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Blurring the Line Separating Church and State: California Exposes the Inherent Problems of Charitable Choice

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When President George W. Bush entered office in January 2001, he began his efforts to assemble the "armies of compassion."1 Shortly after taking his oath of office, President Bush announced his plan to launch a faith-based initiative allowing religious groups to receive federal funds to administer federal programs.2 While Congress debated the Charitable Choice Act (CCA), a California appellate court ordered Catholic Charities to provide its employees with prescription contraceptive coverage.3 The court addressed a California statute enacted to


3. Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento County, 109 Cal. Rptr. 2d 176, 181 (Cal. Ct. App. 2001) (not citable as precedent in any California court). In September 2001, the California Supreme Court granted review of the Court of Appeal's decision. 31 P.3d 1271 (Cal. 2001). Due to the recent grant of review, the opinion accompanying Catholic Charities cannot be cited as precedent in any California court. 31 P.3d at 1271. This Note, however, does not cite the opinion in Catholic Charities for precedential legal authority. Instead, the Note examines one court's approach to a specific factual scenario. In Catholic Charities, the issue centers
eliminate gender discriminatory insurance practices. Although the statute contains a religious exemption, the court found that Catholic Charities did not meet the exemption's required elements.

The implications of the CCA and Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento County are complex and far reaching. The lack of case law that specifically on the exemption for religious employers and the statute that contains it, which is similar to statutes of many other states. 109 Cal. Rptr. 2d at 183; statutes cited infra note 47. The Note does not purport to affirm or denounce the legal reasoning used by the court in reaching its conclusion—it merely examines the effect of these statutes on religious employers and the possible impact the CCA would have on statutes of this kind.

4. Women's Contraception Equity Act, CAL. HEALTH & SAFETY CODE § 1367.25 (West 2000); CAL. INS. CODE § 10123.196 (West Supp. 2002) (requiring employers who provide employees prescription drug coverage under insurance plans to extend insurance coverage for prescription contraceptives); see also Catholic Charities, 109 Cal. Rptr. 2d at 182 (discussing the legislative history of the Act).

5. CAL. HEALTH & SAFETY CODE § 1367.25(b) (West 2000); CAL. INS. CODE § 10123.196(d) (West Supp. 2002). If a religious employer is an entity that meets the following four elements, it may request an insurance plan that does not cover contraceptives if contraceptive use is contrary to its beliefs: (a) the entity's purpose is the inculcation of religious values; (b) the entity hires primarily those employees who share its religious beliefs; (c) the entity serves primarily those individuals who share the religious beliefs of the entity; and (d) the entity is a nonprofit organization pursuant to Section 6033(a)(2)(A)(i) or (iii) of the Internal Revenue Code of 1986. CAL. HEALTH & SAFETY CODE § 1367.25(b)(1)(A)-(D) (West 2000); CAL. INS. CODE § 10123.196(d)(1)(A)-(D) (West Supp. 2002).

6. Catholic Charities, 109 Cal. Rptr. 2d at 184. Although Catholic Charities is a nonprofit organization, it serves and employs people regardless of their religious affiliation. Id. “Its employees, 74 percent of whom are not Catholic, come from a diverse group of religious faiths.” Id. Catholic Charities does not proselytize or inculcate those it serves with Catholic doctrine. Id. Furthermore, it offers general social services to the public at large. Id.

7. For example, two commentators have noted that after a religious group in California receives federal funds under the CCA, the inculcation of religious values will no longer be the primary purpose of the group and it would serve people of all faiths. See John J. Miller & Ramesh Ponnuru, Faithless California, NAT'L REV. ONLINE, at http://www.nationalreview.com/daily/nr070501.shtml (July 5, 2001). After receiving the funds, therefore, this group could not meet the elements of the religious employer exemption under the Women's Contraception Equity Act. See id. Another commentator has observed that the charitable choice concept involves dangers that substantially outweigh the potential benefits. See Stuart Taylor Jr., Separation Anxiety: Bush's Commendable Embrace of Faith Can Both Help and Harm Government and Religion, 24 LEGAL TIMES, Feb. 5, 2001, at 50. For example, the CCA could create competition between religious organizations and secular charities, make religious organizations dependent on the government, and generally degrade the effectiveness of religious organizations and their reli-
addresses the constitutionality of direct federal aid to non-
educational religious institutions presents an additional diffi-
culty in ascertaining the impact of the CCA.\textsuperscript{8} The faith-based
organizations that maintain paid employees and accept federal
aid under the CCA could be required to provide contraceptive
coverage pursuant to California's Women's Contraception Eq-
uity Act.\textsuperscript{9} The questions presented by the CCA and Catholic Charities also involve issues of preemption and the religion clauses of the First Amendment.\textsuperscript{10} Although recent develop-
ments make it unlikely that the CCA will pass under House
Bill 7,\textsuperscript{11} the CCA itself will almost certainly reemerge and de-
gious character. \textit{Id.}

8. See Susanna Dokupil, \textit{A Sunny Dome with Caves of Ice: The Illusion of
Charitable Choice}, 5 \textit{TEX. REV. L. & POL.} 149, 167-68 (2000) (noting that the
American Jewish Congress and the Texas Civil Rights Project filed suit in
Texas state court, claiming that a charitable choice contract (under 42 U.S.C. §
604(a) violates the state and federal constitutions); Carmen M. Guerrica-
gaita, \textit{Innovation Does Not Cure Constitutional Violation: Charitable Choice
and the Establishment Clause}, 8 \textit{GEO. J. ON POVERTY L. & POLY} 447, 448
(2001) (indicating that the American Jewish Congress and the Texas Civil
Right Project "have instituted constitutional challenges to this law in the
courts"); Jean-Paul Jassy & Jeffrey H. Blum, \textit{The First Amendment: Gore Ver-
sus Bush}, 18 \textit{COMM. LAW.}, Fall 2000, at 1, 31 (noting that although many Su-
preme Court cases address governmental aid to parochial schools, few cases
analyze the provision of governmental funds to non-educational religious or-
ganizations); Katherine A. White, \textit{Crisis of Conscience: Reconciling Religious
Health Care Providers' Beliefs and Patients' Rights}, 51 \textit{STAN. L. REV.} 1703,
1731 (1999) (explaining that most recent Establishment Clause jurisprudence
deals with aid to religious schools, which may present such a unique situation
that recent case law may not apply to federal aid for religiously sponsored so-
cial services providers).

9. See Miller & Ponnuru, \textit{supra} note 7 (noting that the inability of reli-
gious employers to claim the exemption would result in requiring faith-based
groups to provide contraceptive coverage despite their objections); \textit{supra} note 5
(discussing the content of the Women's Contraception Equity Act).

10. The First Amendment states in relevant part, "Congress shall make
no law respecting an establishment of religion, or prohibiting the free exercise
thereof." U.S. CONST. amend. I. The doctrine of preemption arises from the
Supremacy Clause. U.S. CONST. art. VI, cl. 2; Maryland v. Louisiana, 451 U.S.

States Senate regarding the introduction of a new bill. 148 CONG. REC. S546
of the controversy surrounding the CCA in H.R. 7. \textit{Id.} Due to that contro-
versy, H.R. 7, although it passed the House, stalled in the Senate. Americans
United for the Separation of Church and State, \textit{White House Endorses 'Com-
promise' on Faith-Based Initiative with Sens. Lieberman, Santorum}, at
berman and Republican Sen. Santorum drafted a compromise that allows reli-
gious organizations to receive federal funds, but lacks the controversial provi-
bate will continue over its provisions.\textsuperscript{12}

\textsuperscript{12} The sponsor of H.R. 7, Rep. J.C. Watts, did not exhibit enthusiasm for the Senate's compromise measure, suggesting that CARE will require more emphasis on faith to pass the House. Dana Milbank, \textit{Bush Endorses Compromise in Senate on Aid to Charities}, WASH. POST, Feb. 8, 2002, at A4. Rep. Watts further stated that once the Senate passes CARE, the House and Senate will work out their difficulties in order to place the "armies of compassion in the field." Elisabeth Bumiller, \textit{Accord Reached on Charity Aid Bill After Bush Gives in on Hiring}, N.Y. TIMES, Feb. 8, 2002, at A19 (quoting Rep. J.C. Watts). An unidentified House Republican leadership aide opined that most Republicans in the House would fight to save the CCA during conference committee. James Kuhnhenn, \textit{Bush settles on a Charity Bill}, PHILA. INQUIRER, Feb. 8, 2002, at A4. Sen. Rick Santorum, the Republican sponsor of CARE, agrees with the House proposal on the concept of charitable choice in the CCA and stated that there will be an opportunity to seek the passage of the CCA later in the year with the reauthorization of welfare legislation. See \textit{id}. Additionally, a senior administration official, speaking on the condition of anonymity, admitted that the White House still supports charitable choice,
This Note will examine the implications of the CCA on California's Women's Contraception Equity Act, the CCA's impact on religious organizations that receive federal funds to operate federal programs, and the constitutionality of the CCA in general. Part I details the CCA, Catholic Charities, and California's Women's Contraception Equity Act. Part II discusses the existing doctrine regarding monetary government involvement in religious areas, the impact of such involvement on the Free Exercise and Establishment Clauses of the First Amendment, preemption, and deference to administrative agencies. Part III discusses the obligations of religious employers, the burden on an individual's free exercise of religion, the CCA's advancement of religion, and the irreconcilability of California's statute with the CCA. Finally, this Note concludes that the CCA violates the religion clauses and that it creates considerable obstacles for states with laws requiring contraception coverage.

I. THE "ARMIES OF COMPASSION" ASSEMBLE FOR WAR AGAINST GENDER EQUITY

A. BREAKING DOWN THE WALL: THE CHARITABLE CHOICE CONCEPT

The premise of the CCA is not novel to the federal government or to President Bush. As Governor of Texas, Bush organized similar charitable choice programs, advocating for the introduction of religious organizations into the social services field. Bush also emphasized the concept of charitable choice in his presidential campaign.

Furthermore, a charitable choice act currently exists in

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but wanted Congress to pass CARE quickly. *Id.* Although the future of the CCA under H.R. 7 is unclear, the commentary in the wake of CARE's introduction is evidence that the ideas and provisions that comprise the CCA will continue to arise in the debate over this legislation and future legislative efforts. For this reason, this Note will discuss the CCA in terms of the language drafted in House Bill 7. Although the bill number may change and the section numbers may be altered, the concept will remain intact.


14. In his presidential campaign, Bush favored expanding charitable choice to all federal programs that allow nongovernmental groups to use federal funds for providing services. Terry M. Neal, *Bush Makes 'Faith-Based' Help Key Issue in Run for President*, WASH. POST, Nov. 27, 1999, at A14; see also Jassy & Blum, *supra* note 8, at 31.
federal law. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 allows states to contract with religious organizations to provide assistance to welfare beneficiaries. The statute explicitly states that its purpose is to

allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described [within the statute] on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.

PRWORA also provides additional safeguards to protect the religious organizations receiving funds, as well as the beneficiaries seeking government-funded services from religious organizations. Even though these religious organizations receive federal funds to administer government programs, they may still discriminate on the basis of religion in employment decisions.

After §604a passed, then-Senator John Ashcroft attempted to expand the application of the charitable choice concept in the "Charitable Choice Expansion Act." The bill attempted to apply the concept of charitable choice across the board to any legislation concerning social service and public health programs.

16. See id; see also Guerricagoitia, supra note 8, at 462 (noting that the charitable choice provision is mostly absent from the legislative history of the PRWORA and that its significance was overlooked because the PRWORA represented a massive overhaul of the welfare system).
17. 42 U.S.C. § 604a(b).
18. See id. § 604a(c) (barring states from discriminating against religious fund applicants on the basis of their religious character); id. § 604a(d)(1) (providing that the religious organization will retain its independence from federal, state, and local governments, including the right to control the development and practice of its beliefs); id. § 604a(d)(2)(A), (B) (declaring that neither the federal government nor the states shall require a religious organization to alter its internal governance or to remove any religious symbols); id. § 604a(e)(1) (providing that if an individual eligible for assistance has objections to the religious character of an organization, an alternative provider must be made available within a reasonable period of time); § 604a(g) (prohibiting discrimination by religious organizations against any eligible individual on the basis of that individual’s religious belief or lack thereof).
19. Id. § 604a(f). The religious organizations still maintain their exemption from Title VII. See id.; Guerricagoitia, supra note 8, at 449-50.
21. See Guerricagoitia, supra note 8, at 450.
Although Ashcroft's initial attempt failed to enlarge charitable choice, the CCA represents a renewed mission of expansion, causing a considerable amount of debate in both the public and private sectors. The new version of the CCA mirrors PRWORA in many respects. The most notable difference, however, is the immense breadth of the CCA's purpose. The CCA facilitates the entry of religious organizations into the social service regime and allows them to maintain the integrity of their religious character. To achieve that goal, the CCA prohibits the government from discriminating against those organizations. The legislation also contains an immense expansion of the concept of charitable choice to a large number of government programs.

