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Free? Exercise

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FREE? EXERCISE

MARCI A. HAMILTON*

Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

—James Madison¹

* Visiting Professor of Law, New York University School of Law; Thomas H. Lee Chair in Public Law, Benjamin N. Cardozo School of Law, Yeshiva University. Copyright © 2000 Marci A. Hamilton. I would like to thank Noel Cunningham, Christopher Eisgruber, Chip Lupu, and the participants of the Symposium held at William & Mary Law School, Religion in the Public Square, for their helpful comments, and Rachel Jaffe, Richard Maluga, Scott McCoy, and Joanna Raby of Benjamin N. Cardozo School of Law and Katharine Marshall, Rachael Melliar-Smith, and Joel Thollander of the New York University School of Law for their excellent research assistance. All errors and omissions remain my own responsibility.

In the interest of full disclosure, I am a religious believer who represented the City of Boerne, Texas in the constitutional challenge to the Religious Freedom Restoration Act. See *City of Boerne v. Flores*, 521 U.S. 507 (1997). I also represented Volunteer Lawyers for the Arts as amicus curiae in both *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), and *Brooklyn Institute of Arts & Sciences v. City of New York*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999). I also represented veterans challenging the directed sale of the Old Soldiers' Home to Catholic University, see *infra* notes 176-79 and accompanying text, and currently represent Children's Healthcare Is a Legal Duty in an Establishment Clause challenge to the Medicare and Medicaid payments made to Christian Science Sanitoria. See *Petition for a Writ of Certiorari, Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084 (8th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3410 (Nov. 27, 2000) (No. 00-914).

1. James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), reprinted in *Everson v. Board of Educ.*, 330 U.S. 1 app. at 65 (1947) (Rutledge, J., dissenting) [hereinafter Madison, *Memorial and Remonstrance*].

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INTRODUCTION

The United States is in the midst of the greatest wealth transfer from government to religious entities in its history.² The shift has been incremental and has occurred on a number of distinct fronts, and therefore has not been apparent to the casual observer. Because of the case and controversy requirement, which focuses the attention of judges and Justices on one case at a time, it is also a shift that may have been unnoticed by the judiciary and those who observe it.³ Yet it has been a fast ride down a slippery slope about which James Madison warned over two hundred years ago. This slippery slope principle enunciated by Madison is reprinted in the epigraph at the beginning of this Article, and stands at least in part for the principle that small amounts of government aid open the door to greater amounts.

Although the courts are permitted to decide only one case at a time, in the Establishment Clause context, they typically and appropriately have considered the contemporaneous balance of power between church and state.⁴ There has been an instinctual search for a balance that simultaneously empowers church and state while deterring both from overreaching. This is no easy task, but its paradoxical nature is built into the Constitution by the pairing of the Free Exercise and Establishment Clauses in the First Amendment.⁵ This principle of balance has led the Court away from a dogmatic reading of the Clauses: The free exercise of religion does not give carte blanche to religion to supersede all laws.⁶ And the

2. By "wealth transfer," I mean any action that improves the financial position of the recipient.

3. See U.S. CONST. art. III, § 2, cl. 1.

4. For a discussion of the Establishment Clause as requiring a balance of power between church and state, see Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 825-26 (1999) [hereinafter Hamilton, *Vouchers*] and Marci A. Hamilton, *A Reply*, 31 CONN. L. REV. 1001, 1003-04 (1999).

5. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

6. See, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 878-80 (1990); *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 386-90 (1990); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448-52 (1988); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Bowen v. Roy*, 476 U.S. 693, 699-700 (1986); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) ("[T]he Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts

Establishment Clause has not been read to preclude church-state relations in all circumstances.⁷ I have argued previously that this search for a balance of power is the most true to constitutional intent, because it recognizes the Framers' fundamental insight that the two most authoritarian structures of human existence—religion and the state—are not static structures. Nor is the power they hold. Instead, the power they wield is malleable, and the Framers rightly assumed that both would attempt to stretch their powers in unpredictable ways.⁸ Therefore, achieving a balance of power is the best that the courts can do, and bright-line rules are invitations to abuse.

Some of the most successful grabs for power are those that are hard to detect, e.g., incremental additions. A stream of financial advantages has been flowing from government to religion since the Court decided its first Establishment Clause case, *Everson v. Board of Education*, where it held that the government could provide school buses for children going to religious schools.⁹ The current has picked up speed in recent years and has turned a trickle of government benefits into a torrent. Indeed, we have reached a point where one distinguished scholar has noted: "The [nonprofit] sector is thereby marked by a mutual dependence between government and nonprofit organizations. Neither can get along without the other."¹⁰ The time has come to assess the state of the balance today.

In a move that would delight the deconstructionists, the word "free" in the Free Exercise Clause has been transformed from

prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.'" (second alteration in original) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961))).

7. See, e.g., *Mitchell v. Helms*, 120 S. Ct. 2530, 2540-49 (2000); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 485-89 (1986); *Mueller v. Allen*, 463 U.S. 388, 393 (1983); *Everson v. Board of Educ.*, 330 U.S. 1, 15-18 (1947).

8. See Hamilton, *Vouchers*, *supra* note 4, at 810, asserting that:

The task of balancing church-state power is unavoidably difficult. Power does not exist in static form. Rather, it is plastic in its permutations and infinitely creative in its drive to realize itself. Thus, the Establishment Clause is charged with the task of policing a constantly changing boundary between two dynamic social entities.

9. 330 U.S. 1, 17-18 (1947).

10. STEPHEN V. MONSMA, *WHEN SACRED & SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY* 5 (Religious Forces in the Modern Political World, 1996).

meaning "liberty" or "freedom" to its more literal denotation: costless. Thus, for religious advocates the clause has come to mean "costless exercise." Cost-free exercise can be achieved through two means: 1) relieving religious entities of all costs imposed on them by the law, from taxes and zoning requirements to clergy malpractice costs; and 2) obtaining government funds for their needs and missions. Both constitute a real transfer of wealth from government to religion.¹¹ As of 2001, religious entities have triumphed on both fronts.

A key problem of wealth transfer to religion lies in the structure of the Constitution: accountability. The Constitution is structured in such a way that no center of power is supposed to spin off into its own orbit.¹² Rather, each governmental entity is to be checked by other governmental structures—the federal branches mutually and the federal government by the states. Church and State also are mutually checking. All governmental entities are accountable to the people in some fashion, even though the people do not directly control them.¹³

Government accountability is achieved in part through the Constitution's institution of an information jurisprudence that requires a two-way communication pathway between the government and the people.¹⁴ For example, under the Publications Clauses, Congress has an obligation to report on its proceedings and to account to the people where their tax dollars are going and how they are being spent.¹⁵ This principle of accountability is in tension

11. See generally Hamilton, *Vouchers*, *supra* note 4, at 816-22 (discussing numerous instances of religious wealth transfer endorsements by Congress and the Court).

12. The image of the Constitution as a solar system was natural at the time of the Framing. See Marci A. Hamilton, *The People: The Least Accountable Branch*, 4 U. CHI. L. SCH. ROUNDTABLE 1, 3-5 (1997) [hereinafter Hamilton, *The People*].

13. See, e.g., Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1504 (1990); Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477, 523-24 (1994) [hereinafter Hamilton, *Proposal*]; Hamilton, *The People*, *supra* note 12, at 9; Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 393 (1989); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 14 (1991).

14. See generally Marci A. Hamilton, *The Constitution and Its Information Pathways* 9-12 (Feb. 1, 2001) (unpublished manuscript, on file with the author) [hereinafter Hamilton, *Pathways*].

15. See U.S. CONST. art. I, § 5, cl. 3; *id.* art. I, § 9, cl. 7.

with most government aid to religion, because religion rightly resists such public inquiries into its affairs.¹⁶ A key element to the appropriateness—and even success—of such transfers will lie in achieving accountability for the expenditure of public funds while respecting religious autonomy.

For example, religious entities have asserted a right to be autonomous of the government,¹⁷ and have resisted financial disclosures¹⁸ and government entanglement with their financial affairs.¹⁹ They also have argued that government accounting requirements water down their religious mission by forcing them to

16. See, e.g., Robert C. DeGaudenzi, *Tax-Exempt Public Charities: Increasing Accountability and Compliance*, 36 CATH. LAW. 203, 231 (1995) (concluding that "measures aimed at increasing accountability and compliance will benefit the long-term interests of all public charities by restoring the public's confidence in, and desire to support, charitable organizations"); Karla W. Simon, *Congress and Taxes: A Separation of Powers Analysis*, 45 U. MIAMI L. REV. 1005, 1021 (1991) (discussing Congress's lack of accountability to the public for tax legislation because "the tax laws written by Congress are too detailed and complex for the members of Congress or their constituents to understand").

17.

The nature of modern administrative bureaucracy makes it nearly inevitable that government will impose substantial burdens on religious practice—especially minority religious practice—in the pursuit of relatively unimportant government goals. In the first place, a variety of factors drive administrative agencies to seek to expand their jurisdiction. Too often, efforts in this regard carry regulatory bureaucrats into domains that should in fact be protected spheres of religious autonomy.

Brief of the Church of Jesus Christ of Latter-Day Saints as Amicus Curiae In Support of Respondents at Pt. III, § B, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (No. 95-2074), LEXIS, 1995 U.S. Briefs 2074; see Brief Amicus Curiae of the United States Catholic Conference In Support of Petitioners at 25-28, *Agostini v. Felton*, 521 U.S. 203 (1997) (Nos. 96-552, 96-553).

18. See, e.g., *Tax Info for Business: Filing Requirements*, at http://www.irs.gov/plain/bus_info/eo/file-reg.html (last modified June 22, 2000) (stating that "churches and certain religious organizations, certain state and local instrumentalities, and other organizations are excepted from the annual return filing requirement"); see also 26 U.S.C. § 6104(b) (1994 & Supp. IV 1998) (noting that disclosure of names or addresses of "any contributor to any organization or trust (other than a private foundation)" is unauthorized).

19. See, e.g., Reka Potgieter Hoff, *The Financial Accountability of Churches for Federal Income Tax Purposes: Establishment or Free Exercise?*, 11 VA. TAX REV. 71 (1991) (discussing the propriety of the government's involvement in the financial affairs of religious entities); Jonathan Friedman, Note, *Charitable Choice and the Establishment Clause*, 5 GEO. J. ON FIGHTING POVERTY 103, 112 (1997) (exploring the Constitutionality of Charitable Choice provisions and noting that "[a]dministrative entanglement might arise from government efforts to ensure that funding is not being used for religious activities, or from the state's auditing of a religious institution's financial records").

separate those portions that receive government money from the other aspects of their religious organization.²⁰

Because the government is restrained from delving into the books of religious institutions, the Constitution's core value of accountability regarding expenditures is inevitably frustrated, with the likely result being a struggle between religious aid recipients and the principle of accountability. As with government aid to art, the safest constitutional answer to the conundrum is to forbid government aid to the First Amendment-protected activity.²¹ Just as artists' receipt of government money compromises their independence and power to challenge government hegemony,²² religion's power and integrity is compromised by government funds, especially when those funds underwrite their mission.²³

Far from moving toward a diminution in such funding, however, the arguments in support are proliferating. The argument is increasingly made that religious entities have a *right* to such wealth transfers from the government. For example, faith-healing groups, like the Christian Scientists, have argued for a right to funds from Medicare.²⁴ Representatives of organized religions have argued to

20. See, e.g., MONSMA, *supra* note 10, at 105 (noting that "a sizable minority [of religious nonprofit organizations] . . . are not as free to pursue the religiously based practices that inhere in their religious traditions as what [sic] they would be if they did not receive public funds"); Timothy S. Burgett, Note, *Government Aid to Religious Social Services Providers: The Supreme Court's "Pervasively Sectarian" Standard*, 75 VA. L. REV. 1077, 1096 (1989) ("When the government bases its decision concerning who receives aid on how pervasively sectarian, i.e. how 'religious' an organization is, a great deal of pressure is exerted upon the organization to 'tone down' or alter its practice in such a manner as to allow access to the aid.").

21. See generally Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 112-19 (1996) [hereinafter Hamilton, *Art Speech*] (discussing the negative impact of government funding on the art world).

22. See *id.*

23. See MONSMA, *supra* note 10, at 80-107; Madison, *Memorial and Remonstrance*, *supra* note 1, at 67-68.

24. Medicare regulations were recently amended so as not to be so obviously sect specific after they became the subject of a lawsuit and media attention when faith-healing "nurses" who had trained one week to assist those near death received federal Medicare funding. See Medicare Act, 42 U.S.C. §§ 1395-1395zz (1994 & Supp. IV 1998); *Children's Healthcare is a Legal Duty, Inc. v. Vladeck*, 938 F. Supp. 1466, 1469 (D. Minn. 1996) ("[M]ost providers of health care under the Medicare Act are required to meet statutory and regulatory standards from which Christian Science sanatoria are exempted, and these exemptions form the basis of their claim under the Medicare Act."). The Senate report that accompanied the amendment explained that:

Congress that land use and zoning regulations impose a cost that violates Free Exercise principles and therefore there should be a right to trump such laws.²⁵ In 1990, Jimmy Swaggart Ministries argued (unsuccessfully) that it had a right to avoid sales taxes applied to nonreligious products.²⁶ Professor Michael McConnell, representing parents of children attending private schools, argued to the United States Supreme Court in *Mitchell v. Helms* for a right to computers and other school support.²⁷ In addition to religious entities, both political parties are now embracing vouchers for

[T]he committee intends that payments to Christian Science sanatoriums would cover costs of services ordinarily furnished by these sanatoriums to patients which are comparable to those for which payment could be made to hospitals and intends these sanatorium services to be a substitute for, and not an addition to, medical services that might be furnished to a person if his religious beliefs were not contrary to use of the usual facilities.

S. REP. NO. 89-404 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 1971. Strangely, however, the statute permits those who do not believe in medical care to make the judgment call on whether the patient would have qualified for Medicare or Medicaid coverage. *See* Petition for a Writ of Certiorari at 13-14, *Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084 (8th Cir. 2000) (No. 98-3521), *petition for cert. filed*, 69 U.S.L.W. 3410 (Nov. 27, 2000) (No. 00-914).

25. *See* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. 106-274, 2000 U.S.C.C.A.N. (114 Stat.) 803; *see also, e.g.*, 146 CONG. REC. S7774 (daily ed. July 27, 2000) (statement of Senators Hatch and Kennedy); *Religious Liberty Protection Act of 1999: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (statement of Steven T. McFarland, Director, Center for Law and Religious Freedom, Christian Legal Society); *id.* at 109-11 (prepared statement of Douglas Laycock, Associate Dean for Research, University of Texas Law School); *id.* at 93-94 (prepared statement of Rabbi David Saperstein, Director and Counsel, Religious Action Center of Reform Judaism); *id.* at 22-24 (statement of Von G. Keetch, Counsel, the Church of Jesus Christ of Latter-Day Saints); *id.* at 55-56 (statement of J. Brent Walker, General Counsel, Baptist Joint Committee on Public Affairs); *Religious Liberty Protection Act of 1998: Hearing Before the Sen. Comm. on the Judiciary*, 105th Cong. 309 (1999) (statement of Nathan J. Diamant, Director, Institute for Public Affairs, Union of Orthodox Jewish Congregations of America); *id.* at 27-31 (statement of Elliot M. Mincberg, Vice President and Legal Director, People for the American Way); *id.* at 303 (statement of Steven T. McFarland, Esq., Christian Legal Society).

26. *See* *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 384 (1990).

Appellant's central contention is that the State's imposition of sales and use tax liability on its sale of religious materials contravenes the First Amendment's command, made applicable to the States by the Fourteenth Amendment, to "make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Appellant challenges the Sales and Use Tax Law under both the Free Exercise and Establishment Clauses.

Id.

27. 120 S. Ct. 2530, 2537 (2000); Reply Brief for Petitioners, *Mitchell* (No. 98-1648).

sectarian schools and charitable choice programs that funnel government money into core, mission activities.²⁸ Then-candidate George W. Bush, during his acceptance speech for the Republican Party presidential nomination, went so far as to say that government cannot handle welfare but rather can be only a financial partner to religious organizations who can.²⁹ As President, he has made federal aid to faith-based organizations a centerpiece of his agenda.

