was denominational preference forbidden by Establishment Clause); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (finding that requiring Bible reading or recitation of Lord's Prayer in public school violated Establishment Clause).

199. See *Esbeck, supra* note 7, at 23 (stating that "unbroken line of victories for the equal treatment of religion" from *Widmar* to *Rosenberger* arose under Free Speech Clause and that question of equal right to participate in direct funding programs remains); *id.* at 34 (contending that in absence of free speech claim it is unclear that Court would compel equal treatment of religion as Court did in *Rosenberger*, *Widmar*, *Lamb's Chapel*, and *Pinette*); see also *Mawdsley, supra* note 90, at 26 n.87 (contending that Establishment Clause simply determines whether government may provide services to religious schools, not whether it must). But see *infra* note 201 (citing *Rosenberger's* suggestion of same result under Establishment Clause as under Free Speech Clause); but see also *Mawdsley, supra* note 90, at 27-30 (suggesting that although Court has determined that aid to student at parochial school does not violate Establishment Clause, Court still must answer whether denial of aid reflects hostility toward religion).

For example, the Court found no Establishment Clause violation in granting access to a religious student group in *Widmar* or in allowing a publication with a religious perspective to benefit from the activities fund in *Rosenberger*. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845 (1995); *Widmar v. Vincent*, 454 U.S. 263, 270-75 (1981). However, in determining what the federal Constitution required of the state, the Court turned to the Free Speech Clause. *Rosenberger*, 515 U.S. at 828-29; *Widmar*, 454 U.S. at 277.

200. See *Agostini v. Felton*, 521 U.S. 203, 230-32 (1997) (focusing on neutral eligibility criteria); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) (stating that series of cases established that "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse"); *Columbia Union College*, 159 F.3d at 171 (Wilkinson, C.J., dissenting) ("There is no question that the neutrality principle is on the rise." (citing *Agostini*, 521 U.S. 203 (1997); *Rosenberger*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Employment Div. v. Smith*, 494 U.S. 872 (1990); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986))); Brief for Pet'rs at 59, *Rosenberger* (No. 94-329) ("Although the most emphatic opinions stressing the overriding importance of neutrality have been relatively recent, the principle is not new." (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 697 (1970); *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 16 (1947))); *Shivakumar, supra* note 159, at 505 (asserting that ideal of neutrality toward religion has long history in Supreme Court's interpretation of religion clauses).

In some cases, the Court simply confirmed that the Establishment Clause does not forbid neutrality toward religion. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753,

suggested that the Establishment Clause mandates neutrality in the same way that the Free Speech Clause does.²⁰¹ Although the *Rosenberger* Supreme Court required that the student group receive funding under the Free Speech Clause, the Court indicated that it might have reached the same conclusion under the Establishment Clause.²⁰²

A. Neutrality as a General Requirement of the Establishment Clause

The principle of neutrality unifies the Supreme Court's Establishment Clause decisions.²⁰³ In *Everson v. Board of Education*,²⁰⁴ the Court for the

764-65 (1995) (plurality) (asserting that equal access does not favor religion and that neutrality toward religion does not violate Establishment Clause). In others, the Court maintained that the Establishment Clause not only *permits* neutrality, but also *mandates* neutrality toward religion. See *Schempp*, 374 U.S. at 226 ("In the relationship between man and religion, the State is firmly committed to a position of neutrality. . . . [T]he rule itself is clearly and concisely stated in the words of the First Amendment."). In *Epperson v. Arkansas*, the Court declared:

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

393 U.S. 97, 103-04 (1968). The neutrality theory received its clearest articulation in *Widmar*. Esbeck, *supra* note 7, at 4. However, the Court in *Widmar* adopted no new rule and overruled no precedent. See Laycock, *supra* note 120, at 62-63 (asserting that *Widmar* was easy case rooted in earlier nondiscrimination case law such as Jehovah's Witness free speech cases and *Everson*).

201. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845 (1993) (contending that university's action risked violating neutrality of Establishment Clause). In its conclusion in *Rosenberger*, the Supreme Court stated:

The neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the University's course of action. . . . That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.

Id. at 845-46; see *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 n.4 (1993) (clarifying that decision did not reach merits of petitioners' claim that denial of access violated Establishment Clause by demonstrating hostility toward religion). This footnote in *Lamb's Chapel* also suggests that in another context the Court may consider the claim that a blanket exclusion of religion creates an impermissible hostility toward religion.