22. See, e.g., 147 CONG. REC. H3992 (daily ed. July 12, 2001) (statement of Rep. Cummings) (arguing that the CCA will violate the separation of church and state and force the government to choose one religion over another); Dana Milbank & Thomas B. Edsall, Faith Initiative May Be Revised: Criticism Surprises Administration, WASH. POST, Mar. 12, 2001, at A1 (noting the Bush administration's delay on the faith-based initiative due to the "surprisingly vehement opposition to the program"); Americans United for the Separation of Church and State, An Open Letter to President Bush and Congress from America's Clergy (Apr. 24, 2001) (explaining the objections of various religious groups to the faith-based initiative because of its entanglement with religion and its ability to undermine the independence of religious practices), available at http://www.au.org/cardlet.htm.


24. Id. § 201(c)(1)(B) (prohibiting discrimination by federal, state, and local governments against religious organizations that apply for federal grants); id. § 201(d)(1) (allowing religious organizations to maintain their autonomy from federal, state, and local government); id. § 201(d)(2)(A), (B) (prohibiting federal, state, and local governments from interfering with the internal governance of the religious organization and from requiring the organization to remove any religious symbols); id. § 201(e)(2) (allowing religious organizations to maintain their Title VII exemption); id. § 201(g) (providing an alternative for individuals who object to the religious character of the organization). For a comparison of these provisions with PRWORA, see supra note 18.

25. H.R. 7 § 201(b)(1)-(4).

26. Id. § 201(b)(2), (4).

27. Id. § 201(b)(2). Also included within the purposes of the CCA are the efficient and effective delivery of assistance to eligible individuals and the protection of the religious freedom of those beneficiaries. Id. § 201(b)(1), (4).

28. Id. § 201(c)(4). Under section 201(c)(4)(A), the following programs are covered by the CCA: the prevention and treatment of juvenile delinquency, the improvement of the juvenile justice system, the prevention of crime, assistance to crime victims, housing assistance, the prevention of domestic violence, and hunger relief. Id. § 201(c)(4)(A)(i)-(viii). The same section also lists programs that are funded under the following statutes: the Omnibus Crime Control and Safe Streets Act of 1968, the Housing and Community Development Act of
The CCA contains numerous protections and prohibitions. It expressly states that the funds received by religious organizations cannot be used to support the religion or the religious beliefs or practices of such religious organizations.29 The legislation further states that the receipt of government funds by religious organizations does not constitute a government endorsement of the religion or its beliefs.30 In another attempt to bolster its constitutionality, the CCA states that the religious organizations receiving funds shall implement the programs in a manner consistent with the Establishment Clause and the Free Exercise Clause of the First Amendment.31 Finally, the CCA makes clear that the legislation does not affect the duties of religious employers to comply with other anti-discrimination laws.32

In addition, the CCA addresses the accountability of these religious organizations to the government.33 At first glance, the CCA does not treat religious groups any differently with regard to accounting purposes compared to other nongovernmental organizations that receive federal funds to operate programs.34 The funds used by religious organizations to implement government programs must be segregated in a separate account, which may be audited by the government.35 In addition to

1974, the Workforce Investment Act of 1998, the Older Americans Act of 1965, and the Federal Transit Act of 1998. Id. Section 201(c)(4)(B)(i) states that the CCA covers programs that involve activities assisting students in obtaining diplomas or their equivalents, and other after school programs. Id. § 201(c)(4)(B)(i). This CCA also includes programs under the Workforce Investment Act of 1998 and the Elementary and Secondary Education Act. Id. § 201(c)(4)(B)(i)(I), (II).

29. Id. § 201(c)(2).
30. Id. § 201(c)(3).
31. Id. § 201(c)(1)(A).
32. Id. § 201(e)(3). Although section 201(e) allows religious organizations to maintain their exemption from Title VII's prohibition on discriminatory hiring on the basis of religion, that exemption is the only one explicitly listed. Id. § 201(e). The CCA provides under the same section that religious organizations must still comply with the other nondiscrimination provisions in Title VII. Id. Under section 201(e)(3), religious organizations are required to comply with Title VI of the Civil Rights Act of 1964 (prohibiting discrimination on the basis of race, color, and national origin), Title IX of the Education Amendments of 1972 (prohibiting discrimination in educational programs on the basis of sex and visual impairment), § 504 of the Rehabilitation Act of 1973 (prohibiting discrimination against otherwise qualified disabled persons), and the Age Discrimination Act of 1975. Id. § 201(e)(3).

33. Id. § 201(h).
34. Id. § 201(h)(1); see discussion infra Part III.B.
35. H.R. 7 § 201(h)(2). For purposes of the audit, the religious organiza-
prohibiting the use of funds for religious beliefs, the CCA also prescribes the expenditure of funds for sectarian instruction, worship, or proselytization. Immediately after that restriction, however, the CCA states that "if the religious organization offers such an activity, it shall be voluntary for the individuals receiving services and offered separate from the program funded under [the statute]."

B. CALIFORNIA LEVELS THE PLAYING FIELD

While Congress focused its attention on cultivating a relationship with religious organizations as potential social service providers, California examined a woman's pressing need for birth control. In 1999, the California legislature passed a remedial statute to eliminate gender discrimination in insurance practices. Although prescription drug benefits can be extensive, many plans do not cover contraceptives, requiring women to pay up to sixty-three percent more in out-of-pocket costs than men. Aside from the financial disparities, women risk the ability to maintain social and economic equality if they are unable to control their reproductive health. In response to these findings, California passed the Women's Contraception

36. Id. § 201(c)(2).
37. Id. § 201(i).
38. Id.
39. See CAL. HEALTH & SAFETY CODE § 1367.25 (West 2000); CAL. INS. CODE § 10123.196 (West Supp. 2002); Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento County, 109 Cal. Rptr. 2d 176, 182 (Cal. Ct. App. 2001) (not citable as precedent in any California court), reh'g granted, 31 P.3d 1271 (Cal. 2001). The court found that the California legislature was entitled to follow the EEOC's decision and to find that excluding contraception from prescription drug plans constituted gender discrimination. Catholic Charities, 109 Cal. Rptr. 2d at 187-88. The EEOC issued a decision declaring that a failure to provide prescription contraceptive coverage under a prescription drug benefit plan constituted gender discrimination on the basis of sex and thus, a violation of Title VII. EEOC, DECISION ON COVERAGE OF CONTRACEPTION (July 2, 2001), available at http://www.eeoc.gov/docs/decision-contraception.html. The EEOC stated that the Pregnancy Discrimination Act (PDA), which amended Title VII to cover adverse employment decisions based on pregnancy as sex discrimination, included contraceptives because they are related to pregnancy. Id.; see Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a) (1994), amended by Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1994).
40. Catholic Charities, 109 Cal. Rptr. 2d at 182.
41. Id.
Equity Act, which requires individual and group health insurance policies that provide prescription drug benefits to cover prescription contraceptives.\textsuperscript{42}

The legislation provoked a response from Catholic groups, which, according to their religious tenets, view contraception as a sin and providing it through an insurance plan as facilitating the commission of a sin.\textsuperscript{43} In response, the legislature included a narrow exemption for religious employers.\textsuperscript{44} Although Catholic Charities operated as a religious organization, it served and employed people of all faiths or no faith.\textsuperscript{45} It therefore failed to meet the requisite criteria for the exemption and therefore had to provide insurance plans that included prescription contraceptive coverage.\textsuperscript{46} The effort to provide contraceptive coverage, while reasonably accommodating religious groups, is not unique to California; similar statutes exist in many other states, though the religious exemptions vary.\textsuperscript{47}

\textsuperscript{42} \textit{CAL. HEALTH & SAFETY CODE} § 1367.25(a)(1) (West 2000); \textit{CAL. INS. CODE} § 10123.196(a)(1) (West Supp. 2002).

\textsuperscript{43} \textit{Catholic Charities}, 109 Cal. Rptr. 2d at 183. The Catholic groups requested that the Legislature place a “conscience clause” in the statute that would allow religious groups to request plans that did not provide prescription contraceptive coverage when doing so is contrary to the religious beliefs of that group. \textit{Id.}

\textsuperscript{44} \textit{CAL. HEALTH & SAFETY CODE} § 1367.25(b) (West 2000); \textit{CAL. INS. CODE} § 10123.196(d) (West Supp. 2002). The exemption represented a compromise that allowed the state to pursue its legitimate interests while also accommodating the beliefs of various religions. \textit{Catholic Charities}, 109 Cal. Rptr. 2d at 183. For a list of the elements of the exemption, see \textit{supra} note 5.

\textsuperscript{45} \textit{See Catholic Charities}, 109 Cal. Rptr. 2d at 184.

\textsuperscript{46} \textit{See CAL. HEALTH & SAFETY CODE} § 1367.25(b) (West 2000); \textit{CAL. INS. CODE} § 10123.196(d) (West Supp. 2002) (requiring that the entity primarily employ and serve people sharing its faith); \textit{Catholic Charities}, 109 Cal. Rptr. 2d at 184.

\textsuperscript{47} \textit{See CONN. GEN. STAT. ANN.} § 38a-503e(b)(1) (West Supp. 2001) (allowing religious employers, defined as a “qualified church-controlled organization,” to request plans excluding coverage of prescription contraceptives if contraceptives are contrary to their religious beliefs); \textit{DEL. CODE ANN. tit. 18, § 3559(d) (2000)} (providing an exemption for a religious employer whose bona fide religious beliefs conflict with contraceptive coverage; providing no definition of “religious employer”); \textit{GA. CODE. ANN.} § 33-24-59.6 (2001) (missing an exemption for religious employers and organizations); \textit{HAW. REV. STAT.} § 431:10A-116.7 (Supp. 2001) (following closely California's exemption, except requiring that the entity not be staffed by public employees and further stating that any educational, health care, or nonprofit owned or controlled by the religious employer is exempted); \textit{IOWA CODE ANN.} § 514C.19 (West Supp. 2001) (requiring group policies or contracts to provide coverage for prescription contraceptives and requiring that the person providing such policy comply with the statute, but not mentioning a religious employer exemption); \textit{ME.}
C. THE EEOC BREATHE NEW LIFE INTO A FAMILIAR DOCTRINE

In an article titled "Faithless California," two commentators linked the religious exemption in the Women's Contraception Equity Act to the pending federal faith-based initiative and saw an irresolvable tension between the two. This article identified the problematic impact of the CCA on the California legislation and the statutes addressing contraception in other states. Once religious institutions receive federal funds, they will no longer primarily serve those of the same religion or inculcate religious beliefs.

REV. STAT. ANN. tit. 24-A, § 2756(2) (West 2000) (defining religious employer as a "church, convention or association of churches or an elementary or secondary school that is controlled, operated or principally supported by a church or by a convention or association of churches"); MD. CODE ANN., INS. § 15-826(c)(1) (2001) (allowing an exemption for religious organizations whose bona fide religious beliefs conflict with providing contraceptive coverage; including no definition of "religious organization"); NEV. REV. STAT. ANN. 689A.0417(5) (Michie 2001) (stating only that an insurer affiliated with a religious organization is not required to provide the contraceptive coverage if there is an objection on religious grounds); N.H. REV. STAT. ANN. § 415:18-I (2000) (requiring insurers (an undefined term) that issue blanket policies of accident or health insurance to provide prescription contraceptive coverage, but not mentioning religious employers or exemptions); N.M. STAT. ANN. § 59A-22-42(D) (Michie Supp. 2001) (stating only that a "religious entity" can elect to exclude prescription drug coverage, without providing a definition of a religious entity); N.C. GEN. STAT. § 58-3-178(e) (1999) (providing an exemption for a religious employer, which is defined as a 501(c)(3) tax-exempt organization that has a primary purpose of inculcating religious values and employs persons who share the organization's religious beliefs); R.I. GEN. LAWS § 27-18-57(e) (2001) (providing exemptions for religious employers, which are defined as churches or qualified church-controlled organizations as defined by 26 U.S.C. § 3121); VT. STAT. ANN. tit. 8, § 4099c (2001) (requiring health insurance plans that provide coverage for prescription drugs to include prescription contraceptive coverage, but not including a religious employer exemption); VA. CODE ANN. § 38.2-3407.5:1 (Michie 1999) (providing that any insurers issuing individual or group insurance policies, corporations providing insurance contracts, and health maintenance organizations providing health care plans are required to provide coverage for prescription contraceptives if the plans cover prescription drugs, but not containing an exemption for religious groups).


