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Charitable Choice: The Ramifications of Government Funding for Faith-Based Health Care Services

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I. INTRODUCTION

In 1996, Congress passed the federal welfare reform bill¹ to help move millions of Americans from welfare to work. Primary in this bill is a provision, known as Charitable Choice, that authorizes faith-based organizations² to compete along side secular organizations to provide a wide range of federally funded welfare, health, and social services.³

1. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193 (1996) (codified as amended in 42 U.S.C. 604a).

2. Gretchen M. Griener, *Charitable Choice Welfare Reform: Collaboration between State and Local Government and Faith-Based Organizations*, 4 WELFARE INFORMATION NETWORK 1 (Sept. 2000), at <http://www.welfareinfo.org/issuenotecharitablechoice.htm>. The term "faith-based organization" includes at least three different types of organizations: 1) national denominations with social service arms like Catholic Charities and Jewish Family Services; 2) community development corporations that are incorporated separately from

The First Amendment, in the language of its clauses, erects a boundary between the federal government and religious institutions by ensuring that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”⁴ The two clauses of the amendment guarantee two distinct forms of religious liberty. “The Establishment Clause prevents the government from imposing religion on people,” and the Free Exercise Clause prevents government from interfering with the religion people choose to exercise.⁵ Because Charitable Choice allows pervasively religious organizations to compete for federal funding to provide services to the needy, potential conflicts with the separation of church and state guaranteed in the First Amendment may arise.⁶

This article will explore Charitable Choice and its practical implications, as well as its possible constitutional conflicts. It argues that despite well crafted language, which may allow Charitable Choice legislation to pass constitutional muster, profound issues are raised when the states extend Charitable Choice laws as a new national social policy. These policies, particularly in regard to providing healthcare services for the poor through religious outreach, appear to be designed primarily as an effort to shift more responsibilities currently filled by government to the private sector.⁷

congregations but with a religious base, and; 3) congregations and churches. *Id.* There is no agreement as to what specifically defines a faith-based organization. *See id.*

3. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, *supra* note 1. The Charitable Choice Provision, § 104, encourages states to involve community and faith-based organizations in providing federally funded welfare services to the needy. *Id.*

4. U.S. CONST. amend. I.

5. RICHARD B. COUSER, *MINISTRY AND THE AMERICAN LEGAL SYSTEM* 30 (1993).

6. *Id.* at 40. “Pervasively sectarian” institutions are defined as those where “religion is so pervasive that a substantial portion of its functions are subscribed in the religious mission.” *Id.* In such an institution, even aid designated for secular purposes “may nonetheless advance the pervasively sectarian institution’s ‘religious mission.’” *Id.* “The risk of such inappropriate grants, however, did not justify striking down the act as unconstitutional” *Id.* *See also* Bowen v. Kendrick, 487 U.S. 589, 610 (1988) (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)).

7. *See* Rebecca Carr, *Leader of Faith-Based Proposal Is a Fighter*, PALM BEACH POST, Apr. 8, 2000, at 21A. John DiIulio is now the director of the new White House Office of Faith-Based and Community Initiatives. *Id.* He promotes Charitable Choice legislation to give religious organizations more “access to federal money to deliver social services.” *Id.* Appointed by President George W. Bush, DiIulio says he first realized the power of African-American churches on his community growing up in his Catholic blue-collar Philadelphia neighborhood. *Id.* DiIulio stated, in a recent White House interview, that much of America’s social capital is thriving in churches, mosques, and synagogues that government should support those efforts. *Id.* “To work around these organizations as if they are somehow

First, the nature and history of Charitable Choice on the federal and state levels will be discussed. Second, the article will examine the legal evolution of the boundary between church and state, and analyze the relevance of that boundary to Charitable Choice legislation.⁸ Third, since there has been no Supreme Court case that has ruled directly on the constitutionality of Charitable Choice, a real-life scenario involving the proposed closing of a hospital in West Palm Beach, Florida will be studied. This example will highlight some possible ramifications in the event that a community faces the choice of providing its safety net healthcare through pervasively religious groups rather than providing no healthcare access for their poor.

II. WHAT IS CHARITABLE CHOICE?

A. *Definition of Faith-Based Services*

The 1996 federal welfare reform bill restructured the federal welfare system. This legislation, formally entitled the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), replaced the former federal entitlement program known as Aid to Families with Dependent Children (AFDC) with a block grant program, Temporary Assistance to Needy Families (TANF), to be administered by the states. This block grant to the states provides cash assistance to needy families within a five-year lifetime limit.⁹ When the welfare reform law

'radioactive' because we presume they are proselytizing, because we presume they can do nothing other than sectarian worship, is just the height of civic irrationality. . . ." *Id.*

8. The controversy is clear in the comments of Marvin Olasky, senior fellow at the Acton Institute and editor of *World* magazine, who was President George W. Bush's chief architect for the "compassionate conservative" philosophy. Olasky criticizes John DiIulio's approach to open up federal money to "fringe" religions. Olasky says DiIulio should avoid controversies and stick to promoting less controversial faith-based proposals like regulatory reform, tax code incentives, and non-discrimination in grant making. The controversy is further underscored in a recent poll for the People and the Press and the Pew Forum on Religion and Public Life, which found seventy-five percent of Americans favored the president's faith-based initiative, but only thirty-eight percent favored giving money to Muslim mosques or Buddhist temples. See Kingsley Guy, *Cult Status As Much Political As Theological*, SUN-SENTINEL (Ft. Lauderdale), Apr. 20, 2001, at 23A.

9. Leighton Ku & Teresa A. Coughlin, *How the New Welfare Reform Law Affects Medicaid*, URBAN INSTITUTE, 1997, available at http://newfederalism.urban.org/html/anf_a5.htm.

passed as H.R. 3734,¹⁰ Medicaid might also have been reorganized along similar lines. However, Medicaid's entitlement status was not changed, despite an initial attempt to restructure Medicaid as a block grant as well. Instead, the bill delinked welfare and Medicaid eligibility, narrowed Medicaid eligibility for disabled children in the Supplementary Security Income (SSI) program, terminated access to Medicaid for some legal immigrants through loss of SSI, and barred most future legal immigrants from Medicaid.

Basically, the welfare reform law reduced the number of people covered and lowered federal expenditures by a projected \$4 billion over six years, through 2002, while giving the states more flexibility in structuring their welfare and health insurance programs.¹¹ Yet, the former welfare population could still qualify for Medicaid health insurance coverage under separate standards. Within this welfare reform law, in section 104, is a key provision called Charitable Choice.¹² This provision is designed to stimulate

10. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, *supra* note 1.

