



The Roundtable

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New Federal Policies on Grants for Building Aid for Houses of Worship

A Legal Analysis

**By Ira C. Lupu and Robert Tuttle
George Washington University Law School**

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for Building Aid for Houses of Worship**

By Ira C. Lupu and Robert Tuttle
Professors
George Washington University Law School

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New Federal Policies on Grants for Disaster Relief or Historic Preservation at Houses of Worship and Places of Religious Instruction

By Professor Ira C. Lupu and Professor Robert Tuttle,
George Washington University Law School¹

DESCRIPTION

On May 27, the National Parks Service announced a \$317,000 grant, under the “Save America’s Treasures” program, for the historic preservation of Boston’s Old North Church. The grant will be matched by the Old North Foundation, and will be spent for repair and restoration of windows, and for improvement of public access to the building.

The announcement represents a major shift in the constitutional views of the federal government. Since at least 1981, the federal government had concluded that the Constitution forbids the use of federal grants for the restoration of properties actively used for worship or religious instruction. This conclusion, embodied since 1995 in a memorandum from the Office of Legal Counsel (“OLC”) in the U.S. Department of Justice,² has been reflected in the National Parks’ Service application form for the Save America’s Treasures program, which excluded “[h]istoric properties and collections associated with an active religious organization (for example, restoration of an historic church that is still actively used as a church).” For applications in 2003, however, the Park Service deleted this exclusion, and the grant for Old North Church is the first under the new policy, which now permits grants to active religious organizations for the preservation of houses of worship.

¹ Portions of the analysis reflected in this comment are condensed from our larger study on the subject, *Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism*, 43 *Boston College L. Rev.* 1139 (2002). A version of that work is available on the Roundtable website at <http://www.religionandsocialpolicy.org/publications/publication.cfm?id=9>.

² A 1995 memorandum from then-Assistant Attorney General for OLC Walter Dellinger to the U.S. Department of Interior asserted that this policy originated in the Reagan Administration in 1981. The 1995 memorandum, which is posted at <http://www.usdoj.gov/olc/doi.24.htm>, concluded that intervening developments in the Supreme Court did not constitute grounds for altering this policy. It may be of interest to some that a 1988 letter from then-Attorney General (of Connecticut) Joseph Lieberman to the Director of the Connecticut Historical Commission took a different view from that espoused by OLC. The letter from Lieberman argued that historic preservation grants to houses of worship advanced secular purposes and advanced religion only incidentally and therefore would not violate the federal Establishment Clause.

The new Park Service policy follows another, related announcement on December 12, 2002, in which the Federal Emergency Management Agency (“FEMA”) approved an emergency grant to the Seattle Hebrew Academy, whose premises had been damaged by an earthquake in Nisqually, Washington on February 28, 2001. The grant to Seattle Hebrew Academy, which provides religious instruction as well as education in secular subjects, was in tension with prior FEMA practice, which had forbidden FEMA grants to repair any structure that is not generally open to the public.³

On May 28, the OLC made public two opinions, one (dated 9/25/02) concerning FEMA grants to places of religious worship and instruction,⁴ and the other (dated 4/30/03) concerning historic preservation grants to similar places.⁵ The new opinions reverse the longstanding federal view that governing Supreme Court precedent prohibits such grants. The opinions now conclude that that the Constitution permits grants to houses of worship when they are among a broad array of beneficiaries, not defined by reference to religion, in a program with broad, secular goals. The National Park Service made the grant to restore Old North Church on the authority of the OLC opinion, which was provided on April 30.

Although the OLC opinions are set in the contexts of disaster relief and historic preservation, they invoke fundamental constitutional principles. Consequently, the opinions are of substantial importance to the President’s Faith-Based Initiative, because the federal government and the states operate programs that subsidize construction or maintenance of structures used by private entities in the delivery of social services. After analyzing the opinions in their own contexts, we will return to their broader implications for the Initiative.

ANALYSIS

The prior federal policy, which the 1995 OLC memo traces to at least 1981, forbade federal grants for repair or preservation of structures devoted to worship

³ As the OLC opinion discusses, FEMA’s practice of excluding facilities “not generally open to the public” may well have been inconsistent with its governing statute and with FEMA’s regulation, codified at 44 CFR sec. 206.221(e)(1). FEMA grantees are forbidden from discrimination based on “race, color, or national origin.” The President has authority to prohibit other forms of discrimination (including religious discrimination) by FEMA grantees, but has not exercised that authority.