202. See *supra* note 201 (quoting *Rosenberger* and citing *Lamb's Chapel*); see also Esbeck, *supra* note 7, at 33 (concluding that when Court considers direct aid, analysis of *Pinette* and *Rosenberger* demonstrates that four Justices allow rule of neutrality, that four remain loyal to theory of no-aid separationism, and that Justice O'Connor is swing vote); Volokh, *supra* note 120, at 12 ("The best way to read the Establishment Clause is that it requires neutrality with respect to religion . . .").

203. See *Rosenberger*, 515 U.S. at 839 ("A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause

first time decided a case solely under the Establishment Clause.²⁰⁵ The *Everson* Court mentioned the importance of the separation of government and religion,²⁰⁶ yet it emphasized the importance of neutrality toward religion and found that the state action at issue did not violate the Establishment Clause.²⁰⁷ Although the Court cautioned that the government cannot levy a tax for the support of religion, it asserted that the First Amendment requires neutrality in that the government may neither handicap nor favor religion.²⁰⁸

attack is their neutrality towards religion."); *see also* *Columbia Union College v. Clarke*, 119 S. Ct. 2357, 2358 (1999) (Thomas, J., dissenting) ("[T]he Constitution requires, at a minimum, neutrality not hostility toward religion."); *Volokh, supra* note 21, at 367 ("Under all its leading Establishment Clause tests [with the exception of the coercion test], the Court has used the language of evenhandedness."); *supra* note 200 (citing recent Supreme Court cases that emphasize importance of neutrality); *infra* notes 205, 207 (summarizing early cases that require neutrality toward religion).

204. 330 U.S. 1 (1947).

205. *See* *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 246 (1963) (Brennan, J., concurring) (referring to *Everson* as first Supreme Court decision addressing unconstitutionality of government action purely under Establishment Clause). In *Everson*, the Supreme Court considered the constitutionality of a plan that reimbursed parents for the cost of bus transportation to schools. *Everson v. Board of Educ. of Ewing*, 330 U.S. 1, 3 (1947). Some of the funds paid for transportation of children to Catholic parochial schools. *Id.* The *Everson* Court stated that the First Amendment, which applies to the states through the Fourteenth Amendment, did not prohibit a general reimbursement program that applied to parents regardless of their religion. *Id.* at 8, 17-18. The *Everson* Court reached this conclusion even while recognizing that the program benefitted the children attending church schools and perhaps even enabled some to attend parochial schools who otherwise could not. *Id.* at 17.

206. *See Everson*, 330 U.S. at 16 ("No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."); *see also* *Esbeck, supra* note 7, at 3 (stating that *Everson* adopted no-aid separationist interpretation of Establishment Clause). *But see Everson*, 330 U.S. at 16 (cautioning that protecting citizens from state-established churches should not lead to prohibition of benefitting from general state laws without regard to religious belief); *Laycock, supra* note 120, at 53 (emphasizing that nondiscrimination language of *Everson* follows no-aid language and thus rejects strong version of no-aid theory).

207. *See Everson*, 330 U.S. at 18 (asserting that First Amendment "requires the state to be a neutral [sic] in its relations with groups of religious believers and non-believers State power is no more to be used so as to handicap religions than it is to favor them"); *id.* (finding that program did not even "slight[ly] breach" "high and impregnable" wall between church and state); *see also Schempp*, 374 U.S. at 217, 222 (approving of strict separation yet also referring to "wholesome neutrality" of religion clauses); *Laycock, supra* note 120, at 54, 74 (concluding that no-aid theory and nondiscrimination theory always coexisted and continue to do so).

208. *See supra* note 206 (quoting separationist language of *Everson*); *supra* note 207 (quoting neutrality language of *Everson*); *cf. supra* note 141 and accompanying text (distinguishing social service voucher from tax levied for direct support of religion). The *Everson* Court also stated: "[The state] cannot exclude individual . . . members of any . . . faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Everson*, 330 U.S. at 16. The exclusion of religious social service providers from a state voucher program would not prevent individual recipients from receiving the benefits because they could redeem the

This principle of neutrality contains several elements.²⁰⁹ Neutrality forbids hostility toward religion.²¹⁰ Neutrality does not require the exclusion of religion from public life; rather, neutrality requires the accommodation of religion.²¹¹ Moreover, because treating all religions alike by excluding them from government benefits is not synonymous with neutrality,²¹² the government may neither discriminate between religion and nonreligion nor endorse secularism.²¹³

vouchers with nonreligious providers; however, it would exclude religious providers from the benefits of the public welfare legislation unless they renounced their religious affiliation.