During and after the framing of the Constitution, James Madison repeatedly warned of the dangers of state support for religious education and entities.³⁰ Many state constitutions banned state support for sectarian schools, and still contain such provisions.³¹ Indeed, the recent Florida voucher plan stumbled on just such a provision.³² In 1962, Leo Pfeffer declared that "every test of public opinion discloses that a substantial majority oppose federal aid to

28. See *infra* Part III.

29. See Laurie Goodstein, *Nudging Church-State Line, Bush Invites Religious Groups to Seek Federal Aid*, N.Y. TIMES, Jan. 30, 2001, at A18; Governor George W. Bush, Acceptance Speech, at <http://www.georgewbush.com/News.asp?FormMode=SP> (last visited Sept. 19, 2000); see also Michael Barone, *Religion on the Left, Religion on the Right: Why is 'God Talk' Becoming a Campaign Staple?*, U.S. NEWS & WORLD REP., Aug. 21, 2000, available in 2000 WL 7718560; Deborah Mathis, *Religion May Have More Impact in this Presidential Election*, GANNETT NEWS SERVICE, Aug. 21, 2000, available in 2000 WL 4404417 (discussing the increased presence of religion in the 2000 presidential election).

30. See *Electing Representatives* (June 6, 1787), in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 52 (Ralph Ketcham ed., 1986) (containing Madison's warning that "[r]eligion itself may become a motive to persecution and oppression"); MADALYN MURRAY O'HAIR, FREEDOM UNDER SIEGE: THE IMPACT OF ORGANIZED RELIGION ON YOUR LIBERTY AND YOUR POCKETBOOK 85 (1974) (noting Madison's rationale for writing *Memorial and Remonstrance*, as observed in a letter to George Mason dated July 14, 1826: "In no instance have [ecclesiastical establishments] been the guardians of the liberties of the people"); Madison, *Memorial and Remonstrance*, *supra* note 1 *passim*.

31. See Murray A. Gordon, *The Unconstitutionality of Public Aid to Parochial Schools*, in THE WALL BETWEEN CHURCH AND STATE 73-74 (Dallin H. Oaks ed., 1963).

32. See *Holmes v. Bush*, No. CV99-3370, 2000 WL 526364 (Fla. Cir. Ct. Mar. 14, 2000) (holding a voucher scheme violative of Article IX, Section 1 of the Florida Constitution). The Florida Constitution states that:

Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

FLA. CONST. art. IX, § 1.

parochial schools.”³³ In 1963, a church/state lawyer writing for a collection of essays on separation of church and state asserted the following:

There is no unequivocal popular consensus for public financing of church schools. On the contrary, virtually every state has retained long-standing prohibitions against the use of tax funds for the construction or maintenance of sectarian schools. Congress has never directly appropriated money for such a purpose, and while supporters of federal aid to parochial schools have combined with those opposed to federal aid for other reasons to block federal aid to the public schools, it seems clear that at congressional and executive hearings and conferences the sense of the public and the authorities has consistently been that church schools shall not be publicly financed.³⁴

Almost forty years later, the people of the states have continued to reject public referenda for vouchers.³⁵ But various groups continue to lobby for vouchers and some local and state government officials continue to treat them as desirable.

Attitudes toward wealth transfers to religion have not been constant: the case for tax exemption has waxed and waned over time.³⁶ In 1999, President Clinton extolled the House’s passage of the Religious Liberty Protection Act,³⁷ which would have lifted a significant measure of the financial burden of zoning regulations from religious institutions, while in 1875, President Ulysses S. Grant proposed legislation to amend the Constitution to outlaw religious property tax exemption, speaking of “the importance of correcting an evil . . . the accumulation of vast amounts of untaxed church property.”³⁸ Echoing the views of James Madison a century

33. Leo Pfeffer, *Federal Funds for Parochial Schools? No.*, 37 NOTRE DAME LAW. 309, 309 (1962).

34. Gordon, *supra* note 31, at 73-74. Gordon dates opposition to public support for parochial schools at least as far back as 1841. *See id.* at 79.

35. *See* Aaron Zitner, *Vouchers Lose as Voters Decide Ballot Measures*, L.A. TIMES, Nov. 8, 2000, at A22.

36. *See* JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 191, 196, 202-03 (2000).

37. *See* David E. Rosenbaum, *House Approves Measure on Religious Rights*, N.Y. TIMES, July 16, 1999, at A16.

38. President Ulysses S. Grant, *State of the Union Address* (Dec. 7, 1875), in 2 THE STATE

earlier, Grant held the view that, "[t]he separation of Church and the State' required that all 'legal instruments encouraging ecclesiastical aggrandizement of wealth and power' including tax exemptions, be 'expunged.'"³⁹ Ironically, as I will discuss in more detail below, Grant also took the position that the government should fund religious missions to the Native Americans in the 1870s, an unsuccessful government initiative.⁴⁰

The current permissive climate for wealth transfers to religious entities appears to have resulted from a tangle of social conditions, including the growth of the federal government's purse,⁴¹ the expansion of Congress's powers under the Commerce Clause until very recently,⁴² and the Great Society vision that thrust the federal government into social roles formerly reserved to churches or, at times, local government.⁴³ Although there is no study to date on the relationship between church wealth and willingness to request or

OF THE UNION MESSAGES OF THE PRESIDENTS 1790-1966, at 1296 (Fred L. Israel ed., 1966).

39. WITTE, *supra* note 36, at 196 (quoting President Ulysses S. Grant, *supra* note 38, at 1296). Madison, following his presidency, warned of the "danger of silent accumulations & encroachments by Ecclesiastical Bodies," saying that they have not "sufficiently engaged attention in the U.S." LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 121 (1994).

40. See *infra* notes 104-19 and accompanying text.

41. Cf. Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1360-63 (1988) (examining forms of spending authority that are constitutionally troubling, especially gift authority).

42. Until *Lopez v. United States*, 514 U.S. 549, 553-59 (1995), the assumption was that Congress had carte blanche to enact laws under the Commerce Clause and, therefore, had legitimate authority to step into the shoes formerly filled by local governments. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547-56 (1985) (holding that city transit authority was not exempt from federal wage and overtime standards enacted pursuant to the Commerce Clause).

43. See, e.g., Mark Tushnet, *The Supreme Court 1998 Term Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 34-35 (1999) (contrasting what the author considers President Clinton's "New Constitutional Order" with Roosevelt's New Deal/Great Society order). Tushnet states:

The nation needed a Second Bill of Rights, according to the constitutional vision of the New Deal/Great Society regime, because combining background rules of property rights with the first Bill of Rights and the Reconstruction amendments failed adequately to promote human flourishing. Racial segregation had to be overcome by aggressive policies of national support for the aspirations of African-Americans; economic inequality had to be addressed through a War on Poverty; the travails of old age had to be reduced by providing health care to the elderly through the Medicare program.

Id. at 61 (citations omitted).

accept government funding, the increase in lobbying power of organized religion by banding together,⁴⁴ and the current fiscal crisis of the mainline churches may be a factor in the push for greater wealth transfer from government to religion.⁴⁵ Even though some mainline churches have eschewed such benefits,⁴⁶ the general sense that churches are financially ailing may have had an effect on politicians' readiness to provide government financial benefits to religion. There is also the age-old phenomenon of the willingness of politicians not only to be photographed with religious leaders but to actively and publicly seek their counsel. This is a stance perfected by President Clinton,⁴⁷ but employed by a wide range of politicians in this era.⁴⁸ Politicians' current attitude toward religion is thus both a cause and an effect of the current phenomenon of increasing governmental aid to religion. Pending legislation in Congress and the states portends further enrichment of religious entities by the government.⁴⁹

This Article examines the current wealth transfer to religion from three perspectives. First, in Part I, this Article explains James Madison's views on wealth transfers to religion, which offer both an

44. See Marci A. Hamilton, *Religion and the Law in the Clinton Era: An Anti-Madisonian Legacy*, 63 L. & CONTEMP. PROBS. 359, 372-89 (2000) [hereinafter Hamilton, *Clinton Era*].

45. See generally DEAN R. HOGE ET AL., *MONEY MATTERS: PERSONAL GIVING IN AMERICAN CHURCHES* (1996) (detailing a study regarding religious giving); ROBERT WUTHNOW, *THE CRISIS IN THE CHURCHES: SPIRITUAL MALAISE, FISCAL WOE* (1997) (discussing the fiscal crisis churches face).

46. See, e.g., Religious Liberty Action Network, *Preserve Our Religious Liberty*, Religious Action Center of Reform Judaism, at <http://www.rj.org/rac/religiousliberty> (last visited Sept. 19, 2000) (discussing the Istook Amendment, which would have allowed "school prayer and government funding of religious institutions"); The Coalition to Preserve Religious Liberty, Member Organizations, Religious Action Center of Reform Judaism, at <http://www.rj.org/rac/religiousliberty/memb.html> (last visited Sept. 19, 2000) (listing mainline churches opposed to the Istook Amendment); see also Baptist Joint Committee on Public Affairs, *Resolution on Public Financial Aid to Parochial Schools*, at <http://www.bjcpa.org/timely/pubaidres.html> (last visited Sept. 19, 2000) (opposing public aid for parochial schools).

47. For a fuller discussion of the relationship between President Clinton and religious entities, see Hamilton, *Clinton Era*, *supra* note 44.

48. See, e.g., Milo Ippolito, *Influential Marietta Baptist Pastor Says He'll Retire*, *Nelson Price Set to Leave Church After 35 Years*, ATLANTA J. & CONST., Apr. 10, 2000, at B1, available in 2000 WL 5451247 (noting the retirement of a prominent clergyman whose "counsel also has been sought by area elected officials," including U.S. Representative Johnny Isakson).

49. See legislation cited *infra* note 68.

antidote to the current permissive era and meaningful guidance. Second, Part II analyzes the issue of accountability, government funding, and religious institutions from two real-world perspectives. First, it employs the recent legal disputes in the context of government arts funding to illustrate the dynamics of government funding of First Amendment-protected entities. Because art and religion play similar roles in the constitutional scheme, these cases are instructive.⁵⁰ These cases make clear that Madison's concerns about funding First Amendment-protected activities continue to be relevant. Part II then turns to an example in which the government used funding to religious entities to *avoid* accountability: President Grant's "Peace Policy." Finally, in Part III, this Article documents the ride down the slippery slope feared by Madison by describing four arenas in which wealth transfer to religion recently has increased or newly appeared: sectarian school support, tax-exempt status, direct handouts, and mission support, popularly referred to as "charitable choice."

This Article eschews the Court's religion *doctrine* to focus on translating Madison's thesis on church and state into contemporary practice. It is intended to be a return to first principles. The reader is left to judge whether it comports with past, current, or future doctrine, and what doctrinal "fixes" might be desirable.

I. MADISON'S THESIS

In the epigraph at the opening of this Article, Madison declared that not even three pence should be paid by the government in support of a church.⁵¹ At other times, he objected to other relatively small expenditures for religion on the grounds that they violated the Constitution's structure and provisions, including pay for a congressional chaplain.⁵² As President, Madison vetoed several bills he thought violated the principle of disestablishment.⁵³ Later, strict

50. See Hamilton, *Art Speech*, *supra* note 21, at 80-86.

51. See Madison, *Memorial and Remonstrance*, *supra* note 1, at 65.

52. Madison's opposition to Henry's Virginia proposal, "Establishing a Provision for Teachers of the Christian Religion," eventually became his *Memorial and Remonstrance*. See JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* 71-72 (1998).

53. See *id.* at 84 (noting "ecclesiastical encroachments" that President Madison vetoed, including: "a congressional bill in 1811 to incorporate the Episcopal church in Alexandria

separationists, like Justice Douglas and Justice Jackson, took Madison's meaning literally, only to be told that such severe separation is unreasonable and unattainable. Justice Jackson, dissenting from the majority in *Everson v. Board of Education*, said: "This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity."⁵⁴ Similarly, in his dissent in *Walz v. Tax Commission*, Justice Douglas noted that "subsidies either through direct grant or tax exemption for sectarian causes, whether carried on by church *qua* church or by church *qua* welfare agency, must be treated differently, lest we in time allow the church *qua* church to be on the public payroll, which, I fear, is imminent."⁵⁵ The *Walz* majority rejected Douglas's bright-line approach, holding that a New York City-based property tax exemption of real property, which was owned by religious organizations and used only for religious worship, did not violate the Establishment Clause: "The course of constitutional neutrality in this area cannot be an absolutely straight line"⁵⁶

Madison's message, though, was more nuanced than a simple rule against any funding for religious entities. His message instead was that small amounts of funding could open the way to further, larger funding. Three pence was the top of a slippery and steep slope. The Virginia bill, proposing federal funding for teachers of Christianity, "[d]istant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance."⁵⁷ At the bottom of that slope, according to Madison, was a disintegration of the distinct identities of church and state and a corresponding weakening of their respective, constructive roles in society.⁵⁸ "Madison argued that establishment of religion weakened the beliefs of adherents so favored, strengthened their opponents, and generated 'pride and indolence in the Clergy; ignorance and

[and] a bill also in 1811 to reserve land in the Mississippi territory for a Baptist church"). Madison's opposition also led to the defeat of "a bill in Kentucky to exempt Houses of Worship from taxes." *Id.* (internal quotations omitted).

54. 330 U.S. 1, 26 (1947) (Jackson, J., dissenting).

55. 397 U.S. 664, 711 (1970) (Douglas, J., dissenting).

56. *Id.* at 669.

57. Madison, *Memorial and Remonstrance*, *supra* note 1, at 69.

58. *See id.* at 66.

servility in the laity; [and] in both, superstition, bigotry, and persecution."⁵⁹

A. Madisonian Constitutional Fundamentals—Distrust

The primary premise of the Framers, and especially Madison, was that every entity should be distrusted, because every individual and entity has the capacity to abuse its power.⁶⁰ This was a society-wide shared assessment of human nature, borrowed in no small part from the Calvinist tradition.⁶¹ His solution for this bedrock problem was to advocate factionalism—everyone was safer if collectives were relatively small and squared off against each other.⁶² Conversely, tyranny was most likely to result from large

59. *Mitchell v. Helms*, 120 S. Ct. 2530, 2574 (2000) (Souter, J., dissenting) (alteration in original) (quoting Madison, *Memorial and Remonstrance*, *supra* note 1, at 67).

60. Wherever the Framers looked, they accepted as a fact that men could and would use their power to accomplish evil, rather than good: "From the nature of man we may be sure, that those who have power in their hands will not give it up while they can retain it. On the contrary we know they will always when they can rather increase it." JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 266 (W.W. Norton & Co. 1987) (statement of George Mason) [hereinafter MADISON, NOTES OF DEBATES]. In James Madison's words, "The truth was that all men having power ought to be distrusted to a certain degree." *Id.* at 272; *see also id.* at 288 (statement of Elbridge Gerry) ("They will if they acquire power like all men, abuse it."). Madison referred to the "landmarks of power." LEVY, ESTABLISHMENT CLAUSE, *supra* note 39, at 123.

There was broad consensus on the end to be avoided—tyranny from any social center of power. The Framers typically focused on the choice of the best means to avoid tyranny. All those with power were assumed to be interested in exceeding their authority. *See* MADISON, NOTES OF DEBATES, *supra* at 193 (statement of James Madison) ("In order to judge of the form to be given to this institution, it will be proper to take a view of the ends to be served by it. These were first to protect the people ag[ain]st their rulers . . ."); *id.* at 133 (statement of Alexander Hamilton) ("The members of [Congress] being chosen by the States & subject to recall, represent all the local prejudices . . . till a tyrannic sway shall be established."); *id.* at 197 (statement of James Wilson) (referring to "tyranny"); *id.* at 279 (statement of Edmund Randolph) (referring to legislatures' propensity to "perpetuate [their] power"); *id.* at 323 (statement of Gouverneur Morris) (referring to "love of power . . . oppression").

