

Partnership or Peril?

*Faith-Based Initiatives and the
First Amendment*

BY OLIVER THOMAS

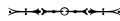


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Faith-Based Initiatives and the First Amendment

BY OLIVER THOMAS

Faith-based initiatives: the phrase conjures up images as varied as those who invoke it.

Many believe that partnerships between government and the religious community have great potential for alleviating some of America's most intractable social ills — homelessness, joblessness, drug addiction and juvenile crime. According to a poll by the Pew Center for the People and the Press, nearly two-thirds of Americans feel that religious organizations should be able to use government funds to address these problems.¹

Nearly half of those surveyed also support President Bush's decision to create a White House office of faith-based initiatives. Already, the president has named a director, released a 17-page document titled "Rallying the Armies of Compassion," which calls for a dramatic expansion of church-state partnerships, and established centers in a half-dozen federal agencies, including the Department of Justice, to enhance cooperation between government and the religious community.

Meanwhile, civil libertarians and some religious leaders are voicing concern. Invoking the words of the late Martin Luther King Jr., one Baptist pastor warned that the president's initiative threatens to make churches "the servant of the state, rather than its conscience."² Others maintain that providing tax funds to churches violates the separation of church and state.

Is the president's faith-based initiative an exciting breakthrough in the delivery of social services, or is it the wrong way to do right, a way that ultimately may undermine the strength and autonomy of religious institutions? This paper will explore these questions and others. We will review the historical background of church-state partnerships; examine how the Supreme Court has grappled with the questions raised by such partnerships; and, finally, discuss where we are likely to go from here, citing areas of general agreement and disagreement.

Two Principles At Stake

Throughout history, religious groups have provided assistance to their own communities and to those less fortunate than themselves. From the Hebrew concepts of Sabbath and Jubilee, to the fasting of early Christians to feed the poor, to the Muslim practice of almsgiving, religious people have sought to serve. Centuries of experience have also taught religious communities some of the most cost-effective methods of serving. If religious organizations are so good at providing services with their own funds, proponents ask, then why not give them the opportunity (and the funding) to provide other services traditionally provided by the government? Given the current push for tax cuts at the state and federal level, the search for more cost-effective methods of providing social services is likely to continue.

At the same time, another American principle is at play here: religious liberty. The conviction that government should not meddle in matters of faith — either by advancing or inhibiting it — is deeply imbedded in the American psyche. So fundamental is this commitment to religious liberty that it is the first freedom listed in the Bill of Rights. Some have called the twin principles of free exercise and no establishment (often referred to as “separation of church and state”) America’s greatest contribution to the betterment of humankind. Key to the notion of no establishment is the principle that tax dollars should not be diverted to religious uses. As Thomas Jefferson put it, taxing people for the support of religion is “sinful and tyrannical.”³

The challenge is finding a way to provide cost-effective public welfare services without sacrificing the First Amendment.

How We Got Here

NOT THE FIRST TIME

More than a century ago, the District of Columbia turned to the Sisters of Charity to provide medical services to the city’s poor. District commissioners contracted with the Roman Catholic Church to construct a new building on the grounds of its existing hospital. Because the church was to provide “secular” services to the city’s needy without regard to their religion, the fact that the hospital was affiliated with the church was deemed “wholly immaterial” by the Supreme Court.⁴ The landmark decision of *Bradfield v. Roberts* marked the beginning of a long history of cooperation between government and religious and charitable organizations.⁵ Since that time, religiously affiliated organizations have cooperated with the government in the

provision of everything from surplus food to higher education. Despite this history of cooperation, however, little in the way of legislation or court decisions occurred until the late 20th century.

CONGRESS AND THE FEDERAL AGENCIES

Passage of the Hill-Burton Construction Act of 1948 opened the door for millions of federal dollars to flow to religiously affiliated hospitals. With *Bradfield v. Roberts* as a backdrop, no one challenged the program on establishment-clause grounds. Other lawsuits were filed, however, including a series of cases brought under Section 1983 of the Civil Rights Act of 1871. These cases alleged that private religious hospitals were acting “under color of state law” as a result of the government funding they had received. Though it was never a majority view, some courts did adopt this expansive state-action theory and, among other things, ordered Catholic hospitals to provide sterilization procedures in violation of their religious tenets.⁶ The result of all this was passage of the so-called “Church Amendment” — named after Idaho Sen. Frank Church — which still permits religiously affiliated hospitals to adhere to their religious teachings in such matters. Although subjected to an establishment-clause challenge, the Church Amendment was upheld by a federal appeals court.⁷

In 1987, a debate arose over whether religious organizations should continue receiving government funds to provide emergency-shelter care and related services to the homeless. A controversy had erupted the previous summer when a halfway house for drug addicts and alcoholics run by the Salvation Army was denied funding because it encouraged its clients to seek spiritual help. In a *Washington Post* column, Mary McGrory complained that the Salvation Army was having difficulty qualifying for the assistance despite its almost unparalleled record in housing the homeless.⁸ Looming in the background was a news story that had revealed that the District of Columbia was spending nearly \$100 a night to house a homeless family, while the Salvation Army was providing the same service for about \$20.

The public, along with key members of Congress, was outraged. The result was a House Banking Committee report and new emergency-shelter regulations that eased restrictions somewhat on religious providers. Because many civil liberties groups also were alarmed by the growing number of homeless Americans in the 1980s, the regulations were never challenged in court.