209. See *infra* notes 210-13 and accompanying text (setting out requirement that action neither be hostile nor promote religion of secularism); *infra* Part IV.B.1 (explaining elements of *Lemon* test); *infra* Part IV.B.2 (focusing on endorsement test); see also Volokh, *supra* note 21, at 369 ("These statements have largely been dicta, but the Court has repeated them so often that we must assume that it meant them . . ."). For a more thorough definition of the principle of neutrality, see Esbeck, *supra* note 7, at 20-39 (describing Court's paradigm of governmental neutrality); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990) (defining substantive neutrality as requirement of religion clauses that government "minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance").

210. See *Board of Educ. of the Westside Community Schs. v. Mergens*, 496 U.S. 226, 248 (1990) (plurality) ("[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("[T]he Constitution . . . affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." (citations omitted)); *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment) ("The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."); *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) (forbidding hostility toward religion).

211. See *Lynch*, 465 U.S. at 673 (asserting that Constitution requires not only toleration of religion but also accommodation); *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970) (stating that policy of neutrality derives from accommodation of both Establishment and Free Exercise Clauses); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) ("[U]ntutored devotion to the concept of neutrality can lead to . . . a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.").

212. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) (emphasizing that treating all religions and all uses for religious purposes alike is not synonymous with viewpoint neutrality).

213. See, e.g., *Epperson*, 393 U.S. at 103-04 (asserting that First Amendment mandates neutrality between religion and nonreligion); *Schempp*, 374 U.S. at 225 (agreeing that state cannot establish "religion of secularism" (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952))); *McConnell*, *supra* note 125, at 33 (asserting that neutrality and secularism are not identical because secular and religious viewpoints compete); Stephen V. Monsma & J. Christopher Soper, *Introduction to EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY*, *supra* note 125, at 1, 4 (referring to increasing secularism as "community of moral conviction").

B. Neutrality as a Requirement of Establishment Clause Tests

The Court has used various tests to determine whether state action violates the Establishment Clause.²¹⁴ In articulating two common tests for determining whether the government has violated the Establishment Clause, the Court has acknowledged the importance of balance between promoting and handicapping religion and the importance of nondiscrimination toward religion.²¹⁵ First, as explained below, each prong of the *Lemon* test promotes an aspect of neutrality.²¹⁶ Second, by forbidding the government either to endorse or to disfavor religion, the endorsement test also creates a balance that preserves neutrality.²¹⁷ Applying the Blaine provisions to prohibit the involve-

214. See *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring in part and concurring in judgment) (stating that in Establishment Clause analysis, Court does not confine itself to single test); *Lynch*, 465 U.S. at 678-79 (same); Laycock, *supra* note 209, at 999 (claiming doubts that single principle can define religion clauses). Although the *Lemon* test appears often throughout Establishment Clause jurisprudence, see *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring in judgment) (criticizing manner in which *Lemon* test "stalks" Establishment Clause jurisprudence), the Court has neither applied it consistently nor overruled it. Keith A. Wilson, Note, *Thou Shalt Fund My Religious Expression: Neutrality Alone Gores the Establishment Clause* in *Rosenberger v. Rector and Visitors of the University of Virginia*, 16 LOY. L.A. ENT. L.J. 817, 822 (1996). In fact, in the Court's most recent Establishment Clause case, Justice O'Connor, the proponent of the endorsement test, looked to the *Lemon* test. See *Agostini v. Felton*, 521 U.S. 203, 218 (1997) (quoting *Lemon* test).

215. See *infra* Part IV.B.1 (pointing out neutrality aspects of *Lemon* test); *infra* Part IV.B.2 (summarizing neutrality component of endorsement test). Although this Note focuses only on the *Lemon* test and the endorsement test, neutrality lurks in other Establishment Clause tests as well. See *Lee v. Weisman*, 505 U.S. 577, 598-99 (1992) (applying coercion test and hinting at balance in Establishment Clause by saying that excluding religion from every area of public life risks violating Constitution); *Larson v. Valente*, 456 U.S. 228, 246 (1982) (applying strict scrutiny to discrimination between denominations); *Walz*, 397 U.S. at 696 (Harlan, J., concurring) ("Neutrality in its application requires an equal protection mode of analysis."). However, coercion, strict scrutiny, and equal protection as separate tests are beyond the scope of this Note.