Thus, this new national government the Framers were crafting was constructed on the presupposition that its power was likely to be misused. *See id.* at 43-44. To avoid undue concentrations of power, the Framers sought to achieve a balance of power between identified social entities. *See* Hamilton, *The People*, *supra* note 12, at 3-5 (discussing images of solar system and clock).

61. *See generally* Marci A. Hamilton, *The Reformed Constitution: Representation, Calvinism, and Congressional Responsibility* 4-11 (Nov. 20, 2000) (unpublished manuscript, on file with the author) [hereinafter Hamilton, *Reformed Constitution*].

62. In an article defending vouchers, Professor Stephen Macedo makes the strange point

concentrations of power, including when smaller collectives join together to achieve one end.⁶³

Following his fundamental premises, Madison trusted neither the state nor the church to forego tyranny when left to their own devices. Each needed a check to achieve the balance of power that would lead to liberty for the people.⁶⁴ His conviction on this score became deeper as his career advanced through the presidency, at the end of which he declared that the most serious, underexamined issue in America was the accumulation of power and wealth by religious entities.⁶⁵ On Madison's reasoning, the savvy citizen ought to fear overreaching by either church or state and understand that both are capable of tyranny. "The preservation of a free government requires not merely, that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people."⁶⁶ He knew the United States was attempting a new balance of power between church and state, saying that "[i]t remained for North America to bring the great & interesting subject [church and state and the voluntary support of religion] to a fair, and finally to a decisive test."⁶⁷

that Madison would have approved of a concept of civil society in which there is a national morality at work and a national school system composed of private and public schools operating under the same moral precepts. See Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHL-KENT L. REV. 417, 421-23 (2000). This is directly contrary to Madison's endorsement of factionalism and the safety it brings. While Madison's views could be read consistently with a civil society theory that required the presence of a multiplicity of differing sects and organizations, they cannot be squared with a single, national morality, a totalistic view much more akin to Friedrich Hegel than Madison.

63. See Madison, *Memorial and Remonstrance*, *supra* note 1, at 65 ("True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true, that the majority may trespass on the rights of the minority."); see also Hamilton, *Clinton Era*, *supra* note 44, at 362 ("[Madison] believed that a number of individual sects is vastly preferable to a 'majority united by a common interest or passion,' which places the 'rights of the minority in danger.'" (quoting MADISON, *NOTES OF DEBATES*, *supra* note 60, at 76)).

64. See Hamilton, *Vouchers*, *supra* note 4, at 811-14.

65. See LEVY, *supra* note 39, at 121.

66. Madison, *Memorial and Remonstrance*, *supra* note 1, at 65.

67. 9 THE WRITINGS OF JAMES MADISON 485 (Gaillard Hunt ed., 1910).

The spirit of Madison's warnings is but a small part of contemporary discourse. His deep understanding of the ability of religion and government to overstep their bounds has been swept under the rug as legislators of this era rush to hand religion whatever it requests.⁶⁸ Religion, in its current genesis, is whitewashed as a do-good, trustworthy collective that can only assist the development of a moral fiber the government has

68. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 604a (Supp. IV 1998) (allowing the states to "administer and provide services . . . through contracts with charitable, religious, or private organizations"); Medicare Act, 42 U.S.C. §§ 1395-1395zz (1994 & Supp. IV 1998); The Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-2000bb-4 (1994), *invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997); Community Services Block Grant Program, 42 U.S.C. § 9920 (Supp. IV 1998) ("[T]he government shall consider, on the same basis as other nongovernmental organizations, religious organizations to provide assistance under the program, so long as the program is implemented in a manner consistent with the Establishment Clause . . ."); Fathers Count Act of 1999, H.R. 3073, 106th Cong. § 403A (1999) (making grants for fatherhood programs available to public and private entities); Charitable Choice Expansion Act of 1999, S. 1113, 106th Cong. (1999) (intending, *inter alia*, to "prohibit discrimination against nongovernmental organizations and certain individuals on the basis of religion in the distribution of government funds to provide government assistance and the distribution of the assistance," and "to allow the organizations to accept the funds to provide the assistance to the individuals without impairing the religious character of the organizations or the religious freedom of the individuals"); Charity Empowerment Act of 1999, H.R. 1607, 106th Cong. (1999) (proposing legislation similar to that of the Charitable Choice Expansion Act); S. 997, 106th Cong. (1999) (same); Youth Drug and Mental Health Services Act of 1999, S. REP. NO. 106-196, at 100 (1999) (prohibiting discrimination against religiously-based substance abuse programs and allowing such organizations to accept funding without "impairing the religious character of the organizations or the religious freedom of the individuals"). See generally Hamilton, *Reformed Constitution*, *supra* note 61, at 100-01, 110-13 (discussing "look-good, feel-good" legislation).

The Charitable Choice Expansion Act of 1999 suggests further that

any program carried out by the Federal Government, or by a State or local government with Federal funds, in which the Federal, State, or local government is authorized to use nongovernmental organizations, through contracts, grants, certificates, vouchers, or other forms of disbursement, to provide assistance to beneficiaries under the program, the government shall consider, on the same basis as other nongovernmental organizations, religious organizations to provide the assistance under the program, so long as the program is implemented in a manner consistent with the Establishment Clause of the first amendment to the Constitution. Neither the Federal Government nor a State or local government receiving funds under such program shall discriminate against an organization that provides assistance under, or applies to provide assistance under, such program, on the basis that the organization has a religious character.

S. 1113, 106th Cong. § 1944A(c) (1999).

despaired of providing.⁶⁹ While many religions do beneficial and good works, close analysis shows neither religion nor government has changed since the framing so as to deserve this sort of unreflective trust. While *religion's* requests for privilege from generally applicable laws and for government funding have increased apace, government has shown itself unfit to fund First Amendment-protected interests in the *arts* cases and in its nineteenth-century dealings with the Native American tribes. On a Madisonian reading, each is acting true to form and the Constitution is the tool to bring them back within safe parameters.

In sum, Madison reasoned that all wealth transfers to religion are dangerous: whether they are small or large and whether they are direct or indirect. This era has departed far from his platform of distrust.

B. Madisonian Constitutional Fundamentals—The Role of the Representative

To fully apprehend the role of the Establishment Clause, it is helpful to grasp the role of the federal legislator. The First Amendment, after all, is specifically directed to Congress, and Madison was one of the primary influences on the shape of

69. This whitewashing has occurred in both the White House and Congress. See Hamilton, *Clinton Era*, *supra* note 44, at 361 ("President Clinton routinely whitewashes religion, treating it as an undifferentiated force for good [and] actively encourages religious lobbyists to join together to increase their power in the political process and to raise their voices in the public square, including the international public square.").

Charitable Choice is intended to allay . . . fears and to prevent government officials from misconstruing constitutional law by banning faith-based organizations from the mix of private providers for fear of violating the Establishment Clause. Even when religious organizations are permitted to participate, government officials have often gone overboard by requiring such organizations to sterilize buildings or property of religious character and to remove any sectarian connections from their programs. This discrimination can destroy the character of many faith-based programs and diminish their effectiveness in helping people climb from despair and dependence to dignity and independence.

145 CONG. REC. S13845, S13859 (daily ed. Nov. 3, 1999) (statement of Sen. Ashcroft). *But see* NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 15 (1998) (stating that "[t]here is no systematic answer to whether we can depend on the associations of civil society to cultivate the moral dispositions liberal democracy requires").

representation as well as the drafter of the First Amendment.⁷⁰ The constitutional scheme is premised on a representative structure in which representatives are not controlled by the people. Rather, the people have the power to choose their representatives through voting, and the power to communicate with them through the Publications Clauses,⁷¹ the Speech and Debate Clause,⁷² and the First Amendment's Speech and Press Clauses.⁷³ Representatives are quite independent of the people in the sense that the decisions a representative reaches during her term of office are constitutionally legitimate even if the people expressly disagree.⁷⁴ Thus, the representative is placed in the role of a trustee to the people. As trustee, she is expected, if the system is to work as the Framers hoped it would, to make decisions in the general interest of the people. That frame of mind is supposed to become a habitual attitude of responsibility, accountability, and service. Although many may fall short, Madison believed that the system would not succeed if enough of those chosen to be representatives were not individuals of virtue.⁷⁵ The reason virtue was so necessary lay in the extent of the people's delegation of lawmaking power to their representatives.

The trustee relationship can work in the interest of the polity for the vast majority of topics that cross a representative's desk. The Bill of Rights, however, warns members of Congress not to take this paternalistic or trustee role vis-a-vis the people in certain specified arenas. They may, and should, race to the people's aid to protect them from fire, violence, and bad roads, to name a few examples, but they may not protect the people from religions, ideas, or speech

70. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."); see also Hamilton, Reformed Constitution, *supra* note 61, at 61 (discussing Madison).

71. U.S. CONST. art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings . . ."); *id.* art. I, § 9, cl. 7.

72. *Id.* art. I, § 6, cl. 1 ("[A]nd for any Speech or Debate in either House, they shall not be questioned in any other Place.").

73. *Id.* amend. I.

74. See Hamilton, Reformed Constitution, *supra* note 61, at 75, 82-84; Hamilton, *Proposal*, *supra* note 13, at 523-24; Hamilton, *The People*, *supra* note 12, at 9.

75. See also Hamilton, Reformed Constitution, *supra* note 61, at 15 ("Virtue in those serving the people by representing them is in fact the fulcrum on which the entire constitutional system rests.").

some believe are wrong, inappropriate, or unpopular.⁷⁶ Thus, it is fair to say that the Constitution's representative structure actually predisposes the members of Congress to cross the constitutional line in the arena of religion or speech: the more seriously a representative takes the duty of care owed to her constituents, the more likely she will find herself criticizing religion or art on behalf of all or some constituents, including religious constituents.

Although this structural predisposition is no excuse for the member of Congress, it does help to explain how the Establishment Clause is continually violated by members of Congress who are led across constitutional barriers by powerful political rhetoric. This phenomenon of the structure of representation also makes clear the First Amendment's absolute necessity as a guard against legislative reaching beyond prescribed, enumerated categories.

Under Madison's vision, each wealth transfer discussed in this Article raises serious Establishment Clause concerns. Tax exemptions for real property used by religious organizations and direct aid for school supplies already have been upheld by the Court on the grounds that the former has been in place for many years and the latter is not really a transfer of wealth to religious entities.⁷⁷ The other three wealth transfers discussed—direct handouts, vouchers, and charitable choice—raise more troubling Establishment Clause problems. The combined novelty and magnitude of each wealth transfer ought to break the spell cast by the transformation of “free” in free exercise from “liberty” to “costless.”

II. ACCOUNTABILITY, GOVERNMENT FUNDING, AND RELIGIOUS ENTITIES

A. *Lessons for Religion and the Government from the Arts Wars*

The arts cases illustrate that the price and risk of government funding of works protected by the First Amendment is extraordinarily high. Without doubt, the Framers' concern that all

76. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989); *Board of Educ. v. Pico*, 457 U.S. 853, 869-72 (1982).

77. See *Walz v. Tax Comm'n*, 397 U.S. 664, 671-72, 676-80 (1970).

entities would abuse their power is heightened when money enters the picture. True to Madison's vision, entities must work hard to retain their separate identities once the government has instituted a funding program.⁷⁸ This is true whether the government is state or federal.

1. The Federal Government and Arts Funding: NEA v. Finley

Government labors under an obligation to serve the people and, in order for public officials to retain their positions and credibility, they must take into account the views of the people. This feature was built into the representative system by the Framers,⁷⁹ and creates both an incentive system for government officials to condemn that which is unpopular or harmful to any group, as well as a platform for voicing those views.⁸⁰ When the "people's money" is being used in a way that would offend or hurt particular persons or groups, the representative is strongly tempted to: 1) criticize how the money was spent; 2) seize control of the current project created with the money; and 3) take measures to ensure it never happens again. Though at odds with the First Amendment, and properly condemned when the subject is speech or religion, these are natural

78. See *supra* notes 51-59 and accompanying text.

79. See generally Hamilton, Reformed Constitution, *supra* note 61, at 69-70.

80. This phenomenon is usually identified in the literature as "majoritarianism," but that term is in fact misleading. The representative system in place does not permit majorities of the people to prevail, and in fact gives no combination of the people the power to make law. Rather, a system of independent representation was chosen by the Framers expressly to guard against majoritarianism. See THE FEDERALIST NO. 10 (James Madison). Speaking of the need for republican government, Madison invoked the potential evils of religion when he wrote to Thomas Jefferson that:

When Indeed Religion is kindled into enthusiasm, its force like that of other passions is increased by the sympathy of a multitude. . . . Even in its coolest state, it has been much oftener motive to oppression than a restraint from it. If then there must be different interests and parties in Society; and a majority when united by a common interest or passion can not [sic] be restrained from oppressing the minority, what remedy can be found in a republican Government, where the majority must ultimately decide, but that of giving such an extent of its sphere, that no common interest or passion will be likely to unite a majority of the whole number in an unjust pursuit.

Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in *FEDERALISTS AND ANTIFEDERALISTS: THE DEBATE OVER RATIFICATION OF THE CONSTITUTION* 202 (John P. Kaminski & Richard Leffler eds., 2d ed., Constitutional Heritage Series Vol. I, 1998); see also Hamilton, *Proposal*, *supra* note 13, at 523-27.

consequences flowing from the representative's obligation to represent the people's best interests.

In a nonspeech context, this temptation is perfectly acceptable. For example, suppose a county used its tax funds to build a structurally weak bridge that led to the death of a person. Local officials (assuming they were not the cause) rightly would condemn the bridge builders, seize control of the bridge to correct the harm, and promise that it would never happen again. Similarly, a local government could institute a school lunch program, which is run by a contractor that serves food with ants in it. Upon discovery of the problem, local officials would immediately condemn the contractor, seize control of the program until they could find a more reliable contractor, and promise to ensure it would never happen again. Once again, this is the way the system is supposed to work. When financing of non-First Amendment activities is involved, like bridges and school lunches, it is called "accountability" and is constitutionally legitimate.

Enter the First Amendment, particularly government funding of the arts, and the government's trustee role becomes unconstitutional. Even where such funding starts with the best of content-and-viewpoint-neutral intentions,⁸¹ art's instrumental function of challenging status quo assumptions⁸² drives government officials to castigate and single out certain artistic creations and to find measures to ensure similar creations are never funded again.

Like most government funding programs, the National Endowment for the Arts (NEA) is rooted in mixed motives. On the one hand, it was based on a content-and-viewpoint-neutral policy. On the other hand, it was intended to empower certain views over unpopular views. As to the former, the NEA began as an institution to:

enable groups and individuals to provide or support in the United States (1) productions which have substantial artistic and cultural significance, giving emphasis to American creativity and the maintenance and encouragement of professional excellence; (2) other productions, irrespective of

81. Frequently—perhaps usually—funding of the arts is not content-and-viewpoint-neutral.

82. See Hamilton, *Art Speech*, *supra* note 21, at 101.

origin, which meet professional standards or standards of authenticity and are of significant merit, and which, without such assistance, would otherwise be unavailable to our citizens in many areas of the country; (3) projects that will encourage and assist artists and enable them to achieve standards of professional excellence; (4) workshops that will encourage and develop the appreciation and enjoyment of the arts by our citizens; and (5) other relevant projects, including surveys, research, and planning in the arts.⁸³

At the time of the NEA's enactment, there was a general sense, still shared by some, that great cultures throughout history have funded the arts and therefore the United States should as well.⁸⁴ Beneath this neutral veneer, however, there was also an explicit intention to fund "American" artworks for the purpose of "overcom[ing] the increasing 'cultural offensive' being waged by Communist ideologies."⁸⁵

It should come as no surprise that what began as an attempt to drown out Communism turned into a ready tool to suppress other unpopular viewpoints. In the 1980s and 1990s, members of Congress decried particular artworks funded by the NEA that they perceived to be offensive to some constituencies, especially works with sexual or religious content.⁸⁶ These works led government

83. H.R. REP. NO. 89-618, at 7 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3186, 3192; *see also* 20 U.S.C. § 953(a) (1994) (establishing a National Foundation on the Arts and the Humanities, including a National Endowment for the Arts, a National Endowment for the Humanities, a Federal Council on the Arts and the Humanities, and an Institute of Museum Services).