11. Ku, *supra* note 9, at 14. The major policy goal of the new welfare law was to provide more flexibility to states in both welfare and Medicaid, albeit with fewer dollars. *Id.* But counties and cities that maintain public or safety net hospitals that serve large numbers of indigent and uninsured patients would need to tap other local or state revenue sources to cover the uncompensated care costs. *Id.* Most affected will be hospitals and clinics in high immigrant areas such as South Florida, South Texas, or New York City. *Id.* at 5.

12. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, *supra* note 1.

The specific sections of § 604(a) provide:

(a) In general

(1) State options

A State may—

- (A) administer and provide services under the programs described in subparagraphs (A) and (B)(i) of paragraph (2) through contracts with charitable, religious, or private organizations; and
- (B) provide beneficiaries of assistance under the programs described in subparagraphs (A) and (B)(ii) of paragraph (2) with certificates, vouchers, or other forms of disbursement which are redeemable with such organizations.

(2) Programs described

The programs described in this paragraph are the following programs:

- (A) A State program funded under Part A of title IV of the Social Security Act (as amended by section 103 (a) of this Act).
- (B) Any other program established or modified under title I or II of this Act, that—
 - (i) permits contracts with organizations; or
 - (ii) permits certificates, vouchers, or other forms of disbursement to be provided to beneficiaries, as a means of providing assistance.

(b) Religious Organizations

The purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described in subsection (a)(2) of this section, on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.

(c) Nondiscrimination against religious organizations

In the event a State exercises its authority under subsection (a) of this section, religious organizations are eligible, on the same basis as any other private organizations, as contractors to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, under any program described in subsection (a)(2) of this section so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution. Except as provided in subsection (k) of this section, neither the Federal Government nor a State receiving funds under such programs shall discriminate against an organization which is or applies to be a contractor to provide assistance, or which accepts certificates, vouchers, or other forms of disbursement, on the basis that the organization has a religious character.

(d) Religious character and freedom**(1) Religious organizations**

A religious organization with a contract described in subsection (a)(1)(A) of this section, or which accepts certificates, vouchers, or other forms of disbursement under subsection (a)(1)(B) of this section, shall retain its independence from Federal, State, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs.

(2) Additional safeguards

Neither the Federal Government nor a State shall require a religious organization to—

(A) alter its form of internal governance; or

(B) remove religious art, icons, scripture, or other symbols; in order to be eligible to contract to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, funded under a program described in subsection (a)(2) of this section.

(e) Rights of beneficiaries of assistance**(1) In general.**

If an individual described in paragraph (2) has an objection to the religious character of the organization or institution from which the individual receives, or would receive, assistance funded under any program described in subsection (a)(2) of this section, the State in which the individual resides shall provide such individual (if otherwise eligible for such assistance) within a reasonable period of time after the date of such objection with assistance from an alternative provider that is accessible to the individual and the value of which is not less than the value of the assistance which the individual would have received from such organization.

(2) Individual described

An individual described in this paragraph is an individual who receives, applies for, or requests to apply for, assistance under a program described in subsection (a)(2) of this section.

(f) Employment Practices

new collaborations between government and faith-based organizations (FBOs),¹³ particularly in regard to spending Temporary Assistance for Needy Families (TANF) funds, the new name for federal welfare money provided as block grants to the states to administer.

Pursuant to section 104 of PRWORA, state governments which opt to contract with social service providers cannot legally prevent FBOs from competing for contracts simply because they are pervasively sectarian. The Charitable Choice provision, authored by Senator John Ashcroft of Missouri, prior to his recent appointment as Attorney General, has three basic goals: 1) to encourage states to expand the involvement of community and faith-based organizations in providing local services; 2) to protect the religious character of participating faith-based organizations; and 3) to protect the religious liberty of the individuals they may serve.¹⁴

The theory behind Charitable Choice relies on three statutory principles: 1) to provide a nondiscrimination provision against religious providers; 2) to protect the rights of faith-based providers to keep their institutional autonomy; and 3) to provide choice through the free exercise rights of beneficiaries to say “no” to the services provided by a religious provider.¹⁵ By stating that beneficiaries who object to receiving faith-based services have the choice of which service provider to utilize, section 104 codifies the constitutional requirements for governmental interaction with faith-based providers in a way that intends to honor United States Supreme

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) of this section.

(g) Nondiscrimination against beneficiaries

Except as otherwise provided in law, a religious organization shall not discriminate against an individual in regard to rendering assistance funded under any program described in subsection (a)(2) of this section on the basis of religion, a religious belief, or refusal to actively participate in a religious practice.

13. The term “faith-based” organization or provider of services is used here very broadly to include whatever is generally construed to mean a religious organization under the Establishment Clause of the United States Constitution.

14. See <http://www.fed-soc.org/Publications/practicegroupnewsletters/PG%20Links/charchoice.htm> (last visited Jan. 27, 2002). Carl Esbeck, Director of the Center for Law and Religious Freedom, described these goals in a panel debate with Elliot Minberg, Policy Director for the People for the American Way Foundation sponsored by the Federalist Society, a conservative group. *Id.* Esbeck, one of the chief architects of Charitable Choice, argues that it is consistent with the Establishment Clause, while Minberg argues that it is unconstitutional. *Id.*

15. *Id.*

Court precedents for government neutrality.¹⁶ How the Supreme Court will ultimately decide the constitutionality of Charitable Choice remains unclear, but it seems likely from President Bush's track record in Texas on Charitable Choice, and his proactive stand on the concept since entering the White House, that the federal government will avidly embrace the concept of working with faith-based organizations.

Since the Charitable Choice law is designed to make social service grants available to religious groups without impairing the religious character of those groups, the very essence of these faith-based organizations seems to lie in the strength of their religious message. Since this is emerging territory for the boundaries between church and state, and moves the boundary line, it is likely to stimulate defining litigation in at least four areas which may pose concerns: proselytizing beneficiaries; employment discrimination on the basis of religion; government entanglement; and adverse effects on religious missions.¹⁷ But key to any court analysis on how far to go in deregulating religion will be whether Charitable Choice truly provides choice to beneficiaries to avoid religious coercion as a condition of getting government funded services.