⁴ Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy, Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, For the General Counsel, Federal Emergency Management Agency, September 25, 2002, available at <http://www.usdoj.gov/olc/FEMAAssistance.htm>.

⁵ Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties such as The Old North Church, Memorandum from M. Edward Whelan III, Acting Assistant Attorney General, Office of Legal Counsel, For the Solicitor, Department of the Interior, April 30, 2003, available at <http://www.usdoj.gov/olc/OldNorthChurch.htm>.

or religious instruction. The government had based this policy on principles of constitutional law, derived both from the history of the Establishment Clause and from several Supreme Court opinions dating to the early 1970's. The original understanding of the Establishment Clause rests in part on the political rejection in Virginia in 1785 of a proposed tax assessment bill that would have, among other things, paid for the creation and maintenance of "places of divine worship." James Madison led the fight against this proposal,⁶ and the Supreme Court has frequently looked to this historical episode as a guide to the original meaning of the Establishment Clause, which became part of the federal constitution in 1791.

In 1899, the Court upheld a federal grant for construction of a hospital controlled by the Roman Catholic Church.⁷ In 1971, however, at the height of the Separationist era in the Supreme Court, the Court's ruling in *Tilton v. Richardson*⁸ set the framework for what remains the current constitutional law of government support for the construction, repair or maintenance of buildings owned and used by religious entities. *Tilton* involved federal grants to secular and religiously affiliated institutions of higher education for libraries and other buildings, devoted to science, music and art. The program explicitly excluded sectarian worship or instruction in all government-financed buildings. Although the Court upheld this program, it unanimously invalidated one feature of it – a provision that would have returned the newly constructed edifice after twenty years to the exclusive control of its owner, without restriction on religious use. Because this reversion effectively meant that after twenty years, the government might be subsidizing worship or instruction, the Justices all agreed that the restriction on religious use must extend for the useful life of the building.

In a pair of cases decided two years after *Tilton v. Richardson*, the Supreme Court reaffirmed the principle that the Establishment Clause prohibits government construction or repair of buildings used for religious worship or instruction. In *Hunt v. McNair*,⁹ the Court upheld state issuance of revenue bonds for use at a religiously affiliated college, but only on the condition that bond-financed

⁶ The objections are laid out in Madison's Memorial and Remonstrance Against Religious Assessments, which is reprinted in the Appendix to the dissenting opinion of Justice Rutledge in *Everson v. Ewing Township*, 330 U.S. 1, 63-72 (1947).

⁷ *Bradfield v. Roberts*, 175 U.S. 291 (1899). The hospital was used exclusively for the medical care of persons with contagious diseases.

⁸ 403 U.S. 672 (1971).

⁹ 413 U.S. 734 (1973). More recent decisions in the lower courts have approved of the revenue bond device even in cases in which the buildings financed might be used for religious instruction. See *Steele v. Industrial Development Bd.*, 2000 U.S. App. LEXIS 16375 (6th Cir. 2002); *Virginia College Building Auth'y v. Lynn*, 538 S.E.2d 682 (Va. 2000). Revenue bonds do not involve direct state financing of the repair or preservation of religious buildings, because private bondholders are the sources of the funds. In light of the Cleveland voucher case, the restriction approved in *Hunt* may no longer be required by the Establishment Clause.

structures never be used for religious worship or instruction. And in *Committee for Public Education v. Nyquist*,¹⁰ the Court held unconstitutional New York State's program of "maintenance and repair" grants for the upkeep of religious schools. Such grants, the Court reasoned, would inevitably subsidize the religious activities of the aided schools.

The principles of *Tilton* and *Nyquist* have guided federal policy for the past 20 years or more. There are reasons to believe, however, that the Supreme Court might no longer adhere to the full sweep of this exclusion of structures devoted to worship or religious instruction from government assistance. First, the rule is often extremely harsh in its application. Whatever one may think of ongoing public subsidy of private schools, there is something deeply troubling about excluding houses of worship from government help in cases of natural disaster.¹¹ If, as we would expect, the city firefighters may extinguish a blaze at a place of worship, excluding them from funds for rebuilding after a fire, flood, or earthquake is hard to explain. Second, the law of the Establishment Clause has been moving away from a regime of strict separationism and toward a regime of neutrality -- that is, even-handedness between secular and religious entities. The burden has now shifted to those who defend special treatment for religious entities -- relief from burdens or exclusion from benefits -- to justify this treatment in persuasive constitutional terms. When the government's mission is historic preservation or relief from disasters, and does not involve intrinsically religious concerns, justifying the exclusion is not easy. Third, one ground on which the OLC's 1995 opinion rested -- that the government may not aid "pervasively sectarian" entities -- has been undermined in recent Supreme Court decisions.¹²