Several years later, church-state partnerships were again on Congress’s agenda with passage of the Act for Better Child Care. Co-sponsored by Senators Edward Kennedy (D-Mass.) and Orrin Hatch (R-Utah), the act was a response to the widespread

shortage of quality child care resulting from the movement of many stay-at-home moms into the workforce. Among other things, the act provided direct grants and contracts to child-care providers, as well as vouchers for use by parents. There was a catch: the only child-care providers in many communities were churches and synagogues. In fact, as the debate over the legislation developed it became apparent that nearly half of America's child-care providers were religiously affiliated.

Early drafts of the legislation included strict provisions to ensure that government funds available under the act were used solely for non-religious purposes, but as the legislative process played out, several of those provisions were weakened or stripped from the bill altogether. What remained was a prohibition against the use of direct grants and contracts for religious activities that many considered unenforceable, given the absence of a meaningful monitoring mechanism. If the only funds received by a religious organization were *indirect* — such as through vouchers — the prohibition on religious activity was eliminated altogether. Again, the act was never challenged in court.

The Supreme Court Weighs In

BOWEN v. KENDRICK

The Supreme Court broke its century of silence with the 1988 decision *Bowen v. Kendrick*.⁹ At issue was the Adolescent Family Life Act, popularly known as the “Chastity Act.” Passed by Congress in 1981, the act was designed primarily to discourage sexual activity among teenagers. Funds were made available to both religious and secular organizations to promote self-discipline, encourage adoption as an alternative to abortion and provide counseling and support services to pregnant teens. The act was challenged by the American Jewish Congress and a group of federal taxpayers. The U.S. District Court held that providing funds to religious organizations to promote sexual abstinence violated the establishment clause.

The Supreme Court reversed. Applying the traditional three-part test set forth in *Lemon v. Kurtzman* (1971),¹⁰ the sharply divided Court held that the act had a valid secular purpose, did not have a primary effect of advancing religion and did not cause excessive governmental entanglement with religion. Four of the justices dissented.

Charitable Choice Is Progressive Social Policy Promoting the Public Trust

By Stanley W. Carlson-Thies and John J. Dilulio Jr.

Without a doubt, throughout America’s rural areas and urban centers, houses of worship and religious nonprofits are vital elements of our social safety net. A majority of the American public trusts faith-based organizations as sources of community service and favors more government support for their civic good works. And many welfare officials are looking to religious charities as often the only trusted beacons of hope in distressed inner cities.

If we want to strengthen our nation’s commitment to helping the least, the last and the lost, this is the direction we must go. Government must expand its collaboration with neglected neighborhood healers, both sacred and secular. Officials should welcome these social entrepreneurs as partners, not resent them as rivals. As President Bush proposes, we need tax changes to spark an outpouring of private charitable giving. And we must also reform federal policy to ensure that community-serving ministries have a fair chance to win government support to expand their successful efforts.

A renewed social policy must promote results, respect pluralism, ensure equal opportunity for all helpers and honor constitutional church-state requirements. That’s why we support charitable choice. Charitable choice is neither a strategy for government to dump welfare caseloads on the doorsteps of churches nor a plan to dump government funds into church offering plates. It is, in our view, a carefully crafted framework that expands options for needy Americans, safeguards the autonomy of faith-based groups, protects constitutional values and promotes the public trust.

Charitable choice does not codify government favoritism toward religion but curbs widespread government bias against many religious poverty-fighting charities. There is no pot of money set aside for favored religious groups. Rather, eligibility criteria that excluded some groups as “too religious” are changed to prize performance, not process, so that all providers — Methodist, Muslim, Mormon or good people of no faith at all — can seek federal support to serve their needy neighbors. If a faith-based provider wins funding, it will be because it provides effective and respectful services and meets all accountability standards

Charitable choice forbids diverting government money to pay for inherently religious activities like sectarian worship, preaching or proselytizing. All recipients must be served without discrimination and without compulsory religious observance. And government must ensure an equivalent alternative service if a client objects to a faith-based provider.

Charitable choice also retains the well-established right of religious organizations to hire staff of similar faith. Some call this government-funded job discrimination and an attack on civil rights. In fact, this long-standing right is *itself* a cornerstone civil rights protection enshrined in the 1964 Civil Rights Act, not a violation of it. Under charitable choice the government funds the best providers it can find, some of whom — as protected by settled civil rights law and the courts — consider religion when staffing in order to preserve their faith-driven community-service mission.

Congress has adopted charitable choice four separate times since 1996, and always by overwhelming bipartisan majorities. It is a careful, compassionate and constitutional approach to expanding government’s ability to partner with community-serving groups, whether religious or not, that achieve civic purposes. If government’s previous poverty-fighting strategies had boasted great results, we wouldn’t be having this discussion. President Bush is determined to make U.S. social policy more effective. We must give faith-based groups a fair chance to compete, and that means respecting their religious character.

We see charitable choice as a carefully tailored way to deliver critical services to needy children, youth, and families. To rally America’s armies of compassion, we must herald and support the quiet heroes who heal broken lives and distressed neighborhoods one act of kindness at a time.