84. *See* H.R. REP. NO. 89-618, at 5 ("The broad-based programs envisaged by the Foundation would serve not only to deepen our understanding of our friends and allies throughout the world, but would strengthen the projection of our Nation's cultural life abroad . . ."). *See also* David Cole's remarks in *Symposium: Art, Distribution & the State: Perspectives on the National Endowment for the Arts*, 17 CARDOZO ARTS & ENT. L.J. 705, 743 (1999):

I believe it is important to have public funding of expression generally, and I do not think artistic expression is any exception. A lot of expression cannot be funded in the private marketplace, but is nonetheless very valuable. . . . I think it is also important, however, that it not be driven by political pressures to become an art of majoritarian values. That was said by virtually everybody when they created the NEA thirty years ago.

85. H.R. REP. NO. 89-618, at 5.

86. NEA-funded works drawing ire included the performance art of the petitioners in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), Robert Mapplethorpe's *This*

officials to follow the same pattern they would have followed with a faulty bridge or an ant-infested school lunch: condemn, gain control of the particular works, and institute procedures to ensure it never happens again.

The condemnations were in no uncertain terms:

While it may be true that only a handful of the 85,000 projects which received grants from the National Endowment for the Arts during its 25-year history are the focus of the current opposition to its reauthorization, the fact is that the public's views should prevail and that works that conflict with current standards of decency should not receive Federal funds, either directly or indirectly.

....

[W]e should not be providing funds from the National Endowment for the Arts that are used to produce or to exhibit works that a significant number of people consider obscene or indecent.

....

We are not talking about limiting freedom of speech or expression. We are talking about how American taxpayers' dollars should be used.⁸⁷

Similarly:

I do not believe the government is obligated to pay for so-called art which deliberately denigrates religious, racial, or ethnic groups or belief of this country—works which degrade the very principles for which this government stands.

If an individual wants to engage in that denigration on his own with his own money and it is within the limits of present law, then he certainly has that right. But, I believe the government has no obligation to fund those kinds of projects.⁸⁸

Perfect Moment, and Andres Serrano's *Piss Christ*.

87. H.R. REP. NO. 101-566, at 37-38 (1990) (dissenting views of Hon. Joseph M. Gaydos and Hon. Austin J. Murphy in opposition to H.R. 4825, the authorization bill for the NEA and related agencies). In their remarks, Mr. Gaydos and Mr. Murphy referred specifically to the works of Robert Mapplethorpe, Andres Serrano, the performance art of Annie Springle, and an exhibition by David Wojnarowicz. See *id.* at 37.

88. *Id.* at 41 (dissenting views of Hon. Glenn Poshard on H.R. 4825).

There were various proposals to "deal" with the works, some of which involved suppression. Others proposed amendments to the NEA's grant-authorizing process.⁸⁹

In the end, Congress took it upon itself to correct the NEA's grant procedures to ensure its members were not put in this position again. In late 1990, it enacted an amendment, subsequently challenged in *Finley*, requiring the NEA to ensure that "artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."⁹⁰

The constitutional difference between the bridge and lunch examples and NEA-funded artworks is, of course, the First Amendment. What public officials must do in the public interest with respect to bridges and lunches, it may not do to First Amendment-protected speech, like art.⁹¹ When artists instituted a facial challenge to the NEA guidelines, the Court upheld the guidelines on the ground that there might be certain circumstances, e.g., art directed at children, in which a viewpoint discriminatory, "decency" criterion could be constitutionally acceptable.⁹² The Court

89. See *id.* at 43 (individual views of E. Thomas Coleman); *id.* at 44 (additional views of Paul B. Henry). Coleman proposed reforms which "increased accountability to the public whose tax funds support the Endowment." *Id.* at 43. Rep. Henry suggested an amendment to H.R. 4825:

The Chairperson and the National Council for the Arts shall ensure that any project supported by an award, grant, loan, or other form of support provided by the Endowment demonstrates a commitment to artistic excellence which is sensitive to the nature of public sponsorship, and does not deliberately denigrate the cultural heritage of the United States, its religious traditions, or racial or ethnic groups. The Chairperson and the National Council for the Arts shall ensure that any project supported by an award, grant, loan or other form of support provided by the Endowment does not violate prevailing standards against obscenity or indecency.

Id. at 44.

90. Department of the Interior and Related Agencies Appropriation Act of 1991, Pub. L. No. 101-512, § 103(b)(d)(1), 104 Stat. 1915, 1963-64 (1990) (codified as amended at 20 U.S.C. § 954(d)(1) (1994)).

91. See, e.g., *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952); *Winters v. New York*, 333 U.S. 507, 510 (1948); *Bery v. City of New York*, 97 F.3d 689, 694 (2d Cir. 1996).

92. See *National Endowment for the Arts v. Finley*, 524 U.S. 569, 584 (1998).

made it clear, however, that such viewpoint discrimination would violate the First Amendment in other scenarios.⁹³

In sum, the grant of federal money leads inevitably to governmental attempts to control how that money is allotted. This relationship is the nature of the structure of government and the reason the First Amendment is necessary. The same reasoning holds true at the local level and even when government money does not go directly to the creation of new art.

2. Local Government and Arts Funding: Brooklyn Institute Versus Giuliani

New York City provides certain support services to a number of artistic organizations, including security and maintenance.⁹⁴ The City does not directly fund the creation of artworks.⁹⁵ Instead, for example, the Brooklyn Art Museum has absolute title to anything in its collection.⁹⁶ The dispute between the Brooklyn Museum and the New York City Administration follows the same pattern as that described in the NEA context: condemnation, censorship, and extraordinary measures to prevent such expression in the future.

The Brooklyn Arts Museum has received city funds for maintenance and security for over 100 years.⁹⁷ When it mounted the

93. The Court in *Finley* stated that an as-applied challenge, in which the government engaged in specific viewpoint discrimination, might allege a First Amendment violation. The Court warned that "even in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas,' and if a subsidy were 'manipulated' to have a 'coercive effect,' then relief could be appropriate." *Id.* at 587 (citations omitted).

94. New York City's contract with the Brooklyn Museum provides that the City will fund maintenance and security of the building, including: "(1) repairs and alternations; (2) fuel; (3) waste removal; (4) wages of employees providing essential maintenance, custodial, security and other basic services; (5) cleaning and general care; (6) tools and supplies; and (7) insurance for the building, furniture, and fixtures." Brooklyn Inst. of Arts and Sciences v. City of New York, 64 F. Supp. 2d 184, 189 (E.D.N.Y. 1999).

95. *See id.* at 189 ("City funds generally 'are not used for direct curatorial or artistic services.'").

96. *See id.* at 188 ("The Contract is unequivocal that the City has no ownership rights with respect to any of the collections in the Museum.").

97. The then-City of Brooklyn leased the land on which the museum now stands to the Brooklyn Museum on December 23, 1893, for a 100-year term. *See id.* at 187. Upon completion of the building, the two parties entered into the contract described *supra* note 94. *See id.* at 187-89. Although the lease expired in 1993, the Museum has remained tenant in possession based on the terms contained in the original lease and contract. *See id.* at 188.

"Sensation" exhibit in the fall of 1999, which included a painting of the Madonna that incorporated elephant dung and pornographic cutouts, New York City Mayor Rudolf Giuliani attacked the Museum because of his perception that the exhibit offended Catholic sensibilities.⁹⁸

Giuliani followed the predictable pattern: condemnation, suppression, and then consideration of how to prevent the same in the future. First, he repeatedly condemned the specific painting and the exhibition in general, saying that the painting was sacrilegious.⁹⁹ Second, he directed the Museum to remove the painting, and attempted to have the Board of Trustees unseated and the Museum's lease terminated.¹⁰⁰ Third, he laid the groundwork for future attacks on artworks that offended certain constituencies' sensibilities. He declared his intention to visit every museum receiving City money for the purpose of reviewing content,¹⁰¹ and he promised to engage in the same aggressive tactics if any future museum showed artworks offensive to any religious group.¹⁰²

Most remarkable about the government's response to "Sensation" was the fact that the City had not funded the creation or even the transportation of the works it attempted to suppress.¹⁰³ Rather, the City Administration perceived that it had an obligation to the public to distance itself from the art because public funds had paid some of the Museum's overhead. Thus, the instinct of public officials to claim the control that follows from public funding extends well beyond direct or complete funding of a project. As the City's

98. See *id.* at 190-91.

99. Mayor Giuliani called the artwork "a desecration of religion," David Barstow, *Giuliani Ordered to Restore Funds for Art Museum*, N.Y. TIMES, Nov. 2, 1999, at A1, B5; he said the exhibit was an "attack on religion," Ralph Blumenthal & Carol Vogel, *Museum Says Giuliani Knew of Show in July and Was Silent*, N.Y. TIMES, Oct. 5, 1999, at B1, B8; and stated further that the exhibit "desecrated [the] Christian faith," Brief Amicus Curiae of Volunteer Lawyers for the Arts et al. at 4, *Brooklyn Inst. of Arts and Sciences v. City of New York* (No. 99-9326) [hereinafter Brief of Volunteer Lawyers] (2d Cir. on appeal from 64 F. Supp. 2d 184 (E.D.N.Y. 1999), dismissed pursuant to settlement agreement Mar. 27, 2000) (on file with the author).

100. See *Brooklyn Inst. of Arts and Sciences*, 64 F. Supp. 2d at 191.

101. See Michael R. Blood, *Mayor Hints at Screening for More Art*, N.Y. DAILY NEWS, Oct. 6, 1999, at 26, available in LEXIS, News Library, DLYNWS File.

102. See Brief of Volunteer Lawyers, *supra* note 99, at 5-6; Elisabeth Bumiller, *Giuliani Says He'd Defend Other Faiths Against Offensive Art*, N.Y. TIMES, Oct. 5, 1999, at B8.

103. See *Brooklyn Inst. of Arts and Sciences*, 64 F. Supp. 2d at 202.

draconian response in the *Brooklyn Institute* case illustrates, the consequent threat to First Amendment interests is not insubstantial.

What looked to be a boon for government support of the arts has turned out to be an entre for government control and suppression. With some plausibility (even if unconstitutional) and apparent inevitability, government will attempt to control how its money is spent, even when the money is flowing to First Amendment-protected entities or works. Religion is no different from art on this score.

B. Lessons from President Grant's "Peace Policy"

Even though the structure of representation entrusts elected representatives with paternalistic oversight of most problems and builds in accountability, there are numerous instances in which representatives do not embrace their responsibilities. Rather, it may be politically expedient to delegate the hard work of the trustee to others.

The preceding section depicted the impropriety under the First Amendment of government acting out its trustee role by insisting on accountability for the expenditure of public funds. This section shows the other side of the problem of government aid to First Amendment protected activities: what happens when government provides the money but washes its hands of oversight over the use of the money? There is a historical example that illustrates how this set of factors operates: President Ulysses S. Grant's "Peace Policy" for the Native Americans.¹⁰⁴

The Peace Policy emerged after the Civil War, under the administration of President Ulysses S. Grant (1869-77), as a means of assimilating, or Christianizing, the Indians into white society.¹⁰⁵ The stated policy goal was "conquering [the Indians] with

104. See generally HENRY E. FRITZ, *THE MOVEMENT FOR INDIAN ASSIMILATION, 1860-1890*, at 56-86 (1963) (discussing the Peace Policy and attempts to assimilate Native Americans into Anglo-American culture); ROBERT WINSTON MARDOCK, *THE REFORMERS AND THE AMERICAN INDIAN* 47-128 (1971) (discussing the Peace Policy and the social forces influencing U.S.-Native American policy during the post-Civil War period).

105. See FRITZ, *supra* note 104, at 79.

kindness.”¹⁰⁶ In 1869, when Grant took office, the “Indian policy” was in shambles. Religious leaders convinced Congress to appropriate \$2 million for Indian affairs and created the citizen Board of Indian Commissioners, whose ten members were appointed by Grant from various religious denominations, with the Society of Friends taking a leading role.¹⁰⁷ The Peace Policy involved reservations administered by religious organizations with funds appropriated by the government. Religious “agents” were assigned particular reservations.¹⁰⁸

The federal government, after setting up the Peace Policy, left the fate of the Native Americans, who desperately needed food, education, and agrarian training, to the religious organizations. Two results accrued. First, Congress did not authorize adequate funds for the agents to fulfill their mission and educational goals, and the religious organizations did not, for whatever reason, fill the funding gap themselves. The tragic result was starvation and although the Native Americans were religiously trained, they did not receive the necessary agrarian training they needed to avoid further starvation.¹⁰⁹ The combination of insufficient funding, interchurch quarreling, Indian discontent and starvation, western bandits, illegal liquor trafficking, and a failed attempt at a legal system with which to resolve disputes on the reservations created insurmountable obstacles for the religious administrators.¹¹⁰

As both Congress and the President lost interest in Indian affairs, partly as a result of public opinion against Indian uprisings,¹¹¹ the citizen Board of Indian Commissioners lost all of its original members, and the Bureau of Indian Affairs became corrupt and bureaucratically disabled.¹¹² The relationship between government and religious organizations became so strained by 1880 that the denominations began to withdraw from the Peace Policy, and it was soon discredited during the administration of President Rutherford B. Hayes.¹¹³

106. *Id.* at 64.

107. *See id.* at 73-75.

108. *See id.* at 75-79.

109. *See id.* at 135.

110. *See id.* at 135-67.

111. *See id.* at 137.

112. *See id.* at 152-62.

113. *See id.* at 101-04.

Second, there was a great deal of denominational conflict between religious entities regarding which sect was assigned to which reservations.¹¹⁴ The Roman Catholics were the most exercised, because their active ministry to the Native Americans was not taken into account in the original reservation assignments.¹¹⁵ The intersect war escalated quickly into charges of bigotry and discrimination by the Catholics,¹¹⁶ while other sects fought over which reservations they were assigned.¹¹⁷ On all of the reservations, the particular religious sect indoctrinated the Native Americans into their faith.¹¹⁸

The government funding of religious mission in the Peace Policy shows a government throwing funds at a social problem as it declares that government cannot itself solve the problem. Thus, government avoided taking direct responsibility for the fate of the Native Americans through the convenient displacement of responsibility with money. Having allocated some funds to the problem and having handed the difficult part to religious sects, the federal government washed its hands of the Native Americans, and allocated its resources to other, more politically pressing issues.¹¹⁹

The result of government withdrawal from the policy field was destructive, interdenominational conflict, and a failure to ensure that government funds actually achieved the government's end of educating the Native Americans. The failure to enforce accountability displayed in this historical circumstance makes the overeager embrace of accountability in the arts-funding cases seem more benign, though no more constitutional. The government must walk a tightrope when it funds works protected by the First Amendment. Thus, government funding without accountability strings attached, already a violation of the representative's appointed role, is also potentially disastrous for church-church peace and church-state relations.

114. *See id.* at 87-95.

115. *See id.* at 87, 92.

116. *See id.* at 107.

117. *See id.* at 153-54.

118. *See id.* at 92.

119. *See id.* at 135.

III. DOCUMENTATION OF CONTEMPORARY WEALTH TRANSFER TO RELIGION

The arts-funding cases illuminate church-state issues because the Supreme Court has resisted a bright-line rule against government aid to religion under the Establishment Clause and instead adopted a case-by-case approach in which the essential inquiry has been the contemporary balance of power between church and state.¹²⁰ While the Court has consistently used this balance calculus, its level of distrust of religious entities and the government has hit different plateaus.¹²¹ In some eras, the Court has echoed Madison's more distrustful attitude. For example, in 1973, the Court declared that "notwithstanding the 'high social importance' of the State's purposes, neither may justify an eroding of the limitations of the Establishment Clause now firmly emplantated."¹²² Recently, however, the Court has taken a more trusting attitude toward religion, stating that "certain entities that exist in a harmonious relationship to the community at large, and that foster its 'moral or mental improvement,' should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes."¹²³

During the Supreme Court's last term, a plurality married this rosy view of religion to a notion that religion need not be treated distinctively, and ruled that the provision of computers to private, parochial schools through a federal program did not violate the Establishment Clause:

[I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose. The government, in crafting such an aid program, has had to conclude that a

120. For a fuller discussion of this principle, see Hamilton, *Vouchers*, *supra* note 4, at 826 ("[E]stablishment doctrine has evolved into a context-dependent and era-dependent balancing approach, which affords the Court maximum flexibility to identify inappropriate relationships of power.").