In asserting that neutrality is a central principle of the Establishment Clause, this Note does not intend to discount these other tests or to contend that neutrality alone defines the Establishment Clause. See Laycock, *supra* note 209, at 998 (maintaining that neutrality cannot be sole or most fundamental principle of Establishment Clause). However, perhaps in this case of excluding religious social service providers from voucher programs, "[n]eutrality is the easiest way to recognize the problem, to decide the case, and to explain the result." *Id.* at 999.

216. See Laycock, *supra* note 120, at 56 (stating that although *Lemon* test has become symbol of strict separationism, its roots are in "benevolent neutrality" language of *School District of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963)); *infra* Part IV.B.1 (emphasizing neutrality components of *Lemon* test).

217. See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (stating that Establishment Clause prohibits government from making individuals feel like insiders or outsiders based on religious affiliation); *infra* Part IV.B.2 (discussing neutrality component of endorsement test).

ment of religious providers on an equal basis with other independent providers of social services fails the neutrality principle of both these tests.

1. *The Lemon Test and Neutrality*

In *Lemon v. Kurtzman*,²¹⁸ the Court established a three-prong test for determining whether governmental action violates the Establishment Clause.²¹⁹ The first part of the *Lemon* test requires that the government have a secular purpose for its action.²²⁰ The states' purpose in applying the Blaine provisions may be to avoid promoting religion, but because the Establishment Clause forbids favoring religion or nonreligion, aiding nonreligion at the expense of religion is an impermissible religious purpose.²²¹ Moreover, the model for the Blaine provisions itself did not serve a secular purpose; rather, the proposed

218. 403 U.S. 602 (1971).

219. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (requiring that statute have secular purpose, that its primary effect be neither to advance nor to inhibit religion, and that it not create excessive government entanglement with religion). In *Lemon*, the Court considered a challenge to two programs that provided benefits to religious schools. *Id.* at 607-09. Considering the cumulative criteria of former Establishment Clause cases, the *Lemon* Court summarized: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Id.* at 612-13 (internal quotations and citations omitted). Examining the first prong, the Court found no legislative intent to advance religion but rather an intent to improve secular education in all schools. *Id.* at 613. Declining to decide whether the primary effect of the programs violated the religion clauses, the Court found that the relationship between the state and the nonpublic schools involved an excessive entanglement of the government in religion. *Id.* 613-14. Therefore, the program was unconstitutional. *Id.* at 614.

220. See *id.* at 612 ("First, the statute must have a secular legislative purpose . . ."). See generally Michael A. Vaccari, *Public Purpose and the Public Funding of Sectarian Institutions: A More Rational Approach After Rosenberger and Agostini*, 82 MARQ. L. REV. 1 (1998) (proposing public purpose doctrine as revision to Establishment Clause doctrine). In several Establishment Clause cases, the Court focused on neutrality when applying the *Lemon* test. *Id.* at 36 (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983)). In other recent cases, the Court concentrated on neutrality without even mentioning *Lemon*. *Id.* (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995)).

221. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context."); *id.* at 542 (finding, under Free Exercise Clause, that ordinances intended to suppress religion were not neutral toward religion); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996) (asserting that restriction prohibiting religious views intrinsically favors secularism at expense of religion); Volokh, *supra* note 120, at 12 ("[E]xclusion of religion from even-handed government benefits . . . is in fact a form of discrimination against religion."); *supra* note 213 (summarizing prohibition of favoring religion or nonreligion).

amendment promoted a religious purpose because it resulted from widely recognized animus towards a religious group.²²²

The second prong of the *Lemon* test requires that the primary effect of the program be neither to advance nor to inhibit religion.²²³ The Court has never found the "nor inhibit" phrase of this second prong conclusive when evaluating the relationship between religion and secularism,²²⁴ but the balance between the words "advance" and "inhibit" suggests neutrality.²²⁵ The effect of prohibiting religious providers from participating with other independent providers in a voucher program is to create a disability for religious organizations in the market of social service providers.²²⁶ Furthermore, by creating an incentive for religious social service providers to alter their religious practices in order to receive vouchers, the state inhibits and interferes with religion.²²⁷

222. See *supra* note 50 (explaining anti-Catholic motivation for proposed Blaine Amendment to federal Constitution).

223. See *Lemon*, 403 U.S. at 612 ("[S]econd, its principal or primary effect must be one that neither advances nor inhibits religion . . ." (citing Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 243 (1968))).