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Carlson-Thies & Dilulio

The majority opinion, written by Chief Justice Rehnquist, contained important limitations, however. While the Court was willing to uphold the act as applied to the receipt of government funds by agencies that were merely “affiliated” with religious groups, the Court repeatedly warned of the dangers associated with providing government funds to “pervasively sectarian” organizations such as churches or synagogues. Previous opinions of the Court had identified such organizations as those where religion was so pervasive that it was impossible to isolate and fund the organization’s secular activities.

Near the conclusion of the *Kendrick* opinion was the following statement: “In particular, it will be open to appellees on remand to show that aid is flowing to grantees that can be considered “pervasively sectarian” as we have held parochial schools to be.” The implication was that if aid were indeed flowing to such institutions, it would be struck down.

A LESS “SEPARATIONIST” COURT?

In the years following *Kendrick*, the Supreme Court seemed to grow more relaxed in its application of the establishment clause. A series of decisions convinced some legislators that the Court’s earlier pronouncements against government funding for so-called pervasively sectarian organizations were no longer controlling.

In *Zobrest v. Catalina Foothills School District* (1993),¹¹ the Court upheld the provision of a sign interpreter at public expense to a deaf special-education student whose parents enrolled him in a parochial school. Despite the fact that the interpreter might be called on to interpret religious matters, the Court held that the independent decision of the parents to send their child to a religious school saved the program from an establishment-clause challenge. Because the parents had a wide variety of public and private schools from which to choose, the Court found that the program created no incentive to attend a religious school and, therefore, conformed to the First Amendment’s underlying requirement of government neutrality toward religion.

Two years later in *Rosenberger v. Rector and Visitors of the University of Virginia*,¹² the Court again gave encouragement to proponents of public funding for religious groups. The Court, speaking through Justice Anthony Kennedy, struck down the university’s decision to deny school funds to an Evangelical Christian student newspaper. Key to the Court’s decision was the fact that the university provided funds to more than a hundred other student publications and/or clubs.

The precedent-setting aspect of the *Rosenberger* decision was muted by the fact that Justice Kennedy’s opinion contained a number of caveats: (1) the disputed funds were

not tax dollars but instead were student activity fees, (2) the funded organization was not religious but was simply a group of students, (3) the funded activity (i.e. publishing a newspaper) was not a religious activity *per se*, and (4) the funding went to the publisher, not the students, and, therefore, was indirect.

In 1997, the Supreme Court revisited a pair of 1985 decisions that had struck down a portion of a federal education program that provided remedial instruction to students attending parochial as well as public schools. In *Aguilar v. Felton*¹³ and *Grand Rapids v. Ball*,¹⁴ the Court had held that sending public-school teachers into parochial schools to provide such remedial instruction amounted to a subsidy of the parochial schools and created an impermissible “symbolic union” between church and state. As a result of these decisions, remedial services for parochial-school students were offered only at off-campus, neutral sites.

The Court’s decision in *Agostini v. Felton*¹⁵ changed all that. In addition to scrapping the so-called symbolic-union doctrine, the justices opined that they would no longer *presume* a church-state violation based solely on the fact that government employees were providing services in a religious setting such as a parochial school. If establishment-clause violations were occurring, they would have to be pled and proven.

Though *Zobrest*, *Rosenberger* and *Agostini* were important decisions, they have limited relevance to the question of whether the government may provide grants and contracts to religious organizations for the provision of social services. First, each case was decided by the narrowest 5-4 margin. A slight variation in the facts could push the Court the other way. Second, each case had its own peculiar limiting factors. *Rosenberger* had the four caveats that made it inapplicable to faith-based initiatives. *Zobrest* hinged on the fact that the aid was provided to the student who then chose which school to attend. And *Agostini*, though reversing earlier Court doctrine pertaining to government employees providing secular services in a religious setting, did nothing to disturb that portion of the *Grand Rapids* decision which struck down the government’s use of a religious organization’s own employees to provide similar secular services. Looking back at the *Grand Rapids* opinion, it is telling that Justice O’Connor wrote separately in order to underscore this important distinction.

MITCHELL v. HELMS

In 2000, a sharply divided Supreme Court again spoke on the establishment clause, this time in a way that had great relevance to the issue of faith-based initiatives.¹⁶ By a vote of 6-3, the justices upheld the provision of computer hardware and software *directly* to primary and secondary parochial schools. Although the Court had upheld the

provision of secular textbooks to such schools in the past, the computers were not “locked” or “dedicated” computers and, therefore, were more easily diverted to religious use. The mere *possibility* that such a violation might occur was not enough to derail the program, however. After *Agostini*, such violations would have to be pled and proven. A four-justice plurality, led by Justice Clarence Thomas, opined that the fact that the aid was direct rather than indirect or that it was divertible to religious use was irrelevant. These justices also gave no significance to the fact that the parochial schools were “pervasively sectarian” but instead identified such terminology with a history of hostility toward Roman Catholics. As long as government aid is provided on the basis of “neutral, secular criteria,” the fact that it is received by a religious group, wrote Thomas, is immaterial.

In a lengthy dissent, Justice Souter — joined by Justices Stevens and Ginsburg — took issue with most of the plurality’s opinion but especially its conclusion that providing direct financial aid to pervasively religious organizations comports with the constitutional mandate that government neither advance nor inhibit religion.