The language of section 104 requires the states to provide an alternative to a religious provider if there is objection, and the alternative must be both timely and of comparable service. The Charitable Choice provision got little attention when it was first adopted as part of the welfare overhaul in 1996. Nor did it appear on many radar screens when it was expanded to cover drug treatment and community development grants in 1998.¹⁸ However, when President Bush created the White House Office of Faith-Based and Community Initiatives in late January to launch his plan to use government money to fund religious charities providing social services, new attention focused on this existing provision of the law.

16. *Agostini v. Felton*, 521 U.S. 203, 230–31 (1997). The neutrality principle inherent in the Establishment Clause does not bar the government from providing public funds to religious organizations, provided the purpose is interpreted as neutral. *Id.* The *Agostini* Court held that public school teachers could provide federally funded remedial education to disadvantaged students in parochial schools. *Id.* *Agostini* assumes public funding distributed in a neutral fashion is "less likely to have the effect of advancing religion." *Id.*

17. See Julie A. Segal, *Welfare for Churches: Buyers and Beneficiaries Beware*, 5 GEO. J. ON FIGHTING POVERTY 71 (Winter 1997). The writer is a policy analyst for Americans United for Separation of Church and State, which argues against the constitutionality of Charitable Choice. *Id.*

18. Laura Meckler, *Bill Expands 'Charitable Choices,'* SUN-SENTINEL (Ft. Lauderdale), Mar. 4, 2001, at 1B.

Presently, members of Congress are pressing ahead with legislation to allow religious groups to compete for government money, including a major expansion of charitable choices, which allows groups to qualify for grants without divorcing their programs from religion. Senator Rick Santorum, (R-Pennsylvania), along with Representatives J.C. Watts, Jr. (R-Oklahoma), and Tony P. Hall, (D-Ohio), plan to introduce expanded legislation later this year, which translates President Bush's plans into future law.¹⁹ Faith-based providers held an organizational summit for Congress in Washington on April 24–25, 2001, to further advocate for legislation to expand the plans.

But legislators have recently slowed down the effort to give more time to fine-tune the proposals, which ran into controversy and were unexpectedly criticized by religious conservatives, as well as civil libertarians.²⁰ Critics on the right reportedly fear the program could cause churches to become dependent on government funds, and objectionable sects could be funded.²¹ On the left, opponents fear an expanded program would chip away at the separation between church and state and permit government funded hiring discrimination. President Bush said at a press conference on February 22, 2001, defending his plan: "I believe that so long as there's a secular alternative available, we ought to allow individuals who we're helping to be able to choose a program that may be run by a faith-based program."²²

19. Elizabeth Becker, *Bill on Church Aid Proposes Tax Incentives for Giving*, N.Y. TIMES, Mar. 18, 2001, at 18. These bills will include tax credits to help low income workers open savings accounts at banks, charitable contribution deductions for people who do not itemize deductions on their income tax returns, and full deductions for donations of food to charities for restaurants and grocers. *Id.* Interestingly, this suggests that private, profit-making organizations like banks, restaurants, and grocers are the first in line to get tax breaks from faith-based initiatives.

20. Dana Milbank, *Senators Slow Action on 'Faith-Based' Aid*, WASH. POST, Mar. 14, 2001, at A1. Sen. Rick Santorum (R-Pa.) will wait several months to a year now to act on Charitable Choice in order to build consensus for his proposal and will likely split the bill in two. *Id.* The first bill will focus on tax incentives for charitable giving which has broad-based support. *Id.* The second part will likely be an incremental approach to charitable choice which he hopes to expand to five Cabinet agencies. *Id.*

21. See Debate 2, *Should the Government Provide Financial Support for Religious Institutions that Offer Faith-Based Social Services?*, at 7, available at http://www.camlaw.rutgers.edu/publications/law-religion/debate_2.htm (last visited Oct. 31, 2001). "I do not want to see state budget battles in my home state of Virginia, between the Methodists, the Scientologists, and Jerry Falwell over the amount of the welfare block grant that is going to each one." (quoting the Rev. Barry W. Lynn, an ordained minister in the United Church of Christ and attorney with Americans United for Separation of Church and State). *Id.*

22. Laurie Goodstein, *Bush's Charity Plan is Raising Concerns for Religious Right*, N.Y. TIMES, Mar. 3, 2001, at A11.

President Bush's comment stresses the choice factor inherent in the charitable choice provision. However, a central question is not being raised. What occurs under Charitable Choice provisions when, in terms of practical applications, there is no alternative choice available?

B. Background

Throughout America, healthcare is undergoing a major structural transformation. According to the Robert Wood Johnson Foundation, "one-third of all hospitals in the United States are failing financially, an equal percentage is [approaching fiscal failure], and the other third is barely making it."²³ As healthcare in the United States faces a significant financial crisis resulting in aggressive managed care and changing government policies, hospital markets around the country face declining occupancy rates and inpatient activity. These declines suggest many markets will face the continuing shrinkage of their healthcare providers through merger and consolidation. Such a scenario assures many markets fewer choices for healthcare and may undercut the implicit promise in Charitable Choice, that there will be alternative providers if needed.

Charitable Choice legislation represents a significant change from the historical practices and approaches of government in funding religious groups. Faith-based providers have long provided services to the poor.²⁴ In the past, the government often would contract with religious groups to provide certain services, but safeguards were typically kept in place to protect the integrity of the groups and the interests of taxpayers.²⁵ Previously, religious institutions had to create separate secular entities, (separate 501(c)(3) organizations), or sanitize its religious nature to receive public

23. Consultants Study of Intracoastal Health Systems 35, (Oct. 30, 2000) (quoting the Robert Wood Johnson Foundation, June 1, 2000) (on file with author).

24. See Sean Mehegan, *The Federal Connection: Nonprofits Are Looking More and More to Washington*, NON PROFIT TIMES, Nov. 1994, at 43. According to a non-profit study, sixty-five percent of Catholic Charities' revenues, seventy-five percent of the Jewish Board of Family and Children's Services revenues, and ninety-two percent of Lutheran Social Ministries' revenues, come from government. *Id.*

25. See ACLU Briefing Paper Number 3—Church and State, at <http://www.lectlaw.com/files/con07.htm> (last visited Jan. 12, 2002). The ACLU believes government funding of services within religious facilities is constitutional only if: 1) the program is run by a nonreligious group; 2) the nonreligious group's staff has no association with the religious facility; 3) the program has no religious content; 4) no religious symbols are displayed; 5) children are admitted on a nondiscriminatory basis, and; 6) government pay only to rent the religious facility. *Id.* This view contrasts sharply with the Charitable Choice provision. *Id.*

funds. Theoretically, these separate corporations allowed government to ensure that tax money was used for secular purposes, such as health services only, rather than for religious worship or proselytizing.²⁶