Despite this movement in federal constitutional law, the rule of *Tilton* and *Nyquist*, which appears to require exclusively secular use for publicly financed buildings, has never been repudiated or even seriously questioned in the Supreme Court. The Bush Administration's recent announcements, therefore, venture into constitutionally questionable territory. The arguments offered in the two new memoranda from OLC are lengthy and detailed, and we strongly encourage interested parties to read these opinions in full. What follows is our list, synthesized from the two opinions, of the primary assertions in the two opinions. We follow that list with comments of our own on the adequacy and persuasiveness of OLC's reasoning.

¹⁰ 413 U.S. 756 (1973).

¹¹ After the bombing of the Murrah Building in Oklahoma City, FEMA and HUD initially excluded houses of worship from federal reconstruction aid. Congress then enacted legislation that specifically authorized grants to houses of worship damaged in the bombing, and the agencies complied. See Ira Lupu & Robert Tuttle, Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism, 43 Boston College L. Rev. 1139, 1163-64 (2002).

¹² *Mitchell v. Helms*, 530 U.S. 793, 829 (2000) (plurality opinion).

The new OLC opinions, which supercede the 1995 opinion from that office, emphasize these points:

- The Constitution does not require the exclusion of houses of worship from basic government services, available to all, like police protection and fire fighting. Indeed, such an exclusion would seem to be a reflection of unconstitutional disregard for houses of worship. Disaster relief, in the form of FEMA grants, should also be viewed as a form of general governmental services, even though such relief is not available to all (for example, private residences are not eligible for FEMA grants). Historic preservation grants, though highly limited in number, are also a matter of general government service, because they preserve landmarks of community-wide significance.
- Both FEMA grants and historic preservation grants are not skewed toward institutions of worship or religious instruction, but are available to a broad array of beneficiaries on a religion-neutral basis.
- The constitutional norms expressed in *Tilton* and *Nyquist* may no longer be good law. The principle that buildings in which worship or religious instruction occur must be singled out for exclusion for government programs is in tension with intervening Supreme Court decisions about equal access of religious speakers to government-provided resources for expression, and is also in tension with concerns of nondiscrimination reflected in recent decisions concerning the Free Exercise Clause. Moreover, the principle of non-endorsement has become a central Establishment Clause consideration in the past twenty years, and no reasonable observer would perceive FEMA grants or historic preservation grants to houses of worship or religious schools as a government endorsement of the religious messages disseminated in those buildings.
- Even if the principles reflected in *Tilton-Hunt-Nyquist* remain viable, those cases were all about programs of support for educational institutions only, rather than a broader class of beneficiaries. Because religiously-affiliated educational institutions are frequently in the business of religious instruction, aid limited to the class of educational institutions runs a particularized risk of government subsidy for religious missions.
- In a particularly original analytic approach, both OLC opinions emphasized the constitutional significance of limitation on official discretion to favor religious entities over secular ones, or to favor some religions over others. The FEMA opinion showed, by discussion and an elaborate chart of grants resulting from the earthquake that damaged the Seattle Hebrew Academy, that FEMA grants involve little or no opportunity for the exercise (or abuse) of such official discretion. Indeed, virtually every one of the hundreds of FEMA grants made as a result of that earthquake went to a secular institution. The North Church opinion also emphasized objective criteria – involving historical significance,

rather than religious value – in the awarding of grants under the “Save America’s Treasures” program, though the opinion conceded that such grants were scarce and therefore inevitably involved a considerable amount of official discretion.

- Both opinions emphasized the audit rules imposed on grantees by the respective agencies. These rules will insure accountability of the grantees to use the funds for stated public purposes, not religious ones.
- These arguments are all quite plausible, and indeed may have the support of four of the current Justices.¹³ It is by no means clear or settled, however, that a majority of the current Supreme Court would accept some or all of the reasoning of the OLC opinions. Under current law, the OLC arguments are open to the following questions and concerns:
- Government services like police and fire protection are matters of common right, available to all without regard to status in the community. But government financing of construction or maintenance is always more limited, and always involves some exercise of official discretion. Consequently, the danger of religious favoritism is typically present in such programs. Whether that danger justifies a blanket exclusion of houses of worship from certain benefit programs is a real and difficult question.
- In the context of historic preservation, the “broad array” of beneficiaries, religious and otherwise, may not be so broad as first appears. A disproportionate number of historic buildings are houses of worship, because settlers built them first and maintained them over time. And faiths, such as Christianity and Judaism, that have long worshiped in such structures in America are far more likely to qualify for grants for their worship buildings than more recent arrivals, such as Islam.
- The votes of the Justices were unanimous, or nearly so, in the *Tilton-Hunt-Nyquist* trilogy, and the aspects of these cases dealing with government support for buildings devoted to religious instruction or worship have never been repudiated by the Supreme Court. Indeed, Justice O’Connor explicitly cites *Tilton* with apparent approval in her crucial concurring opinion in *Mitchell v. Helms*.¹⁴ Moreover, *Tilton* involved higher education, and the new OLC opinions involve a house of worship and a secondary school, places in which religious indoctrination are even more

