

Background

No. 2645
January 24, 2012



Published by The Heritage Foundation

Protecting Religious Staffing by Religious Organizations: A Wise and Just Public Policy

Thomas M. Messner

Abstract: *Religious staffing by religious organizations is an established, baseline position in federal law that deserves continued support. Most fundamentally, religious staffing by religious organizations is socially desirable conduct that benefits individuals and society, not unjust discrimination that should be eradicated through law. In addition, protections for religious staffing advance several important public interests, including eliminating discrimination against faith-based charities that compete for federal social service funds, increasing the effectiveness of important services to the poor, reducing government entanglement in religious affairs, and protecting religious freedom. Accordingly, public officials should shore up, not tear down, legal protections for religious staffing by religious organizations.*

Activists continue to attack the freedom of faith-based organizations to staff on a religious basis if those organizations receive federal funds.¹ Protecting the freedom of religious organizations to consider religion when staffing makes good sense and promotes several important public goods, including religious freedom. Public officials should both uphold and strengthen protections for religious staffing by religious organizations and be prepared to explain why this freedom benefits the public.

Religious staffing by religious organizations is an established, baseline position in federal law. Title VII of the Civil Rights Act of 1964, which prohibits reli-

Talking Points

- Religious liberties are under attack on several fronts, including the freedom of religious organizations to staff on a religious basis when providing federally funded services.
- Some religious organizations want their employees to share a commitment to their religious beliefs and practices, even in activities or positions that do not involve explicitly religious content.
- Though exceptions exist, religious staffing by religious organizations is an established, baseline position in federal law, and it deserves continued support.
- Religious staffing by religious organizations is socially desirable conduct that should be protected, not unjust discrimination that should be banned.
- Protecting the religious staffing freedom benefits needy Americans, advances religious freedom, and eliminates discrimination against faith-based charities seeking to provide federally funded services.
- Public officials should shore up, not tear down, the freedom of all religious organizations to staff on a religious basis.

This paper, in its entirety, can be found at:
<http://report.heritage.org/bg2645>

Produced by the Richard and Helen DeVos
Center for Religion and Civil Society

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002-4999
(202) 546-4400 • heritage.org

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

gious selection by private employers, expressly preserves the freedom of religious employers to staff on a religious basis.² As amended,³ the Title VII freedom includes secular as well as religious activities⁴ and positions,⁵ and it applies to religious organizations that are independently organized and operated, not just traditional houses of worship.⁶

As a general rule, religious organizations neither forfeit the freedoms protected by Title VII⁷ nor become “government actors” subject to constitutional restraints⁸ merely by accepting federal funds. Further, Title VI of the Civil Rights Act of 1964, which forbids racial and other forms of discrimination by private-sector organizations receiving federal funds, notably does not ban religious selection.⁹ Moreover, a significant number of federal laws, policies, and regulations protect or reinforce the religious staffing freedom in various federal programs and in the context of federal procurement contracts.¹⁰

There are some federal funding programs that ban religious staffing even by religious organizations.¹¹ However, unless Congress provides otherwise, even those programs are subject to the Religious Freedom Restoration Act (RFRA), which requires that any substantial burden imposed by the federal government on the exercise of religion must further a compelling governmental interest and be the least restrictive means of doing so.¹² The U.S. Department of Justice Office of Legal Counsel has concluded that, on a case-by-case basis, RFRA can protect the religious staffing freedom even if, in the words of one government source, “the statute that authorizes the funding program generally forbids consideration of religion in employment decisions by grantees.”¹³ Accordingly, RFRA further reinforces the presumption in federal law that religious organizations should be free to staff on a religious basis even if they receive federal funds.

Protecting religious staffing by religious organizations is a wise and just public policy. Most fundamentally, religious staffing by religious organizations is socially desirable conduct that benefits individuals and society, not unjust discrimination that should be eradicated through law. In addition, protections for religious staffing advance several important public interests, including eliminating discrimination against faith-based charities that compete for fed-

eral social service funds, increasing the effectiveness of important services to the poor, reducing government entanglement in religious affairs, and protecting religious freedom. Accordingly, public officials should shore up, not tear down, legal protections for religious staffing by religious organizations.

Socially Desirable Conduct, Not Unjust Discrimination

Much opposition to the religious staffing freedom reflects the assumption that religious selection by religious organizations is unjust discrimination that should be eradicated by law. This assumption lacks merit and reveals an embarrassing failure to distinguish between just and unjust instances of taking religion into account.

- **Religious selection by religious organizations is neither irrational nor unjust.** In general, it is neither irrational nor unjust for organizations to determine which activities further their mission and to select individuals who identify with and are committed to that mission. This process is how organizations, including religious organizations, define themselves.¹⁴

Most people will understand, to provide two examples, if Planned Parenthood prefers staffers who support abortion or if Democrat lawmakers prefer staffers who vote Democrat. Not everyone will agree with the ends of every organization, but unless those ends have been ruled out of bounds for civil society, it generally makes sense to support the freedom of organizations to choose members and employees who will identify with and support those ends.

The same principle applies to religious organizations. Society condemns religious selection by non-religious organizations because those organizations were not formed to facilitate religious community, activities, and purposes. However, religious organizations facilitate religious community, activities, and purposes and can do so even in “the provision of secular social services and charitable works that do not involve explicitly religious content.”¹⁵ Therefore, as a general rule, it is neither irrational nor unjust for religious organizations, including faith-based charities, to choose individuals who are committed

to the religious identity and purposes of the organization.¹⁶

- **Religious selection by religious organizations promotes the common good.** Religious organizations, like other civil society organizations, provide significant benefits to individuals and to society at large. By facilitating collective action through communities of like-minded people who share similar objectives, organizations empower individuals to achieve human goods that cannot be achieved in isolation. Laws that destroy organizational integrity, identity, and cohesion undermine the ability of organizations to provide these benefits.