With four justices willing to uphold virtually any form of aid provided evenhandedly to both religious and secular schools and three justices vigorously opposed to such aid, the concurring opinion of Justice O’Connor — joined by Justice Breyer — was critical. O’Connor began by denouncing the plurality opinion as one of “unprecedented breadth.” She reminded the Court that neutrality is not the sole criterion for establishment-clause analysis but is simply one of several factors to consider. Actual diversion of government aid to religion, wrote O’Connor, has been and continues to be contrary to the Court’s precedents, including *Agostini v. Felton*. However, the mere possibility of diversion is not enough, and there need be no “fail-safe” mechanism to prevent diversion from taking place.

Justice O’Connor voted to uphold the program of aid on the strength of several factors:

1. The aid was distributed according to neutral, secular criteria.
2. The government funds were used only to supplement — not supplant — the funds of the religious schools.
3. The government funds were controlled by the local public schools and never reached coffers of the parochial schools. The public schools purchased the computers, then provided them to the parochial schools.

4. The parochial schools signed contracts promising not to divert the aid to religious use.
5. Adequate safeguards — including monitoring and periodic inspections — were in place to ensure compliance with the contractual obligation against religious use. In fact, four years of compliance monitoring had uncovered only two minor violations.

Applying O'Connor's criteria to a government program that provides direct cash grants and contracts to churches raises obvious concerns. First, the funds would indeed reach the coffers of pervasively religious organizations. Second, monitoring the activities of church employees would be more difficult than monitoring the use of a computer. This could create problems under the Court's third criterion for prohibited conduct under the establishment clause: excessive government entanglement with religion. Without some constitutionally appropriate mechanism for compliance monitoring, it is difficult to believe that O'Connor would vote to uphold such a program.

On the other hand, Justice O'Connor makes much of the distinction between direct and indirect government funding. Diversion of government aid to religious purposes is unproblematic, she wrote, if "true private choice" directs the aid. Thus, O'Connor would appear willing to uphold a program, for example, that provided housing *vouchers* that could be redeemed at a variety of religious and nonreligious shelters. Aid to the client, rather than to the religious organization, would seem to be the key.

Charitable Choice

While the Supreme Court has not fully addressed the issue of faith-based initiatives, Congress has. "Charitable Choice" was the name given to Section 104 of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) or "welfare reform" as it is commonly known.¹⁷ Passed in 1996, PRWORA created lifetime limits and timetables for welfare benefits but also made funds available to nongovernmental agencies for counseling, job training and the like.

Section 104 increased the possibility for religious organizations to enter into partnerships with the government for the provision of these social services. Services that previously had been provided by the federal government were now provided by state and local governments — or their private subcontractors — through block grants.

Government Funding for Religious Groups Is Ill-Advised, Divisive

By Rabbi David Saperstein

Charitable choice is bad for religion, bad public policy, unconstitutional and socially divisive — all this for a program that will not necessarily help one more needy person.

Rabbi David Saperstein is Director of the Religious Action Center for Reformed Judaism and the Union of American Hebrew Congregations.



First, with government dollars come government rules and regulations, audits, monitoring and control. When such rules limit religious activity in government-funded programs, those churches committed to including religious activity as essential to their programs must either compromise their mission to obtain the money or ignore the rules. Too often, the latter means imposing religious proselytization or worship on the recipients. (No matter what kind of protections charitable-choice legislation tries to create, without extensive government surveillance such abuses will continue.)

For 200 years, the wall separating church and state has kept religion free of government interference, protecting the religious freedom of all and allowing religion to flourish with remarkable vitality and strength. Taking the sledgehammer of government funding to the wall would be a major retreat from the vision of our founders.

Second, by opening up our nation's limited funding for social service to, potentially, scores of thousands of houses of worship, countless millions of dollars will be diverted from (and thus weaken) what are widely regarded as the finest, most effective social-service providers today: the superb (albeit overwhelmed) "religiously affiliated" social-service providers such as Catholic Charities, Jewish Federations, Lutheran Social Services, etc., all of which abide by the regulations applicable to other charities. Without a national commitment to substantial increases in social-service funding, there is no guarantee one more needy person will be helped by this ill-advised initiative.

Third, the Supreme Court has noted that in houses of worship, religion is suffused throughout the entire program such that it cannot be separated out, and since funding is fungible, a major program of support to any part of the institution will constitute government funding of religion, thereby violating the establishment clause. Common sense says the justices are right, which is why so many religious leaders — on the left and on the right — oppose the program. Whether they are bothered by their tax dollars going to support the Nation of Islam, Scientologists, Jews for Jesus, Hare Krishnas, Muslims, Jews, Catholics or Evangelicals, they know Jefferson had it right: "To compel a man to furnish contributions in money to the propagation of opinions in which he disbelieves is sinful and tyrannical."

Finally, churches and synagogues have been (rightly!) exempted from many laws that would compromise their religious freedom, including the right to discriminate on religious grounds concerning those whom they hire. While major government funding for programs with such exemptions may be constitutional, such a practice can be part of a campaign to weaken civil rights and will give government sanction for dividing America along religious lines.

In the charitable-choice debate, President Bush faces a far-reaching test of his intention to unify and heal the nation. If he rallies the nation around the substantial parts of his faith-based initiative on which almost everyone agrees (using the tax system to stimulate charity to social-service providers; providing training, technical support and information-sharing) he can forge a new, constitutionally permissible partnership between the faith community and government.