¹³ In *Mitchell v. Helms*, 530 U.S. 793 (2000), a plurality of four Justices adopted a view of the Establishment Clause highly consistent with the general view expressed in the new OLC opinions. Three Justices dissented in *Mitchell*, and two Justices – O’Connor and Breyer – took a middle view that did not accept the plurality’s central premise that government neutrality between religious and secular entities was constitutionally sufficient to save a program of aid to schools, including religiously affiliated ones. Justices O’Connor and Breyer, who represent the Court’s controlling middle ground on this issue, insisted that aid not be diverted to religious activities.

¹⁴ 530 U.S. at 856-857.

likely to occur. When the government finances the reconstruction or preservation of space in which such activity occurs, is it not effectively financing “specifically religious activities,” which Justice O’Connor’s opinion in *Mitchell* asserted was forbidden?

- In a number of recent cases, the Supreme Court has indeed ruled that the free speech guarantee of the First Amendment requires equal access to state-created public fora for expression. But the regimes of FEMA grants and historic preservation grants cannot fairly be considered to constitute such fora for speech, because they are not designed for expressive purposes and do not welcome all comers. Moreover, in the one decision of this character that involves the provision of money subsidies rather than public space,¹⁵ the Court opinion expressly noted that it was a group of religiously motivated students, rather than a religious institution, that was claiming the right to equal participation, and also noted that the aid was not provided directly to the students.
- The audit rules upon which the OLC opinions rely solve a problem of accountability, but raise the constitutional specter of “excessive entanglement,” a longstanding judicial doctrine drawn from concerns associated with both the Establishment and Free Exercise Clauses. Particularly in the case of houses of worship, preservation grants that extend to active worship space involve the government in monitoring the construction and preservation of that space. Indeed, grant recipients in the “Save America’s Treasures” program must promise to make a 50-year covenant requiring the owners to “repair, maintain, and administer the premises so as to preserve the historical integrity of the features, materials, appearance, workmanship, and setting that made the property eligible for the National Register of Historic Places.” (Save America’s Treasures Guidelines, at 2.) Enforcement of such a covenant invites the sort of state-religion interaction at which the doctrine of “excessive entanglement” seems aimed. The 1995 OLC opinion refers to these concerns, but the recent OLC opinions make no distinction between worship space and other building features, and in general ignore the problems of entanglement and government control over houses of worship.¹⁶

¹⁵ *Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819 (1995).

¹⁶ Out of constitutional apprehension of government control of sacred space, the Supreme Court of Washington State has exempted houses of worship from that state’s historic preservation scheme. *First Covenant Church v. Seattle*, 840 P.2d 174 (Wash. 1992). This ruling rested on both the federal and state constitutions. And the Supreme Judicial Court of Massachusetts has ruled that Boston’s landmarking ordinance may not constitutionally be applied to the interior of a church. *Society of Jesus v. Boston Landmarks Commission*, 564 N.E. 2d 571 (Mass. 1990). The city ordinance forbade alteration of, in the court’s words, “the nave, chancel, vestibule and organ loft on the main floor . . .” *Id.* at 572. The Massachusetts court rested its ruling entirely on the state constitution. Both the Washington and the Massachusetts courts were concerned about state involvement in the design of worship structures, because such involvement may well distort the religious message associated with various features of the

- The OLC opinion suggests that the Free Exercise Clause of the First Amendment may bar categorical discrimination against religious entities, of the sort reflected in their prior exclusion from FEMA grants and historic preservation grants. It is true that discrimination against particular religious sects presumptively violates the Free Exercise Clause, but it is a hallmark of Religion Clause jurisprudence to treat religious institutions distinctively as a class. It is of course always a question whether such distinctive treatment is constitutionally warranted, and it is true that the Supreme Court’s answer to that question has in recent years been increasingly in the negative. But an argument that rests on overarching nondiscrimination norms simply assumes that religion is not constitutionally distinctive, and that is the very question that Establishment Clause claims – such as those made in *Tilton* and *Nyquist* – put before the courts. To invoke the Free Exercise Clause broadly to sweep such claims away is inconsistent with the past half-century of adjudication in the field, and with still vital norms of religious distinctiveness in constitutional law.