121. *See id.* at 827-36.

122. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 789 (1973).

123. *Walz v. Tax Comm'n*, 397 U.S. 664, 672 (1970).

given level of aid is necessary to further that purpose among secular recipients and has provided no more than that same level to religious recipients.¹²⁴

On this reasoning, religion poses no threat to the state, but rather should be treated as though it is on par with any other entity. This is, in fact, the "equality" approach favored by Professors Eisgruber and Sager.¹²⁵ Both suffer from the fundamental defect that religion is different, potentially more powerful, and more prone to abuse power, a view reflected in the decision to include the Establishment Clause, Madison's writings, and in the cultural milieu at the time of the framing.

The *Mitchell* plurality even refused to embrace the concept that federal funds easily diverted to sectarian use should be closely scrutinized under the Establishment Clause, saying that "[t]he issue is not divertibility of aid but rather whether the aid itself has an impermissible content."¹²⁶ Accordingly, once the content of the aid passes muster under the Establishment Clause, the plurality would apparently immunize the law from further Establishment Clause attack.

Two members of the Court, Justices O'Connor and Breyer, were not as sanguine on this score, but they were unwilling to find actual diversion of government resources to religious purposes in the absence of direct proof (where the plaintiffs had had ten years to uncover such diversion).¹²⁷

Only three members of the *Mitchell* Court objected to the plurality's and the concurrence's acquiescence in state support for church schools through the federal computer program. A dissent by Justice Souter repeatedly sounded Madison's themes of distrust when money passes from state to church,¹²⁸ resisting the Court's general inclination in this era to whitewash religion.

124. *Mitchell v. Helms*, 120 S. Ct. 2530, 2541 (2000) (plurality opinion of Rehnquist, Kennedy, Scalia, and Thomas).

125. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1282-84 (1994); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 448-50 (1994).

126. *Id.* at 2548.

127. See *id.* at 2556-72 (O'Connor, J., concurring).

128. See *id.* at 2572, 2574, 2595 (Souter, J., dissenting).

Like the trusting and optimistic view taken by Congress of the National Endowment for the Arts at its inception,¹²⁹ contemporary aid to religious entities seems to have assumed that only good can arise from funding religious entities.

A. Support for Sectarian Schools

The most innocuous-seeming support for religion can be found in the school aid cases. These cases start with the Court's decision in *Everson v. Board of Education* that public support for bus transportation to all children, including those attending private, sectarian schools, did not violate the Establishment Clause.¹³⁰ The Court reasoned that the aid did not cross the disestablishment barrier because, "[t]he State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."¹³¹ While Justice Jackson vocally dissented that even busing for school children crossed the disestablishment divide,¹³² the Court's finding that the program was "general," a

129. See H.R. REP. NO. 89-618, at 7 (1965), reprinted in 1965 U.S.C.C.A.N. 3186, 3192 (noting that the purpose of establishing a National Foundation on the Arts was, inter alia, "to develop and promote . . . a broadly conceived national policy of support for the humanities and the arts in the United States").

130. 330 U.S. 1, 17 (1947).

131. *Id.* at 18.

132. See *id.* at 26-27. Justice Jackson wrote:

[T]he religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom and which the Court is overlooking today. This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse. Those great ends I cannot but think are immeasurably compromised by today's decision.

Id.

variant on the equality thesis proposed by Professors Eisgruber and Sager, ended the inquiry.

In fact, *Everson* was the "three pence" decision that signaled the beginning of a long series of disputes in the courts over the constitutionality of school aid. Except for the 1950s, there has not been a decade since *Everson* in which the Court has not addressed a statute that provided school aid. In most cases, the aid has been found constitutional. The mere presence of these cases shows that religious schools and their families have not been shy about lobbying for state support for their needs, legislatures have been willing providers, and the Court has not been concerned about Madison's slippery slope.

Busen were just the beginning. There has been a steady elongation of the list of school supplies that the Supreme Court has been willing to permit religious schools to receive from government funds.¹³³ Moreover, attempts to provide funding for sectarian

133. See, e.g., *Mitchell v. Helms*, 120 S. Ct. 2530, 2536-38 (2000) (upholding federal law providing computers and other classroom aid to sectarian schools); *Agostini v. Felton*, 521 U.S. 203, 208-09, 235 (1997) (overruling *Aguilar v. Felton* and upholding a New York City program that allowed public school teachers to provide remedial education in parochial schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 3 (1993) (allowing sign language interpreter, under both federal and Arizona state statutes, for deaf student attending Catholic high school); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 482 (1986) (upholding grant under state vocational rehabilitation assistance program to blind student pursuing a religious career at a Christian college); *Aguilar v. Felton*, 473 U.S. 402, 404-06 (1985) (overturning a New York City program which used federal funds to pay public school teachers to provide remedial teaching in parochial schools), *overruled by Agostini v. Felton*, 521 U.S. 203, 235 (1997); *Mueller v. Allen*, 463 U.S. 388, 390-403 (1983) (upholding a Minnesota tax deduction provided to parents for expenses incurred in sending children to private schools, including parochial schools); *Wolman v. Walter*, 433 U.S. 229, 255 (1977) (upholding provisions of an Ohio statute providing nonpublic school pupils with books, standardized testing and scoring, diagnostic services, and therapeutic and remedial services, but overturning those provisions relating to instructional materials and equipment and field trip services), *overruled in part by Mitchell v. Helms*, 120 S. Ct. 2530, 2555 (2000); *Meek v. Pittenger*, 421 U.S. 349, 351-55, 373 (1975) (upholding a Pennsylvania statute allowing for textbook loans to nonpublic schools, but overturning statutes providing for auxiliary services and instructional materials), *overruled in part by Mitchell v. Helms*, 120 S. Ct. 2530, 2555 (2000); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 796-98 (1973) (overturning New York statutes that provided aid to nonpublic schools, and provided aid and tax benefits to parents of children attending nonpublic schools); *Walz v. Tax Comm'n*, 397 U.S. 664, 666-67, 680 (1970) (finding constitutional a New York property tax exemption to religious organizations using the property for religious worship); *Flast v. Cohen*, 392 U.S. 83, 103-04 (1968) (finding that taxpayers who brought suit challenging use of federal tax funds to purchase materials for use in parochial schools had standing to do so because such an

schools have taken the form of tax deductions,¹³⁴ tax credits,¹³⁵ and, more recently, vouchers.¹³⁶ There has been general consensus that religious schools cannot be directly funded by the government; however, indirect funding through tax schemes or vouchers has fallen in and out of fashion, and courts have been increasingly willing to uphold programs closer to the line between the two.¹³⁷ The plurality in *Helms* moved the closest to that line to date, arguing that indirect funding is almost always constitutional.¹³⁸

action, if proved, would violate the Establishment Clause); *Board of Educ. v. Allen*, 392 U.S. 236, 238 (1968) (upholding a New York statute requiring school districts to lend, at no cost, textbooks to students in public and private schools, including parochial schools); *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947) (holding that the First Amendment does not prohibit New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools).

134. See, e.g., *Mueller*, 463 U.S. at 390-403 (upholding a Minnesota tax deduction for expenses associated with sending children to school, including parochial schools).

135. See, e.g., *Walz*, 397 U.S. at 666-67, 680 (upholding New York property tax exemption for religious entities).

136. See, e.g., *Simmons-Harris v. Goff*, 711 N.E.2d 203, 205-11 (Ohio 1999) (upholding a Cleveland voucher program that provided tuition money for students to attend private schools because any religious entanglement was an indirect result of the parents' decision to send children to parochial school, but severing that portion of the program that gave priority to those students whose parents belonged to a religious group that supported the sectarian school); *Jackson v. Benson*, 578 N.W.2d 602, 618 (Wis. 1998) (upholding the Milwaukee Parental Choice Program (MPCP), which provides indirect aid to parents of children in private schools by sending tuition checks to the schools, made payable to the parents of the child, who would then "restrictively endorse the checks to the private schools"). The program in *Jackson* was upheld in part because "not one cent flows from the State to a sectarian private school under the amended MPCP except as a result of the necessary and intervening choices of individual parents." *Id.* at 618. The Cleveland voucher program, however, was recently struck down by the Sixth Circuit. See *Simmons-Harris v. Zelman*, Nos. 00-3055/3060/3063, 2000 U.S. App. LEXIS 31367, at *47 (6th Cir. Dec. 11, 2000).

137. Compare *Pfeffer*, *supra* note 33, at 314 (stating that most state constitutions prohibited funding of sectarian schools), with Greg Todd, Comment, "Fully Participating" Voucher Programs and the Wisconsin Template: A Brick or a Breach in the Wall of Church-State Separation?, 2 U. PA. J. CONST. L. 710, 738 (2000) (concluding that "[a] voucher system that indirectly funnels aid to public, sectarian, and private secular schools via parents' individual private choices, and which applies to all children, regardless of which schools they attend, is likely to survive scrutiny under any of [the Lemon, establishment, or coercion] tests").

138. The plurality specifically denounced a direct/indirect bright line rule, discussing instead the recent trend toward favoring private choice: "If aid to schools, even 'direct aid,' is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.'" *Mitchell*, 120 S. Ct. at 2544 (quoting *Witters*, 474 U.S. at 489).

B. Tax-Exempt Status for Religious Institutions

There is a patchwork of religious exemptions from taxes, from property taxes to income taxes. Tax exemption for religious organizations is, on its face, a benefit for religion, because an "exemption" relieves a religious entity from having to pay taxes that it otherwise would have to pay.¹³⁹ A version of property tax exemption has been in place for so long that it has come to be treated as a neutral baseline that could not violate the Constitution's rule against establishment.¹⁴⁰ From Madison's perspective, though, tax exemption looks less innocent.¹⁴¹ John Witte captured the spirit of Madison's concerns when he stated:

Opponents [of tax exemptions of church property] insist that such exemptions are subsidies of religion that are proscribed by the establishment clause and its principle of state separation from the church. . . . Opponents look to the future and portend with alarm the further erosion of the state tax base and the further aggrandizement of church wealth and power

....
Mainline religious groups have no inherent aversion to payment of taxes. The Bible enjoins Christians to "[r]ender . . . to Caesar the things that are Caesar's" and to pay "taxes to whom taxes are due, revenue to whom revenue is due" . . . Arguments for the free exercise right to exemption from taxes, therefore, appear ill-founded.¹⁴²

That was almost ten years ago, and there is little indication that religious entities have any impetus to reverse tax exemption. To the contrary, the trend is toward expanding existing exemptions and simultaneously finding other financial benefits from government.

139. Black's Law Dictionary defines an exemption, in the taxation context, as "an amount allowed as a deduction from adjusted gross income in arriving at taxable income." BLACK'S LAW DICTIONARY 572 (6th ed. 1990).

140. See, e.g., *Walz*, 397 U.S. at 676-80.

141. See Madison, *Memorial and Remonstrance*, *supra* note 1, at 66 ("As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions.").

142. John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363, 407, 414 (1991) (citations omitted) (alterations in original).

Many have struggled to find the right baseline for tax treatment of religious entities. There are those who argue that tax exemption is not really a benefit for religion, because it is folly to assume that tax exemption is a privilege. Rather, all taxes should be considered burdens. In essence, they argue that the baseline ought to be a presumption of zero taxation. Others have offered different baselines for determining whether tax-exempt status for religion is an unconstitutional benefit. Most recently, Erika King argued that tax benefits should be available for religious entities when the religious entity is similarly situated to other entities receiving the same tax treatment.¹⁴³ John Swomley would set the baseline at a not-for-profit category, so that religious entities receive the same tax treatment as others that are not-for-profit.¹⁴⁴ John Witte would dissolve the special religious exemptions and provide religious entities the tax benefits of charitable institutions if the religious entities fall under the definition of a charitable organization.¹⁴⁵ Ed Zelinsky has criticized such categorical approaches to tax benefits, saying that sometimes they are akin to tax deductions and sometimes more akin to direct benefits.¹⁴⁶ The main point of this Article is not to find the doctrinally correct treatment, but rather to explore the expanding contours of tax-exempt treatment and the consequent expansion of financial benefit to religion.

1. State and Local Tax Exemption

a. Property Tax Exemption

The tax exemption of church property began as a narrow category of exemption covering only those aspects of the physical plant and grounds devoted to worship.¹⁴⁷ That limitation has steadily been

143. See Erika King, *Tax Exemptions and the Establishment Clause*, 49 SYRACUSE L. REV. 971, 1036-37 (1999) (arguing that similarly situated treatment comports with the Establishment Clause and the Fifth and Fourteenth Amendments).

144. See John M. Swomley, *The Impact of Tax Exemption and Deductibility on Churches and Public Policy*, 22 CUMB. L. REV. 595, 597 (1992).

145. See Witte, *supra* note 142, at 408.

146. See Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures?*, 112 HARV. L. REV. 379, 400-09 (1998).

147. See, e.g., Witte, *supra* note 142, at 372 (noting that the only church property exempt at common law included "[t]he properties of incorporated established churches that were

dissolved as local authorities have permitted more and more land uses to justify tax-exempt status, including hospitals, schools, and daycare centers.¹⁴⁸

In the main, this form of wealth transfer has been more liberally applied to religious bodies as the years have passed. By the time the Supreme Court was asked to address whether property tax exemptions for religious institutions were consistent with the Establishment Clause, they were such an embedded structure that the Court shied away from holding it unconstitutional.¹⁴⁹ The first part of the Court's opinion in *Walz* would have led one to assume that property tax exemption was inconsistent with the Establishment Clause. "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion."¹⁵⁰

The Court made a sharp turn, however, saying that tax-exempt status had been in existence for so many years that it must be constitutional. "Nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious belief."¹⁵¹

devoted to the appropriate 'religious uses' prescribed by ecclesiastical law, such as chapels, parsonages, glebes, and consecrated cemeteries").

148. See, e.g., *Phillips v. Mission Fellowship Bible Church*, 955 S.W.2d 917, 918-19 (Ark. Ct. App. 1997) (upholding tax exemption under a broad state statute for 1.05 acre tract upon which is situated the church building, a 6,800 square foot structure that contains a sanctuary, chapel, Sunday School classrooms, religious lending library, fellowship areas, administrative offices, guest quarters for visiting pastors and missionaries, landscaped grounds, approach roads, and a parking area); *Hapletah v. Assessor of Fallsburg*, 590 N.E.2d 1182, 1183-86 (N.Y. 1992) (upholding property tax exemption for a school and 31 acre parcel of land, a facility that contains a kitchen, communal dining room for all participants, a ritual bath, recreational facilities, classrooms, synagogues, a multi-unit dormitory building, 64 bungalows, 6 trailers, and 10 acres of wooded hiking land, used primarily during the summer months for rigorous "religious and educational instruction").

149. See *Walz v. Tax Comm'n*, 397 U.S. 664, 676-80 (1970). Tax exemption for religious leaders and organizations has been around a long time. See, e.g., Erika King, *supra* note 143, at 973-81; John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 522-45 (1992).

150. *Walz*, 397 U.S. at 669.

151. *Id.* at 678.

The entrenchment of property tax exemption has created a powerful financial incentive for religious institutions to expand their range of activities. Churches have entered into lease arrangements with for-profit entities, and are now offering everything from fitness centers, child and senior care centers, motion picture theaters, and even automobile repair on campuses dubbed "mega churches."¹⁵² They compete with secular offerings and do so below their secular competitors' costs with tax-exempt status. The churches bristle, of course, at the suggestion that any of these uses are not an "exercise" of religion and therefore fully expect the tax exemption originally intended for houses of worship to apply to these new uses. Obviously, the contours of tax exemption for religious properties are highly contested. The current political and legislative milieu, though, has favored expansion of the privilege.