49. See id. (pointing out that the purpose of any charity receiving federal funds under the CCA would no longer primarily be inculcating religious values and therefore would not be eligible to claim an exemption); see also CAL. HEALTH & SAFETY CODE § 1367.25(b)(1)(A)-(D) (West 2000); CAL. INS. CODE § 10123.196(d)(1)(A)-(D) (West Supp. 2002) (listing the elements of the religious employer exemption).

50. For a list of states with similar statutes regarding contraception coverage and the religious exemptions that they contain, see supra note 47.

51. Miller & Ponnuru, supra note 7.
The Women's Contraception Equity Act, along with many of its counterparts in other states, addresses the discrimination women face in insurance practices regarding their reproductive health. The recent decisions of the Equal Employment Opportunity Commission (EEOC) and a recent district court case out of Washington state further expanded a state's legitimate interest in eliminating the financial and social disparities in insurance treatment of men and women.

The EEOC issued a decision during the summer of 2001 declaring that the failure to provide prescription contraceptive coverage under insurance plans containing prescription drug coverage violated Title VII of the Civil Rights Act, as amended by the Pregnancy Discrimination Act (PDA). The PDA, enacted by Congress to require equal treatment of women affected by childbirth and related conditions, covers not only women who are actually pregnant, but generally protects women's potential to become pregnant. The EEOC concluded that contraception is a method by which women control their ability to become pregnant, thus triggering the protections provided by the PDA because contraception is related to pregnancy.

The district court in Erickson v. Bartell Drug Co. adopted the EEOC's decision. In Erickson, the federal court first faced the question of whether the exclusion of prescription contraceptive coverage from a comprehensive prescription plan constitutes discrimination on the basis of sex. Although the court noted that the PDA does not explicitly refer to contraception, it found that failing to provide contraceptive coverage under comprehensive insurance plans is inconsistent with the con-

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52. See CAL. HEALTH & SAFETY CODE § 1367.25 (West 2000); CAL. INS. CODE § 10123.196 (West Supp. 2002); Catholic Charities, 109 Cal. Rptr. 2d at 182 (exhibiting concern over gender discrimination in insurance practices); see also supra text accompanying notes 39-42 (discussing the legislative purpose of the Act).


54. See Catholic Charities, 109 Cal. Rptr. 2d at 187 (finding that the state has a compelling interest in preserving public health and well-being).


58. EEOC, supra note 39.


60. Id. at 1268.

61. Id. at 1270.
gressional intent evinced by the PDA. The EEOC's decision, its adoption in the state and federal system, and the contraception coverage statues in many other states represent a compelling and uniform trend in further eliminating gender discrimination in employment.

II. THE CONSTITUTIONAL OBSTACLES

A. LOSING OUR RELIGION? THE FREE EXERCISE CLAUSE

The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Supreme Court's Free Exercise jurisprudence establishes the degree to which the government may intrude upon citizens' religious practices. The standard used to determine the point at which the infringement violates the Free Exercise clause varies throughout the Court's case law.

In one of its earliest Free Exercise cases, the Court recognized that Congress cannot pass laws that prohibit the free exercise of religion or punish individuals for their religious beliefs. The Court, however, upheld the application of a law prohibiting bigamy among Mormon settlers claiming a religious duty to do so. The Court distinguished the anti-bigamy law as one that regulated conduct and not the exercise of one's religion. If individuals could engage in otherwise unlawful conduct solely because of their religious beliefs, that religion's doctrines would reign superior over the law of the government.

62. Id. at 1270-71. "Even if one were to assume that Bartell's prescription plan was not the result of intentional discrimination, the exclusion of women-only benefits from a generally comprehensive prescription plan is sex discrimination under Title VII." Id. at 1271-72.

63. U.S. CONST. amend. I.

64. Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring) ("The Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."); see also White, supra note 8, at 1725 (explaining that the Supreme Court's Free Exercise Clause jurisprudence established the boundaries regarding the intrusion of a government regulation on individual religious practices).

65. White, supra note 8, at 1725.


67. Id. at 166.

68. See id. (explaining that although the government may not interfere with religious opinions and beliefs, it can constitutionally regulate practices).

69. Id. at 167.
In a later Free Exercise case, Lee, an Amish individual and the defendant, challenged the constitutionality of the requirement that he pay social security taxes because he objected to the payment on religious grounds.\textsuperscript{70} In addressing Lee's claim, the Court developed a three-part Free Exercise inquiry: (1) whether the government action interferes with the claimant's free exercise rights,\textsuperscript{71} (2) whether the accomplishment of an overriding government interest necessarily requires the burden imposed on the individual,\textsuperscript{72} and (3) whether the accommodation of the individual's religious belief unduly interferes with the fulfillment of the government's interest.\textsuperscript{73} Although the Court emphasized the need for Congress and the courts to be sensitive toward the religious beliefs of individuals, it recognized that some burdens would inevitably exist.\textsuperscript{74}

When laws directly target religion or involve a direct burden on religion, strict scrutiny is the appropriate level of review.\textsuperscript{75} Sherbert v. Verner involved the denial of unemployment compensation benefits to a woman who would not work on Saturdays due to her religious beliefs.\textsuperscript{76} Justice Brennan, writing for the majority, found that the woman's religious practices were burdened because the law effectively forced her to choose between religion and work.\textsuperscript{77} The government could not impose

\textsuperscript{70} United States v. Lee, 455 U.S. 252, 254 (1982). Congress provided an exemption to self-employed individuals who objected to the payment of social security taxes and the receipt of public welfare benefits, but Lee did not fall within the exemption. See id. at 255-56.

\textsuperscript{71} Id. at 256-57. The Court did not dispute that the payment of the taxes violated Lee's religious beliefs and therefore burdened his free exercise rights. Id. The Court noted that although a government action may burden an individual's free exercise rights, not all burdens are unconstitutional. Id.

\textsuperscript{72} Id. The maintenance of a regulated social security and tax system in the United States clearly represented a valid governmental interest. Id. at 258.

\textsuperscript{73} Id. at 259. Allowing an exemption for religious beliefs in the area of taxation would prove extremely difficult due to the extensive number of diverse religious beliefs in the country. Id. Although a religious accommodation is possible in most cases, there are times when providing that accommodation will restrict the ability of the legislature. Id. at 259-60.

\textsuperscript{74} Id. at 261 ("Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs.").


\textsuperscript{76} Sherbert, 374 U.S. at 401-02.

\textsuperscript{77} Id.
such a choice because it appeared as though the government was punishing the individual for her religious beliefs.\textsuperscript{78}

The Court again modified its Free Exercise inquiry in \textit{Employment Division, Department of Human Resources of Oregon v. Smith}. The Court determined that an individual's religious beliefs do not excuse him from obeying the valid laws of the government.\textsuperscript{79} The Court thus found that neutral and generally applicable laws receive strict scrutiny only when they infringe upon multiple constitutional rights.\textsuperscript{80} The Court also concluded that the Free Exercise Clause does not require a religious exemption in laws that place an incidental burden on religion.\textsuperscript{81} Since the law placed only an incidental burden on religious practices, the Court examined it under a relaxed level of scrutiny and gave considerable deference to state interests in drafting neutral laws of general applicability.\textsuperscript{82}

\section*{B. Religion and Government: Strange Bedfellows}

While the Free Exercise Clause delineates the baseline

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item \textit{See Smith}, 494 U.S. at 879, 885 (finding that if a general and neutral law's incidental impact on religion was sufficient to trigger strict scrutiny, individuals could condition their recognition of the law upon their religious beliefs, thus elevating an individual's religion above the law of the land). The state law at issue in \textit{Smith} was a neutral law of general applicability that regulated criminal conduct. \textit{Id.} at 877-78.
\item Id. at 881. Justice O'Connor disagreed with the majority's hasty disposal of the respondents' argument for application of strict scrutiny. \textit{Id.} at 897 (O'Connor, J., concurring). She felt that relief under a free exercise claim was appropriate whether the government imposed the burden directly, through laws that specifically target religion, or "indirectly[,] through laws that... make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community." \textit{Id.}; \textit{see also} White, \textit{supra} note 8, at 1727 (noting that since the Court found strict scrutiny appropriate only when multiple constitutional rights were at issue, burdens on religious exercise will not receive strict scrutiny unless they amount to "deliberate political persecution").
\item \textit{Smith}, 494 U.S. at 890. The Court emphasized that a nondiscriminatory religious practice exemption was not required because the political process would aid those individuals whose religious beliefs were burdened. \textit{Id. But cf.} White, \textit{supra} note 8, at 1730 (asserting that legislative exemptions that specifically apply to religious organizations are probably unconstitutional).
\item \textit{Smith}, 494 U.S. at 878. Justice Scalia, writing for the majority, found that a burden on religion that is an incidental effect of valid law does not offend the First Amendment. \textit{Id.} Scalia noted, however, that the Court will still "strictly scrutinize governmental classifications based on religion." \textit{Id.} at 886 n.3.
\end{enumerate}
\end{footnotesize}
that Congress must maintain to accommodate individual religious beliefs, the Establishment Clause erects a ceiling on the government's involvement in religion. Establishment Clause jurisprudence does not yield a clear formula for addressing laws that excessively entangle government with religious practices. Although state and federal funding of religious institutions permeates many areas, the Court has addressed the constitutionality of direct aid to non-educational religious institutions only twice.

In one of its earliest Establishment Clause cases, the Court addressed the payment of federal funds to support a religious hospital. The Court focused on the nature of the hospital as a corporation, instead of as a religious hospital. Although the individuals who represented the corporation all belonged to a particular religion and thus exerted some influence, that factor did not convert a secular corporation into a religious one. Therefore, the Court's decision emphasized a neutral application of law to corporations, regardless of their religious character.

The issue of allocating federal funds to religious institutions arose again nearly one hundred years later in Bowen v. Kendrick. The federal statute, the Adolescent Family Life Act (AFLA), provided grants to religious and other organizations to

83. See White, supra note 8, at 1729.
84. See Mitchell v. Helms, 530 U.S. 793, 804 (2000) ("The case's tortuous history over the next 15 years indicates well the degree to which our Establishment Clause jurisprudence has shifted in recent times, while nevertheless retaining anomalies with which the lower courts have had to struggle.").
85. See Bowen v. Kendrick, 487 U.S. 589, 593 (1988) (upholding the Adolescent Family Life Act (AFLA), which provided federal grants to religious institutions to curtail teenage sexuality); Bradfield v. Roberts, 175 U.S. 291, 297-98 (1899) (holding that federal funding of a religious hospital did not violate the Establishment Clause); see also Dokupil, supra note 8, at 176-82 (examining the Court's reasoning in both cases and the implications of the decisions upon the concept of charitable choice).
86. Bradfield, 175 U.S. at 292.
87. See id. at 296-97 (noting that the hospital's incorporation documents characterize the hospital as a corporation and do not refer to the religious beliefs of those in charge of the hospital).
88. Id. at 298.
89. See Dokupil, supra note 8, at 177-78. Although the Court did not delve into an examination of the potential religious practices of an institution, the decision left open the possibility that a religious corporation could alter its charter just enough to continue to receive federal funding without implicating Establishment Clause concerns. Id. at 178.
develop programs and conduct research in the area of adolescent sexuality. The congressional purpose behind AFLA, according to the Court, was primarily secular. The appellees argued that AFLA was unconstitutional on its face because it expressly recognized the role of religion in problems of teenage sexuality. In addition, they asserted that impermissible religious inculcation would result because the religious groups directly received federal funds. The Court, however, noted that the Establishment Clause does not forbid Congress from utilizing religious groups to fight secular problems.

In *Lemon v. Kurtzman*, the Court announced a test to determine when laws violate the Establishment Clause. When examining a challenged law, the Court must find that (1) the statute has a secular purpose, (2) the primary effect of the legislation does not advance or inhibit religion, and (3) it will not create unnecessary governmental entanglement with religion. The particular "evils" that the Court hoped the test would root out were sponsorship, financial support, and active state or federal involvement in religion.