Intact, cohesive religious groups also contribute to beneficial forms of diversity that naturally occur in a free and open society. Forcing religious organizations to ignore the religious beliefs and commitments of participating individuals would dampen this diversity and trivialize the importance that religion has in the lives of many individuals and organizations.¹⁷ In contrast, protecting the religious integrity of religious organizations promotes respect for and toleration of sincere differences in core beliefs and commitments.¹⁸

- **Freedom is the key for individuals to benefit from participating in organizations.** Of course, the freedom of organizations to select individuals who share a commitment to their philosophies and purposes means that individuals who lack that commitment might be excluded. However, those individuals are “free to form other organizations for their own mutual advantage, which are in turn protected against subversion by the same right not to associate with others.”¹⁹ To enjoy the benefits of participating in communities of like-minded people identified with and committed to a common philosophy and mission, individuals must bear the risk of exclusion by organizations dedicated to philosophies and missions that they do not identify with or support.

This principle applies with special weight to religious organizations, where a community based on common religious beliefs and moral values is precisely what many individuals seek from

participating in such an organization. If government forces every religious organization to accept every individual, whether or not he or she shares a commitment to the beliefs and purposes of the organization, then there will be no meaningful religious organizations for anyone to join. This result would harm individuals and violate fundamental American values.

- **Public funds are no excuse for bad public policy.** Finally, some people might support the freedom of religious organizations to staff on a religious basis in privately funded situations but oppose this freedom in situations involving public funds. It is true that, in some ways, regulations imposed indirectly through conditions attached to federal funds sometimes present different considerations than do regulations imposed directly through statutory or regulatory mandates. However, religious staffing by religious organizations is not socially undesirable conduct, merely to be “tolerated” in the context of direct regulation and stamped out everywhere else. Religious staffing by religious organizations is an affirmative good, and protecting it is an important part of protecting the more fundamental good of empowering individuals through the freedom to form and participate in coherent organizations dedicated to goals and purposes shared by individual participants. Public funds provide no excuse for imposing a bad policy on the public.

In sum, “slandering our sacred institutions with the charge of bigotry” on the ground that they prefer members of their own religion “is unacceptable and must be ruled out of bounds.”²⁰ Pursuing shared goals and interests with groups of like-minded and similarly committed people is one of the great means for individuals to improve their lives. A just government will secure, not frustrate, the liberty of individuals to pursue this form of happiness and personal empowerment.

Placing Faith-Based Organizations on an Equal Footing with Other Organizations that Accept Federal Funds

Opponents of religious staffing argue that it is wrong for religious employers to exclude potential

employees because of religion. However, the policies these activists advocate would discriminate by excluding many religious organizations from public partnerships because of religion.

- **Putting Religious Organizations at an Unfair Disadvantage.** Forcing religious organizations, but not secular organizations, to hire employees who do not share their ideals and commitments would put religious organizations at an unfair disadvantage because of their religion. Organizations like the World Wildlife Fund and Planned Parenthood have received millions of dollars from the federal government.²¹ Few if any people would argue that those organizations, as a condition of receiving those funds, should be forced to hire employees who do not share their ideals and commitments.

The same standard should apply to religious organizations. Without the freedom to hire coreligionists, “religious organizations lose the right to define their organizational mission enjoyed by secular organizations that receive public funds.”²²

- **Discriminating Against Religious Organizations.** Further, excluding religious organizations that practice religious staffing from federal programs will, in many cases, amount to excluding—not just disadvantaging—religious organizations because of religion.²³ Many faith-based organizations will not, or are not as likely to, participate in federally funded programs if they lose their freedom to maintain their religious identity and mission through religious staffing.²⁴ Excluding organizations that practice religious staffing effectively discriminates against religious organizations in favor of secular organizations.

As President Obama has stated, “No organization should be discriminated against on the basis of religion or religious belief in the administration or distribution of Federal financial assistance under social service programs.”²⁵ Religious organizations should enjoy the same freedom as secular organizations to select employees who are committed to the ideals and mission of the organization.

Protecting the Autonomy and Effectiveness of Religious Organizations

Religious staffing can be an important tool for strengthening and protecting religious organizations in at least four ways:

- **Promoting Coherent Group Identity.** For many religious organizations, the freedom to select employees who share their religious teachings and mission is central to maintaining their “religious identity.”²⁶ Religious staffing makes it possible for religious individuals to form coherent organizations and enables them to “maintain” their religious vision “over a sustained time period.”²⁷
- **Protecting Religious Integrity.** Religious staffing enables faith-based organizations to preserve their religious “integrity.”²⁸ Laws that prevent religious organizations from religious staffing can:
 1. “[T]ransform[] [them] into something they are not;”²⁹
 2. Pressure them to “secularize” to obtain resources that are available to other entities; and
 3. Undermine their ability “to promote common values,”³⁰ to define their “mission according to the dictates of [their] faith,”³¹ and to maintain their religious character.³²
- **Preserving the Ability to Teach Faith by Example.** Religious staffing enables faith-based organizations to ensure that their staff members “exemplify the religious convictions that inspired the creation of the organization.”³³ Organizations have a strong interest in the commitments of their employees because, “in the eyes of the public,” employees “are” the organization.³⁴ Without the ability to hire coreligionists, therefore, the ability of faith-based organizations “to teach their faith by example” would be diminished.³⁵
- **Maximizing Effectiveness.** For many religious organizations, including faith-based charities, staffing on a religious basis can be important in

helping them “to remain effective.”³⁶ Religious organizations make social contributions because of their faith, not despite of it.³⁷ Accordingly, the “religious character” of these organizations is often “the key” to their effectiveness.³⁸ Indeed, “without the ability to employ individuals who share the tenets and practices of their faith,”³⁹ these organizations cannot be expected to “sustain their religious drive”⁴⁰ or to make their “distinctive” and “faith-shaped” contributions as effectively as they otherwise would.⁴¹

Benefiting Needy Americans

According to the Institutional Religious Freedom Alliance, “[M]any faith-based organizations that consider religion to be an important job qualification have for many decades partnered with the federal government to provide many important services.”⁴² Stamping out the religious staffing freedom could rupture those important private–public partnerships,⁴³ cause “massive disruption”⁴⁴ and “utter chaos” in federally funded services,⁴⁵ diminish the resources available to needy Americans,⁴⁶ and generate “great hardship for many individuals, families, and communities” that depend on federally funded services provided by those displaced charities.⁴⁷

Further, certain beneficiaries might prefer “to receive their benefits from a faith-based organization.”⁴⁸ Excluding religious social service providers “only frustrates those ultimate beneficiaries who would choose to receive their benefits from a faith-based organization.”⁴⁹

In short, as one source puts it, if the government does not “respect” the “unique identity” of faith-based providers, “the poor will suffer.”⁵⁰

As President Obama has eloquently stated, “For as much as government can do and must do, it is ultimately the faith and determination of the American people upon which this nation relies.”⁵¹ Faith-based charities are a vital source of those qualities of faith and determination. Protecting the religious identity and character of those organizations is a vital tool for leveraging those qualities to the benefit of the nation.