The other emerging arena in which churches and church schools are receiving tax-free status appears in the increasing willingness of local municipalities to underwrite tax-free municipal bonds for church buildings and universities.¹⁵³

152. See, e.g., Sybel Alger, *Church to Celebrate Purchase of New Site at Service: Victoria Community Church in Riverside Plans to Build on a 48-acre Parcel on Alessandro Boulevard*, PRESS-ENTERPRISE (Riverside, California), May 27, 2000, at B06, available in 2000 WL 19871439 (discussing a planned mega-church, which, if approved by the city, would include "a gymnasium, an outdoor theater, a food court, a bookstore and senior-citizen housing"); Lori Baker, *Booming Church Serves All Ages; Community of Joy Has 11,000 Members*, ARIZ. REPUBLIC, Dec. 29, 1999, at 1, available in WL ARPG-C Database (describing a mega-church with "a child-care center serving 430 babies through preschoolers; an elementary school with 270 students from kindergarten through eighth grade, a leadership training center and administrative offices"); Bill Banks, *Added Blessings Getting Bigger: With Congregations in the Thousands, 'Mega Churches' Keep Growing as They Embrace Diversity*, ATLANTA J. & CONST., Feb. 17, 2000, at J1, available in WL ATLANTA-JC-C Database (describing such mega-church characteristics as "multiple ministries, a large sports complex, a television and/or radio ministry, a large day-care center and an elaborate educational program"); John Keilman, *Suburban Churches Enjoy Boom*, DAYTON DAILY NEWS, Mar. 26, 2000, at 1A, available in 2000 WL 7586600 (describing a planned mega-church that includes "two full-sized basketball courts and three baseball diamonds," a sanctuary with "a professional-quality theater stage and perhaps a wall of video screens," and "a coffee shop and bookstore"); Lisa Miller, *Registers Ring in Sanctuary Stores: Tax-Exempt Church Shops Peddle Stuffed Bears, Tapes and Special Coffee Blends*, WALL ST. J., Dec. 17, 1999, at B1 (describing San Francisco's Grace Cathedral, which features a café that "lets customers browse the bookshelves and listen to music while they sip specialty coffee blends").

153. See, e.g., Kirk Loggins, *Lipscomb to Appeal Ruling; 20 Private State Institutions Have Received Similar Tax-Free Bonds*, TENNESSEAN, Oct. 26, 2000, at 1B, available in 2000 WL

b. Sales and Use Taxes

The incremental expansion of property tax exemption has increased challenges by churches to other general schemes of taxation. In 1990, the Supreme Court was asked to decide whether the Free Exercise Clause required the California sales tax to exempt religious entities in *Jimmy Swaggart Ministries v. Board of Equalization*.¹⁵⁴ In that case, the Supreme Court upheld a California sales and use tax as applied to a religious ministry's sale of recorded broadcasts and other materials.¹⁵⁵ Jimmy Swaggart Ministries argued that a "tax on religious materials violated the First Amendment," specifically the Establishment and Free Exercise Clauses.¹⁵⁶ The Court did not find that the Constitution required this wealth transfer, but rather ruled that religious organizations could be taxed. It reasoned that the sales and use tax was not a tax on the right to disseminate religious information, ideas, or beliefs per se, but instead was a tax on the privilege of making retail sales of tangible personal property and on the storage, use, or other consumption of tangible personal property in California.¹⁵⁷

Jimmy Swaggart Ministries illustrates that the Court has not abandoned its balancing approach in the wealth transfer issues; there are financial advantages that churches may not demand of the government. It also illustrates how far religious entities in this era are willing to go to argue for those financial advantages.

2. Federal Income Tax Exemption

Local property tax exemptions come with few strings attached, except for some minor reporting requirements and the less obvious perils of engendering public disapprobation. This is a very different situation from the federal income tax exemption, which comes with

25361092 (noting that thirteen private colleges and universities in Tennessee with institutional ties to religious denominations had benefitted from tax-exempt bonds issued by local municipalities).

154. 493 U.S. 378, 380 (1990).

155. See *id.*

156. *Id.* at 383-84.

157. See *id.* at 394-96. The same conclusion has been reached regarding social security taxes. See *United States v. Lee*, 455 U.S. 252, 260-61 (1982).

burdens on the freedom of speech and association that in turn endanger the quality of the information in the marketplace of expression regarding the political preferences of some of society's most powerful players, the churches.

Religious entities have obtained tax exemption from federal income tax laws only on the condition that they foreswear lobbying on particular issues and supporting particular political candidates.¹⁵⁸ In other words, the price of federal income tax-exempt status has been greater (though certainly not total) silence in the political ring.¹⁵⁹ The instinct to place limitations on religion's power in exchange for federal government income tax exemption is perfectly consistent with the Constitution's general drive to a balance of power between church and state.¹⁶⁰ This particular balance, though, would appear to be a devil's bargain.

The result of the federal income tax exemption is to muzzle churches, and they have strained at the limitations.¹⁶¹ While candidate-neutral "voter guides" have become common in many churches,¹⁶² some churches do endorse particular candidates

158. See 26 U.S.C. § 501(c)(3) (1994) (granting exemption from taxation to religious organizations, "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office"); see also *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 856-57 (10th Cir. 1972) (holding that the denial of religious organization's tax-exempt status for political advocacy does not violate the First Amendment); *Branch Ministries, Inc. v. Rossotti*, 40 F. Supp. 2d 15 (D.D.C. 1999) (revoking church's tax-exempt status after publication of an anti-Clinton advertisement); Richard C. Montgomery, *Charitable Organizations and Prohibited Political Activities*, 63 PA. B. ASS'N Q. 83 (1992) (discussing section 501(c)(3)).

159. See 26 C.F.R. § 1.501(c)(3) (2000) ("Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate."); see also 26 U.S.C. § 501(h) (denying tax exemption to organizations whose activities include "carrying on propaganda, or otherwise attempting, to influence legislation" if the organization makes either lobbying or grass roots expenditures in excess of the ceiling amount for either expenditure each year). Religious organizations do not qualify for the latter exemption. See *id.* § 501(h)(5).

160. See Hamilton, *Vouchers*, *supra* note 4, at 812.

161. See, e.g., *Rossotti*, 40 F. Supp. 2d at 26-27 (revoking church's tax-exempt status after its publication of anti-Clinton advertisement).

162. See, e.g., Curt Anderson, *IRS Ruling Shakes Up Christian Coalition*, ARIZ. REPUBLIC, June 11, 1999, at A18, available in 1999 WL 4178302.

contrary to the IRS Code. Most voter guides do not endorse any particular candidate, but make clear where each candidate stands on matters of extreme importance to the particular church.

It is a nonsensical and dangerous scheme. Church and state do not cease their dialectical relationship in the face of the federal income tax laws. Instead, the relationship between certain churches and certain candidates is driven underground. It creates an "old boys" relationship between political and religious leaders, thereby reducing the knowledge of the general public of the actual play of power. It invites cabal and close, unexamined relationships and results in a situation that is the very opposite of the constitutional drive to make government transparent and accountable to the greatest extent possible.¹⁶³

The depletion of the marketplace of ideas by the federal tax policy is intolerable. Churches are the most powerful human structure to challenge the assumptive power of the state, and should not be barred from speaking out frankly at these crucial moments in American politics, not only for the sake of their members, but equally for the sake of nonmembers, who have a right to know who is handling the levers of power. The federal income tax policy reduces the capacity of the churches to speak out on the qualities of leadership their faiths would endorse, which is a net loss in the debate over virtue and its characteristics and undercuts the ability of the churches to challenge and criticize certain candidates. This is a troubling attack on the churches' rights under the Free Speech Clause of the First Amendment.¹⁶⁴

But the balance between church and state must be maintained. Federal income tax exemption with no countervailing policy that makes up for this religious privilege goes to the heart of Madison's deep concerns about the silent accumulation of wealth and power by religious entities.¹⁶⁵ Without the limitations on political activity, the exemptions would induce many organizations to claim some religious affiliation to benefit from the tax-exempt privilege, and

163. See, e.g., Hamilton, *Pathways*, *supra* note 14, at 11-12 (discussing the need for transparency).

164. *But see* *Christian Echoes Nat'l Ministry v. United States*, 470 F.2d 849, 856 (10th Cir. 1972) (holding that the denial of religious organization's tax-exempt status for political advocacy does not violate the First Amendment).

165. See *supra* notes 51-59 and accompanying text.

religiously related organizations would have relatively more wealth than secular organizations (other than charitable organizations) to spend on political objectives.¹⁶⁶ There is no lengthy history of federal income tax exemption in the United States, *a la Walz*, and therefore there is no tradition that would be undermined by repealing the churches' income tax exemption status. Indeed, the Sixteenth Amendment, which allowed for federal income taxation, does not exclude religious entities.¹⁶⁷

The federal income tax exemption laws have been used to permit the federal government to require certain beliefs and practices to obtain the tax-exempt benefit, which is another reason to eliminate this particular type of wealth transfer to religion. In *Bob Jones University v. United States*, the Court declined to recognize the University's federal tax-exempt status due to the school's racially discriminatory admissions policy.¹⁶⁸ Just as funding in the arts context has provided a platform for politicians and representatives to censor and to punish unpopular or unconventional views expressed in artworks, wealth transfer to religious institutions opens the door to government constraint of unpopular religious views. Rather, the important point to be made is that government financial support, and especially federal government support, inevitably entails the imposition of mainstream views on dissenting institutions. It reduces the diversity and the mix of views available in the marketplace of religion. On its face, the *Bob Jones University* opinion may have appeared to condemn the beliefs of Bob Jones University, but, as a constitutional matter, the fault did not lie in the University's beliefs but rather in its decision to accept federal tax exemption in the first place. Any entity accepting government support needs to understand the inevitable risks of which Madison warned.¹⁶⁹

166. See, e.g., Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308, 320 (1990) ("It is nearly as settled, at least in Congress and the courts, that permitting a section 501(c)(3) organization to engage in election-related activity would be equivalent to granting a 'subsidy' of public funds for the activity.")

167. See U.S. CONST. amend. XVI.

168. 461 U.S. 574, 602-05 (1983).

169. See, e.g., CARTER, *supra* note 185, at 6 ("Religion, which should be in love with witness and persuasion, has all too often in history allowed itself to be seduced by the love of temporal power, a passionate but dysfunctional and even immoral love affair that has led

There are those who would applaud the instinct at the heart of government funding that tends to generate a uniform society. Stephen Macedo has defended the concept of "civil society" on the very ground that it reduces differences and increases homogenization.¹⁷⁰ Such uniformity of belief, however, is the opposite of Madison's vision of the healthy constitutional scheme.

C. Direct Handouts

1. Medicare and Faith-healers

Federal Medicare law permits those who believe that medical care is inappropriate to obtain federal dollars for the "nursing" of their dying members.¹⁷¹ In its first form, the Act specifically identified Christian Science "sanatoria" as the recipients of such federal funding. After that obviously unconstitutional statute was overturned,¹⁷² the Act was amended so that it did not *explicitly* aid Christian Scientists by substituting "Religious Nonmedical Health Care Institution" whenever "Christian Science Sanatoria" had appeared.¹⁷³ The amendment was an instance of pretextual neutrality, where the actual purpose of the Act to funnel funds to a particular religious sect is obvious, but the language employed to do so is neutral on its surface.¹⁷⁴ On a similar tack, an HMO bill

to much human misery and has been destructive as well of true faith."); see generally MONSMA, *supra* note 10; Madison, *Memorial and Remonstrance*, *supra* note 1.

170. See generally Macedo, *supra* note 62, at 420-23.

171. See Medicare Act, 42 U.S.C. §§ 1395-1395zz (1994 & Supp. IV 1998); *Children's Healthcare is a Legal Duty, Inc. v. Vladeck*, 938 F. Supp. 1466, 1479-80 (D. Minn. 1996) (holding unconstitutional a regulation mandating payments for Christian Science members because it was sect specific).

172. See *Children's Healthcare*, 938 F. Supp. at 1485.

173. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4454, 111 Stat. 251, 426-32 (codified as amended in scattered sections of 42 U.S.C.); see *Petition for a Writ of Certiorari at 2-4, Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084 (8th Cir. 2000) (No. 98-3521), *petition for cert. filed*, 69 U.S.L.W. 3410 (Nov. 27, 2000) (No. 00-914).

174. Addressing a similar theory in a Free Exercise case, the Supreme Court found that the apparently neutral language in an ordinance banning "animal sacrifice" was in fact pretextual and hid the legislature's agenda to persecute the members of the Santeria religion. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); see also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (finding school's facially neutral policy of holding student-led payers at football games to be an instance of pretextual neutrality).

in the 105th Congress contained a provision that would have permitted faith-healing nurses to receive HMO insurance funds, and to do so without satisfying the rigorous screening requirements attached to any medical provider's request for payment.¹⁷⁵

2. The Directed Sale of the Old Soldiers Home Land to Catholic University

In a little-noticed amendment to a Department of Defense authorization bill, Congress directed the Old Soldiers Home in Washington to sell forty-nine acres to its neighbor, Catholic University.¹⁷⁶ The Home, which was in severe financial straits, had asked for permission from Congress to sell the forty-nine acres to avoid bankruptcy. Instead of permitting the Home to put the land on the open market to achieve its highest value, Congress directed the Home to sell the land to Catholic University for the construction of a Peace Institute.¹⁷⁷ The Home, which had worked out a plan with a contractor to turn the land into a profit generator, resisted the sale, as did a group of retired veterans who were either housed at the Home, or hoped to have the Home available if needed.¹⁷⁸

In the face of such pressure, and the threat of a lawsuit based on the Establishment Clause, Congress amended the law to permit an open market sale, but gave Catholic University the right of first refusal and placed a one-year time limit on the open market sale.¹⁷⁹

3. Church Breach of Fiduciary Duty

One of the means by which churches can have their finances reduced is through clergy malpractice lawsuits.¹⁸⁰ In these cases,

175. See S. 2416, 105th Cong. § 3(d) (1998).

176. See H.R. 3616, 105th Cong. § 1043 (1998).

177. See Dale Eisman, *Vets, Church Struggle Over 49-Acre Parcel in Washington*, VIRGINIAN-PILOT, Mar. 22, 1999, at A1, available in 1999 WL 7159310.

178. See Steve Vogel, *Veterans Home Retains Right to Keep Operating: Defense Bill Allows Land in NE to be Sold to the Highest Bidder*, WASH. POST, Oct. 9, 1999, at B4.

179. See H.R. 1401, 106th Cong. § 365 (1999).

180. See, e.g., Paul A. Clark, *Clergy Malpractice After F.G. v. MacDonell and Sanders v. Casa View Baptist Church*, 22 AM. J. TRIAL ADVOC. 229 (1998); Melissa A. Provost, *First Amendment-Free Exercise Clause-Cleric Who Engaged in Sexual Acts While Providing Pastoral Counseling to a Parishioner Can Be Held Liable for Breach of Fiduciary Duty-F.G.*

churches are charged with responsibility for knowingly permitting clergy members to abuse children or disabled adults.¹⁸¹ Churches

v. MacDonell, 150 N.J. 550, 696 A.2d 697 (1997), 8 SETON HALL CONST. L.J. 625 (1998); James A. Serritella, *Insurance Coverage Issues in Cases of Clergy Misconduct*, 39 CATH. LAW. 55 (1999); Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U. L. REV. 1 (1996); Faye M. Hammersley, Comment, *Reconciling L.L.N. v. Clauder and Pritzlaff v. Archdiocese of Milwaukee: Does this Mean Blanket Immunity for Religious Organizations?*, 81 MARQ. L. REV. 611 (1998); James Brooke, *Facing Ruin From Lawsuits, Anglicans in Canada Slash Budget*, N.Y. TIMES, Aug. 23, 2000, at A6.