If either the FEMA grant to the Seattle Hebrew Academy, or the Park Service grant to the Old North Church, is challenged by federal taxpayers, as either may be, the lower courts may adhere to the principle of *Tilton* and *Nyquist*, and invalidate the grant. Were such a case to go the Supreme Court in its current composition, we would predict that the Court would limit the application of *Tilton* and *Nyquist*, but that it would not be prepared to rule that religious structures are constitutionally identical to non-religious structures in all relevant respects. In particular, we would expect that sensitivity to the problem of government regulation of worship space may eventually make courts reluctant to approve grants to preserve or maintain the interior, worship-focused portion of religious structures. By contrast with our view, OLC makes no distinction in its opinion between worship space and other space owned and used by religious entities.

The National Park Service describes its grant to the Old North Foundation as being for the purposes of “repair and restoration . . . of the windows in the aging structure and [making] the building accessible to the American public.”¹⁷ Because neither of these expenditures is focused on the configuration of worship space, we think that courts might be willing to uphold this grant. The results of a challenge to the Seattle Hebrew Academy grant is harder to predict; it may be that any reconstruction of classroom space would aid religious instruction, but that classrooms – unlike chapels or religious sanctuaries – do not invite the sort of “excessive entanglement” problem we mention above.

building.

¹⁷ In the Historic Preservation article cited in footnote 1, above, we suggest that stained glass windows should be seen as an integral, image-laden part of worship space, and therefore outside the boundaries of government regulation or subsidy. But the Old North Church windows are not of this character, and we would permit the grant just made under the “Save America’s Treasures” program.

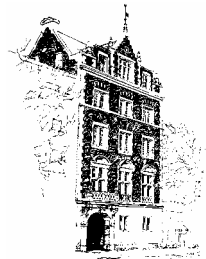
Finally, we want to offer a word about the connection between the new OLC opinions and the Faith-Based Initiative. The themes of neutrality, nondiscrimination, and a weakened jurisprudence of the Establishment Clause – all central to the constitutional rhetoric of the Initiative -- are pervasive in these opinions. More pointedly, the invocation of these themes in the context of construction and repair of buildings owned and operated by religious institutions is currently on the federal government’s regulatory table. The Department of Housing and Urban Development has proposed, but not yet promulgated, a set of regulations that would permit HUD construction and repair funds to go to religious entities, to be paid in proportion to the secular use for social service in the subsidized structures (e.g., HUD might pay 60% of maintenance costs for a building that was used 60% for secular social service, 40% for worship or religious instruction.) See here for more information: <http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2003/03-133.htm>. As we comment elsewhere on the Roundtable’s Website (<http://www.religionandsocialpolicy.org/publications/publication.cfm?id=24>), such a policy is in stark tension with *Tilton* and, in particular, with *Nyquist*, which expressly rejected a comparable pro rata scheme. If the new OLC opinions are correct and ultimately find validation in the courts, the HUD rules may be on safe ground. We note, however, that an allocation which turns on the percentage of time that a building is devoted to secular use requires monitoring of usage in a way that particularly invites concerns of “excessive entanglement” of state agents and religious entities. Accordingly, even if OLC is correct about the FEMA grants and the “Save America’s Treasures” grants, the proposed HUD rules raise questions which the opinions do not explicitly address.¹⁸

Moreover, the emphasis in the OLC opinions on the constitutional dangers of subjective discretion in the award of government funds remains a constant issue in the implementation of the Faith-Based Initiative. These concerns may be particularly acute at the state and local level, where criteria and processes tend to be less transparent than those relied upon in the dispensation of federal grants for historic preservation or disaster relief. State and local governments seeking the protection of the reasoning in the OLC opinions will be aided by such transparency.

¹⁸ By contrast, an allocation that turns on the character of the space – worship space compared to non-worship space -- may be settled more readily in advance of the grant and policed with less intrusive interaction than one that turns on time of use, a factor likely to be in constant and unpredictable flux.



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www.religionandsocialpolicy.org
(518) 443-5014



**The Nelson A. Rockefeller
Institute of Government
State University of New York
411 State Street
Albany, NY 12203**

THE GEORGE
WASHINGTON
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LAW SCHOOL
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