If, however, he insists on including a major funding program aimed at supporting houses of worship in their social-service efforts, he will draw the nation into a painful, divisive, sectarian dispute that will mar his legacy. Rev. Jerry Falwell's attack on Islam and the attack by Rev. Eugene Rivers (who runs wonderful inner-city programs) on conservative evangelicals as racist is just a foretaste of what might be before us. Thousands of local churches, synagogues and mosques competing for limited government funds in the coming years would only exacerbate this rancor.

Section 104 provides ground rules for how religious organizations — including local congregations — may participate in the provision of these services. The goal of “charitable choice” is to allow the maximum level of participation by religious organizations consistent with the First Amendment.

The type of funded services that religious organizations may provide varies from state to state but may include job training, mentoring programs, job research, child care, nutrition and food-budgeting classes, before- and after-school programs and adult day care, as well as GED (high school equivalency) and ESL (English as second language) classes.

The type of regulation to which a religious organization is subject depends on the type of funding it receives. There are two choices. If the organization receives a *direct* grant or contract, it must provide a strictly secular (non-religious) program. Government funds may not be used for worship, sectarian instruction or proselytizing.

If, on the other hand, a religious organization receives only *indirect* funding — such as child-care vouchers — the limitations on worship, sectarian instruction and proselytizing do not apply. Thus, faith-based programs need not give up their religious character if their government funding comes only from indirect sources.

All religious organizations that receive government funding — either directly or indirectly — must provide services in a non-discriminatory manner. In other words, religious organizations may not deny funded services to citizens on the basis of race, religion, gender, national origin or the recipient’s refusal to participate in a religious activity. In addition, all recipients of federal funding are subject to four major civil-rights laws: Title IV (race and national origin), Title IX (gender), Rehabilitation Act (disability) and Age Discrimination Act.

If a person objects to the religious character of the institution where he is to receive funded services, it is the government’s — not the church’s — responsibility to provide him with a reasonable secular alternative. In addition, the government may not encroach upon the independence of a religious organization by attempting to alter its governance or by forcing it to remove religious art, icons or symbols from its premises in order to participate in a funded program.

Finally, the legislation permits religious organizations to maintain a separate set of books as a means of accounting for any funds received from the government. Although not required by PRWORA, separate accounting could serve as an important means of avoiding excessive entanglement between the government and religious groups.

What about proposed plans to expand charitable choice into such areas as drug treatment, homelessness and youth violence prevention? If providing government funds for church-run feeding programs and homeless shelters raises constitutional questions, funding educational and quasi-educational services such as those for countering youth violence or drug addiction raises even more.

Again, the answer to the constitutional question may hinge upon the type of funding received. If the funding is indirectly provided through use of vouchers or certificates, the Supreme Court would appear unlikely to declare the program unconstitutional. Direct funding, on the other hand, could run afoul of the establishment clause.

One possible solution is the imposition of a non-discrimination requirement on the employment of those providing the funded services. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, religion, gender and national origin. Sections 702 and 703, however, *exempt* religious organizations from the prohibition against *religious* discrimination. Otherwise, an Evangelical church could be required to hire an atheist as its receptionist — something Congress and the Supreme Court considered unworkable.¹⁸

If religious organizations were to give up this right to discriminate in exchange for direct government funding, the result would be creation of a religiously diverse work force disinclined to proselytize and, therefore, less likely violate the First Amendment. Religious organizations no doubt would object to such a condition if an employee performed other tasks not funded by the government, but the anti-discrimination requirement could be limited to employees whose salaries are paid entirely by government funds.¹⁹ Such a requirement could also blunt the popular criticism that charitable choice amounts to a subsidy for religious discrimination.

Another means of curing the constitutional defects associated with direct funding of churches and synagogues would be the use of separate, non-sectarian corporations for purposes of receiving and disbursing government funds. The architects of charitable choice considered and rejected this option. An approach that would not require the creation of a separate corporation yet likely would avoid the problems associated with the provision of direct funding to local congregations would be use of a local ecumenical or inter-faith body as the recipient of any government grants or contracts.

Churches, synagogues and other local congregations are responding to charitable choice in a variety of ways. Many avoid government funding altogether, while others are entering into limited partnerships through the use of child-care vouchers and other indirectly funded programs. Others have chosen more complex arrangements involving direct grants and contracts.

Where Do We Go From Here?

AREAS OF AGREEMENT

Despite the partisan wrangling, proponents and opponents of charitable choice actually agree on a lot. Among the areas of agreement:

1. Religious organizations have a distinguished track record in providing social services such as health care, child care and other forms of assistance. The efficient, cost-effective approach of groups like the Salvation Army and Catholic Charities has provided much of the impetus for charitable choice. Also providing impetus is the fact that some faith-based programs aimed at such vexing problems as substance abuse and youth violence seem to work better than most secular programs.²⁰
2. Even the staunchest advocates of church-state separation generally do not object to government funding for *religiously affiliated* (as opposed to *pervasively sectarian*) organizations for the provision of secular social services such as food, clothing and shelter care pursuant to the arrangements that have developed over the last several decades. Religiously affiliated agencies would include such organizations as Catholic Charities, Lutheran Social Services and United Jewish Communities.²¹
3. The autonomy of religious organizations should be respected. Organizations should not be required to alter their governance, name or permanently affixed art and icons in order to receive government funding.
4. Secular alternatives should be made available by the government. Responsibility for providing access to these secular alternatives should not fall on religious organizations.