Reducing Government Entanglement in Religious Affairs

Religious staffing by religious organizations promotes a healthy separation of church and state by reducing government entanglement in religious affairs.

- **Entanglement Through Coercion.** Forcing religious organizations to secularize as a condition of participating in publicly funded social services programs would increase government influence on the choices of religious institutions.⁵² This outcome would violate the principle that government should minimize its influence on the religious choices of private individuals and institutions.⁵³ In contrast, laws that protect religious providers from having to secularize in order to qualify for federal funds promote a clearer separation between government action and private religious choices.⁵⁴

The same principle applies to government influence over the private religious choices of individual beneficiaries. “Expanding the variety of choices available to needy individuals... reduces the government’s influence over how those individual choices are made.”⁵⁵ Therefore, “[w]herever possible, [policymakers] should work to ensure that there are not only secular alternatives to faith-based providers but also faith-based alternatives to secular services.”⁵⁶

To increase faith-based alternatives to secular services and thereby reduce government influence on the private choices of beneficiaries, government should protect the autonomy of faith-based organizations that participate in federally funded service programs.

- **Entanglement Through Overregulation.** Government entanglement in religion can also happen through overregulation. Some activists might argue that the religious staffing freedom should apply only to certain overtly religious positions or activities within a religious organization. However, asking the government to determine whether a certain position or activity is “religious

enough” to be protected would require “intrusive government inquiries”⁵⁷ and unwisely entangle the government in religious affairs.

It was “to avoid” the burden of “such inquiries” that Congress, in 1972, amended Title VII “to allow religious organizations to prefer believers for work in *all* their activities, not merely their ‘religious’ activities.”⁵⁸ This approach “effectuates a more complete separation” of religion from government and “avoids the kind of intrusive inquiry into religious belief” that a narrower policy would require.⁵⁹

Because the employment practices of faith-based organizations are “varied and complex,”⁶⁰ it is reasonable to fear that even the most unbiased judges and regulators will not adequately understand a religious group’s “religious tenets and sense of mission.”⁶¹ The best policy is one that avoids government officials “trolling” through a religious institution’s religious beliefs in the first place.⁶² Accordingly, wherever reasonable, religious organizations should determine for themselves when religious staffing furthers their religious ideals and mission.

Advancing Religious Freedom

As with freedom of speech and freedom of the press, freedom of religion sometimes means protecting conduct that some people might not favor. Religious staffing by religious organizations is socially desirable conduct that should be encouraged and protected, not unjust discrimination that should be stamped out. However, even if some people disagree with religious hiring by religious organizations, respect for religious freedom should compel such individuals to support this freedom for religious organizations that consider the practice to be an important tool for maintaining their religious integrity.

- **Religious Freedom of Faith-Based organizations.** Rules protecting religious staffing advance the religious freedom of faith-based charities.⁶³ For religious organizations that deem religious faith “an important part” of their “self-definition,” having to make employment decisions without

regard to their faith could “substantially alter” the character of their organization.⁶⁴ The government burdens the religious freedom of such organizations when it conditions funding on their willingness to abandon the practice of staffing on a religious basis.⁶⁵

As religious freedom expert Professor Douglas Laycock explains, “[W]e should not offer [religious organizations] Federal money on condition that they surrender that essential part of the free exercise of their religion.”⁶⁶ Forcing any individual or organization to choose between respect for government and allegiance to God is usually a troublesome policy that should be avoided where possible.

- **Religious Freedom of Individuals Who Receive Federal Aid.** Government influence over private religious choices decreases when beneficiaries of government aid have the option to receive that aid from either a faith-based or secular provider. Protecting the religious staffing freedom encourages religious organizations to provide services through federally funded programs,⁶⁷ which results in greater choice for individual beneficiaries. Therefore, the religious staffing freedom also enhances the religious freedom of individuals who receive publicly funded services.
- **Religious Freedom of Individuals Who Staff Religious Charities.** The religious staffing freedom also advances the freedom of individuals who wish to work for faith-based providers.⁶⁸ “For many individuals, religious activity derives meaning in large measure from participation in a larger religious community.”⁶⁹ Laws that prohibit religious organizations from maintaining “an ongoing tradition of shared beliefs”⁷⁰ frustrate the ability of private citizens to pursue religiously motivated service activities with intact religious communities. In contrast, laws that protect “the autonomy of religious organizations [will] often further[] individual religious freedom as well.”⁷¹

Opponents of the religious staffing freedom sometimes argue that religious freedom for individuals means forcing religious organizations to hire

individuals of all religions and no religion at all.⁷² However, there is a significant difference between private citizens and entities asking only for freedom from state interference with religious exercise and the state forcing one private citizen or entity to accommodate the religious exercise of another private citizen or entity.⁷³ Laws that force religious organizations to staff without regard to religion burden religious freedom in the truer sense of the word “freedom.”

Some individuals might wish to work for religious organizations even if they do not share the religious commitments of those organizations. However, it would undermine religious freedom to “protect” those individuals by “destroying” the “separate religious identities” of those organizations.”⁷⁴ Destroying the religious identity of religious organizations would burden:

- The religious freedom of religious organizations,
- The religious freedom of private citizens who wish to serve with people of similar religious beliefs and commitments, and
- The religious freedom of individual beneficiaries who prefer to choose whether to receive benefits from either a faith-based or secular provider.

In addition, by weakening important civil society institutions, destroying the religious identity of religious organizations would undermine a vital check on the centralization of authority in government, which in turn would threaten the freedom of all individuals and institutions.⁷⁵

In short, forcing religious institutions to ignore religion does not advance religious freedom. Protecting the religious staffing freedom does.