181. See, e.g., Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 430 (2d Cir. 1999) (vacating and remanding for new trial on questions arising from fraudulent concealment tolling statute, but affirming jury finding that the diocese breached fiduciary duty to parishioner by failing to investigate whether a priest had sexually abused minor parishioners); Sanders v. Casa View Baptist Church, 134 F.3d 331, 335-40 (5th Cir. 1998) (finding that plaintiffs could sue minister directly, but that church was not liable for minister's sexual harassment of female employees during the course of providing marriage counseling that violated church policy); Dausch v. Rykse, 52 F.3d 1425, 1427-29 (7th Cir. 1994) (finding that Illinois law would not recognize parishioner's claim for breach of fiduciary duty against pastor and church for pastor's involvement with the parishioner, to whom he was providing counseling, but allowing claim under Illinois psychotherapy statute along with claim of professional negligence); Fenelon v. Byrd, No. Civ. A. 99-1052, 1999 WL 600380, at *1 n.5 (E.D. La. Aug. 6, 1999) (dismissing, among others, plaintiffs' claim for clergy malpractice because no such claim exists under Louisiana law); Doe v. Hartz, 52 F. Supp. 2d 1027, 1079-81 (N.D. Iowa 1999) (allowing claim for respondeat superior liability for priest's alleged behavior toward parishioner, but dismissing breach of fiduciary duty claims against priest and diocese); Wilson v. Diocese of the Episcopal Church, No. 96 Civ. 2400 (JGK), 1998 WL 82921 (S.D.N.Y. Feb. 26, 1998) (dismissing claims of negligent hiring and liability under respondeat superior against church and diocese when they did not and could not have known of propensity of priest to commit sexual assault when they hired him); Maryland Cas. Co. v. Havey, 887 F. Supp. 195 (C.D. Ill. 1995) (finding that insurance company had no duty to defend charges of sexual abuse of minors, because behavior was not covered by policy, and further, because Illinois does not recognize a duty between clergymen and congregations, and finding that company had no duty to indemnify priest for any award arising therefrom, because policy was not applicable); Isely v. Capuchin Province, 880 F. Supp. 1138 (E.D. Mich. 1995) (dismissing breach of contract, statutory negligence, and common law negligence claims against a seminary and its directors for failing to report priest's sexual abuse when there was no evidence that directors were on notice of the abuse); Barquin v. Roman Catholic Diocese, Inc., 839 F. Supp. 275 (D. Vt. 1993) (holding that claims against Catholic orphanage were not barred by statute of limitations when plaintiff recalled sexual abuse during psychotherapy 40 years later); Schmidt v. Bishop, 779 F. Supp. 321 (S.D.N.Y. 1991) (finding no claim of clergy malpractice sustainable in New York, and holding intentional tort claims for sexual abuse time barred); Bear Valley Church of Christ v. DeBose, 928 P.2d 1315 (Colo. 1996) (reinstating trial court's breach of fiduciary duty verdict against minister who inappropriately touched child parishioner during therapy sessions, and finding that Free Exercise Clause of First Amendment protected neither minister nor church from liability); Bohrer v. DeHart, 943 P.2d 1220, 1231 (Colo. Ct. App. 1996) (upholding verdict of breach of fiduciary duty and outrageous conduct against minister who had engaged in a sexual relationship with minor parishioner, along with verdict of negligent hiring and supervision

carry insurance for such breaches, but that has not halted them from lobbying for immunity from such lawsuits, thereby leaving the victim with a low-paid clergy member as the only means of redressing the abuse in a civil suit.

Colorado, viewed as a testing ground for such laws, has considered legislation that would make church coffers immune to fiduciary duty claims even when the church knew of the abuse.¹⁸² The law was narrowly defeated, and has been reintroduced.¹⁸³ The Presbyterian and Catholic Churches joined together to lobby for the bill, and the special counsel on religious and civil liberties for the National Council of Churches stated: "Churches provide so many social services Compensatory awards you can understand, but when you get into punitive awards of millions of dollars . . . you have to wonder if this is what society wants."¹⁸⁴

D. Mission Support, or Charitable Choice

Of the new entrants in the wealth movement to religion, mission support, or as it is euphemistically called today, "charitable choice" proposals, ought to give both churches and the government reason to pause.¹⁸⁵ In all fairness, some churches have publicly condemned

against conference, but reversing claims for breach of fiduciary duty and punitive damages against conference, and reversing compensatory and punitive damages against minister and conference); *F.G. v. MacDonell*, 696 A.2d 697 (N.J. 1997) (allowing parishioner to proceed with breach of fiduciary duty claim against married rector, and counselor, with whom she was involved in a sexual relationship).

182. See, e.g., Editorial, *Clergy, Therapists and Sex the Issue: Should it be More Difficult to Get Money When an Affair Goes Bad?; Our View: More Difficult, Yes; Impossible, No*, DEN. ROCKY MTN. NEWS, Feb. 8, 1999, at 34A, available in 1999 WL 6639259 (discussing then-proposed House Bill 1290, which would insulate religious entities through limitations on lawsuits "based on breach of fiduciary duty to cases involving money or property only . . . [t]hat definition still covers a lot of territory . . . [b]ut not a suit claiming a member of the clergy sexually exploited someone he (or perhaps she) was counseling").

183. See Jillian Lloyd, *Churches Seeking Shield from Lawsuits*, CHRISTIAN SCI. MONITOR, Oct. 28, 1999, at 1.

184. *Id.* (quoting Rev. Oliver Thomas).

185. See, e.g., STEPHEN L. CARTER, *GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS* 5 (2000) ("A religion that becomes too settled in the political sphere, happily amassing influence and using it, is likely to lose its best and most spiritual self, as has happened to established churches all over Europe, which nowadays find themselves virtually without a voice—small wonder, as they have relied on man rather than God for their sustenance."); see generally MONSMA, *supra* note 10, at 4-7.

these proposals,¹⁸⁶ but these proposals are receiving negligible resistance in Congress and are portrayed as an unalloyed good for the United States. Already, federal statutes have been amended to include charitable choice provisions.¹⁸⁷ Both political parties made charitable choice a pillar of their presidential campaigns.¹⁸⁸

Charitable choice is nothing other than government aid for religious missions. To state the same point differently, religious entities that seek and receive charitable choice money are those that engage in such services for the purpose of fulfilling their religious mission. These funds typically are directed at the good works—from care for the poor to education to drug treatment—that are at the heart of the particular religion's mission, and it is the religious component that is credited with the success of the program. Madison's ride down the slippery slope that starts at "three pence" surely stops here, with government funding core, mission activities of religious organizations.

The reasoning behind charitable choice is that faith-based organizations (or FBOs, as they have been dubbed) have a better track record than the government in solving problems such as teenage delinquency and drug dependency,¹⁸⁹ or that they provide

186. See *supra* note 46 and accompanying text.

187. See proposed provisions cited *supra* note 68.

188. For an extensive listing of Governor George W. Bush's proposed "faith based initiatives," see Faith Based Initiatives, at <http://www.georgewbush.com/issues.asp?FormMode=FullText&ID=33> (last visited Sept. 19, 2000). In a May 24, 1999 speech addressing the "Role of Faith-Based Organizations," Vice President Al Gore stated: "I believe we should extend this carefully tailored approach [charitable choice] to other vital services where faith-based organizations can play a role—such as drug treatment, homelessness, and youth violence prevention." Al Gore, *The Role of Faith-Based Organizations*, at http://www.algore.com/speeches_faith_052499.html (last visited Sept. 19, 2000).

189. See *Teen Challenge World Wide Network*, at <http://www.teenchallenge.com/main/tc/abouttci.htm> (last visited Sept. 19, 2000) ("During their 1-year stay, [residents] do not hold down outside jobs, as all of their attention is focused on the program. We challenge the residents to embrace the Christian faith. We see that when they do, their lives are transformed and they find true meaning and purpose."); see also *Teen Challenge's Proven Answer to the Drug Problem*, at <http://www.teenchallenge.com/tcreview.html> (last visited Sept. 19, 2000) (reviewing a study of Teen Challenge International's residential program, conducted by Northwestern University researcher Dr. Aaron Bicknese). The organization's review of the study, completed in June 1999, asserts that:

[t]he results show that with at least one very popular type of publicly funded secular drug treatment program, Teen Challenge is in many ways far more effective. The study particularly emphasized Teen Challenge's ability to help students gain new social skills, so that upon leaving the program, the Teen

superior counseling support in prisons.¹⁹⁰ Yet, such groups, like Teen Challenge or Prison Fellowship, claim that the reason their programs work better is *because* of their religious content.¹⁹¹ We need to be absolutely clear here: the but-for reason proffered for the success of these religious welfare service programs is the presence of God, or religion, in the program. They claim they work better *because* God is integrally incorporated throughout the program.¹⁹² The opposite point is being made by these groups as well: without God, a program cannot work and therefore the government cannot succeed with such programs. Thus, government funding is being employed, not because a religious organization is filling a gap left by the government's decision to reduce its involvement in welfare services, but rather because the religious organization will offer a different set of welfare services—religious welfare services.

Until recently, religious entities receiving government money for social programs had been required to show that the money was used for nonsectarian purposes.¹⁹³ This requirement arose out of

Challenge student, compared to clients of the secular programs surveyed, is productively employed at a much higher rate and has a dramatically lower chance of returning for further residential treatment.

Teen Challenge's Proven Answer to the Drug Problem, supra.

190. See *Prison Fellowship Ministries* at <http://www.pfm.org> (last visited Sept. 19, 2000).

191. See *supra* notes 189-90; see also Kevin Butler, *Faith-Based Groups Win Aid, Praise in Battle Against Serious Social Ills*, INVESTOR'S BUS. DAILY, A28 (Aug. 14, 2000), available in LEXIS, News Library, Investor's Business Daily File (citing support for the "faith factor" of charitable choice); Al Gore, *The Role of Faith-Based Organizations*, at http://www.algore.com/speeches/speeches_faith_052499.html (last visited Sept. 19, 2000). Gore argues:

There is a reason faith-based approaches have shown special promise with challenges such as drug addiction, youth violence, and homelessness. Overcoming these problems takes something more than money or assistance—it requires an inner discipline and courage, deep within the individual. I believe that faith in itself is sometimes essential to spark a personal transformation—and to keep that person from falling back into addiction, delinquency, or dependency.

Gore, *supra*.

192. See *supra* notes 189-90 and accompanying text (discussing the religious bases of both Teen Challenge and Prison Fellowship).

193. See, e.g., *Meek v. Pittenger*, 421 U.S. 349, 359-73 (1975) (upholding a Pennsylvania statute allowing for textbook loans to nonpublic schools, but overturning as violative of the Establishment Clause statutes providing for auxiliary services and instructional materials); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 798 (1973) (overturning New York statutes that provided aid to nonpublic schools, and provided aid and tax benefits to parents of children attending nonpublic schools because the statutes had a

the case law forbidding government aid to pervasively sectarian institutions, a principle that rests on the fundamental constitutional norm that all expenditures of government funds ought to be capable of being accounted to the people on neutral grounds.¹⁹⁴

"primary effect that advance[d] religion" and were violative of the Establishment Clause); *Columbia Union College v. Clarke*, 159 F.3d 151, 157-58 (4th Cir. 1998) (holding that direct state funding of general education courses at a "pervasively sectarian" institution would violate the Establishment Clause); *Decker v. O'Donnell*, 661 F.2d 598, 606-08 (7th Cir. 1980) (holding that placement of persons employed under the Comprehensive Employment Training Act (CETA) in sectarian schools created an impermissible risk of political entanglement for the CETA program); *Fordham Univ. v. Brown*, 856 F. Supp. 684, 700-01 (D.D.C. 1994) (holding that National Telecommunications and Information Administration regulations prohibiting sectarian use of federally funded broadcast equipment did not excessively entangle government with religion).

194. See, e.g., *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 389-90 (1990); *Hernandez v. Commissioner*, 490 U.S. 680, 684-85 (1989) (finding that payments, whether called "fixed donation[s]," "price," or "fixed contributions," made to churches for services called "auditing and training" are not deductible charitable contributions or gifts); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 10 (1989) (plurality opinion) (opinion of Brennan, J.) (finding that a Texas statute providing sales tax exemption for long-term subscriptions on religious periodicals but not nonreligious periodicals violated Establishment Clause); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227-28 (1987) (holding that Arkansas sales tax scheme that taxed general interest magazines but exempted newspapers and religious, professional, trade, and sports journals, and/or publications printed and published within the state, violated First Amendment on freedom of the press grounds); *Bob Jones Univ. v. United States*, 461 U.S. 574, 602-05 (1983) (holding that the University's policy of refusing admission to interracial couples was racially discriminatory; nonprofit educational institutions with discriminatory admissions policies, even if based on religious interpretation, were not eligible for tax exemption; contributions to such schools were not eligible for charitable deductions); *California v. Grace Brethren Church*, 457 U.S. 393, 396, 415-19 (1982) (vacating on jurisdictional grounds a decision enjoining enforcement of a cooperative federal-state excise tax scheme to provide benefits to unemployed workers, which entitled employers to reimbursement of up to 90% of the taxes paid if the employer was in a defined category of "covered" institutions, including, inter alia, religious organizations); *Larson v. Valente*, 456 U.S. 228, 244-55 (1982) (invalidating a Minnesota statute imposing registration and reporting requirements on religious organizations receiving more than half of their total contributions from nonmembers or nonaffiliated organizations, but none on those receiving the same from members/affiliating organizations); *Valley Forge Christian College v. Americans United for Church and State, Inc.*, 454 U.S. 464, 485-86 (1982) (dismissing for lack of standing as either taxpayers or citizens, a challenge to a transfer without payment of federally ordered property to a religiously related college); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 735-36, 748-50 (1974) (denying injunctive relief that would protect tax-exempt/charitable contribution deduction status to a university that maintained racially discriminatory admissions practice, in spite of claim that practice was allegedly driven by religious interpretation); *Hunt v. McNair*, 413 U.S. 734, 735-36, 741-49 (1973) (upholding a proposed South Carolina bond scheme designed to generate revenue through issuance of tax-exempt bonds that would benefit a Baptist college, because the scheme did not constitute excessive entanglement, nor was the school pervasively sectarian); *Nyquist*,

As a result, religiously affiliated organizations have evolved, with a separate existence from their sectarian parent and with their claims to secular handling of government money intact.¹⁹⁵ As others before me have argued, a system that generates an internal split between mission and proselytizing in a religious organization is a system that is unhealthy for religious entities.¹⁹⁶ If there is a claim to secularization in our society, a claim I usually resist as an empirical matter, it has occurred when religious organizations have accepted government money for their mission and split apart in order to receive it.¹⁹⁷ There is little question that such funding results in the very end that Madison predicted and feared: "[A] Bill establishing a provision for Teachers of the Christian Religion' . . .

413 U.S. at 771-72, 798 (invalidating on Establishment Clause grounds a New York statute granting aid to nonpublic schools); *United States v. Christian Echoes Nat'l Ministry, Inc.*, 404 U.S. 561, 562-66 (1972) (per curiam) (dismissing for want of jurisdiction the U.S. government's appeal of an order granting a tax refund to a corporate plaintiff which the district court judge had singularly found was operated exclusively for religious purposes and was thus exempt under the Internal Revenue Code despite its lobbying activities; because the judge found only that the organization qualified for tax exemption, and did not find a congressional act unconstitutional, either on its face or as applied, the government improperly relied on 28 U.S.C. § 1252 as the basis for appellate jurisdiction); *Tilton v. Richardson*, 403 U.S. 672, 675-76, 678-79 (1971) (striking as violative of the Establishment Clause the portion of the Higher Education Facilities Act of 1963 placing a 20-year limit on the use of government financed facilities for religious purposes, but upholding the remainder of the Act); *Walz v. Tax Comm'n*, 397 U.S. 664, 669-80 (1970) (upholding New York statute exempting from tax property owned by organization with, and used for, exclusively religious purposes as violative of neither the Establishment Clause nor the Free Exercise Clause); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 209-12 (1948) (granting mandamus requiring board of education to adopt and enforce rules prohibiting teaching of religious education in public schools and in public buildings when occupied by the schools); *Everson v. Board of Educ.*, 330 U.S. 1, 15-18 (1947) (upholding resolution providing for transportation of students to both public and parochial schools).