Charitable Choice removes the safeguards, allows groups to evangelize while providing publicly financed services, and permits groups to discriminate in hiring on religious grounds.²⁷ There may be significant, if not radical changes in the way healthcare is funded in the future. Since the welfare reform bill passed, millions of people were moved from welfare to the job market, but needed transitional healthcare benefits, paid for by Medicaid, to do so.²⁸ Medicaid, the joint federal-state government-funded healthcare program for low income citizens, insures forty-one million Americans through a federal-state partnership. The Charitable Choice provision applies when states enter into purchase-of-service contracts or voucher arrangements with independent sector organizations under the Temporary Assistance for Needy Families program (TANF).²⁹

TANF provides states with grants to be spent on time-limited cash assistance.³⁰ TANF generally limits a family's lifetime cash welfare benefits to a maximum of five years and permits states to impose a wide range of other requirements, such as employment.³¹ If a person was eligible for AFDC, he or she would still be eligible for Medicaid, but although most persons covered by TANF will receive Medicaid, it is no longer required by law—in essence, Medicaid and welfare eligibility are no longer linked.³²

26. *Bowen v. Kendrick*, 487 U.S. 589, 631 (1988) (Blackmun, J., dissenting). In discussing pervasively sectarian environments and proselytizing, the case described these issues as terms of art with roots in the "Court's recognition that government must not engage in detailed supervision of the inner workings of religious institutions . . ." *Id.*

27. *See generally Americans United for Separation of Church and State*, (Apr. 11, 2001), at <http://www.au.org/press/pr41101.htm> (opposing the Watts-Hall bill, (H.R. 7) as subsidizing religious discrimination and citing a poll released by the Pew Forum showing that 78% of Americans say government-funded religious groups should not be able to hire only people who share their beliefs to staff programs, a key component of the Bush plan).

28. Interview with Louis Sullivan, M.D., Goodwin Seminar Speaker, Shepard Broad Law Center, Nova Southeastern University in Ft. Lauderdale, Fla. (Apr. 16, 2001). According to Dr. Louis Sullivan, former head of HHS, current HHS Director Tommy Thompson may be creative in forging national healthcare policy for the poor through transitional healthcare waivers now being crafted through welfare reform. *Id.*

29. Letter from Timothy M. Westmoreland, Director of Health Care Financing Administration, to State Medicaid Directors (Jan. 6, 2000).

30. 42 U.S.C. § 601 et seq. (codified in Title 1 of DROWRA).

31. *Id.*

32. *Id.* AFDC was codified at 42 U.S.C. § 601 et seq. (repealed by § 103(a) of DRWORA).

Charitable Choice also applies to the Supplementary Security Income (SSI) program, and therefore can be read to include food stamps and Medicaid programs,³³ to the extent that states administer these programs using contracts or vouchers with non-governmental providers.³⁴ Broadly interpreted, faith-based providers could offer everything from maternity homes, medical and health services that include drug and alcohol treatment, and primary healthcare. Since states may also contract with faith-based providers to administer social services, this could encompass setting eligibility standards for beneficiaries.³⁵ Medicaid spending rose nine percent nationally last year, the largest increase in seven years, and now costs the states more than \$200 billion a year.³⁶ Legislators are scrambling to find ways to cut these costs and to provide more flexibility for shifting the costs of government programs to local providers.³⁷

C. *The National Situation*

On the national level, Charitable Choice has become one of the key struggles in church/state legislative activities with many special interest groups lining up on both sides of the issue. Its supporters include the Center for Public Justice, the Christian Legal Society, the National Association of Evangelicals, and the Union of Orthodox Jewish Congregations, to name but a few. Groups opposed include the American Civil Liberties Union, the American Jewish Committee, Americans United for the Separation of Church and State, and many conservative religious groups.³⁸ These groups

33. In 1996, the State of Texas asked the Clinton Administration to approve their plan to contract out welfare, Medicaid, and food stamps. See Barbara Vobejda, *Privatization of Social Programs Curbed; Texas Is Told Firms Can't Determine Medicaid, Food Stamp Eligibility*, WASH. POST, May 10, 1997, at A9. Clinton approved only the welfare waiver, but not Medicaid and food stamps. *Id.* But under President Bush, new interest in broader waivers seems likely.

34. According to the analysis of the Congressional Research Service, these additional programs are the SSI program, and probably the food stamps, and Medicaid programs. See CRS memo, "*Questions Re Section 104 of P.L. 104-193 (H.R. 3734) Concerning Services Provided by Charitable Religious or Private Organizations*," Sept. 1996 (from the American Law Division), and CRES memo "[a]pplication of Section 104 of P.L. 104-193" Oct. 18, 1996 (by the Education and Public Welfare Division).

35. 42 U.S.C. § 604(a)(1)(A) (1997).

36. *Id.*

37. Robert Pear, *Governors Offer 'Radical' Revision of Medicaid Plan*, N.Y. TIMES, Feb. 26, 2001, available at <http://www.nytimes.com/2001/2/26/politics/26GOVS.html>.

38. Marc D. Stern, *Resist Temptation*, JTS MAG., Spring 2000, at <http://www.jtsa.edu/pubs/jtsmag>.

perceive that funding and regulation in the long run are inescapably intertwined, and it is unwise to allow religious organizations to become financially beholden to government.³⁹ They see great risk in allowing government funds to go to pervasively religious institutions without adequate safeguards.⁴⁰

These groups hold that Charitable Choice chips away at the wall between church and state, and unconstitutionally permits government advancement of religions, while risking a general weakening of religious autonomy and integrity.⁴¹ Some social policy advocates also fear that government reliance on faith-based organizations for social services could weaken the social safety net, by allowing the government to retreat from its traditional role as a health and social service provider, and to shift the social and financial burden to private institutions.⁴² Whether this shift of services from public to private providers is a realistic possibility is questionable given the current amount of social services provided by the private sector. There have been major efforts to document how much aid church-related groups give to the poor.

In 1994, private contributions to the six largest faith-based organizations totaled \$1.67 billion. This sum included \$644 million to the Salvation Army; \$315 million to the Union of Gospel Missions; \$250 million to Jewish Federations; \$204 million to Catholic Charities USA; \$106 million to Christian Social Service Agencies; and \$15 million to the YMCA.⁴³ The percentage of funds that goes to social services is hard to determine because many of the major denominations, including the Evangelical Lutherans, the Southern Baptists, the United Methodists, and some Catholic archdioceses do not keep records on what social services its churches or parishes provide.