Conclusion

Public officials should uphold and, where appropriate, expand protections for religious staffing by religious organizations. Religious staffing by religious organizations is sound public policy and should be the default position of government absent specific and adequate justification provided on a case-by-case basis. In places where the law fails to protect religious staffing by religious organizations, lawmakers should consider measures to remedy that failure and to strengthen the religious staffing freedom.

In addition, public officials should avoid measures that would entangle the government in the internal affairs of religious organizations. In general, religious organizations, not government officials, are better able to determine when the religious purpose of a religious organization is served by religious staffing and when it is not. Government officials should resist proposals to limit religious staffing only to certain activities or positions that are subject to invasive line-drawing by the government.

—*Thomas M. Messner is a Visiting Fellow in the Richard and Helen DeVos Center for Religion and Civil Society at The Heritage Foundation.*

Endnotes

1. See, e.g., *Again: CARD Presses Obama to Limit Religious Hiring*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE (Sept. 26, 2011), <http://archive.constantcontact.com/fs020/1102433538532/archive/1107700353076.html#LETTER.BLOCK7>; *Pitting Civil Rights Against Religious Hiring*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE (June 28, 2011), <http://archive.constantcontact.com/fs020/1102433538532/archive/1106245065640.html#LETTER.BLOCK7>; *Congressional Hearing on Thursday on Obama Faith-Based Initiative*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE (Nov. 16, 2011), <http://archive.constantcontact.com/fs020/1102433538532/archive/1103929364236.html#LETTER.BLOCK6>; *Signs of the Times: Rising Washington Tide Against Religious Hiring*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE (July 28, 2010), <http://archive.constantcontact.com/fs020/1102433538532/archive/1103587592994.html#LETTER.BLOCK6>.
2. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (1964) (codified as amended at 42 U.S.C. § 2000e-1(a) (2006)).
3. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103, 104 (1972) (codified as amended at 42 U.S.C. § 2000e-1(a) (2006)).
4. See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 330 (1987) (upholding exemption even as applied “to the secular nonprofit activities of religious organizations”); Letter from Douglas Laycock, Professor of Law, University of Michigan Law School, to Eric H. Holder, Jr., Att’y Gen. of the United States 3 (Nov. 13, 2009) [hereinafter Laycock Letter], available at <http://mirrorofjustice.blogspot.com/files/laycockholdererrfra.pdf> (explaining that Congress amended Title VII in 1972 “to allow religious organizations to prefer believers for work in *all* their activities, not merely their ‘religious’ activities”).
5. See *Amos*, 483 U.S. at 330 (upholding exemption as applied to situation involving employee who served “as an assistant building engineer and then as building engineer”).
6. See *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) (per curiam) (holding that nonprofit faith-based Christian humanitarian organization “qualifies as an entity exempt...from Title VII’s general prohibition against religious discrimination”), *cert. denied* 132 S. Ct. 96 (2011); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 221 (3d Cir. 2007) (holding that Jewish community center was qualified for the exemption from the religious discrimination provisions of Title VII). See also Thomas M. Messner, *Can Parachurches Hire and Fire Based on Religion Without Violating Title VII?*, 17 U. FLA. J.L. & PUB. POL’Y 63 (2006) (discussing application of Title VII freedom to independently organized and operated religious organizations).
7. See, e.g., *Lown v. Salvation Army, Inc.*, 393 F. Supp. 2d 223, 251 (S.D.N.Y. 2005) (stating that “[a] religious organization that receives federal funds is not required to waive its eligibility for Section 702 protection”); CARL H. ESBECK, STANLEY W. CARLSON-THIES & RONALD J. SIDER, *THE FREEDOM OF FAITH-BASED ORGANIZATIONS TO STAFF ON A RELIGIOUS BASIS* 34–35 & n.33 (2004) [hereinafter FREEDOM TO STAFF] (discussing this issue and citing additional cases); Paul Taylor, *The Costs of Denying Religious Organizations the Right to Staff on a Religious Basis When They Join Federal Social Service Efforts*, 12 GEO. MASON U. C.R. L.J. 159, 174 (2002) (asserting that “no provision in [section] 702(a) state[s] that its exemption is forfeited when a faith-based organization receives a federal grant”); *Constitutional Role of Faith-Based Organizations in Competitions for Federal Social Service Funds: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 107th Cong. 20 (2001) [hereinafter 2001 Faith-Based Organizations Hearing], available at <http://judiciary.house.gov/legacy/72981.pdf> (testimony of Prof. Douglas Laycock) (stating that “nothing in Title [VII] says” that “if you are federally funded...[the] Title [VII] right goes away”). See also FREEDOM TO STAFF, *supra*, at 43–47 (discussing unpublished outlier opinion sometimes cited as contrary authority and stating that “reliance [by opponents of religious staffing] on that shaky precedent merely evidences the level of desperation in their position”).
8. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (explaining that “[a]cts of [certain] private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts”). See also *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 299 (2001) (citing *Rendell-Baker* for proposition that payments by public buyers for services rendered do not “convert the service providers into public actors”); 2001 Faith-Based Organizations Hearing, *supra* note 7, at 39 (prepared statement of Prof. Ira C. Lupu) (stating that “discretionary action taken by private parties with the use of government funds ordinarily does not constitute ‘state action’ subject to the Constitution”).