224. See Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 118 n.9 (1992) (explaining that only case in which Court applied Establishment Clause to invalidate inhibition of religion concerned discrimination between denominations, not discrimination against religion (citing *Larson v. Valente*, 456 U.S. 228 (1982))).

225. See Laycock, *supra* note 209, at 1007 (labeling focus on only one side of balance between advancing or inhibiting religion as disaggregated neutrality).

226. See *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970) (recognizing that hostility toward religion can take economic form); Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 228 N.E.2d 791, 794 (N.Y. 1967) ("The so called 'wall of separation' may be built so high and so broad as to impair both the state and the church . . ."), *aff'd*, 392 U.S. 236 (1968); see also *County of Allegheny v. ACLU*, 492 U.S. 573, 663-64 (1989) (Kennedy, J., concurring in part) ("[E]nforced recognition of only the secular . . . would signify . . . not neutrality but a pervasive intent to insulate government from all things religious."); McConnell, *supra* note 224, at 184 (asserting that excluding religious organization from program providing financial support to nonprofit sector creates penalty for religion). It is unclear whether a court would find the inhibition of religion to be the *primary* effect of an exclusion of religious providers. However, in *Agostini*, the Court notably omitted the word "primary" from its statement of the test. See *Agostini v. Felton*, 521 U.S. 203, 223 (1997) ("[W]e continue to explore whether the aid has the 'effect' of advancing or inhibiting religion.").

227. See *Agostini v. Felton*, 521 U.S. 203, 232 (1997) (considering, as part of *Lemon's* second prong, whether program "give[s] aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services"); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) (asserting that fullest realization of religious liberty requires that government not deter or compel religious beliefs); *Columbia Union College v. Clarke*, 159 F.3d 151, 177 (4th Cir. 1998) (Wilkinson, C.J., dissenting) ("[T]he president of Columbia Union College asked, 'If we recant, would we qualify?' . . . The only way [the college] could receive such aid is by compromising or abandoning its religious views. That to me is impermissible inhibition of religion, impermissible discrimination under our Constitution's religion clauses . . ."), *cert. denied*, 119 S. Ct. 2357 (1999); Brief for *Amici*

The third prong of the *Lemon* test prohibits excessive entanglement between the government and religion.²²⁸ In various cases dealing with parochial schools, the Court has suggested that *excluding* a religious school from a program in fact might create greater entanglement between the government and religion than *including* it.²²⁹ This entanglement would arise from the government's monitoring the religious content of schools' speech.²³⁰ The same argument applies to social service voucher programs: A government inquiry to determine whether an organization is "religious" would create greater entanglement between the entity and the government than would neutrality toward its religious character.²³¹ Therefore, each prong of the *Lemon* test requires the inclusion of religious providers according to the same neutral criteria as other social service providers.

2. The Endorsement Test and Neutrality

Justice O'Connor's articulation of the endorsement test is a second Establishment Clause standard.²³² Although the Court never has repudiated

Curiae of Christian Legal Society, et al., at 31, *Columbia Union College* (No. 97-2565) ("The First Amendment does not permit the government to use the public fisc as a lever to 'buy out' a college's constitutional rights." (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995))); Laycock, *supra* note 120, at 71 (explaining that if government pays only for secular soup kitchen, it creates powerful incentive to secularize).

228. See *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) ("[F]inally, the statute must not foster 'an excessive government entanglement with religion.'" (quoting *Walz v. Tax Comm'n*, 397 U.S. 674 (1970))). In *Agostini v. Felton*, the Court collapsed the three-part *Lemon* test into two questions, asking whether the purpose or the effect of government action was to advance or to inhibit religion. *Agostini*, 521 U.S. at 222-23. However, it addressed the entanglement prong as part of the effect question. See *id.* at 232 ("[T]he factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect.'").