The Court modified the *Lemon* test in *Agostini v. Felton*. Congress passed AFLA in response to the significant social, economic, and public health consequences of early sexual activity and childbirth among adolescents. The grant recipients were to use the federal funds to provide care and prevention services. The Court assumed that AFLA services provided by grant recipients were not religious in character. The Court found nothing to indicate that a significant amount of the AFLA funds would go to pervasively sectarian institutions. Grant applicants were required to submit proposals detailing the proposed services and the manner in which they would be provided. Fourth, the grant recipients were subject to evaluations and had to submit reports on the use of funds.

91. *Id.* Congress passed AFLA in response to the significant social, economic, and public health consequences of early sexual activity and childbirth among adolescents. *Id.* The grant recipients were to use the federal funds to provide care and prevention services. *Id.* at 594. The Court assumed that AFLA services provided by grant recipients were not religious in character. *Id.* at 604-05. The section it cited for this proposition, however, contains no such provision. *Id.* at 594 n.2.

92. *Id.* at 602. Fighting teenage sexual activity and providing for the expansion of services to help win that war represented legitimate, secular interests of government that did not implicate religious beliefs. *Id.* at 602-04.

93. *Id.* at 605-06.

94. *Id.*

95. *Id.* at 607. In upholding the constitutionality of AFLA, the Court relied on several factors. First, AFLA made grants available neutrally to a wide variety of organizations. *Id.* at 608. Second, the Court found nothing to indicate that a significant amount of the AFLA funds would go to pervasively sectarian institutions. *Id.* at 610. Third, grant applicants were required to submit proposals detailing the proposed services and the manner in which they would be provided. *Id.* at 615. Fourth, the grant recipients were subject to evaluations and had to submit reports on the use of funds. *Id.*


99. *Id.* at 612 (citing Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

100. 521 U.S. 203, 222-23 (1997). The Court continued to look for a secular
In determining whether a government action results in the advancement of religion, the Court developed a three-part inquiry. First, the Court determines whether religious indoctrination can be attributed to a government action by focusing on the principles of neutrality and private choice. Second, the Court asks if the program identifies its beneficiaries by reference to religion. Third, in conducting the excessive entanglement portion of the inquiry, the Court evaluates the character and purpose of the institutions benefited, the nature of the aid, and the relationship that results between the government and the religious organization.

Cases examining government aid to private schools occupy a large portion of the Establishment Clause jurisprudence and the reasoning is applicable to government funding of non-educational religious organizations receiving direct aid. The principle of neutrality controls the inquiry of determining whether religious indoctrination is attributable to the government.

In Agostini, the Court applied the modified test in a government purpose but changed its inquiry regarding the effect of the government action. Id. at 233. This change combined the second and third prongs of the Lemon test and treated entanglement as part of the inquiry into the statute's effect. Id.; see also Mitchell v. Helms, 530 U.S. 793, 807-08 (2000) (stating that the Court clarified the appropriate test under the Establishment Clause in Agostini).

101. See Mitchell, 530 U.S. at 809-10 (viewing the principle of private choice as a means of assuring neutrality); Agostini, 521 U.S. at 223, 225-26, 230.

102. Mitchell, 530 U.S. at 813; Agostini, 521 U.S. at 230-31. In determining this portion of the inquiry, the Court examines the factors used by the program to identify beneficiaries to see if they create a financial incentive for religious indoctrination. Agostini, 521 U.S. at 231.

103. Agostini, 521 U.S. at 232. The Court did not address this portion of the inquiry in Mitchell. 530 U.S. at 808.

104. The Court's most recent Establishment Clause case involved the disbursement of federal funds to state and local agencies using the funds to lend educational materials and equipment to public and private schools. Mitchell, 530 U.S. at 801. The program required the agencies to equally distribute equipment and materials to both public and private schools. Id. The program also required that the materials and services provided must be secular and neutral in character. Id. Furthermore, the private schools never acquired control over the funds or materials lent to them through the funds. Id. at 802-03. The issue was whether the religious indoctrination occurring in the private schools that received federal funds could be attributed to the government. Id. at 809.

105. Id. at 809-10. If the program furthers a legitimate secular purpose and neutrally allocates aid, without reference to religion, to those who can further that purpose, the only effect of the aid going to religious organizations is the furtherance of the secular purpose. Id. at 810; Agostini, 521 U.S. at 230.
school case and upheld a federal program that sent public school teachers into private schools to provide remedial education for disadvantaged children.\textsuperscript{106}

The effect of the program did not advance religion through indoctrination because the program disbursed aid to public agencies, who then neutrally allocated those funds regardless of the religious character of the school.\textsuperscript{107} The program did not determine its beneficiaries based on religion because the criteria centered on eligibility and need of individual children.\textsuperscript{108} Finally, the program did not create an excessive entanglement because it distributed aid neutrally and contained sufficient protections to detect any religious inculcation.\textsuperscript{109} Therefore, the program's effect did not advance religion.\textsuperscript{110}

C. AVOIDING A COLLISION: WHEN IS PREEMPTION APPROPRIATE?

Although a law may survive the inquiries under the Free Exercise and Establishment Clauses, the doctrine of preemption, which is rooted in the Supremacy Clause, \textsuperscript{111} can present a law with another hurdle. When a federal law and a state law exist in a related field or create a conflict in their application, preemption can apply.

First, Congress can explicitly state the amount of state law

Related to this principle is the importance of private choice. \textit{Mitchell}, 530 U.S. at 810; \textit{Agostini}, 521 U.S. at 226. Neutrality is assured when federal funds that aid religious institutions do so because private individuals made private choices to benefit those institutions. \textit{Mitchell}, 530 U.S. at 810. The danger that the government will exhibit preferences in an aid program is reduced when a series of independent choices by private individuals determine the amount of the benefit received by religious institutions. \textit{Id.}

\textsuperscript{106} \textit{Agostini}, 521 U.S. at 208. The government program at issue had the secular purpose of providing remedial education to all children in need, regardless of where they attended school. 20 U.S.C. § 6315(c)(1)(A), (F) (2000); \textit{Agostini}, 521 U.S. at 209-19.

\textsuperscript{107} \textit{Agostini}, 521 U.S. at 226, 228-29.

\textsuperscript{108} \textit{Id.} at 209, 232.

\textsuperscript{109} \textit{Id.} at 232, 234.

\textsuperscript{110} \textit{Id.}

that it intends to preempt under the applicable statute. 112 Second, although no express language delineates the area of state law preempted, if the federal government evinces intent to occupy an entire area of regulation, the state then is preempted from any regulatory efforts in that area. 113 Third, in the absence of express language and a total regulatory displacement, the state law still is preempted if it conflicts with the federal law. 114 A conflict that necessitates preemption occurs when complying with both the federal and state law is impossible. 115 Another conflict arises where the congressional purposes of the law are frustrated, such that an immovable obstacle is created. 116

In determining whether federal law preempts state law and to what degree, a court inquires on a case-by-case basis. 117 Generally, in the absence of language of congressional intent, the court looks for an inherent conflict between state and federal law. 118 In examining an alleged conflict, the court looks to the intent of Congress and its purpose and objectives included in the law. 119

The Supreme Court addressed preemption issues related to Title VII and the PDA 120 in California Federal Savings & Loan Ass’n v. Guerra. 121 The petitioners claimed that Title VII pre-empted the Fair Employment and Housing Act (FEHA), a California statute that provided preferential treatment for pregnant

113. Id. at 280-81.
114. Id. at 281.
117. See, e.g., id. at 249-56 (discussing the various facts of the regulation at issue, the legislative history, congressional intent, and the likelihood of compliance with both laws). The Court assumes, at first, that Congress did not intend to displace state law. Maryland v. Louisiana, 451 U.S. 725, 746 (1981). Furthermore, if the states traditionally occupy the field that Congress allegedly preempts, the Court also assumes that Congress, in the absence of a clear expression of intent, does not supercede the traditional police powers of the state. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
118. See Cal. Fed. Sav. & Loan Ass’n, 479 U.S. at 281 (examining the statutes for impossibility or frustration of congressional purpose).
119. Id. at 280-81.
121. 479 U.S. at 274-75.
employees. The Court proceeded under the conflict analysis because Congress explicitly disclaimed intent to completely preempt state law or occupy the field of employment discrimination law, thus allowing states to enact additional remedial legislation. The Court rejected the petitioners' claim because Title VII and FEHA shared a common goal and FEHA did not require the commission of a wrongful act to effect compliance.

D. TAKING THEM SERIOUSLY: DEERENCE TO ADMINISTRATIVE AGENCIES

When courts are faced with challenges to the existence and application of a law, an agency interpretation can provide them with guidance. When an agency obtains congressional authorization to administer and interpret a statute, those interpretations generally receive deference. If a party challenges an agency's interpretation of a statute, the court proceeds in one of two ways. First, if Congress spoke directly to the issue and it manifested a clear intent, courts and agencies must give effect to that expressed intent. In the absence of such expressed intent, the court must determine if the interpretation is permissible. In the case of an agency expressly assigned responsibility for a particular statute's interpretation, courts should accord substantial weight to those interpretations.

122. Id. at 274-76. The California law at issue, the Fair Employment and Housing Act (FEHA), required employers to reinstate an employee after an unpaid leave period in the same job unless a business necessity rendered the job unavailable. Id. at 275-76. The petitioners claimed that the language of the PDA rejected any state approach that provided preferential treatment to pregnancy discrimination. Id. at 284.

123. Id. at 281 (citing 42 U.S.C. § 2000e-7, h-4).

124. Id. at 288, 292. In reaching this conclusion, the Court, agreeing with the Ninth Circuit, found that Congress intended the PDA to serve as a floor, not as a ceiling limiting benefits. Id. at 285 (citing Guerra v. Cal. Fed. Sav. & Loan Ass'n, 758 F.2d 390, 396 (9th Cir. 1985)).


126. Id. at 842.

127. Id. at 842-43.

128. Id. at 843. The Court found it improper for courts to impose their own construction on an issue that an agency has interpreted. Id.

129. Id. at 844. In Chevron, a challenge arose against the EPA's interpretation of the Clean Air Act. Id. at 840. The Court found that the ruling issued by the EPA "gave primary emphasis to the rapid attainment of the statute's environmental goals." Id. at 848. The Court further noted that when a challenge to an agency's interpretation essentially rests on criticism of the
Congress vested the EEOC with enforcement responsibility under Title VII.\textsuperscript{130} Because the EEOC enforces Title VII, its interpretations of Title VII's various provisions should receive great deference.\textsuperscript{131} When Title VII and its legislative history support the EEOC's interpretations, those interpretations are viewed as likely expressing the will of Congress.\textsuperscript{132} Therefore, the EEOC's decisions on the proper application of Title VII and its amendments, such as the PDA, carry significant weight.

III. A TORTURED MAZE AND THE CCA'S BLEAK FUTURE

Although the United States House of Representatives included various provisions in the CCA in an attempt to assure its constitutionality,\textsuperscript{133} the expansion of charitable choice to all federal aid programs cannot withstand constitutional scrutiny.\textsuperscript{134} The concept of charitable choice currently exists under federal law,\textsuperscript{135} but the CCA represents a substantial expansion of the concept to most federal aid programs that delegate funds to nongovernmental organizations.\textsuperscript{136} This expansion imposes too great a burden on individuals and thus violates the Free Exercise Clause.\textsuperscript{137} Likewise, the Establishment Clause is violated because the effect of the CCA advances religion.\textsuperscript{138} Further agency's wisdom, instead of whether the interpretation is reasonable, the challenge must fail. \textit{Id. at} 866.

\begin{itemize}
\item \textsuperscript{131} \textit{Griggs}, 401 U.S. at 433-34.
\item \textsuperscript{132} See \textit{id.} at 434.
\item \textsuperscript{133} See H.R. 7, 107th Cong. § 201(c)(1)-(3), (d)(1)-(2), (e), (g) (2001). For a discussion of these statutory sections and their contents, see supra notes 25-27, 29-32, 37-38 and accompanying text.
\item \textsuperscript{134} See generally Dokupil, \textit{supra} note 8, at 204 (finding that the narrower charitable choice concept under PRWORA exhibits major weaknesses because it lacks private choice and aid flows directly to religious organizations, therefore violating the Establishment Clause); Guerricaguita, \textit{supra} note 8, at 472 (concluding that charitable choice under PRWORA violates the three Establishment Clause principles of secular purpose, coercion, and endorsement); Evan P. Schultz, \textit{God Save the Court—From Bush!}, 24 LEGAL TIMES, Feb. 5, 2001, at 51 (declaring that President Bush's faith-based initiative, which the CCA is based on, "will end up in the courts").
\item \textsuperscript{135} See supra notes 15-19 and accompanying text (listing PRWORA statutory sections and detailing its concept of charitable choice).
\item \textsuperscript{136} See H.R. 7 § 201(b)(1)-(5) (listing the five stated purposes of the CCA); \textit{id.} § 201(c)(4) (listing the possible programs that fund recipients could administer); see also supra text accompanying notes 25-28.
\item \textsuperscript{137} See discussion \textit{supra} Part II.A.
\item \textsuperscript{138} See discussion \textit{supra} Part II.B.
\end{itemize}
therrmore, although the CCA does not preempt the state laws concerning contraceptive coverage,\textsuperscript{139} its enforcement renews and increases the difficulties faced by the CCA.