5. Prospective beneficiaries of funded services should be apprised of their rights — namely, that secular alternatives are available and that public benefits may not be conditioned on participation in a religious activity if the service provider is receiving *direct* federal financial assistance.
6. Service providers — whether religiously affiliated or pervasively sectarian — should not be permitted to discriminate in the *provision* of funded services. Tax-funded services should be available to all who need them without regard to age, race, gender, sexual orientation or national origin.
7. No direct funding should be provided for explicitly religious activities such as worship or Bible study. Although former Missouri Sen. John Ashcroft, the lead sponsor of charitable choice, supported this bedrock principle of non-establishment, it should be noted that there is some disagreement about what constitutes “worship, religious instruction and proselytizing.”²² In addition, a minority within the religious community (and on the Supreme Court) maintains that the government may fund even explicitly religious activities as long as it provides such funding in a nondiscriminatory fashion (i.e., one religion is not preferred over another). This is consistent with Chief Justice Rehnquist’s view that the establishment clause prohibits only the designation of a single national church.²³
8. Separate books should be maintained by religious service providers to ease problems related to compliance monitoring for both the government and religious organizations.
9. The government can and should take steps to encourage charitable activity on the part of all non-governmental bodies. One way to do this is to restore the charitable deduction for taxpayers who do not itemize their deductions.
10. All religions must be treated the same. Absent a compelling interest such as public health or safety, the government may not discriminate among religious organizations.²⁴ Whether a shelter or child-care center is run by the Salvation Army, Nation of Islam, Presbyterian Church or Unification Church should not affect its eligibility for government funds as long as it is providing the service for which the funds were appropriated.

AREAS OF DISAGREEMENT

Two issues remain hotly contested. Both concern whether churches, synagogues, primary and secondary parochial schools, theological seminaries and other “pervasively sectarian” organizations can receive government funds and, if so, under what conditions.

The most contentious debate is over the receipt of government grants and contracts by pervasively sectarian organizations and how to ensure compliance with the prohibition against using these funds for explicitly religious activities. *Bowen v. Kendrick* suggests that courts may be disinclined to uphold direct government funding for such organizations unless there is reasonable assurance that the funds will not be used for religious indoctrination in violation of the test set forth in the Court’s more recent establishment-clause decision, *Agostini v. Felton*.

There is also disagreement over whether the prohibition against funding explicitly religious activities should extend to those programs that receive only *indirect* funding such as child-care vouchers or drug-rehabilitation certificates. It is precisely the religious element that seems to account for much of the success of these programs, so proponents of charitable choice are unlikely to agree to additional restrictions. This is particularly true in light of recent Supreme Court decisions suggesting an inclination on the part of the justices to uphold such indirect funding arrangements.

Conclusion

At a time when both political parties are pushing tax cuts and state and local governments are looking for ways to provide services more efficiently, politicians will continue looking to religious organizations for help. Charitable choice, or something similar, appears destined to stay.

At present, there seems to be little chance of finding common ground. Proponents of faith-based initiatives are confident that a more conservative Supreme Court is likely to uphold these new church-state arrangements. Opponents seem unwilling to condone the provision of government funds to local congregations under *any* circumstances.

A possible solution is the creation of some prophylactic measure that would reduce the likelihood of impermissible religious indoctrination with government funds, such as a non-discrimination requirement to govern the employment of workers who actually provide the funded services. If employers are unable to inquire whether a prospective day-care worker is Catholic, Jewish, Muslim or atheist, there is little chance the worker will violate the First Amendment by promoting the religion of the sponsoring organization. Such an arrangement might well provide the reasonable assurance Justice O'Connor was looking for in her *Mitchell* concurrence. A religiously diverse work force simply does not present a danger of impermissible religious indoctrination. After all, which religion would it promote?

Constitutionality is one thing; politics is another. Will political forces remain polarized, with one side seeking all the no-strings-attached government money it can get and the other refusing even to consider that local congregations could provide some social services without violating the establishment clause? Will one side or the other be willing to bend? Is the public willing to continue paying for the government to provide services that the religious community can provide for a fraction of the cost?

Ultimately, the issue is likely to be decided by the Supreme Court. The outcome of such a test will depend on whether the decision comes sooner or later and what the composition of the Court is at the time. When the decision finally does come down, it may serve to remind us just how pivotal the presidential election of 2000 really was.