195. See, e.g., Catholic Charities USA, *Who We Are*, at <http://www.catholiccharitiesusa.org/who/> (last visited Sept. 19, 2000) ("[Our] mission is: to provide service for people in need, to advocate for justice in social structures, and to call the entire Church and other people of good will to do the same.").

196. See, e.g., CARTER, *supra* note 185, at 6 ("Religion, which should be in love with witness and persuasion, has all too often in history allowed itself to be seduced by the love of temporal power, a passionate but dysfunctional and even immoral love affair that has led to much human misery and has been destructive as well of true faith."); see generally MONSMA, *supra* note 10, at 80-107; Madison, *Memorial and Remonstrance*, *supra* note 1, at 67-68.

197. See generally MONSMA, *supra* note 10, at 120-27 (describing the "pervasively sectarian" standard and arguing that if it were strictly followed, religious organizations would not be eligible to receive funds until purged of religious elements).

if finally armed with the sanctions of a law, will be a dangerous abuse of power"¹⁹⁸

Even these disestablishment principles—the requirement that a religious organization create a secular recipient of government funds—appear to have fallen by the wayside, however, as recent charitable choice proposals have proliferated that would give government money to pervasively sectarian institutions without any meaningful limitation.¹⁹⁹ Indeed, such proposals encourage religious organizations to retain their full religious character in the context of providing social services. First, they provide explicit permission to fund pervasively sectarian entities.²⁰⁰ Second, there is implicit permission for indoctrination of welfare recipients, with the burden falling on welfare recipients to complain about proselytizing.²⁰¹ Third, religious organizations receiving such government money receive a special privilege to trump the antidiscrimination laws.²⁰²

198. Madison, *Memorial and Remonstrance*, *supra* note 1, at 65-66.

199. See, e.g., Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 604a (Supp. IV 1998); Medicare Act, 42 U.S.C. §§ 1395-1395zz (1994); Community Services Block Grant Program, 42 U.S.C. § 9920 (1998); Fathers Count Act of 1999, H.R. 3073, 106th Cong.; Youth Drug and Mental Health Services Act, S. 976, 106th Cong. (1999); Charitable Choice Expansion Act of 1999, S. 1113, 106th Cong.; Charity Empowerment Act of 1999, H.R. 1607, 106th Cong.; Charity Empowerment Act of 1999, S. 997, 106th Cong.; Marc Lacey, *Bush Fleshes Out Details of Proposal to Expand Aid to Religious Organizations*, N.Y. TIMES, Jan. 31, 2001, at A15.

200. See, e.g., 42 U.S.C. § 604a(b) ("The purpose of this section is to allow States to contract with religious organizations . . . on the same basis as any other nongovernmental provider without impairing the religious character of such organizations"); 42 U.S.C. § 9920(b)(1) ("A religious organization that provides assistance under a program described in subsection (a) of this section shall retain its religious character and control over the definition, development, practice, and expression of its religious beliefs.").

201. See, e.g., 42 U.S.C. § 604a(d)(2)(B) ("Neither the Federal Government nor a State shall require a religious organization to . . . remove religious art, icons, scripture, or other symbols"); see also Charitable Choice Expansion Act of 1999, S. 1113 (allowing a religious organization funded by charitable choice to "require that its employees providing assistance under such program adhere to the religious tenets and teachings of such organization"). Senator John Ashcroft has endorsed a "Questions and Answers" guide released by the Center for Public Justice that notes: "Beneficiaries have access to an alternative provider and may be deemed to have consented to the religious characteristics and practices of a provider from whom they accept service." A Guide to Charitable Choice, A Letter from Senator Ashcroft, at <http://cpjjustice.org/CGuide/ccqanda.html#letter> (last visited Sept. 21, 2000).

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

The structuring of social services by the charitable choice provisions also reveals a Congress sublimely unconcerned about placing unfettered power in the hands of religious entities. The way they are written, a single religious entity could obtain the federal government contract for an entire state and then have the sole power to subcontract all of those particular services in that state. For example, the Baptist Church could obtain the teenage drug dependency contract for the entire state of Illinois and then hold the power to determine what other entities in Illinois would receive federal funds for teenage drug dependency services.²⁰³

The original platform was to reduce welfare for the purpose of getting people back to work and restoring their dignity, and to underwrite tax cuts.²⁰⁴ But government and politicians found it impossible to remove themselves from welfare as fully as they could have. Welfare was reduced, but welfare cuts did not ineluctably lead to tax cuts. Rather, the federal government retained control of the welfare purse. The rising political power of religion made it the most attractive recipient for these funds, and now we have an entire movement of religious organizations arguing that it has a *right* to government welfare funds to carry out the work the government failed to provide.²⁰⁵

There was another tack: Government could have removed itself from control of welfare by reducing its involvement and reduced tax

section.”).

203. See, e.g., 42 U.S.C. § 9920(e) (“If an eligible entity or other organization . . . acting under a contract . . . with the Federal Government or a State or local government, is given the authority under the contract or agreement to select nongovernmental organizations to provide assistance . . . [this organization] shall have the same duties under this section as the government.”).

204. See, e.g., Republican National Committee, *Principles of the 1996 Republican Platform*, at <http://www.rnc.org/2000/96platform2> (last visited Sept. 21, 2000) (“Because we recognize our obligation to foster hope and opportunity for those unable to care for themselves, we believe in welfare reform that eliminates waste, fraud and abuse; requires work from those who are capable; limits time on public assistance; discourages illegitimacy; and reduces the burden on the taxpayers.”).

205. See, e.g., *Prepared Statement of Dave Batty, Executive Director, Teen Challenge, Inc., Brooklyn, NY Before the House Ways and Means Committee, Human Resources Subcommittee*, FED. NEWS SERVICE, Oct. 28, 1997, available in LEXIS, News Library, Federal News Service File (“There is a great need for the federal government to find appropriate ways to partner with faith-based programs which are proving to be so successful in treating those with drug addictions.”).

rates proportionally.²⁰⁶ The reduction in tax rates would have freed more money per capita that could have been used by the people to support the charities, including religious, of their choice—a move that is encouraged through tax deductions.²⁰⁷ Yet, the federal government could not trust the people to use their money charitably, could not release its control over the purse, and religion could not resist this large pot of money, both refusing to acknowledge that money coming from individuals would have fewer strings attached than money coming from the government.

IV. SHORT-TERM AND LONG-TERM PERILS OF IGNORING MADISON'S MANY WARNINGS AGAINST GOVERNMENT AID FOR RELIGION

The arts-funding cases and the story of Grant's Peace Policy should make clear that government funding of First Amendment-protected activities is a poisoned apple. In the short term, religious entities may benefit from the increased cash flow, whether it is achieved through direct handouts, tax schemes, or vouchers. More money equals more means to achieve the religious organization's goals. When those goals are laudatory, like getting kids off drugs, it is hard to see any long-term risk that outweighs the short-term benefit. In the short term, church and state will retain sufficient separation through the lingering aura of former Establishment Clause jurisprudence and, therefore, it would appear to be a win-win situation.

While government and religion will retain their nominal identities in the short term, however, the two will increasingly become unequal financial partners. As religion becomes the beggar, like the churches acting as agents under Grant's Peace Policy, asking for this amount of money for this mission at this particular time, government will become the enslaver, capable of demanding accountability and loyalty.

As time marches on, it will be increasingly difficult to tell the difference between government and religion, because of the

206. See generally Alice Gresham Bullock, *Taxes, Social Policy and Philanthropy: The Untapped Potential of Middle- and Low-Income Generosity*, 6 CORNELL J.L. & PUB. POL'Y 325, 327-29 (1997) (arguing that tax deductions for gifts to charitable organizations should be expanded to help compensate for reductions in welfare spending).

207. See *id.*

blending of their roles and their money.²⁰⁸ Such a church/state compact would submerge the healthy distrust built into the core of the Constitution that ensures the two entities challenge each other.

In the long term, these protections must give way: either government's passionate embrace of religion will lead to the public's inability to know how its money is being used or religion will have to open its doors and books for the public to read. By introducing widespread government support for religious entities, government not only funds those entities currently providing the services it seeks to provide, but also creates an incentive to claim a religious basis for a program. To state the matter slightly differently, by providing the carrot of special treatment for religious entities, wealth transfers to religious entities send the message that it pays to be religious. Those religious organizations that actually do provide for the general welfare will be joined by many others. The one disestablishment principle currently at its maximum is that the government cannot distinguish between different religions based on their theology. When the Luciferians want to assist troubled youth or the Ku Klux Klan seeks oversight of welfare-to-work, they cannot be rejected on the basis of their theology. No matter how drunk we are with the wonders of religion—and it does display wonders at times—the constitutional instinct to balance power between church and state will drive government to find neutral reasons for choosing to fund some religions and not others. We know the outcome: the inter-sect disputes generated by Grant's Peace Policy. Instead of wandering into the battlefield of righteousness over differing theologies, one might as well start by providing neutral reasons for choosing to fund any religion from the beginning. This is the path that requires exploration if the political will to fund religious organizations persists. Neutrality and accountability ought to be the watchwords for this tightrope feat.

Germany offers a startling example of the results of government involvement in religious finances. In Germany, individuals do not give directly to their churches, but rather the government taxes individuals who claim church membership and transfers the funds

208. To some degree, we are already there with respect to government funding of religious social services carried out by nonsectarian organizations like Catholic Charities. See MONSMA, *supra* note 10, at 50-51.

to the churches from government coffers.²⁰⁹ The result has been less voluntary giving to churches and a sense that no individual holds responsibility for the church's mission. Rather, the government holds sole responsibility for the churches' financial plight. Attendance and giving have gone down in a way that suggests a wedge was driven between the people and their churches by the government's intervention as banker for the churches.

Taking the arts-funding cases and the Peace Policy together with the German example, it becomes clear that when government intervenes in church finances, it alienates, attempts to control, and assumes the church will serve *its* ends. Church and state cease to operate as mutual checks on each other, each losing sight of their independent role in serving the people. On the one hand, then, churches are disempowered.

On the other hand, government funding will enrich certain churches—those that serve the ends government has identified—as compared to other churches. A church/state compact consisting of ideologically mainstream religions, and which gathers to itself government money for certain core, religious missions will lead to greater intolerance than is already inevitably present in a religious society.²¹⁰ Tolerance is never absolute, but rather a matter of degree in each society. It has been achieved to the degree it has in the United States only because we have realized Madison's vision of separate sects, each free to persuade the other of its truth, but neither empowered with the government's might to accomplish its own ends at the expense of all others. Government funding of certain religions that stand shoulder-to-shoulder with government will trigger an intolerance of those left out of the funding stream (whether by choice or ideology) that will invite nothing short of war, as much as I hesitate to make such a strong statement.

If not war, massive government support for religious entities will engender an inevitable backlash by those who are not part of the

209. Under the authority of Article 137 of the Weimar Constitution of 1919, established religious communities (Catholic Church, various Protestant denominations, Judaism) were authorized to collect tax from their members. See GERMAN CONST. OF 1919, reprinted in ALBERT P. BLAUSTEIN & JAY A. SIGLER, *CONSTITUTIONS THAT MADE HISTORY* 379 (1988). The continued validity of this provision is confirmed expressly by Article 140 of the Basic Law of the Federal Republic. GRUNDGESETZ [GG] [Constitution] art. 140 (F.R.G.).

210. See, e.g., Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2264-65 (1997).

believing coterie. The upshot could be a backlash against religion. Let religion systematically abuse children on government money; let it refuse to report how it has spent government largesse, and there will be an equal and opposite reaction. The distance and barriers between church and state instituted by the Establishment Clause reduce the likelihood of warfare. The swing of the pendulum is built into the U.S. Constitution, and the pendulum will swing back if the people perceive privilege and unfairness:

At that time, we had in the United States a revolution against established churches and against the special privileges they received. We are now witnessing a counter-revolution by the Supreme Court, by government, and some Christian agencies. What we are now facing is an acute danger, as well as a great opportunity.²¹¹

These bleak, Madisonian predictions are no less accurate now than they were a decade ago when John Witte said:

For many people—adherents and antagonists alike—tax exemptions and other legal privileges have rendered the contemporary church too mercenary, too opulent, and too self-indulgent. The church's voluntary renunciation of one of its privileges would do much to allay the anxieties of its adherents and to parry the attacks of its antagonists.²¹²

CONCLUSION

Madison's rule of "not three pence" to religious entities was not hyperbole, but rather evidence of a sage understanding of the way in which power operates through church and state. This era has failed to use the Establishment Clause as a meaningful weapon against the slide down the slippery slope Madison identified. The tide of government financial aid to religions has increased nearly imperceptibly.

The steady, silent, incremental increase of wealth transfers to religion has given presidential candidates and federal and state

211. Swomley, *supra* note 144, at 602.

212. Witte, *supra* note 142, at 415.

legislators the sense that they cross no meaningful constitutional or moral lines when they advocate giving government money or benefits directly to religious organizations. Not only are the examples of wealth transfer in this Article in tension with Madison's core understanding of the Establishment Clause, but they are also the opening of new paths to new instances of First Amendment infringement by trustee-minded representatives. If the arts cases are as much of a strong indicator as I argue in Part III, then these various instances of government funding in the religious context inevitably will lead to government attempts at suppression through condemnation, assertion of direct control, and pledges to control the religious recipient or situation in the future when the religious organization challenges majority preconceptions.²¹³ There is already a harbinger of this in the congressional response to the revelation that Army bases were permitting Wiccans to practice their religion on Army bases pursuant to the Religious Freedom Restoration Act—a discovery greeted with cries of outrage from members of Congress.²¹⁴

The message of the arts cases is that government financing of First Amendment-centered activities inevitably comes with strings attached—dangerous strings. If the current increases in wealth transfer continue apace, the result is likely to be government attempts at suppression of religious practices and beliefs. Such attempts will increase geometrically as government aid programs collide with the constitutional requirement that prohibits the government from denying benefits on the basis of belief, creed, or sect identity. A white supremacist group may well build a school with the political savvy to apply for and obtain voucher funds. When the funds start flowing to groups whose beliefs are not reflected in the mainstream, the reality that such aid can underwrite religious proselytization and mission will come home to roost. There will be loud complaints about the money flowing to those religions, just as government aid to religion has been decried

213. See *supra* notes 79-103 and accompanying text (discussing the pattern of government response in arts cases).

214. See, e.g., Kim Sue & Lia Perkes, *Wiccans Becoming More at Home in Military: Their Numbers Are Small, but Fort Hood's Openness Continues to Generate a Heated Response*, DALLAS MORNING NEWS, May 29, 1999, at 1G, available in 1999 WL 4124184 (reporting that Representative Bob Barr asked Fort Hood's commanding officer to "stop this nonsense").

most vociferously when public morality was challenged by an artwork.²¹⁵

When controversial religions step into the government aid line, there will be an impetus to cut such funding altogether. No one suggested eradicating or reducing the budget of the National Endowment for the Arts until it funded works that offended certain mainstream quarters. The reasons for defunding in that circumstance were viewpoint-discriminatory and unconstitutional. The root of the constitutional violation is the flow of money from the government to a First Amendment-protected activity in the first place. Just as the NEA should have been defunded to free art,²¹⁶ religion, and especially its mission, should not be funded. Otherwise, diversity and tolerance are seriously threatened. As Republicans learned with the NEA, however, once a funding stream is established, no matter how thin the trickle, it is nearly, if not utterly, impossible to stop the stream altogether.

The Peace Policy teaches yet another Madisonian lesson, and that is that when competing sects seek government aid, the sect that does not receive the aid will complain, making interdenominational conflict inevitable in a world of limited government funds flowing into mission activities. Moreover, when government abandons its role as trustee over the use of the money, the results can be disastrous. Conversely, when government interposes itself in the financial relationship between the believer and the Church, giving can become a duty rather than charity.

The current wave of wealth transfer to religious organizations is building a church-state compact that could defy accountability, accessibility, and limitation. Such was the equation of tyranny James Madison understood all too well.

215. See *supra* notes 78-103 and accompanying text (discussing pattern of government response in arts cases).

216. See Hamilton, *Art Speech*, *supra* note 21.