A. AN ASSAULT ON RELIGIOUS CHOICES

Under the CCA, religious organizations can compete with other private, non-profit organizations for the receipt of federal funds to administer federal programs.\textsuperscript{140} As a result, religious service providers could dominate some areas and programs.\textsuperscript{141} The CCA contains a provision requiring the availability of an alternative for an individual who objects to the religious character of the organization.\textsuperscript{142} Although the CCA intends to protect individuals, it places the burden on the individual to come forward with the objection. The Free Exercise Clause operates as a restriction on the degree of governmental intrusion into an individual's religious beliefs.\textsuperscript{143} Therefore, creating a predominantly religious regime of social service providers surpasses the permissible degree of intrusion.\textsuperscript{144}

Unlike the law at issue in Smith, the CCA is not a neutral law of general applicability.\textsuperscript{145} Instead, the CCA specifically allocates program funds to religious groups and instills an expec-
tation that religious organizations will be on equal footing with other providers. On one hand, administrators of the funds must seek out religious institutions for the receipt of these funds to carry out the CCA's purpose. On the other hand, the administrators must turn a blind eye to the religious character of the organization to avoid any appearance of discrimination. The CCA, however, directs its anti-discrimination provision only to religious institutions. The conundrum created by the interaction between the CCA's purpose and the anti-discrimination provision results in a scheme where there is a rapid rise of religious institutions in the social service regime.

146. See H.R. 7 § 201(b)(2) (expressing a desire to increase the presence of religious organizations in the social service regime); id. § 201(c)(1)(B) (prohibiting fund administrators from deciding against an organization because of its religious character). These two sections combined create an expectation of equal footing for religious organizations in light of the statute's purpose to increase the presence of these groups.

147. See id. § 201(b)(2) (maintaining that one of the primary goals of the CCA is to facilitate the entry of religious organizations into the social service regime).

148. See id. § 201(c)(1)(B). The prohibition on discrimination, in addition to the goal of increasing religious organizations in the social service regime, creates a situation where administrators are first told to pay careful attention to a group's religious character and at the same time to ignore it.

149. Id. The CCA states that neither federal, state, nor local governments "shall discriminate against an organization that provides assistance under, or applies to provide assistance under, such program on the basis that the organization is religious or has a religious nature." Id. (emphasis added). The CCA does not contain a similar provision prohibiting discrimination on the basis of a protected class against secular applicants.

150. Furthering the CCA's purpose is made substantially easier by doubling the burden on officials choosing applicants to receive funds. These officials are not only charged with fulfilling the purpose of the CCA, but also with ensuring that no organization is denied funding because of its religious character. See id. § 201(b)(2), (c)(1)(B). One commentator has created a hypothetical situation involving this claim. Taylor, supra note 7, at 51. When President Bush initially unveiled his faith-based initiative, it was thought that for every religious organization that received a federal grant, a secular counterpart would also. Id. Although this would appear to provide continually a secular alternative for beneficiaries, it would not guarantee that a "truly equivalent" program would always be available. Id. The hypothetical, created without incorporating the CCA's requirement that the programs be implemented in a manner consistent with the religion clauses, pictured two drug treatment programs—one secular and one religious. Id.; see also H.R. 7 § 201(c)(1)(A). If the secular program, operating as the religious organization's counterpart, shut down, the religious organization would lose its funding unless it removed the religious character from the program. Taylor, supra note 7, at 51. When the provisions of the CCA amend the hypothetical, individuals are left only with a religious organization providing a program that
The government does not regulate or target religious practices under the CCA. The effect of the law, however, places a substantial burden on individuals in need of services that CCA program providers offer. Although *Smith* indicates that most Free Exercise claims will receive relaxed scrutiny under which the state is accorded considerable deference, the Court did not overrule *Sherbert*. When an individual can show a classification based on religion that places a significant burden on her religious practices, strict scrutiny is still appropriate. Under the CCA, the government does not explicitly place a burden on the religious practices of potential program beneficiaries. Nonetheless, the CCA makes a classification based on religion by targeting religious organizations and thereby imposing a burden.

The effect of the CCA, therefore, results in a substantial burden on the beliefs or non-beliefs of individuals who are eligible for the government programs at issue. For example, major Christian organizations likely will receive the majority of the federal funds because they have access to a large amount of supposedly does not violate the religion clauses, while religious art and images hang on the walls and clergy proselytize beneficiaries a few feet from the door. *See id.; discussion infra Part III.B* (noting that the lack of monitoring makes it impossible to insure that religious organizations are complying with the CCA's requirement that the program be consistent with the religion clauses); *see also* H.R. 7 § 201(j) (allowing proselytization so long as it is voluntary on the part of the individuals and conducted separately from the federally funded program).

151. *See Reynolds v. United States*, 98 U.S. 145, 166 (1878) (noting that laws that prohibit the free exercise of religion or punish individuals for their beliefs cannot survive under the Free Exercise Clause); H.R. 7 § 201(d)(1), (2)(A) (upholding the autonomy of religious groups and forbidding government interference with the organization's internal governance); *id.* § 201(g) (requiring the availability of an alternative provider for an individual who objects to the religious character of the social service provider); *supra* text accompanying notes 66-69.


153. *See Smith*, 494 U.S. at 886 n.3 (explaining that although neutral and generally applicable laws that incidentally burden religion do not warrant strict scrutiny, classifications based on religion are subject to strict scrutiny).

154. *Id.*

155. *See H.R. 7 § 201(b)(5)* (listing one of the purposes of the law as the protection of individuals' religious freedom).

156. *See id.* § 201(b)(2) (encouraging the increased presence of religious organizations in the social service regime is an express purpose of the law); *id.* § 201(b)(3) (allowing religious organizations to provide services without impairing the religious character of the group); *id.* § 201(d)(1), (d)(2)(A)-(B) (including special safeguards to protect the autonomy, internal governance, and religious displays of organizations that receive funds).
resources not readily available to other religious groups. 157 These Christian religions would provide a program that many individuals may object to due to their different, contrary, or lack of religious beliefs. Although the CCA provides that objectors can receive the services from an alternative provider, 158 the burden rests on the individual to raise that objection. 159 The safeguard seems reasonable on paper, but the CCA does not provide guidance as to whom the individual makes the complaint, how to locate the alternative provider, or what the individual must do in the interim. 160

157. Before many religious organizations could provide a federal program, they would need to consider overhead costs, such as maintenance costs for the area where the program is provided and salaries for clergy members devoting time to the program. See Taylor, supra note 7, at 50. Even before the CCA's provisions entered the debate, critics and supporters stressed that the initiative should only allow the withdrawal of funds for direct program costs and not overhead. Id. at 51. The CCA clearly states that the federal funds cannot be used to support the religion or religious beliefs or practices of the religious organization. H.R. 7 § 201(c)(2). Furthermore, these funds cannot be used for proselytization or sectarian instruction and worship. Id. § 201(j). Therefore, because all overhead costs must be accounted for prior to receiving funds (which can only be used for direct program costs) minority religious sects with considerably smaller congregations may not have the available resources and therefore could not apply for funds. See also Dokupil, supra note 8, at 198 (finding that large religions with more resources will get most of the funding because the government views them as representing the "general consensus on morality or ethics").

158. H.R. 7 § 201(g).

159. The objection provision in the CCA requires an alternative program be made available for individuals who object to the religious character of an organization. Id. Under this language, the government forces an individual into one of several impermissible positions. First, an individual would likely need to state his own religious beliefs in explaining why he objects to the religious character of the organization. Second, an individual who did not wish to share his religious beliefs would either have to attempt to explain his objection on non-religious grounds or forego the opportunity for an alternative, secular provider. The individual would likely be forced into the latter because the CCA allows the request for an alternative when the individual "has an objection to the religious character of the organization." H.R. 7 § 201(g)(1). Third, if it is insufficient to claim an objection to the organization's religious character without stating why it conflicts with an individual's religious beliefs, the individual would be required to choose between receiving a vital, government provided social service and maintaining his right to freely exercise his religion. See Sherbert v. Verner, 374 U.S. 398, 401-02 (1963); Guerricagaotia, supra note 8, at 466 (arguing that charitable choice is coercive because it requires individuals to shoulder the burden of requesting an alternative provider because of their own religious beliefs).

160. See H.R. 7 § 201(g) (stating only that if an individual objects to the religious character of the provider, an alternative provider will furnish assistance within a reasonable period of time); Guerricagaotia, supra note 8, at 456
Finally, though the CCA implements numerous safeguards to preserve its constitutionality, it still allows religious organizations to maintain their display of religious symbols in the areas where the organization provides the program.\textsuperscript{161} It also expressly allows proselytization and instruction, so long as it takes place outside the program.\textsuperscript{162} In the absence of any definition, outside the program could mean a few feet outside the entry door. All of these examples result in a direct burden on an individual's religious practice.\textsuperscript{163} The CCA is the proximate cause of this burden; but for its focus on increasing the presence of religious organizations in the social service regime, only non-profit, secular organizations would compete for and receive funds to administer programs, reducing any objectionable grounds for program beneficiaries.\textsuperscript{164}

The CCA also affects how religious organizations freely exercise their religious practices. The CCA prohibits the use of funds for the support of religion or the religious practices and beliefs of the organization.\textsuperscript{165} Furthermore, the CCA directs the organizations receiving the funds to conduct the programs in a manner consistent with the Free Exercise and Establishment Clauses.\textsuperscript{166} The CCA does not indicate how to achieve that goal, but it seems reasonable to assume that the organization could not conduct the program in a religious manner.\textsuperscript{167}

\textsuperscript{161} H.R. 7 § 201(d)(2)(B). This visual reminder of the religious character of the organization would further burden an individual's religious beliefs or lack thereof.

\textsuperscript{162} \textit{Id} § 201(j).

\textsuperscript{163} \textit{Sherbert}, 374 U.S. at 403.

\textsuperscript{164} H.R. 7 § 201(b)(2). The CCA's purpose is to facilitate the entry of religious organizations into the social service regime. \textit{Id}. Reading this purpose into the anti-discrimination provision of section 201(c)(1)(B) creates a contradictory situation in which the CCA starts by focusing on religion, then requires those responsible for carrying out the goals of the CCA to ignore religion. \textit{Id}. § 201(c)(1)(B); see also supra text accompanying notes 140-148.

\textsuperscript{165} H.R. 7 § 201(c)(2).

\textsuperscript{166} \textit{Id}. § 201(c)(1)(A).

\textsuperscript{167} \textit{See} Mitchell v. Helms, 530 U.S. 793, 818-19 (2000) (citing \textit{Rosenberger v. Rector & Visitors of Univ. of Va.}, 515 U.S. 819, 842 (1995)) (emphasizing the heightened Establishment Clause dangers when federal funds were distrib-
Many of the existing private religious programs hailed for their effectiveness center their treatment of crime victims and addicts on religion. To receive funds under the CCA, these religious organizations must change their approach to providing services to comply with the CCA's directions. A clear alternative would be for those institutions to refrain from applying for federal funds. As discussed below, however, the potential effect of this rationale is to create the appearance of government endorsement of certain religions. To compete on an equal level with other religious organizations, the groups would need to remove the religious character from the programs, thus constituting a burden.

Because the CCA makes explicit classifications on the basis of religion and imposes a direct and substantial burden on insti-

168. See 147 Cong. Rec. H3452-53 (daily ed. June 21, 2001) (statement of Rep. Souder) (discussing various existing faith-based treatment programs). Many of these programs involve mandatory Bible study and church attendance as part of the program's regime. Id. These distinctly religious programs would not receive grants because the funds cannot be used in a manner consistent with the Free Exercise and Establishment Clauses. See id. at H3453-54.