39. *Id.*

40. *Id.*

41. *Id.*

42. The Pew Forum on Religion and Public Life, *What is "Charitable Choice?"* (2000), at <http://pewforum.org/issues/charitablechoice.php3>.

43. There is no common definition as to what comprises a faith-based or religious institution. President Bush has talked about Chuck Colson's prison ministry. But such a mainstream concept may be quite different in operation than the street ministry of Minister Louis Farrakhan's Nation of Islam or the beliefs held by the Church of Scientology, all of which could likely qualify to compete for tax money. See Griener, *supra* note 2; Mark Chaves, *Religious Congregations and Welfare Reform: Who Will Take Advantage of Charitable Choice?* AM. SOC. REV. 836-46 (Dec. 1999) (noting few clerics understand the issue yet, but black churches are more likely than white to participate in government faith-based contracts). *Id.*

The American Association of Fund Raising counsel estimates about twelve percent of the amount raised by churches and synagogues “annually goes to ‘direct social service provision by congregations.’ [which] [i]n 1995 would have amounted to \$12.6 billion.”⁴⁴ Since 1996, Congress has passed additional legislation involving Charitable Choice provisions. These include: the Welfare-to-Work program (1997); the Community Services Block Grant program funded by the Health and Human Service Reauthorization Act (1998); the drug treatment programs funded by the Substance Abuse and Mental Health Services Administration (2000); and the Community Renewal and New Markets Act of 2000. The purpose of President Bush’s aforementioned Executive Order of January 29, 2001, which authorized the establishment of an Executive Department Center for Faith-Based and Community Initiatives, is to expand Charitable Choice legislation, and to ensure that states, local government, and its contractors comply with the law. He estimates it would cost \$8 billion in the first year of his administration.⁴⁵

Proponents continue to attach Charitable Choice provisions to popular legislation. In the last session of Congress, several acts of health-related legislation included the provisions. The American Community Renewal Act (H.R. 815), could require substance abuse beneficiaries to “actively participate in religious practice, worship and instruction.” The Adoption Awareness Act of 1999 was marked up as part of the Child Health Act of 2000, but not included. Other pieces of legislation include a Safe and Drug Free Schools and Communities bill, the Substance Abuse Mental Health Reauthorization Act (SAMHSA),⁴⁶ and the Faith-Based Drug Treatment Enhancement Act, which explicitly allows religious organizations to receive federal funds for substance abuse treatment and rehabilitation, and requires beneficiaries to actively participate in religious practice, worship, and instruction.

44. Martin Morse Wooster, *Faith-Based Charity: Poised for a Revival?*, Capital Research Center, TRIB.-REV., Apr. 30, 2000, at <http://www.capitalresearch.org/ap/ap-0400.html>.

45. White House Press Release, George W. Bush, Executive Order, Agency Responsibilities with Respect to Faith Based and Community Initiatives (Jan. 29, 2001). When Bush was Governor of Texas he signed a similar order. The Texas Legislature then approved four bills in 1997 to encourage “faith-based organizations to offer child care, drug and alcohol counseling, medical services and other welfare-related services . . .” H.R. 2481, 75th Leg., Reg. Sess. (Tex. 1997); H.R. 2482, 75th Leg., Reg. Sess. (Tex. 1997); H.R. 21, 75th Leg., Reg. Sess. (Tex. 1997); and S. Con. Res. 44, 75th Leg., Reg. Sess. (Tex. 1997).

46. *Faith Communities: Studies, Articles and Reports*, SAMHSA, (Sept. 1997) at <http://www.samhsa.gov/search/search>.

Faith-based models for rehabilitating inner-city drug addicts abound, and popular support for church-state partnerships seems to be on the rise. A poll for the Democratic Leadership Council in 1999 found seventy-two percent of Americans favor close collaboration between government, religious, and charitable organizations to address the nation's problems, and "[t]he Pew Forum on Religion and Public Life reports even higher support among minorities and low-income families for such collaborations."⁴⁷ These trends suggest a climate which would welcome the shift of social services and costs to the private sector.

Already, Congress has jumped on the idea of a market-based system for healthcare delivery. A market-based system, in which economic market forces regulate healthcare provisions, has been the pet project of conservative groups such as the Heritage Foundation for some time.⁴⁸ Senator John Breaux (D)-La. and Senator Bill Frist (R)-Tenn.⁴⁹ introduced their version of a market-based bill to reform Medicare in which private insurance companies compete to provide healthcare coverage for the elderly and disabled.

Section 104 authorizes two types of governmental financial arrangements with independent providers.⁵⁰ One method includes purchase-of-service contracts by which government pays providers to deliver specified services.⁵¹ Such contracts are a means for the government to deal directly with providers.⁵² The other type of financial arrangement consists of government-provided certificates, vouchers or other forms of disbursement, which are redeemable with the providers.⁵³ This government relationship

47. Aimee Welch, *Charitable Choice for Washington*, INSIGHT MAG., (Mar. 23, 2001), at <http://www.insightmag.com/archive/200101091.shtml>.

48. Larry Lipman, *Market-Based System Not Cure for Medicare Woes*, PALM BEACH POST, Feb. 12, 2001, at 1E. The Breaux-Frist proposal allows companies to compete to offer plans at least equal to current Medicare levels and to offer a separate option plan to include prescriptions. *Id.* Based on bids, a government board determines how much Medicare would pay. *Id.*

49. It is noted that Senator Bill Frist's brother is Dr. Thomas F. Frist, chairman of HCA/Columbia, the nation's largest for-profit healthcare provider.

50. See 42 U.S.C. § 604a(a)(1)(A) (1994). The Center for Public Justice, *A Guide to Charitable Choice: The Rules of Section 104 of the 1996 Federal Welfare Law Governing State Cooperation with Faith-based Social-Service Providers* (1997) analyzes this section in its pamphlet from an advocate's perspective, at <http://web.cyberis.net/vhosts/nlrc.org/public/docs/charity1.htm> (last visited Mar. 20, 2001).

51. § 604a(a)(2).

52. *Id.*

53. *Id.*

with the provider is indirect, as the assistance goes to the beneficiary before passing to the provider. Both forms can be used in a market-based system.