229. See *Board of Educ. of the Westside Community Schs. v. Mergens*, 496 U.S. 226, 253 (1990) (plurality) (asserting possibility of greater entanglement if government denied equal access to religious groups and monitored student meetings to prevent religious speech); *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981) (finding risk of greater entanglement if university tried to enforce exclusion of religious worship and speech); see also *Lemon*, 403 U.S. at 620 (suggesting that excessive monitoring by state to ensure separation of secular and sectarian activities would result in unconstitutional entanglement and intrusion of religion), cited in *Agostini*, 521 U.S. at 233.

230. See *supra* note 229 (citing cases asserting greater entanglement would result from prohibition of religion).

231. See *Columbia Union College*, 159 F.3d at 175 (Wilkinson, C.J., dissenting) (asserting that lengthy trial considering religious character of college "denigrates the very values underlying our Constitution's religion clauses"); Esbeck, *supra* note 7, at 15-16 (asserting that inquiry into degree of religiosity of organizations results in deep entanglement).

232. See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 772-83 (1995) (O'Connor, J., concurring in part and concurring in judgment) (applying endorsement test); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in judgment) (stating that government cannot make individual's religion relevant to standing in political community); *County of Allegheny*

the *Lemon* test,²³³ seven Justices have indicated approval of the endorsement test.²³⁴ Under the endorsement test, government endorsement or disapproval of religion violates the Establishment Clause.²³⁵ By endorsing or disfavoring religion, the government makes religion relevant to a person's standing in the community.²³⁶ Governmental disapproval of religion communicates to the public that adherents of religion "are outsiders, not full members of the political community," and that nonadherents "are insiders, favored members of the political community."²³⁷ If an examination of the government's purpose in excluding religious groups demonstrates an intent to communicate endorsement or disapproval of religion, or if an analysis of the effect of the exclusion reveals the actual conveyance of a message of endorsement or disapproval, the challenged government action is unconstitutional.²³⁸

v. *ACLU*, 492 U.S. 573, 625-37 (1989) (O'Connor, J., concurring in part and concurring in judgment) (utilizing endorsement test); *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring) (articulating endorsement test).

233. See *Agostini v. Felton*, 521 U.S. 203, 218 (1997) (relying on *Lemon* test); Wilson, *supra* note 214, at 822 (stating that Court has not overruled *Lemon* test). However, the Justices repeatedly have expressed dissatisfaction with the *Lemon* test. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring in judgment) (observing that five of Justices sitting in 1993 had written opinions that criticized *Lemon* and that another had concurred in such opinion (citations omitted)).

234. See *Pinette*, 515 U.S. at 767-69 (plurality) (expressing approval of four Justices for applying endorsement test to government actions); *id.* at 774 (O'Connor, J., concurring in part and concurring in judgment) (expressing approval of three Justices for applying endorsement test to private religious conduct as well as to direct government speech); Wilson, *supra* note 214, at 822 n.48 (stating that in *Pinette*, two groups of Justices – Justices Scalia, Kennedy, Thomas, and Chief Justice Rehnquist, along with Justices O'Connor, Souter, and Breyer – expressed approval for endorsement test but disagreed on its applicability to private speech); see also *County of Allegheny*, 492 U.S. at 594 (agreeing that Establishment Clause at least prohibits government from making adherence to religion relevant to standing in political community (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring))).

235. See *Lynch*, 465 U.S. at 688, 692 (O'Connor, J., concurring) (focusing on whether government communicates message of government endorsement or disapproval of religion); see also Shivakumar, *supra* note 159, at 521 (summarizing cases in which Court has ruled that government cannot disfavor religion in general, such as by excluding religion from government programs and benefits (citing *Lamb's Chapel*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981))).

236. See *Lynch*, 465 U.S. at 687-88 (O'Connor, J., concurring) (stating that by endorsing religion, government can violate Establishment Clause's prohibition against making religion relevant to political standing).

237. See *id.* at 688 (O'Connor, J., concurring) ("Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."); see also *Pinette*, 515 U.S. at 773 (O'Connor, J., concurring in part and concurring in judgment) (same).

238. See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (stating that purpose or effect of endorsing or disapproving religion invalidates challenged practice).