9. Section 601 of Title VI of the Civil Rights of 1964 states, “No person in the United States shall, on the ground of *race, color, or national origin*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI, § 601, 78 Stat. 241, 252 (1964) (codified at 42 U.S.C. § 2000d) (emphasis added). See Letter of Faith-Based Service Organizations, Religious Freedom Advocates, and People of Faith to President Barack Obama 2 (July 12, 2011) (explaining that Title VI “pointedly does not name ‘religion’ as one of the forbidden selection criteria”), available at <http://jasonboyte.com/clients/irfa/letter-to-president3.pdf>; 2001 Faith-Based Organizations Hearing, *supra* note 7, at 20 (testimony of Prof. Douglas Laycock) (stating that “there is no general Federal spending clause statute [with respect to religion] like there is with respect to race”).
10. See Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-55, tit. I, § 144, 114 Stat. 2763A-587, 2763A-621 (2000) (codified at 42 U.S.C. § 290kk-1(e)) (stating that “[a] religious organization’s exemption provided under section 702 of the Civil Rights Act of 1964 regarding employment practices shall not be affected by its participation in, or receipt of funds from, a designated program”), incorporated and enacted by reference in Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, app. G, § 1, 114 Stat. 2763 (2000); Children’s Health Act of 2000, Pub. L. No. 106-310, div. B, tit. XXXIII, § 3305, 114 Stat. 1101, 1213–14 (2000) (codified at 42 U.S.C. § 300x-65(d)(2)) (stating that “[t]he exemption of a religious organization provided under section 702 or 703(e)(2) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1, 2000e-2(e)(2)) regarding employment practices shall not be affected by the religious organization’s provision of services under, or receipt of funds from, any substance abuse program under this title or title V”); Community Opportunities, Accountability, and Training and Educational Services Act of 1998, Pub. L. No. 105-285, tit. II, § 201, 112 Stat. 2702, 2750 (1998) (codified at 42 U.S.C. § 9920(b)(3)) (stating that “[a] religious organization’s exemption provided under section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1) regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described in subsection (a)”); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, tit. I, § 104(f), 110 Stat. 2105, 2163 (1996) (codified at 42 U.S.C. § 604a(f)) (stating that “[a] religious organization’s exemption provided under section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1a) regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described in subsection (a)(2)”). In addition, according to scholars, a “significant number” of regulations and policies adopted during the Administration of George W. Bush included provisions “designed to maximize” the “hiring autonomy” of religious organizations. IRA C. LUPU & ROBERT W. TUTTLE, THE ROUNDTABLE ON RELIGION & SOC. WELFARE POLICY, THE STATE OF THE LAW—2008: A CUMULATIVE REPORT ON LEGAL DEVELOPMENTS AFFECTING GOVERNMENT PARTNERSHIPS WITH FAITH-BASED ORGANIZATIONS 27 (2008), available at http://www.religionandsocialpolicy.org/docs/legal/state_ofthe_law_2008.pdf. See, e.g., Exec. Order No. 13,279 § 2(f), 3 C.F.R. 258, 260 (2003) (stating that faith-based organizations should be eligible to compete for federal social service funding “without impairing their independence, autonomy, expression, or religious character”); *id.* § 4 (amending previous executive order to authorize faith-based organizations to accept federal procurement contracts); Rules and Regulations, Agency for International Development, Participation by Religious Organizations in USAID Programs, 69 Fed. Reg. 61,716, 61,724 (Oct. 20, 2004) (final rule, codified at 22 C.F.R. § 205.1(g)) (stating that “[a] religious organization’s exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in Sec. 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, is not forfeited when the organization receives financial assistance from USAID”); Rules and Regulations, Department of Agriculture, Equal Opportunity for Religious Organizations, 69 Fed. Reg. 41,375, 41,382 (July 9, 2004) (final rule, codified at 7 C.F.R. § 16.2(c)) (stating that “a religious organization’s exemption from the Federal prohibition on employment discrimination on the basis of religion, set forth in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, is not forfeited when an organization receives USDA assistance”); Rules and Regulations, Department of Education, Participation in Education Department Programs by Religious Organizations; Providing for Equal Treatment of All Education Program Participants, 69 Fed. Reg. 31,708, 31,710 (June 4, 2004) (final regulations, codified at 34 C.F.R. § 75.52(g)) (stating that “[a] religious organization’s exemption from the Federal prohibition on employment discrimination on the basis of religion, in section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, is not forfeited when the organization receives financial assistance from the Department”).
11. See FREEDOM TO STAFF, *supra* note 7, at 57–58 (discussing social-service programs that “have a nondiscrimination provision embedded in their implementing statutes” and effect of those provisions on religious staffing freedom); *Persistent Myths About Religious Hiring*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE (Nov. 30, 2010) [hereinafter *Persistent Myths*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE], available at <http://archive.constantcontact.com/fs020/1102433538532/archive/1103998616888.html#LETTER.BLOCK14> (stating that “[o]nly a few federal programs... have ever banned religious hiring by participating organizations”).