Update: Bush-era developments

The administration of President George W. Bush was concerned to “level the playing field” to correct what the administration believed was a pattern of discrimination against faith-based organizations in the competition for federal grants. Bush-era policies and practices were aimed at removing obstacles that had previously discouraged or prevented religious organizations from seeking federal funds to provide social services.²⁵

Beginning in January 2001, President Bush issued a series of executive orders requiring all federal agencies with the power to issue federal grants to review their rules and regulations and remove any roadblocks that might unnecessarily prevent religious groups from applying for and receiving federal contracts.²⁶

One of the main objections to the Bush administration's faith-based initiative concerned religious discrimination in hiring by faith-based organizations receiving federal funds. As Professor Ira Lupu has explained, this conflict reflects two opposing views of church-state relations.²⁷ Critics of the administration charged that government has no business subsidizing religious discrimination and that only a religiously diverse workforce can ensure that government funds are not being used to promote religion in violation of the establishment clause. The Bush administration, however, countered that religious groups must have the right to hire co-religionists in order to preserve the religious character of their programs. Moreover, Bush officials argued, it is precisely the religious component of the services that makes them so effective.²⁸

The cornerstone of the administration's policies toward faith-based hiring was an executive order issued in December 2002, the "Equal Protection of the Laws for Faith-Based and Community Organizations."²⁹ This order amended a 1965 executive order by then-President Johnson that explicitly forbade the federal government from offering contracts to organizations that consider religion during the hiring process. President Bush's order, while reaffirming the validity of the 1965 order as applied to secular organizations, eliminated its application to religious organizations.

During its second term, the Bush administration extended this position further by claiming that federal statutes prohibiting agencies from contracting with organizations that practiced faith-based hiring, such as the Workforce Investment Act and the Juvenile Justice and Delinquency Act, should be ignored. Because these statutes are federal laws passed by Congress, the administration was unable to counteract them by executive order. What the administration was able to do, however, was to argue that it could not fully implement these laws without violating existing federal law.

In 2007, the Office of Legal Counsel in the Department of Justice prepared a memo that argued that the Juvenile Justice and Delinquency Prevention Act, and by extension all other federal laws prohibiting government contractors from engaging in faith-based hiring, could not be applied in full to religious organizations without violating the Religious Freedom Restoration Act, or RFRA.³⁰ RFRA is a 1993 congressional act that prohibits the federal government from placing undue burdens on religious groups and practices. Under RFRA, when a federal law places a substantial burden on a religious activity, the government must exempt from the law any group or person suffering from that burden (unless of course the government can show that it has a compelling interest in requiring compliance with the law). The Office of Legal

Counsel argued that the religious-nondiscrimination provisions of these federal statutes posed an undue burden on religious organizations, and thus should not be applied to them by the executive branch.

STATE-LEVEL OFFICES OF FAITH-BASED AND COMMUNITY INITIATIVES

Many state governments followed President Bush's lead and started their own offices of faith-based initiatives. According to then-Acting Director of the White House Office of Faith-Based and Community Initiatives Jed Medefind, in an interview with the *Christian Post*, 36 states have their own independent offices of faith-based initiatives.³¹

State-level offices of faith-based initiatives add an additional level of complexity to the debate, with each state possessing its own maze of statutes, constitutional provisions, and regulatory structures. Beyond additional questions of legality, each state raises important policy questions that are unique to its particular situation. Regardless of how or when these questions are answered, the widespread proliferation of these offices is a clear signal that the debate over the appropriateness of such church-state partnerships is far from over.

Looking ahead: faith-based initiatives and the Obama administration

President Barack Obama has committed to expanding the faith-based initiative, although he has promised to review the constitutionality of Bush-era policies and institute new safeguards as needed. Exactly what form these changes will take, however, remains somewhat unclear.

On Feb. 5, 2009, the new president signed an executive order establishing his own White House Council for Faith-Based and Neighborhood Partnerships.³² Central to the governance of the initiative will be the president's new 25-person advisory board for faith-based and community partnerships. The board is composed of many well-known religious and secular leaders, including former Baptist Joint Committee General Counsel Melissa Rogers, the CEO of Big Brothers and Big Sisters of America Judith Vredenburg, Rabbi David Saperstein and Bishop Vashti McKenzie. Obama has also named 26-year-old Josh DuBois, who ran religious outreach for the Obama campaign during the election, as the agency's head.³³

Of critical concern to many onlookers is the question of how President Obama's new agency plans to handle the issue of faith-based hiring by organizations seeking federal

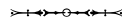
funding. Many of Obama’s supporters are highly critical of the previous administration’s position on the hiring question and want the Obama administration to change course. During the campaign, candidate Obama made no secret of where he stood on the hiring question. Speaking in Zanesville, Ohio, candidate Obama remarked that, “First, if you get a federal grant, you can’t use that grant money to proselytize to the people you help and you can’t discriminate against them — or against the people you hire — on the basis of their religion.”

President Obama, however, has not yet ruled out the possibility of some organizations that consider religion during the hiring process receiving federal grants. According to the February executive order, White House and Justice Department lawyers will consider the legality of each grant application on a case-by-case basis, particularly any constitutional problems that may arise from the hiring practices of specific organizations. President Obama has also reportedly asked the Justice Department to prepare a memo on the legal questions surrounding faith-based hiring.

Some civil liberties groups, including the American Civil Liberties Union and the People For the American Way, have expressed disappointment at the Obama administration’s lack of clarity about what they describe as federally subsidized discrimination. But the presence of strong proponents of church-state separation on Obama’s advisory council may signal that the new administration will ultimately take a markedly different position toward faith-based hiring than that taken by the Bush administration.

Though many details of President Obama’s plans for establishing faith-based and community partnerships are yet to be determined, it is clear that the new president is committed to expanding the faith-based initiative.

Shaun McFall wrote the sections on developments in the Bush and Obama administrations.