169. See Bowen v. Kendrick, 487 U.S. 589, 610-11 (1988) (discussing the questionable nature of direct aid to parochial schools because they were pervasively sectarian). This requirement stands in opposition to a protection included in the CCA. Religious organizations are to maintain their autonomy from federal, state, and local governments, including the right to control "the definition, development, practice, and expression of their religious beliefs." H.R. 7 § 201(d)(1). Removing the religious aspects of the program requires the modification of these ideals. See id. If these organizations did remove the religious emphasis of the program, it seems possible that those pervasive beliefs would nonetheless surface in programs under the CCA.

170. See discussion infra Part III.B; cf. Mitchell, 530 U.S. at 810-11 (finding that when religious institutions receive a financial benefit as a result of private choices, there is a reduced danger that the government will exhibit a preference for certain aid recipients, which could create a program that favors one religion over another).

171. To fulfill the goal of the CCA—increasing the presence of religious organizations in the social service regime—without creating an appearance of endorsement, more than a few religions must apply for the funds. Cf. H.R. 7 § 201(b)(2) (encouraging new providers to apply for funds). Many of these religious groups already provide programs with a distinctly religious basis. See supra note 168 (noting the religious character of many programs). Therefore, removing that religious foundation in order to comply with the CCA's directive to implement programs in a manner consistent with the religion clauses constitutes an impermissible burden on that religious organization's ability to freely exercise its religion. See Employment Div., Dept of Human Res. of Or. v. Smith, 494 U.S. 872, 886 n.3 (1990) (imposing strict scrutiny on classifications based on religion); see also H.R. 7 § 201(c)(1)(A).
individuals, strict scrutiny would be the appropriate level of review. The government is effectively dictating the exercise of religion by requiring the removal of religion as a contingency to receiving funds. This surpasses any appropriate degree of governmental intrusion into the free exercise of religion.

B. THE CCA WEAVES A TANGLED WEB: THE GOVERNMENT'S ILLUSION OF "FREEDOM" ENSNARES RELIGION

The potential impact of the CCA and its constitutional ramifications cannot be determined concisely or methodically under the Court's current Establishment Clause jurisprudence. Although nothing prohibits Congress from using the aid of religious organizations to fight secular problems, the Court views with suspicion government aid that flows directly to religious organizations. Under the CCA, administrators grant funds directly to religious organizations that apply for social service program funding, thus giving the religious organization control over the funds.

First, although the CCA asserts a secular purpose, the clear sectarian purposes overwhelm the secular ones. The

172. The purpose of the CCA explicitly targets religion and makes classifications on the basis of religion. See Smith, 494 U.S. at 883 n.3 (1990); Sherbert v. Verner, 374 U.S. 398, 403 (1963); see also H.R. 7 § 201(b)(2). Therefore the CCA is not a neutral law of general applicability that incidentally burdens religious practices. See Smith, 494 U.S. at 878.

173. See Dokupil, supra note 8, at 200.

174. See United States v. Lee, 455 U.S. 252, 257 (1982) (noting that a burden on religion may withstand constitutional scrutiny where "[t]he state... justifies] a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest") (emphasis added).

175. See Mitchell, 530 U.S. at 804 (noting the confusion over the appropriate analysis for Establishment Clause claims).


177. See Mitchell, 530 U.S. at 810, 818-19 (discussing the special dangers inherent in direct government aid to religious groups).

178. Id. at 802-03 (emphasizing that the religious schools never received direct authority over the funds or materials purchased by the funds).

179. See H.R. 7, 107th Cong. § 201(b)(1) (2001) (including within the CCA's purpose the effective and efficient delivery of social services to beneficiaries).

180. Agostini v. Felton, 521 U.S. 203, 222-23 (1997) (inquiring "whether the government acted with the purpose of advancing or inhibiting religion" as the first part of an Establishment Clause analysis); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (describing the first prong of the Lemon test as whether the statute has a secular purpose, which may involve an examination of legislative intent); see also H.R. 7 § 201(b)(2)-(5) (stating that the CCA's purposes include facilitating the entry of religious organizations into the social service regime, prohibiting discrimination against religious organizations in the administr-
CCA explicitly targets religious organizations and integrates them into the federal system as administrators of federal programs. The vast majority of the CCA is devoted to a discussion of the protection provided to religious organizations, the safeguards to bolster its constitutionality, and the accountability of religious organizations. In fact, only two provisions within the CCA address its secular purpose. The debates in the House of Representatives also indicate that the secular purpose may represent merely a veil. The CCA attempts to dilute its religious policy by including gratuitous secular policies to establish a secular purpose. Although the government's assertion is entitled to some deference, a court must "distinguish a sham secular purpose from a sincere one."

The CCA's effect would also advance religion. The CCA contains an anti-discrimination provision regarding the allocation of funds. Nonetheless, the express purpose of the CCA—

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181. H.R. 7 § 201(b)(2).
182. See id. § 201(b)(3), (c)(1)(B), (d), (e).
183. See id. § 201(b)(5), (c)(1)(A), (c)(2)-(3), (j).
184. See id. § 201(i).
185. See id. § 201(g) (requiring that alternative providers be available for individuals who object to the religious character of the organization); id. § 201(h)(1)-(2) (prohibiting discrimination by religious organizations against eligible program beneficiaries on the basis of religious beliefs); see also Guerricagotita, supra note 8, at 464 (finding that since the PRWORA applied only to religious organizations, the narrow statutory breadth denied an inference of a secular purpose).
186. See 147 CONG. REC. H4102-03 (daily ed. July 17, 2001) (statement of Rep. Edwards) (characterizing the CCA as a mechanism that directly funds religion); id. at H3812-13 (daily ed. July 10, 2001) (statement of Rep. Edwards) (pointing out President Bush's faith-based initiative "would for the first time in our country's history, direct Federal tax dollars going immediately into the coffers of our houses of worship... [and] would actually subsidize... religious discrimination"); id. at H3814-15 (statement of Rep. Souder) (reasoning that so long as active proselytization is absent, there is no need for a complete separation of church and state); id. at H3452-53 (daily ed. June 21, 2001) (statement of Rep. Souder) (criticizing the emphasis of the CCA's opponents on the separation of church and state because Americans are religious people); see also Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (examining the legislative purposes and intent to determine the purpose of the statute).
189. H.R. 7 § 201(c)(1)(B).
increasing the presence of religious organizations within the social service regime—requires fund administrators to actively seek out religious groups to effectuate that goal.\textsuperscript{190} The result is that the CCA gives federal money to religious organizations over nonprofit, secular organizations.\textsuperscript{191} Furthermore, the majority of the CCA's provisions apply only to religious groups.\textsuperscript{192} Although the aid provided through the CCA is also available to secular organizations, the majority of the protections offered by the CCA apply solely to religious organizations.\textsuperscript{193} Therefore, the CCA fails to neutrally allocate funds to qualified organizations without regard to religion.\textsuperscript{194}

\textsuperscript{190} See H.R. 7 § 201(b)(1)-(5) (listing the CCA's purposes). \textit{But see Bowen v. Kendrick}, 487 U.S. 589, 604 (1988) (stating that the AFLA did not require that grantees have a religious affiliation).

\textsuperscript{191} See supra text accompanying notes 140-150 (finding that the CCA's purpose and anti-discrimination provision help fulfill the statute's goal because only discrimination against religious organizations is prohibited). \textit{Compare Bowen}, 487 U.S. at 608 ("[N]othing on the face of the Act suggests it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution."). \textit{With Guerricagoitia, supra note 8, at 467} ("Charitable choice makes it easier for faith-based organizations to receive federal funds \textit{not despite} their religious character \textit{but because of} that character.").

Early debates over the CCA suggested that for every religious group receiving a grant, a secular counterpart would also receive a grant. \textit{See Taylor, supra note 7, at 50-51.} The CCA, however, does not include such a provision. It seems unlikely that multiple groups will provide the same program in a given area. Therefore, the religious organizations that receive funds will receive them at the exclusion of secular groups. Although this may not hold true in larger metropolitan areas, smaller cities and rural areas would surely see this result. The exact application and effect of the CCA, however, is unclear. This legislation represents a considerable expansion of the charitable choice concept first seen in PRWORA. \textit{See supra text accompanying notes 25-28.}

\textsuperscript{192} See statutes cited supra notes 182-184 and accompanying text (listing provisions of the CCA devoted to religion).

\textsuperscript{193} See H.R. 7 § 201 (applying the CCA's provisions, safeguards, protections, and restrictions to religious institutions). \textit{But see id. § 201(g)-(h)} (including protections for program beneficiaries); Guerricagoitia, \textit{supra note 8, at 471} (arguing that the PRWORA's charitable choice scheme is not a general program with uniform requirements; it offers special treatment to religious organizations on the basis of their religious character).

\textsuperscript{194} See Mitchell v. Helms, 530 U.S. 793, 810 (2000) (finding that aid flowing to a religious organization is constitutionally sound "if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, \textit{without regard to religion}") (emphasis added); Agostini, 521 U.S. at 232 (upholding a federal program's constitutionality because the criteria for allocating aid did not favor or disfavor religion); \textit{see also} Dokupil, \textit{supra note 8, at 198} (arguing that under PRWORA's charitable choice concept, it is impossible to neutrally distribute funds among religious groups on an equal basis); Guerricagoitia, \textit{supra note 8, at 455-57} (discussing charitable choice in PRWORA and the difficulty faced by government officials neutrally awarding funds to
The CCA also neglects to include the principle of private choice. Religious organizations compete with secular groups for federal funds to administer and distribute public programs. These funds flow directly to the religious organization. Under this scheme, no private individuals make independent and genuine choices that direct aid towards religious organizations. Instead, the federal aid reaches religious institutions by virtue of government decisionmaking. Additionally, the CCA does not provide any criteria for determining which organization should receive the funds, thus granting broad discretionary authority to the officials in charge of awarding the funds. This introduces the personal biases and beliefs of those with decisionmaking authority into the process, resulting in advancement of certain religions.

The allocation scheme developed by the CCA defines aid recipients with regard to religion. It is unclear, however, if this creates a financial incentive for religious indoctrination. The federal grants offered under the CCA are not distributed to secular and religious organizations on the same terms or without regard to religion. The combination of the CCA's purpose

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195. See Mitchell, 530 U.S. at 809-10; Agostini, 521 U.S. at 225-26; H.R. 7 § 201(b)(3).

196. See H.R. 7 § 201(b)(3).

197. See Agostini, 521 U.S. at 228-29 (concluding that the federal aid at issue did not flow directly to the religious schools because the funds did not "reach [their] coffers" and went instead to a public agency); H.R. 7 § 201(i)(2)(A) (instructing religious organizations that receive federal funds to segregate those funds into a separate account). Compare Bowen v. Kendrick, 487 U.S. 589, 610 (1988) (finding that funds flowing directly to religious institutions do not present advancement problems unless those institutions are pervasively sectarian), with 147 Cong. Rec. H3452, 3453 (daily ed. June 21, 2001) (statement of Rep. Souder) (describing the pervasively religious nature of many existing faith-based programs that provide services without federal funds).

198. See Mitchell, 530 U.S. at 810; Agostini, 521 U.S. at 226.

199. See Mitchell, 530 U.S. at 810; Agostini, 521 U.S. at 226.

200. Cf. Mitchell, 530 U.S. at 810 (noting that the concept of private choice eliminated the danger inherent in aid programs where the government exhibits preferences for recipients, which "could lead to a program inadvertently favoring one religion or favoring religious private schools in general over nonreligious ones").

201. See id., 530 U.S. at 813; Agostini, 521 U.S. at 230.

202. See Mitchell, 530 U.S. at 813; Agostini, 521 U.S. at 230.

203. See Mitchell, 530 U.S. at 810, 814 (noting that when determining whether the program defines its beneficiaries by reference to religion, the neutrality analysis is equally appropriate); see also H.R. 7, 107th Cong. §
and its anti-discrimination provision results in the direct aid allocation by officials that favors religious organizations. It is possible that religious organizations, as potential aid recipients, would modify their religious beliefs and practices to obtain federal grants. If such incentive exists, the religious indoctrination at these programs would be attributable to the government.

The excessive entanglement the CCA creates between religious organizations and the government represents the last step in its advancement of religion. The CCA provides a substantial benefit to institutions that are predominantly religious in character. These institutions receive a financial benefit

201(c)(1)(B) (2001) (prohibiting discrimination against religious institutions applying for grants); id. § 201(e) (allowing religious organizations to maintain their exemption from Title VII and discriminate on the basis of religion); id. § 201(i)(3) (requiring a self-audit from religious organizations and allowing them to correct any variances).