12. See Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3(a)–(b), 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. § 2000bb-1(b)(1)–(2)). Unless otherwise expressly provided, RFRA, as amended, see Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 7, 114 Stat. 803, 806 (2000), “applies to all Federal law, and the implementation of that law, whether statutory or otherwise,” 42 U.S.C. § 2000bb-3, including denials of federal government grants, see Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act, 31 Op. O.L.C. 9-20 (2007) [hereinafter 31 Op. O.L.C.], available at <http://www.justice.gov/olc/2007/worldvision.pdf> (applying RFRA to facts involving denial of government funding); FREEDOM TO STAFF, *supra* note 7, at 59–60 & n.88 (explaining that a denial of government funding can trigger RFRA); Laycock Letter, *supra* note 4, at 2–3 (stating that “denials of funding may be a RFRA violation”).
13. Memorandum from the U.S. Dep’t of Justice on Effect of the Religious Freedom Restoration Act on Faith-Based Applications for Grants (Oct. 2007), available at <http://www.justice.gov/archive/fbci/effect-rfra.pdf> (discussing conclusion by U.S. Department of Justice regarding RFRA). See 31 Op. O.L.C., *supra* note 12 (concluding that RFRA is reasonably construed to protect religious staffing freedom of a particular organization subject to a prohibition on religious staffing imposed by a particular federal program); FREEDOM TO STAFF, *supra* note 7, at 59 & n.87 (arguing that “for faith-based organizations that staff on a religious basis RFRA will always grant relief from generally applicable employment laws prohibiting discrimination on the basis of religion” and that “it is correct to suggest . . . that there is a presumption that RFRA excuses faith-based organizations from the religious burden imposed by . . . program-embedded nondiscrimination provisions”); Carl H. Esbeck, *The Application of RFRA to Override Employment Non-Discrimination Clauses Embedded in Federal Social Service Programs*, 9 ENGAGE, no. 2, June 2008 at 140–41 (discussing application of RFRA to override program-specific prohibitions of religious staffing even by religious organizations), available at http://www.fed-soc.org/doclib/20080703_Esbeck.Engage.9.2.pdf.
14. See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment) (explaining that, “[d]etermining that certain activities are in furtherance of an organization’s religious mission, and that only those committed to that mission should conduct them, is . . . a means by which a religious community defines itself”); *Faith-Based Initiatives: Recommendations of the President’s Advisory Council on Faith-Based and Community Partnerships and Other Current Issues: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. 35* (2010) [hereinafter *2010 Faith-Based Organizations Hearing*], available at http://judiciary.house.gov/hearings/printers/111th/111-156_62343.PDF (testimony of Professor Douglas Laycock) (stating that “[n]othing—nothing—is more important to religious identity than the ability to hire employees who actually support the religious mission and will faithfully execute it”).
15. 31 Op. O.L.C., *supra* note 12, at 10 (internal quotations omitted). See *id.* (explaining that even “the provision of secular social services and charitable works that do not involve explicitly religious content and are not designed to inculcate the views of a particular religious faith nevertheless may well be religiously inspired and play an important part in the furtherance of an organization’s religious mission” (internal quotations and citations omitted)).
16. See STEPHEN V. MONSMA, PLURALISM AND FREEDOM 151–58 (2012) (providing reasons why it is reasonable for religious organizations to consider religion in staffing even when they receive government funds to provide social services, and answering objections); *2010 Faith-Based Organizations Hearing*, *supra* note 14, at 35 (testimony of Prof. Douglas Laycock) (stating that religious selection by religious organizations “is not about irrational exclusion” but rather “about assembling a group of likeminded people in pursuit of a common religious mission and a common activity”); *2001 Faith-Based Organizations Hearing*, *supra* note 7, at 11 (prepared statement of Carl H. Esbeck, Senior Counsel to the Deputy Att’y Gen. of the United States) (stating that “[e]ven when not engaged in ‘religious indoctrination’ such as proselytizing or worship, [faith-based organizations] view what they are doing as religiously motivated and thus may desire that such acts of mercy and love be performed by those of like-minded creed”).
17. Cf. FREEDOM TO STAFF, *supra* note 7, at 89 (arguing that, “[t]o regard religious differences to be of no serious consequence, as mere personal preferences or cultural habits, is to denigrate religion”).
18. See *id.* at 92 (explaining that the religious staffing freedom “undergirds, rather than undermines, a diverse and pluralistic society”). See also MONSMA, *supra* note 16, at 158 (explaining that one defense of religious staffing freedom is based on “the advocacy of a genuine pluralism among faith-based and secular human service providers”).
19. Brief of Amicus Curiae the Cato Institute in Support of Petitioner at 10, *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010) (No. 08-1371), available at http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1371_PetitionerAmCuCATOInst.authcheckdam.pdf.

20. *2001 Faith-Based Organizations Hearing*, *supra* note 7, at 75 (written testimony of Nathan J. Diament, Director of Public Policy, Union of Orthodox Jewish Congregations of America).
21. See WHITE HOUSE FAITH-BASED AND COMMUNITY INITIATIVES, PROTECTING THE CIVIL RIGHTS AND RELIGIOUS LIBERTY OF FAITH-BASED ORGANIZATIONS: WHY RELIGIOUS HIRING RIGHTS MUST BE PRESERVED 3 (2003) [hereinafter FAITH-BASED INITIATIVES], available at http://www.religionandsocialpolicy.org/docs/general/6-24-2003_whoofbcireligious_hiring_rights.pdf.
22. Jeffrey Rosen, *Why the Catholic Church Shouldn't Have to Hire Gays*, THE NEW REPUBLIC (Feb. 26, 2001), http://advocacy.ou.org/issues-and-positions/charitable_choice_hiring_practices/.
23. See *2001 Faith-Based Organizations Hearing*, *supra* note 7, at 23 (prepared statement of Prof. Douglas Laycock) (explaining that “[t]o say that a religious provider must...hire people who are not committed to its mission[] is an indirect way of saying that government can contract only with secular providers”); Laycock Letter, *supra* note 4, at 3 (explaining that “[d]isqualifying all religious charities that hire members of their own faith even for executive positions would disqualify all religious charities”).
24. See MONSMA, *supra* note 16, at 43 (stating that “some faith-based organizations might very well withdraw from partnerships with government...if the price they need to pay is to forgo certain standards or practices deeply rooted in their religious traditions”); *2001 Faith-Based Organizations Hearing*, *supra* note 7, at 10 (prepared statement of Carl H. Esbeck, Senior Counsel to the Deputy Att’y Gen. of the United States) (stating that “protecting institutional autonomy was thought necessary to draw reluctant [faith-based organizations] into participating in government programs”); *id.* (stating that “many” faith-based organizations are unlikely to participate in government programs “if they face invasive or compromising controls”); *id.* at 12 (stating that “many” faith-based organizations will “decline to compete for charitable choice funding” if they “cannot operate in accord with their own sense of self-understanding and mission”); Letter from Sen. John Ashcroft (Dec. 1996) [hereinafter Ashcroft Letter], available at http://www.cpjustice.org/files/CCGuide_0.pdf (stating that “[i]n the past, many successful faith-based organizations have not participated in government programs for fear of having to compromise their religious identity or being hobbled by excessive government regulation and intrusion”); Taylor, *supra* note 7, at 175 (stating that “prohibiting religious organizations from maintaining their religious character through hiring practices would endanger much current federal funding for child services and education”); *Persistent Myths*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, *supra* note 12 (stating that many faith-based organizations have informed the federal government that if religious hiring were banned “they could no longer collaborate with the federal government to serve the needy”); *Religious Hiring by Faith-Based Organizations Is Not Illegal Job Discrimination*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE [hereinafter *Religious Hiring Not Illegal*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE], <http://www.irfalliance.org/religious-hiring.html> (stating that many of the government’s faith-based social service partners “have informed the administration that, should a sweeping ban [on religious hiring] be introduced, they would be forced to stop their service partnerships with the federal government”) (last visited Jan. 11, 2012). See also CARL H. ESBECK, WHY LEGISLATURES SHOULD ACCOMMODATE RELIGIOUS FREEDOM, § I.10 (2009) [hereinafter ESBECK, LEGISLATURES], available at <http://www.irfalliance.org/images/stories/pdf/esbeck-accommodate-rel-freedom.pdf> (stating that to “overly regulate” religious providers is to “exclude” them from “participation in health care, education, and social service programs”).
25. Exec. Order No. 13,559 § 2(c), 75 Fed. Reg. 71,319, 71,320 (Nov. 22, 2010); accord. Exec. Order No. 13,279 § 2(c), 3 C.F.R. 258, 260 (2003); cf. 31 Op. O.L.C., *supra* note 12, at 10 n.7 (explaining that “an argument could be made that not permitting a religious organization to discriminate on the basis of religion in hiring, while permitting non-religious organizations to discriminate on the basis of their particular ideologies in hiring, would violate the Free Exercise Clause and the Free Speech Clause”).
26. FAITH-BASED INITIATIVES, *supra* note 21, at 9; see *2010 Faith-Based Organizations Hearing*, *supra* note 14, at 35 (testimony of Professor Douglas Laycock) (stating that “[n]othing—nothing—is more important to religious identity than the ability to hire employees who actually support the religious mission and will faithfully execute it”).
27. Taylor, *supra* note 7, at 170.
28. *Religious Hiring Not Illegal*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, *supra* note 24.
29. Rosen, *supra* note 22.
30. FAITH-BASED INITIATIVES, *supra* note 21, at 9.
31. Taylor, *supra* note 7, at 170.