In the case of TANF, states are authorized to use both “direct” and “indirect” means of paying for services provided by independent organizations.⁵⁴ Section 104 leaves it up to the states whether to involve independent sector providers of social services or to provide all services through government agencies.⁵⁵ If a state elects to involve any independent sector providers, then it may not exclude religious providers from consideration.⁵⁶ Certainly there may be other ways to indirectly provide government funds to faith-based charities such as channeling funds through intermediary organizations; the federal tax credit is another vehicle that could provide government assistance indirectly. Unlike the existing tax deduction for charitable contributions, a tax credit would allow a greater sum to be given to charity since the amount would be directly subtracted from the total tax bill.⁵⁷

President Bush’s proposal calls for easing regulations that make it difficult for religious-based charities to work with government agencies. The Bush plan offers “a \$500-per-person tax credit for charitable donations and a charitable deduction for the 70 percent of Americans who do not itemize tax returns; . . .”⁵⁸ In addition, “it allow[s] religious charities to compete for government grants on equal footing with secular organizations.”⁵⁹

On September 21, 2000, Bush wrote in *USA Today* that he would allocate \$80 billion over ten years in tax incentives to help churches provide services. Such unabashed plans certainly underscore why the Charitable Choice laws have been described by the Center for Public Justice, as an equal employment opportunity plan for faith-based providers.⁶⁰ Bills already filed in the 107th Congress put private sector profit-making organizations

54. The Center for Public Justice, *A Guide to Charitable Choice: The Rules of Section 104 of the 1996 Federal Welfare Law Governing State Cooperation with Faith-based Social-Service Providers*, available at <http://web.cyberis.net/vhosts/nlrc.org/public/docs/charity1/htm>. (last visited Mar. 20, 2001).

55. *Id.*

56. *Id.*

57. See Louis W. Sullivan, M.D., former head of HHS in Special Keynote, *Health Status, Health Maintenance and Health Care in the 21st Century*, (Feb. 2000), available at <http://www.managedcaremag.com/archiveMC/0002/0002.p3.html>. (last visited Feb. 1, 2000).

58. Dana Milbank, *Bush’s Faith-Based Group Initiative Will Meet Resistance*, WASH. POST, Jan. 27, 2001, at A10.

59. *Id.*

60. See Stern, *supra* note 38.

like banks, restaurants, farmers, and grocers, all in line for tax breaks-in-waiting for the blessings of faith-based initiatives.⁶¹

On the federal level, much legislation has now been enacted with charitable choice provisions but on the state level, only about 125 new initiatives emerged in nine states since 1996.⁶² Of these collaborations, fifty-four were with traditional agencies and seventy-one were with faith-based organizations, not traditionally involved in federal welfare programs, suggesting Charitable Choice provisions do attract and increase competition.⁶³

Most states are not yet in compliance with the law. Few seem well educated or even seem to know about the law. According to the Charitable Choice Compliance Report Card issued by the Center for Public Justice, a majority of states have failed to put the new rule into effect by eliminating old restrictions and restructuring contracts.⁶⁴ At this point, only Texas, Indiana, Wisconsin, and Ohio have begun codifying Charitable Choice provisions into their formal contracts.

"Indiana has become a leader in . . . implementing government-faith-based collaborations."⁶⁵ In November 1999, FaithWorks Indiana began to develop partnerships.⁶⁶ The initiative has awarded \$5 million in contracts to forty-four different faith groups, using a large private accounting firm, Crowe-Chizek, as the independent contractor to develop the connections, but the Indiana Family and Social Services Administration distributes the TANF money to the efforts.⁶⁷ In California, the state-level Office of Community Relations screens the applicants but Shasta County's FaithWorks! acts as the intermediary for training the church members in best practices, using

61. Editorial, *Faith-Based Indulgence, Bush Plan Encouraging Greed, Not Charity*, PALM BEACH POST, Mar. 30, 2001, at 18A.

62. See The Pew Forum on Religion and Public Life, *supra* note 42.

63. Gretchen M. Griener, *Charitable Choice and Welfare Reform: Collaboration Between State and Local Governments and Faith-Based Organizations*, WELFARE INFO. NETWORK, (Sept. 6, 2000), at <http://www.welfareinfo.org/issuenotoecharitablechoice.htm>.

64. The Center for Public Justice, *A Guide to Charitable Choice*, at <http://web.cyberis.net/uhots/nlrc.org/public/docs/charity/.htm>. The Center for Public Justice in Washington, D.C. conducts public policy research and civic education from a Christian perspective. *Id.* It works closely with the Christian Legal Society's Center for Law and Religious Freedom, a network of attorneys and lay people doing legal advocacy. *Id.*

65. Greiner, *supra* note 63.

66. *Id.*

67. *Id.* at 6-7.

Catholic Charities as its fiscal agent for administering to the TANF clients appropriately.⁶⁸

In Texas, TANF funds are divided between the Department of Human Services and the Texas Workforce Commission.⁶⁹ They use a contract group called Texas Family Pathfinders to match TANF families with services.⁷⁰ Texas Family Pathfinders involves 174 active teams, 122 that are faith-based.⁷¹ Apparently, most other states have not yet begun the work to bring government procurement policies and procedures into sync with the law on Charitable Choice, perhaps mistakenly believing these guidelines are optional, when in fact, they are required.⁷²

D. *The Florida Situation*

In Florida, over the past three years, as more people were moved from welfare to work under the welfare reform bill, they too needed transitional health benefits paid for by Medicaid. As more children applied for state sponsored, low-cost healthcare, they discovered their families were poor enough for Medicaid too.⁷³ These factors, on top of swelling drug prices and faulty Medicaid growth estimates made by state economists, have led to an estimated \$944 million deficit in Medicaid this year in Florida.⁷⁴

With an unexpected \$944 million hole to fill this legislative session, program cuts loom and proposals to eliminate prenatal care for thousands of pregnant women and to move Medipass clients to a Medicaid HMO all have surfaced in the legislature. The Agency for Health Care Administration proposes to move 107,689 people in twenty-eight Florida counties from its Medipass program into Medicaid health maintenance organizations to save the agency about \$17 million, since Medipass pays more money than the HMOs.⁷⁵ The National Governors' Association is also proposing radical

68. *Id.*

69. *Id.*

70. *Id.*

71. Greiner, *supra* note 63.

72. See Welch, *supra* note 47.

73. Danielle Conn Rosenberg, *Florida Kidcare Act of 1998: How Will It Benefit Your Child?* Children First Project (1998), at http://www.nsulaw.nova.edu/children_first/kidcarz.htm (last visited Oct. 31, 2001).

74. Linda Kleindienst, *Proposals for Budget Cuts Hurt Poor, Needy*, SUN-SENTINEL (Ft. Lauderdale), Mar. 11, 2001, at 17A.