A state's refusal to allow individuals to redeem their social service vouchers with religious providers simply because of the religious character of the providers would send a message of endorsement of nonreligion and of disapproval of religion.²³⁹ A categorical exclusion of all religious social service providers from state voucher programs would communicate that those providers are inherently inferior by nature of their religious viewpoint; it thereby would imply that the viewpoint of the religious providers and their beneficiaries is itself inferior to the viewpoints of nonreligious providers.²⁴⁰ Prohibiting participation by religious providers when all others are eligible not only risks making religious adherents feel like "outsiders," it also effectively makes religious providers "outsiders" to the program.²⁴¹ Therefore, the use of Blaine provisions to exclude religious providers from state voucher systems violates the endorsement test as well as the *Lemon* test.

V. Conclusion

The above analysis leads to the conclusion that the federal Constitution not only allows but also requires the state to extend eligibility to religious providers if it uses state funds to create a social service voucher program. To exclude religious providers because of a state constitutional provision violates the neutrality that both the Free Speech Clause and the Establishment Clause require. Therefore, the federal Constitution preempts the state Blaine provisions in this context.

The exclusion of religious providers from state programs has additional implications beyond the constitutional questions that barring religious social service providers from state voucher programs raises. First, excluding religious providers from welfare programs has practical implications for welfare reform. The movement toward greater cooperation between states and religious social service providers is likely to continue because of support for the expansion of Charitable Choice and its nondiscrimination principle.²⁴² Ex-

239. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring) (asserting that denying funds to religious group would create impermissible impression that government disfavors religious activities); Brief for Burr, et al., & Garnett, et al., as *Amici Curiae* at 28, *Board of Educ. of the Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990) (No. 88-1597) (stating that expert witness testified that students would perceive hostility toward religion in school's excluding religious club).

240. See *supra* notes 232-39 and accompanying text (setting out endorsement test).

241. See *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) (stating that disapproval sends message to adherents that they are outsiders and not full members of community); cf. *Columbia Union College v. Clarke*, 119 S. Ct. 2357, 2358 (1999) (Thomas, J., dissenting) (labeling disadvantage imposed by excluding religious college from government program "invidious religious discrimination").

242. See Charitable Choice Expansion Act of 1999, S. 1113, 106th Cong. (prohibiting "discrimination against nongovernmental organizations and certain individuals on the basis of religion in the distribution of government funds to provide government assistance and distribu-

cluding religious providers not only defeats the nondiscrimination purpose of Charitable Choice but also frustrates Congress's broader intent to involve religious providers in the delivery of social services.²⁴³ Moreover, because religious providers of social services have met with much success and because many independent-sector social service providers are religious, the Blaine provisions' discrimination against religious providers eliminates a valuable resource for welfare reform.²⁴⁴ Second, the question of the constitutionality of excluding religious providers has both practical and constitutional implications in the area of education reform. As briefly mentioned above, many opponents of school choice have raised Blaine provisions in opposition to that movement.²⁴⁵ Therefore, the scenario at the beginning of this Note outlining a state legislature's dilemma in trying to reconcile state constitutional standards with the federal Constitution is not merely hypothetically foreseeable, it is imminently foreseeable. Soon the courts will have to address the inherent conflict between First Amendment principles and the Blaine provisions' exclusion of religious organizations from general government programs.

tion of the assistance"); 145 CONG. REC. S5954-55 (daily ed. May 25, 1999) (statement of Sen. John Ashcroft) (explaining that Charitable Choice Expansion Act would apply to all federal government programs in which government may utilize nongovernmental organizations in providing federally funded services); *Gore Remarks*, *supra* note 6 (advocating extending approach of Charitable Choice to other services).

243. See *supra* note 74 and accompanying text (stating that purpose of Charitable Choice is to allow participation on nondiscriminatory basis while at same time to preserve religious freedom of providers and recipients); *supra* note 14 and accompanying text (summarizing efforts and intent of Congress to encourage state cooperation with religious providers in welfare reform).

244. See Esbeck, *supra* note 7, at 39 (asserting that involving independent sector in welfare reform is essential because faith-based nonprofits, which make up significant part of voluntary sector, have achieved considerable success); *supra* note 7 and accompanying text (asserting success of faith-based social services).

245. See Viteritti, *supra* note 35, at 659 ("In the end, the fate of school choice will turn on the willingness of the Supreme Court to impose its own constitutional guidelines upon the States in order to protect the free-exercise rights of individuals."); *supra* note 49 and accompanying text (mentioning that several state courts have already addressed state constitutional provisions raised in opposition to school choice).