32. Even one prominent critic of the religious staffing freedom acknowledges the relationship between the “integrity” of religious organizations and their ability to staff on a religious basis. See *Charitable Choice and the Faith-Based Initiative: Implications for Discrimination*, CONGRESSMAN BOBBY SCOTT, http://www.bobbyscott.house.gov/index.php?option=com_content&view=article&id=295 (explaining that Title VII allows “church groups and faith-based organizations” to hire based on religion “in order to maintain their organization’s integrity”) (last visited Jan. 12, 2012).
33. *Religious Hiring Not Illegal*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, *supra* note 24.
34. Taylor, *supra* note 7, at 179.
35. *Id.* at 190.
36. FAITH-BASED INITIATIVES, *supra* note 21, at 9.
37. See Stanley W. Carlson-Thies, *Faith-Based Initiative 2.0: The Bush Faith-Based and Community Initiative*, 32 HARV. J.L. & PUB. POL’Y 931, 938 (2009).
38. *2001 Faith-Based Organizations Hearing*, *supra* note 7, at 76 n.31 (written testimony of Nathan J. Diament, Director of Public Policy, Union of Orthodox Jewish Congregations of America (quoting speech of Al Gore, Appendix 2)).
39. Taylor, *supra* note 7, at 169.
40. *Id.* at 178.
41. Carlson-Thies, *supra* note 37, at 938.
42. *Persistent Myths*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, *supra* note 11; *see id.* (stating that many religious organizations are “trusted and long-term partners” with the federal government in providing social services).
43. *See supra* note 24.
44. *Religious Hiring Not Illegal*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, *supra* note 24.
45. *Persistent Myths*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, *supra* note 11.
46. *See MONSMA*, *supra* note 16, at 153 (explaining how restrictions on religious staffing freedom could “shrink even further the all-too-small safety net on which many persons in need depend”). Compare Carlson-Thies, *supra* note 37, at 938 (explaining that faith-based organizations provide a “major part” of the nation’s “social safety net”), with Taylor, *supra* note 7, at 160 (stating that “private funding for independent welfare services is a less practical alternative” today because “government controls so many of the resources available for the provision of social services”).
47. *Persistent Myths*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, *supra* note 11.
48. ESBECK, LEGISLATURES, *supra* note 24, at § I.9. *See 2001 Faith-Based Organizations Hearing*, *supra* note 7, at 9 (prepared statement of Carl H. Esbeck, Senior Counsel to the Deputy Att’y Gen. of the United States) (stating that “some beneficiaries, for any number of reasons, will inevitably think their needs better met by an FBO”).
49. ESBECK, LEGISLATURES, *supra* note 24, at § I.9.
50. FAITH-BASED INITIATIVES, *supra* note 21, at 5 (quoting Ronald J. Sider). *See also id.* at 6 (quoting Nathan Diament as stating that “only by protecting the character of [faith-based institutions], including their right to hire personnel who share their religious mission and values, can we leverage their unique capacities for the benefit of more Americans in need”); *2001 Faith-Based Organizations Hearing*, *supra* note 7, at 12 (prepared statement of Carl H. Esbeck, Senior Counsel to the Deputy Att’y Gen. of the United States) (stating that “loss will be borne most acutely by the poor and needy” if faith-based organizations, because they “cannot operate in accord with their own sense of self-understanding and mission...[,] decline to compete for charitable choice funding”).
51. President Barack Obama, Inaugural Address (Jan. 20, 2009); *see also 2001 Faith-Based Organizations Hearing*, *supra* note 7, at 86 (speech of Al Gore, submitted as Appendix 2 to testimony of Nathan J. Diament, Director of Public Policy, Union of Orthodox Jewish Congregations of America) (describing “not waiting for government to deal with the problems on their own doorsteps” but rather “casting a vote for their own wise hearts and strong hands to take care of their own” as a “deeply American act”).
52. *See 2001 Faith-Based Organizations Hearing*, *supra* note 7, at 23 (prepared statement of Prof. Douglas Laycock) (stating that conditioning government funding on requirements including that religious providers may not staff on a religious basis “uses the government’s power of the purse to coerce people to abandon religious practices” and that this “coercion” is “just as indefensible as if the government coerced people to participate in religious practices”).
53. *See id.* at 20 (stating that “[g]overnment should minimize its influence over the religious choices and commitments of both the providers and the beneficiaries of government-funded social services”).