75. Sanjay Bhatt, *State Plan Could Hurt Local Health Clinics*, PALM BEACH POST, Feb. 15, 2001, at 5B.

changes in Medicaid to allow states to have greater flexibility to cover more people, but with fewer benefits.⁷⁶

Some Florida legislators clearly intend to bring Charitable Choice to this state in a far more comprehensive way, since \$630 million has been “tucked away in the Florida House’s budget” this legislative session to be earmarked for social programs modeled upon Charitable Choice law.⁷⁷ If it survives, it will open the door for the state to begin codifying charitable choice accountability rules in its contracts.⁷⁸

Concurrently, it was announced on April 6, 2001, that Florida will get further leeway in how it spends certain Medicaid dollars and receive at least another \$159 million from the federal government to spend on the state’s major healthcare centers, where the poor are served and charity care is provided.⁷⁹ Seventy Florida hospitals, most of which are not state run, including Jackson Memorial, Broward General, Imperial Point, South Florida State, North Broward Hospital District, Columbia Hospital, St. Mary’s Hospital in West Palm Beach, and A.G. Holley State Hospital will benefit.⁸⁰

Governor Jeb Bush said that “[t]his is part of a strategy with the new administration, [his brother’s], to trust states,”⁸¹ and “Florida is among a handful of states suddenly winning approval for Medicaid spending changes” under the first waiver to a state for its Medicaid programs.⁸² Four more waivers are expected to be granted shortly.⁸³ This appears to be a clear signal that the federal government is poised to help Florida avert its healthcare budget crisis. Undoubtedly this can be viewed as a political favor from the President, underscored even more by the recent appointment of Ruben King-Shaw, the Secretary of the Florida State Agency for Health Care Administration that oversees Medicaid, to become the second-in-command

76. See Segal, *supra* note 17.

77. Rep. Johnnie Byrd, R.-Plant City, “is the sponsor of legislation to make no-strings grants to churches legal” in Florida and the GOP members of the House are supporting it. Editorial, *House Tithes Taxpayers on Behalf of Churches*, PALM BEACH POST, Apr. 6, 2001, at 18A.

78. *Id.*

79. Mark Hollis, *U.S. Frees up Medicaid Cash for State*, SUN-SENTINEL (Ft. Lauderdale), Apr. 6, 2001, at 5B.

80. *Id.*

81. *Id.*

82. *Id.*

83. Florida has had Medicaid waiver requests pending before the federal Health Care Financing Administration for nearly three years. In less than three months, President Bush acted on his brother’s request. *Id.*

at the federal agency, HCFA, the agency that runs the national health programs.⁸⁴

It also suggests much work has already gone on behind the scenes to prepare the state for entering the Charitable Choice era. The Medicaid waivers give Florida more power to experiment with new healthcare delivery systems and to offer care to uninsured people who otherwise would not be eligible for the program. Charitable Choice provisions in federal law already cover certain medical and healthcare services, including operation of health clinics, drug and alcohol treatment, and abstinence education programs.

The radical changes proposed for Medicaid⁸⁵ warrant further scrutiny as the potential long-term effects on healthcare for the poorest and most vulnerable population are affected by expanding Charitable Choice.⁸⁶ As government moves forward in its attempt to shift more of these services to the local communities' religious providers, there also appears to be an influx of private entrepreneurial providers lining up at the gates in wait.⁸⁷ Many of these efforts represent a philosophical shift or paradigm in how best to revitalize urban neighborhoods, which many believe have seemingly failed to thrive under traditional government entitlement programs.⁸⁸

84. Robert Pear, *Lobbyist Top Contender to Run Medicare, Medicaid*, SUN-SENTINEL (Ft. Lauderdale), Mar. 4, 2001, at 6A. King-Shaw will be deputy to Thomas A. Scully, a lobbyist for the hospital industry. Scully will be nominated to be administrator of the Health Care Financing Administration, of the Department of Health and Human Services, that runs Medicare, Medicaid and the Children's Health Insurance Program. If Scully and King-Shaw are both confirmed, market-based health care delivery seems likely to continue. *Id.*

85. Jena Heath, *Governors Want More Freedom with Medicaid*, PALM BEACH POST, Feb. 26, 2001, at 3A. The National Governors Association has proposed radical changes in Medicaid with less generous benefits because healthcare costs are rising at the same time tax revenues are declining. *Id.* The proposed plan would allow states to combine Medicaid with private health insurance and use it to pay for part of the employee share of premiums under employer-sponsored health plans. *Id.*

86. African-American churches are more likely to respond to charitable choice than any other denomination according to a study by Mark Chaves, associate professor at the University of Arizona. Mark Chaves, *Congregations' Social Service Activities*, Policy Brief No. 6 (Dec. 1999). Urban Institute, Center on Nonprofits and Philanthropy, *available at* http://www.urban.org/periodcl/cnp_6.html (last visited Nov. 15, 2001) (on file with author).

87. *See The Kaiser Commission on Medicaid: Racial, and Ethnic Disparities in Access to Health Insurance and Health Care*, UCLA Center for Health Policy and Research & the Henry J. Kaiser Family Foundation, (Apr. 2000), *at* <http://www.kff.org>.

88. *See generally* Alliance for Redesigning Government, *available at*, <http://www.alliance.napawash.org/alliance/index.html> (last visited Oct. 31, 2001). This advocacy group acts as a catalyst in neighborhoods looking to revitalize. Governor Jeb Bush operates Front Porch Florida, a faith and community-based concept which intends to jump-start black neighborhoods. In its first eighteen months of operation it has failed to attract sustainable

III. CHARITABLE CHOICE AND THE FIRST AMENDMENT

A. Background

To prevent the Charitable Choice provision from violating the Establishment Clause of the First Amendment, its proponents have carefully crafted its language to offer “choice” to potential beneficiaries who may choose not to accept faith-based services when offered.⁸⁹ The language in the proposed bill carefully tries to avoid potential ramifications on the separation of church and state. Specifically, it describes that the state has the option to and may administer its services “through contracts with charitable, religious, or private organizations.”⁹⁰

The current language of the bill states that if a potential beneficiary objects to the religious character of the organization from which he or she would receive assistance, the appropriate federal, state, or local governmental entity shall provide that individual with alternative assistance of equal value within a reasonable time period.⁹¹ The crux of whether Charitable Choice programs will succeed constitutionally lies in its actual field implementation. In other words, constitutionality is based upon whether the government can truly provide an alternative of equal value to accessible providers in a timely fashion.⁹² This requirement appears to be a challenging one in light of proposals for radical changes in Medicaid that would allow states to offer significantly less generous benefits than are now guaranteed to the poor.⁹³

If current and proposed government healthcare policies succeed in significantly cutting back government spending in favor of shifting costs to non governmental organizations, particularly local faith-based providers, this shift may alter the long term effects of providing the healthcare “safety net” for vulnerable populations. If such a result also interferes with the doctrine of separation of church and state, such a change raises the question of whether the states have gone beyond constitutional boundaries. As each state wrestles with how it will change its procurement policies and practices

partnerships with churches and companies due to lack of training and personality clashes. See Brittany Wallman, *State's Front Porch Falling Down*, SUN-SENTINEL (Ft. Lauderdale), Apr. 15, 2001, at 1A, 17A.