204. See Agostini, 521 U.S. at 231 (requiring that the federal aid be made available on a nondiscriminatory basis to secular and religious groups to eliminate the existence of the creation of a financial incentive); supra text accompanying notes 147-150 (arguing that the fund administrators must focus on religious institutions in order to meet their double duty of furthering the CCA's purpose and not discriminating against organization because it is religious).

205. See Agostini, 521 U.S. at 232. Since many religious organizations currently offer programs rooted in religion, they would need to remove the emphasis on faith to administer a program consistent with the religion clauses and comply with the CCA's ban on proselytization. See 147 Cong. Rec. H3452-53 (daily ed. June 21, 2001) (statement of Rep. Souder) (describing such programs); see also H.R. 7 § 201(c)(1)(A), (j). Although there is no requirement that religious institutions apply for grants, the purposes of the CCA require many of those praised by Representative Souder to apply for aid and remove the religious character from their programs. This is "required" to avoid a situation where only a few religions control the aid. See also Dokupil, supra note 8, at 200 (noting instances where grant recipients must alter their operations as a contingency of receiving the grant).

206. See Mitchell, 530 U.S. at 814. The CCA allows religious organizations to proselytize and offer sectarian worship and instruction when it is separate from the program and voluntary on the part of the beneficiary. H.R. 7 § 201(j). It also requires that the organizations be allowed to display religious symbols and art. Id. § 201(d)(2)(B). Religious indoctrination offered "separate" from the program can be interpreted as allowing such activity just outside the door where other beneficiaries receive aid. See id. § 201(j). Although the indoctrination is voluntary on the part of the recipient, it is involuntary on the part of the program beneficiaries still inside viewing religious symbols and art. See id. § 201(d)(2)(B), (j).

207. See Agostini, 521 U.S. at 232-33.

208. See id. at 232.
because of the CCA's express purpose and provisions.\textsuperscript{209} The relationship that will result between these organizations and the government presents the persuasive argument that the CCA creates an excessive entanglement and impermissibly advances religion.\textsuperscript{210}

The CCA allows religious organizations to deposit federal funds directly into their coffers and then provide a variety of vital and sensitive social service programs to the public-at-large.\textsuperscript{211} Despite the potential for constitutional violations by the program providers and against the beneficiaries, the CCA does not contain enforcement or compliance procedures. Instead, it includes numerous safeguards\textsuperscript{212} that attempt to resolve present and future problems in one fell swoop.

Religious organizations that receive grants under the CCA must implement the programs in a secular manner.\textsuperscript{213} In reality, there is no way to enforce this provision.\textsuperscript{214} A self-prepared audit represents the only required record of the religious organization’s activities under the federally funded program.\textsuperscript{215} In addition, the CCA explicitly allows religious organizations to proselytize and offer worship services and religious instruction so long as participation is voluntary and outside the confines of

\textsuperscript{209} See id. at 233 (examining the nature of the aid for neutrality in determining excessive entanglement). The CCA’s purpose and prohibition on discrimination indicate a preference for religious institutions as social service providers. See H.R. 7 § 201(b)(2), (c)(1)(B); discussion supra Part III.A.

\textsuperscript{210} See Agostini, 521 U.S. at 234.

\textsuperscript{211} See H.R. 7 § 201(c)(4), (i)(2)(A); see also Agostini, 521 U.S. at 228.

\textsuperscript{212} H.R. 7 § 201(c)(2) (prohibiting the use of federal funds for religious purposes); id. § 201(c)(3) (stating that the funds given to religious organizations do not constitute government endorsement of religion); id. § 201(c)(1)(A) (requiring generally that the religious organizations implement programs in a manner consistent with the religion clauses).

\textsuperscript{213} See id. § 201(c)(1)(A), (c)(2).

\textsuperscript{214} But see Bowen v. Kendrick, 487 U.S. 589, 615 (1988) (finding that the grantees’ submission of a detailed proposal before receiving funds and, after receiving grants, the completion of evaluations and preparation reports on the use of the funds, were adequate protections against the use of federal funds for impermissible purposes). The CCA briefly pays lip service to the requirement of compliance. After discussing the ban on the use of funds for proselytizing, worship, and instruction, the CCA states that the organization will submit a certificate to the disbursing agency saying it understands this provision. H.R. 7 § 201(j).

\textsuperscript{215} H.R. 7 § 201(i)(3); see also Dokupil, supra note 8, at 203 (noting that many religious organizations will lack the resources and knowledge to comply with the PRWORA’s enforcement procedures and that the regulations may threaten their autonomy, thus creating excessive entanglement).
BLURRING THE LINE

Therefore, sectarian instruction, worship, and proselytizing could occur within a few feet of the program’s entry. The lack of required accountability and the possibility of religious inculcation necessitates some sort of statutorily required monitoring.  

If the CCA wants to insure that organizations follow its instructions regarding the use of funds, the proper roles of the government and the religious institutions, and the rights of beneficiaries, it must necessarily require the government’s presence in religious organizations. The CCA states that the religious organizations are to retain their autonomy and that federal, state, and local governments cannot interfere with their internal affairs.  

Although many existing programs offered by religious entities are extremely religious in nature, the CCA merely states that religious organizations cannot use the funds to further their religious beliefs, that the programs must be consistent with the religion clauses, and that they cannot expend funds for sectarian instruction, worship, or proselytizing. Despite these directives, the CCA does not require that religious organizations remove religious art; in fact, the CCA specifically states that religious organizations cannot be required to remove these symbols. 

The CCA cannot maintain the separation it purports to uphold when it does not monitor the organizations, evaluate the programs for compliance, or test the quality of the aid provided.  

216. H.R. 7 § 201(j); see supra text accompanying note 38 (quoting § 201(i)).  
217. See Agostini v. Felton, 521 U.S. 203, 234 (1997) (finding a public supervisor’s periodic inspections of the program at issue sufficient monitoring to detect any religious inculcation). A monitoring system, on its own, will not create excessive entanglement unless it is pervasive. See id.  
220. H.R. 7 § 201(c)(2).  
221. Id. § 201(c)(1)(A).  
222. Id. § 201(j).  
223. Compare Agostini v. Felton, 521 U.S. 203, 211-12 (1997) (including in the list of the Court’s reasons why no advancement resulted from the federal program at issue the removal of religious symbols from the classroom before remedial instruction was provided), with H.R. 7 § 201(e) (stating that federal, state, and local governments cannot require religious organizations receiving federal funds to remove religious symbols).  
224. Compare Agostini, 521 U.S at 234 (listing as one of the Court’s reasons why no advancement resulted from the federal program the periodic, unan-
faced by secular recipients, given the pains taken by Congress to clearly list the limited responsibilities of the religious organizations, it seems reasonable to assume that secular organizations are subjected to more stringent requirements. For example, the CCA seemingly places religious organizations on the same level as other organizations in terms of accounting responsibilities for the federal funds received.225 The CCA, however, makes an exception for religious entities, requiring them only to prepare a self-audit.226 Therefore, non-religious organizations that receive the same funds will need to comply with more stringent accounting practices to show the government that they are correctly utilizing the funds.227

In addition to the safeguards, special provisions, and restrictions, the CCA allows religious organizations to discriminate in some employment practices, but not others.228 The government visits by a public inspector), with supra text accompanying notes 213-216 (noting that in all of the CCA, only safeguards against government intrusion are present and not safeguards that the religious organizations are complying with the affirmative instructions of the CCA).

225. H.R. 7 § 201(i)(1).

226. Id. § 201(i)(3). In discussing the accountability of religious organizations, the CCA states that "a religious organization providing assistance under any program [described in the statute] shall be subject to the same regulations as other nongovernmental organizations to account in accord with generally accepted accounting principles for the use of such funds and its performance of such programs." Id. § 201(i)(1). Immediately preceding this assertion, however, the CCA makes exceptions to this general requirement insofar as section 201(i)(2)-(3) requires. Id. § 201(i)(1). The first of these exceptions provides that religious organizations must segregate the federal funds into a separate account, which would be subject to government audit. Id. § 201(i)(2)(A). The second exception, however, states that those federal funds, which section 201(i)(2)(A) required to be placed in a separate account, will be subject to annual self-audit by the religious organization. Id. § 201(i)(3). The organization then turns in a copy of that self-audit to the appropriate government agency. Id.

227. The CCA initially states that religious and secular organizations are subject to the same accounting practices. Id. § 201(i)(1). That statement is qualified by two exceptions applying solely to religious organizations. See id. § 201(i)(1), (2)(A), (3). These exceptions allow religious organizations to simplify their account procedures because the exceptions limit the funds to one account and allow the organization to perform a self-audit. Id. § 201(i)(2)(A), (3). It also follows that since the CCA includes a self-audit provision, the government, except perhaps in circumstances not listed, will not audit religious organizations. See id. Based on these exceptions and the accountability section in general, it is reasonable to infer that secular organizations must comply with either additional requirements, stricter guidelines, or both. See id.

228. See id. § 201(e)-(f) (allowing religious organizations to maintain their exemption under Title VII regarding employment practices, but still requiring compliance with other nondiscrimination statutes). For further discussion of
ernment's involvement in religious organizations will be insured when beneficiaries or employees allege violations of antidiscrimination statutes. This reason and those above lead to the plausible inference that by creating special exceptions and requirements for religious organizations under the CCA, the resulting relationship between these religious groups and the government, as compared to non-religious groups, is one that advances religion.229

C. CONFLICT-FREE: EQUALITY TRIUMPHS OVER WHISPERED OBJECTIONS

Religious employers receive an exemption from complying with Title VII's ban on discrimination on the basis of religion.230 The exemption applies only to hiring decisions of religious employers based on religious preferences.231 Consequently, religious employers must still comply with the other discrimination prohibitions under Title VII, including sex discrimination.232 Religious organizations receiving federal funds for the administration of government programs under the CCA are still entitled to exemption under Title VII.233 These

the problems presented by this dichotomy, see discussion infra Part III.D.

229. Cf. Agostini, 521 U.S. at 234 (discussing the criteria that lead to government advancement of religion); Dokupil, supra note 8, at 204 (discussing a court's possible interpretation of the safeguards included in the PRWORA and arguing that "the courts must not grant protections so expansive that government funding may sponsor proselytization or religious instruction").


231. EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1366 (9th Cir. 1986); see also Rayburn, 772 F.2d at 1166 (stating that the religious exemption in Title VII did not allow religious organizations to make hiring decisions on the basis of race, sex, or national origin).

232. Fremont Christian Sch., 781 F.2d at 1366. In Fremont Christian School, the petitioner was a private, sectarian school. Id. at 1364. The school required that its employees be evangelicals and adhere to its faith, which included the belief that only men are heads of households. Id. It offered health insurance as a fringe benefit, which was available only to heads of household. Id. The court found that Congress intended the religious exemption from Title VII to be narrow in scope, noting that Congress and courts rejected the proposal to provide religious employers with a complete exemption from Title VII. Id. at 1365-66. The court also rejected the school's claim that compliance with Title VII prohibited the free exercise of its religion. Id. at 1368. The religion at issue did not possess a rooted religious belief that it must discriminate against women and minorities. Id.

233. H.R. 7 § 201(e).
organizations, however, are not exempted from their duty to comply with other federal anti-discrimination statutes. Furthermore, there is no express preemption section in the CCA that would resolve any potential conflict with state laws. Congress did not evince any intent that would suggest it intended to regulate the insurance provision practices of religious employers by enacting the CCA. The issue here is whether compliance with the CCA regulations for religious organizations renders compliance with the Women's Contraception Equity Act impossible.