For further discussion on this topic, see, “In Good Faith: A Dialogue on Government Funding of Faith-based Social Services,” available from the Feinstein Center for American Jewish History, Temple University, 117 S. 17th St., Suite 1010, Philadelphia, PA 19103.

Notes

- ¹ Results are available at www.people-press.org/rel01rpt.htm.
- ² *Report From the Capitol*, Feb. 7, 2001, p.1.
- ³ “Virginia Statute for Religious Freedom,” W.W. Hening, ed., *Statutes at Large of Virginia*, vol. 12 (1823): 84-86.
- ⁴ *Bradfield v. Roberts*, 175 U.S. 291 (1899).
- ⁵ Senate Report No. 98-496, 10 (1984).
- ⁶ For more details on this litigation as well as on the *Wilder v. Bernstein*, 499 F. Supp. 980, (1980) foster care litigation of the 1970s, see “Public Funding of Social Services Related to Religious Bodies” (1990) by Dean M. Kelley, published by the American Jewish Committee.
- ⁷ *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974).
- ⁸ Mary McGrory, “HUD Halts Christian Soldiers,” *The Washington Post*, July 15, 1986.
- ⁹ *Bowen v. Kendrick*, 487 U.S. 589 (1988).
- ¹⁰ *Lemon v. Kurtzman*, 411 U.S. 192 (1973).
- ¹¹ *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).
- ¹² *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).
- ¹³ *Aguilar v. Felton*, 473 U.S. 402 (1985).
- ¹⁴ *Grand Rapids v. Ball*, 473 U.S. 373 (1985).
- ¹⁵ *Agostini v. Felton*, 522 U.S. 803 (1997).
- ¹⁶ *Mitchell v. Helms*, 530 U.S. 793 (2000).
- ¹⁷ Public Law 104-193 (Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)).

- ¹⁸ *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987).
- ¹⁹ One federal court has held that such a non-discrimination requirement is mandated by the First Amendment where an employee's salary is paid by the government. *Dodge v. Salvation Army*, 1989 U.S. Dist. Lexis 4797 (S.D. Miss. 1989).
- ²⁰ See e.g. William R. Miller, "Researching the Spiritual Dimension of Alcohol and Other Drug Problems," *Addiction*, Vol. 93, No.7 (1998), 979-990.
- ²¹ It should be noted that some organizations and commentators reject the religiously affiliated/pervasively sectarian dichotomy in its entirety. They maintain that such a distinction puts government in the untenable position of sorting through the various activities of religious organizations in order to determine exactly how "religious" they are. A better approach, it is argued, would simply treat all religious organizations on the same basis as their secular counterparts as long as they are providing services (e.g. education or health care) the government is otherwise permitted to provide. The four-justice plurality in *Mitchell v. Helms* adopted this approach. Notwithstanding, a majority of the justices continue to recognize the religiously affiliated/pervasively sectarian distinction, and until it is discarded by the Supreme Court, policy-makers must take it into consideration.
- ²² Certainly the proscription against "worship, religious instruction and proselytizing" would prohibit the expenditure of government funds for such things as Bibles or the delivery of a sermon. Similarly, judges would likely prohibit making religious activities a pre-condition to receiving government-funded services. Whether programs receiving public funds could include prayer or encourage clients to participate in religious activities paid for with private funds is the subject of intense debate. Again, all of this may be moot if the government funding is provided to the client rather than to the religious organization.
- ²³ *Wallace v. Jaffree*, 472 U.S. 38, 91 (Rehnquist, J. dissenting) (1985).
- ²⁴ Endnote to *Larson v. Valente*, 456 U.S. 228 (1982)
- ²⁵ For more detail, see Linda C. McClain, "Unleashing or Harnessing 'Armies of Compassion': Reflections on the Faith-Based Initiative," *Loyola University Chicago Law Journal*, Vol. 39 (2008), pp. 361-426, at 371, where the author discusses the Office of Faith-Based and Community Initiatives' August 2001 report, "Unlevel Playing Field."
- ²⁶ See the Pew Research Center's Forum on Religion & Public Life's interview with Ira Lupu at <http://pewforum.org/events/?EventID=211>. This section draws heavily on that interview.
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²⁷ Ibid.

²⁸ It should be noted, however, that there is some controversy as to whether faith-based groups are in fact more effective at providing social services than the government or other secular groups. See McClain, “Unleashing or Harnessing,” at 387-404.

²⁹ See Pew Research Center, *supra* note 2.

³⁰ Ibid, which links to the OLC memo. The memo is fully titled, “Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act.”

³¹ “White House Faith-Based Director on Successes, Misunderstanding,” interview by the *Christian Post* with Jed Medefind, former acting director of the White House Office of Faith-Based and Community Initiatives, at www.christianpost.com/article/20090115/white-house-faith-based-director-on-successes-misunderstanding/index.html.

³² See the Associated Press story, “Obama establishes new faith-based office,” at www.firstamendmentcenter.org/news.aspx?id=21209. Also see Jonathan Turley, “Faith-Based, Part II,” in *USA Today*, which can be found online at blogs.usatoday.com/oped/2009/01/faith-based-par.html.

³³ See the www.cnn.com article from Feb. 5, 2009, “Obama Overhauls Faith-Based Agency,” at politicalticker.blogs.cnn.com/2009/02/05/obama-overhauls-faith-based-agency/, Suzanne Malveaux and Jessica Yellin reporting.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

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