54. *See id.* at 21 (stating that, “[d]espite the conventional wisdom of many separationists, funding everyone equally separates private religious choice from government influence more effectively than funding only secular providers”); *id.* at 23 (stating that “[c]haritable choice provisions that protect the religious liberty of religious providers are pro-separation” because they “separate the religious choices and commitments of the American people from government influence”).
55. *Id.* at 13 (testimony of Carl H. Esbeck, Senior Counsel to the Deputy Att’y Gen. of the United States).
56. Carlson-Thies, *supra* note 37, at 947.
57. Laycock Letter, *supra* note 4, at 3 (second quotation in sentence only).
58. *Id.*
59. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 339 (1987).
60. 2001 Faith-Based Organizations Hearing, *supra* note 7, at 11 n.22 (prepared statement of Carl H. Esbeck, Senior Counsel to the Deputy Att’y Gen. of the United States).
61. Amos, 483 U.S. at 336.
62. 2001 Faith-Based Organizations Hearing, *supra* note 7, at 12 n.30 (prepared statement of Carl H. Esbeck, Senior Counsel to the Deputy Att’y Gen. of the United States (internal quotations omitted)).
63. *See* 2001 Faith-Based Organizations Hearing, *supra* note 7, at 20 (testimony of Prof. Douglas Laycock) (stating that it is a “serious intrusion into religious liberty” to take away religious providers’ right to “prefer Members of their own church”).
64. 31 Op. O.L.C., *supra* note 12, at 11 (internal quotations omitted).
65. *See* Laycock Letter, *supra* note 4, at 1 (arguing that the government “substantially burden[s] the exercise of religion... when it offers monetary grants on condition that a religious organization abandon one of its religious practices”); 31 Op. O.L.C., *supra* note 12, at 10 (explaining that “prohibiting religious organizations from hiring only coreligionists can impose a significant burden on their exercise of religion, even as applied to employees in programs that must, by law, refrain from specifically religious activities” (internal quotations omitted)); FREEDOM TO STAFF, *supra* note 7, at 61–62 (discussing the substantial burden placed on religious organizations by restrictions on religious staffing imposed as a condition of receiving federal funds); *id.* at 62 n.96 (arguing that “[n]ot to accommodate sincerely held religious employment practices is thus a categorical bar, from here to eternity, to a faith-based organization’s eligibility for any such federal grant program” and that such result is “unquestionably... a substantial burden or ‘cruel choice’”).
66. 2001 Faith-Based Organizations Hearing, *supra* note 7, at 20 (testimony of Prof. Douglas Laycock); *see* 2010 Faith-Based Organizations Hearing, *supra* note 14, at 47 (prepared statement of Prof. Douglas Laycock) (stating that “the power of government funding should not be used to coerce... providers... of government-funded services into becoming more or less religious [than] they would be of their own free will”).
67. *See supra* note 24.
68. *See* MONSMA, *supra* note 16, at 43 (explaining that restricting the religious autonomy of faith-based organizations that partner with the government would “constrict[]” the religious freedom of staff members because individuals whose “religiously molded consciences require them to... work for organizations that are offering help to those in need in the name of their faith would be limited—perhaps even severely—in their ability to do so”).
69. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment). *See* Taylor, *supra* note 7, at 185 (stating that “[t]hose who seek to surround themselves with others who share their faith because they believe doing so will reinforce their faith-driven efforts to help those in need are engaging in public service as part of their private religious calling”); 2001 Faith-Based Organizations Hearing, *supra* note 7, at 87 (speech of Al Gore, Appendix 2 to Testimony of Nathan J. Diament, Director of Public Policy, Union of Orthodox Jewish Congregations of America) (stating that “[t]he men and women who work in faith- and values-based organizations are driven by their spiritual commitment”).
70. Amos, 483 U.S. at 342 (Brennan, J., concurring in the judgment).
71. *Id.*

72. See Letter from Coalition Against Religious Discrimination to President Barack Obama (Feb. 4, 2010), available at <http://www.interfaithalliance.org/news/349-coalition-against-religious-discrimination-letter-to-president-obama> (stating that interpretation that RFRA protects religious staffing freedom “threatens core civil rights and *religious freedom* protections” (emphasis added)); *id.* (asserting that equal treatment rules established by President George W. Bush undermined “traditional legal safeguards” that protect “the civil rights and *religious liberty rights* of program beneficiaries and staff” (emphasis added)); Letter from Religious, Education, Civil Rights, Labor and Health Organizations Committed to Protecting Religious Liberty to Eric H. Holder, Jr., Att’y Gen. of the United States (Sept. 17, 2009), available at <http://www.au.org/media/press-releases/archives/2009/09/card-letter-to-atty-gen.pdf> (requesting withdrawal of June 29, 2007, Office of Legal Counsel Memorandum regarding RFRA and stating that memorandum threatens to “tilt policy” toward an “unwarranted end” that would “damage” civil rights and “*religious liberty*” (emphasis added)).
73. See ESBECK, LEGISLATURES, *supra* note 24, at 12 (discussing distinction between “religious claimant asking only to be left alone by the state” and “claimant asking for the state’s affirmative assistance to effectuate the desired religious observance”). See also *Amos*, 483 U.S. at 337 n.15 (explaining that staff member fired for religious reasons was “put... to the choice of changing his religious practices or losing his job” by the religious organization that fired him, “not the Government”); Taylor, *supra* note 7, at 172 (stating that “[i]t is the faith-based organization, of course, that is making staffing decisions on the basis of religion, not the government”).
74. Laycock Letter, *supra* note 4, at 3.
75. Cf., e.g., Ryan Messmore, *Private Faith, Big Government: Understanding the Impact of Marginalizing Religion*, HERITAGE FOUNDATION BACKGROUND NO. 2123 (Apr. 15, 2008), available at <http://www.heritage.org/research/reports/2008/04/private-faithnbspbig-governmentnbsp-understanding-the-impact-of-marginalizing-religion> (stating that “[w]hen non-governmental institutions—including churches—decline in significance, the role of the state is likely to increase”); Ryan Messmore, *Longing for Belonging and the Lure of the State*, HERITAGE FOUNDATION BACKGROUND NO. 2063 (Aug. 20, 2007), available at <http://www.heritage.org/research/reports/2007/08/longing-for-belonging-and-the-lure-of-the-state>.