States may enact their own laws to combat employment discrimination. California enacted the Woman's Contraception Equity Act as a remedial statute to address gender discrimination in insurance practices. Many individuals receive insurance through their employers; hence, the Act requires that when the employer provides policies that offer prescription drug coverage, those policies cover contraceptives. Therefore, the Woman's Contraception Equity Act resembles California's Fair Employment and Housing Act (FEHA), which provided additional protections to pregnant female employees. The Supreme Court found it possible to comply with both Title VII

234. See id. § 201(e)-(f).
236. The Supreme Court found that Congress explicitly declined to categorically preempt state law in or occupy the field of employment discrimination law as it relates to Title VII and the FDA. Id. at 281. It follows that providing prescription drug coverage as a means of eliminating gender discrimination is in the field of employment discrimination law because it is a violation of Title VII. See 42 U.S.C. § 2000e(k), e-2(a) (2000); EEOC, supra note 39.
238. See id. at 281 (finding that Congress did not intend to preempt state law in or occupy the field of employment law).
239. CAL. HEALTH & SAFETY CODE § 1367.25 (West 2000); CAL. INS. CODE § 10123.196 (West Supp. 2002); Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento County, 109 Cal. Rptr. 2d 176, 182 (Cal. Ct. App. 2001) (not citable as precedent in any California court), reh'g granted, 31 P.3d 1271 (Cal. 2001); see also supra text accompanying notes 39-42.
and FEHA, because both furthered the goal of the eradication of gender discrimination in employment.\textsuperscript{242} It logically follows that employers can comply with Title VII and the Woman's Contraceptive Equity Act because both laws further the goal of eliminating gender discrimination.\textsuperscript{243}

Title VII does not preempt the Women's Contraceptive Equity Act even though both laws exist in the same field.\textsuperscript{244} In view of this finding, the CCA also would not preempt the Women's Contraceptive Equity Act. The CCA operates in the field of government-provided social service programs and the effective delivery of those programs to the public.\textsuperscript{245} It does not purport to affect the field of employment discrimination. It is reasonable to infer that many employers and government social service providers do not maintain a religious character. When inquiring as to whether a federal law preempts a state law, the objections of a clear minority to the application of the law do not create a conflict between the laws that requires the pre-emption of the state law.\textsuperscript{246} The vast majority of social service providers and employers in California can comply with both the Women's Contraceptive Equity Act and the CCA. Furthermore, for those religious employers that object to the Act, the California legislature included an exemption to accommodate their beliefs.\textsuperscript{247}

\textsuperscript{242} Id. at 290-91.

\textsuperscript{243} See id. at 288; Catholic Charities, 109 Cal. Rptr. 2d at 182 (explaining the policy rationale of the Women's Contraceptive Equity Act).

\textsuperscript{244} See Cal. Fed. Sav. & Loan Ass'n, 479 U.S. at 289, 292 (finding FEHA, which provided additional protections for pregnant women, promoted equal employment opportunity and was not preempted by Title VII). The Women's Contraception Equity Act also promotes equal employment opportunity by equalizing the insurance costs for men and women. See Cal. Health & Safety Code § 1367.25 (West 2000); Cal. Ins. Code § 10123.196 (West Supp. 2002).

\textsuperscript{245} See H.R. 7, 107th Cong. § 201(b)(1)-(2) (2001).

\textsuperscript{246} The conflict that arises must render it impossible to comply with both the federal and state law. See Cal. Fed. Sav. & Loan Ass'n, 479 U.S. at 281 (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)). Additionally, if the conflict so frustrates congressional purposes, creating an immovable obstacle, the state law is preempted. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984). To create such an "obstacle" resulting in a conflict requiring preemption, logically vast complications in the application of such laws are necessary to require preemption. See id. That some religious employers would object to the application of the Women's Contraception Equity Act is not enough to create an immovable obstacle or render compliance with each law impossible. See Cal. Fed. Sav. & Loan Ass'n, 479 U.S. at 281; Silkwood, 464 U.S. at 248.

\textsuperscript{247} See Cal. Health & Safety Code § 1367.25(b)(1)(A)-(D) (West 2000);
D. A Small World, A Short Journey: California Calls the CCA's Bluff

Even if the CCA could withstand constitutional scrutiny, the EEOC's recent decision that included contraception within the meaning of the PDA and its adoption within the federal and state systems create problems for religious organizations, further revealing the problems inherent in the CCA.

Congress enacted the PDA to amend Title VII to further promote equal treatment of women in employment by protecting pregnancy and pregnancy related conditions. The EEOC retains the charge of interpreting the scope and application of the PDA, because the PDA is part of Title VII. The states are encouraged to further the purpose of Title VII—the elimination of workplace discrimination—by enacting their own anti-discrimination provisions. Title VII's express purpose is to prohibit, among other things, discrimination on the basis of sex.

A woman's decision to use contraception involves a conscious choice regarding pregnancy. Choosing not to use contra-
ception, in many cases, may indicate a desire to become pregnant, or, at least, makes a woman more susceptible to pregnancy. The PDA not only covers women who are actually pregnant, but also a woman's potential to become pregnant. Furthermore, the PDA emphasizes that it covers not only childbirth, but also related conditions. Contraception (the use or lack thereof) in large part determines whether or not a woman will become pregnant. Therefore, if the PDA protects a woman's potential to become pregnant, it logically follows that contraception would be a "related condition" within the meaning of the PDA. Given Congress's clear intent to eliminate gender discrimination through Title VII, as amended by the PDA, the EEOC's interpretation of the PDA as prohibiting the exclusion of contraceptives from prescription benefit plans accords with Title VII and its legislative history. Based on this analysis, Catholic Charities and Erickson v. Bartell Drug Co. appropriately adopted its reasoning.

The Women's Contraception Equity Act, a California law, furthers the goals of Title VII and the PDA by working to eliminate gender discrimination in insurance practices, a predominantly employer-provided item. Many other states share California's view and maintain substantially similar statutes that mandate prescription contraception coverage. Although not all of these state statutes are identical to California's, courts could interpret many of them the same way California did in Catholic Charities—no exemption. The religious

255. 42 U.S.C. § 2000e(k); Johnson Controls, 499 U.S. at 199, 211.
256. EEOC, supra note 39.
260. For a list of the states that have such statutes, see supra note 47.
261. See Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento County, 109 Cal. Rptr. 2d 176, 183-84 (Cal. Ct. App. 2001) (not citable as precedent in any California court), reh'g granted, 31 P.3d 1271 (Cal. 2001); supra note 47 (showing that although some states maintain religious employer exemptions, many statutes are ambiguous because they contain no definition of a religious employer).
organizations will serve people of all faiths and be federal fund recipients, two factors which, on their face, remove some of the "religion" from a religious employer. This factor raises significant concerns for religious organizations that receive funds under the CCA.

The CCA gives government money directly to religious organizations to administer federal social service programs.\(^{262}\) These organizations could administer a variety of diverse and potentially complicated programs.\(^{263}\) To ensure effective delivery of these programs, religious organizations would likely need a staff. For example, the CCA allows religious organizations to provide programs that assist students in obtaining their diplomas and GEDs.\(^{264}\) An efficient program of this nature requires teachers and a support staff. Accordingly, under many of these programs, religious organizations would become employers. Religious employers only receive an exemption from compliance with Title VII with regard to hiring decisions.\(^{265}\) Therefore, these newly created religious employers would need to comply with Title VII's prohibition on sex discrimination.\(^{266}\)

The EEOC's decision makes excluding contraceptives from prescription drug benefit plans a violation of federal law.\(^{267}\) To comply with Title VII, religious employers like Catholic Charities that do not fall into an exemption and that provide insurance plans to employees would need to provide contraceptive coverage.\(^{268}\) This result affects religious organizations throughout California and the rest of the nation. Though not all religious organizations object to contraception as strenuously as the Catholic Church does,\(^{269}\) it seems likely that many

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\(^{262}\) H.R. 7, 107th Cong. § 201(b)(2) (2001).

\(^{263}\) For a list of the areas in which the CCA provides that religious organizations can administer programs, see supra note 28.

\(^{264}\) H.R. 7 § 201(c)(4)(B)(i).


\(^{266}\) See Fremont Christian Sch., 781 F.2d at 1366; Rayburn, 772 F.2d at 1166-67.

\(^{267}\) EEOC, supra note 39.


\(^{269}\) See id. at 183 (explaining that the exemption included in the Women's Contraception Equity Act arose out of the complaints of the Catholic Church
may not be comfortable with the notion of the requirement to comply with federal anti-discrimination statutes. Additionally, this requirement represents an example of the government potentially interfering with the free exercise of religious practices.

Although the logical response to this concern is that religious organizations should not accept federal money under the CCA, this would make it difficult to meet the CCA's goal—increasing the presence of religious organizations in the existing social service regime. In addition, the religious organizations that do not object to these requirements would control the funds and the available pool of providers, creating problems for

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270. For example, the Court addressed a freedom of association claim under the First Amendment in *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). The Court examined the issue of whether the application of New Jersey's public accommodation law, which would require the Boy Scouts of America (BSA) to include Dale, a gay Scout leader, as a member, violated the First Amendment right of freedom of association. *Id.* at 647-48. The Court cautioned that government actions could burden this freedom, giving as a specific example, the intrusion of a regulation upon the internal affairs of an organization. *Id.* at 648 (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). The Court's concern centered on a regulation that forced a private group like the BSA to include a member that caused it to send an unwanted message and compromised the expression of its views. *Id.* The Court found that the BSA engaged in expressive activity, thus triggering the First Amendment right to freedom of association. *Id.* at 648-50. Furthermore, forcing the BSA to accept Dale as a member would significantly compromise its expression. *Id.* at 656. Because of this substantial burden, the interest of eliminating discrimination embodied in New Jersey's public accommodation law was not sufficient to justify the intrusion on the BSA's right to freedom of association. *Id.* at 657, 659. Considering the Court's reasoning and conclusion in *Dale*, which found that a public accommodation law enacted to prevent discrimination could not outweigh the interests of a private organization like the BSA, it seems that the CCA's requirement that religious employers comply with many federal anti-discrimination laws would create a conflict for those religions that object to the individuals or ideas protected by the statutes. See *id.*; *Sherbert v. Verner*, 374 U.S. 398, 401-02 (1963) (finding that a government regulation that forced an individual to choose between her religious beliefs and work represented an impermissible burden); *supra* note 32 (listing the federal anti-discrimination statutes religious organizations must comply with under the CCA). Although these religious organizations would not be considered "private" because they are recipients of federal grants, they can still invoke the protections of the Free Exercise and Establishment Clauses. The conflict caused by the organizations' compliance could result in the Court pitting the exercise of groups' religious beliefs against the interests of the government in enacting anti-discrimination statutes.

271. *See Reynolds v. United States*, 98 U.S. 145, 162 (1878) (declaring that Congress may not pass laws that punish on account of religious beliefs).

272. *H.R. 7, 107th Cong. § 301(b)(2) (2001).*
individuals seeking services. Finally, in the absence of a diverse array of religious groups, the fund administration system set up through the CCA could result in a small number of religions using the majority of the funds, creating an appearance of government endorsement of certain religions at the exclusion of others.

CONCLUSION

The unknown consequences of the CCA represent its gravest dangers. If the CCA becomes law, the government, religious organizations, and individuals will face a myriad of potential difficulties. On one hand, the CCA seeks to provide individuals with the opportunity to choose a religious provider of government services. On the other hand, to maintain its constitutionality, the CCA orders these organizations to administer the programs secularly. The CCA first asserts a rationale of faith to support the “choice” it offers and then removes the very faith it hopes to promote.

The inability of a religious organization to separate entirely its beliefs from its very existence ensures, however, that faith will be present in the programs the CCA funds. In a very limited respect, therefore, the CCA maintains its faith rationale, but at a high cost. The choice given to individuals who seek faith is taken away from those who do not. The inherently religious nature of the organization and its display of religious imagery create a kind of assault on individuals who hold different beliefs and those who choose not to believe at all.

In addition to its burden on individual religious choices, the CCA places religious organizations in a quandary. The choice the CCA gives to these groups erodes the freedom it purports to preserve. Religious organizations that receive federal funds lose their right to infuse the program with their religious tenets. Those organizations that continue to promote religious values forego the opportunity for the increased exposure that accompanies these grants.

The special treatment provided to religion under the CCA further complicates the predicament. The CCA searches for religious organizations, promising them numerous protections

273. See discussion supra Part III.A.
and autonomy. The CCA's promises, however, create constitutional problems instead of affording constitutional protections. The CCA compromises the independence it aimed to preserve by entangling government objectives with religious pursuits.

The CCA's authors hoped the safeguards would establish a safe haven for religion. Instead, they construct a cage. Religious organizations must now comply with a host of laws at varying levels of government. A court's decision to require Catholic Charities to provide contraception represents but one example of the difficulties religious organizations will face if they receive direct federal aid.

The existing social service system presents the government with a dire situation. It must determine the best way to deliver effectively vital services to its citizens. The CCA is not the solution. The controversy it presents and its difficult application will only serve to remove the focus and resources from the root of the problem—fixing the ineffective delivery of social services. Religious organizations will continue to provide effective programs for needy individuals. The Constitution, however, drew a line to separate these organizations from the state. Although the line between church and state is not absolute, it has existed in varying strengths throughout our nation's history. Charitable choice, on paper, blurs that line. In practice, it would obliterate it.