89. See 42 U.S.C. § 604(a) (Supp. V 1994).

90. See 42 U.S.C. § 604a(a)(1)(A) (Supp. 1994).

91. *Id.*

92. *Id.*

93. See Ku, *supra* note 9.

to comply with these new provisions, Section 104 is a new law untested in the courts and applicable constitutional law is developing. At this time, only some isolated trial court litigation in Texas, California, Kentucky, and Wisconsin has been filed.⁹⁴

B. *The Legal Evolution of Church/State Relations*

A wall has been built between church and state since the time of the Founding Fathers. In 1802, Thomas Jefferson wrote on the subject in a letter to the Danbury Baptists:

Believing . . . that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'⁹⁵

The dilemma confronting legislators and the judiciary lies in the degree to which one builds the wall of separation between church and state. Much of the case law on the matter comes out of a long tradition of suspicion of government funding for religious education, not for the religious provision of social services. Most case law on church and state issues is about education. These cases may be helpful in understanding the court's thinking over time, but education cases also may not be quite on point.

The United States Supreme Court's most significant modern interpretation of the wall between Church and State stems from *Everson v. Board of Education of Ewing Township*,⁹⁶ which relies on a strict separationist interpretation of the Establishment Clause. In *Everson*, the Court held that

94. *Legal Watch: Charitable Choice Lawsuits*, Center for Religion and Civic Culture at the University of Southern California, (2001), at http://www.usc.edu/dept/LAS/religion_online/welfare/lawsuits.html (last visited Jan. 27, 2002).

95. See Eyer Robert Coates, Sr., *Thomas Jefferson on Politics & Government: Freedom of Religion* at <http://etext.lib.virginia.edu/jefferson/quotations/jeff1650.htm> (last visited Jan. 27, 2002). The "wall of separation" metaphor used by Justice Hugo Black in the 1947 *Everson* case came from a letter Thomas Jefferson wrote to the Danbury Baptists, during his presidency, explaining his view of the meaning of the religion clauses. Jefferson's concern was likely as a way to prevent religion from interfering with government, rather than the reverse. *Id.*

96. 330 U.S. 1 (1947).

state reimbursement for bus fares to attend religious schools was constitutional.⁹⁷ The Court acknowledged that the First Amendment was intended to erect a wall of separation between church and state; however, the Court found that the plan to reimburse parents for bus transportation benefits the child, and can therefore be differentiated as a more neutral purpose.⁹⁸

Voting five-four, the Court rejected the contention that no aid was necessary, and appeared to distinguish between money going to parochial schools for secular functions like busing, and money going for religious purposes.⁹⁹ While the dissenters believed free transportation to religious schools was aiding religion,¹⁰⁰ the majority differentiated the specific purpose for which the money was used.¹⁰¹

The Court's opinion in *Everson* states:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.¹⁰²

Thus, *Everson* sets some judicial precedent for beginning to define the wall of separation as something which might be viewed more neutrally or equally if the money's purpose did not aid religion specifically.

There was a proliferation of religious freedom cases in the courts after the incorporation doctrine made the religion clauses applicable to all government entities and the chance for conflict multiplied. This was no doubt accentuated by changes in perspective since the 1960's that brought into constitutional question many long standing government practices, such as school prayer.¹⁰³

Stricter separation case law is developed in *Lemon v. Kurtzman*,¹⁰⁴ when the Court found it unconstitutional to augment parochial school

97. *Id.* at 18.

98. *Id.* at 17.

99. *Id.* at 16.

100. *Id.* at 18.

101. *Everson*, 330 U.S. at 20.

102. *Id.* at 15–16. Justice Black delivered the opinion of the Court. *Id.*

103. See COUSER, *supra* note 5.

104. 403 U.S. 602 (1971).

teachers' salaries with state funds.¹⁰⁵ The Court held that such a plan caused excessive entanglement of civil authority and religion.¹⁰⁶ *Lemon* puts forth a three-prong test for determining when government violates the Establishment Clause: 1) the statute must have a secular legislative purpose; 2) the principal effect of the statute must neither advance nor inhibit religion; and 3) the statute must not foster "an excessive government entanglement with religion."¹⁰⁷ For a law to be forbidden under *Lemon*, the government, itself, must have advanced religion through its own activities and influence.

This separatist test sufficed for nearly a generation until *Bowen v. Kendrick*¹⁰⁸ signaled a shift in policy by allowing the Adolescent Family Life Act to provide federal funding to religious organizations for services and counseling in the area of premarital, adolescent, sexual relations, and pregnancy.¹⁰⁹ The Act in *Bowen* did not violate the Establishment Clause because the Court found on its face that the Act did not have the principle purpose or effect of advancing religion, an accommodating view.¹¹⁰ Chief Justice William Rehnquist, writing for the majority, noted that it met the three-prong test for aid to parochial schools established in *Lemon*.¹¹¹ Grants went to religious organizations to fund a sincere and legitimate secular purpose in dealing with problems of adolescent sexuality.¹¹² While the act encouraged grant recipients to involve religious organizations, among others, in addressing the problem, it was considered too incidental to advance religion in a way to be a constitutional problem.¹¹³ The act was neutral.¹¹⁴ It was determined that the use 1) had a valid secular purpose; 2) did not have the primary effect of advancing religion; and 3) did not create an excessive entanglement of church and state.¹¹⁵ The Court held that it was not a violation of the Establishment Clause for a religious organization to participate in the state program even when certain religious goals were furthered.¹¹⁶

105. *Id.* at 612. This case consolidated First Amendment challenges from Rhode Island and Pennsylvania that provided state aid to parochial schools. *Id.* at 606-07.

106. *Id.* at 625.

107. *Id.* at 612-13.

108. 487 U.S. 589 (1988).

109. *Id.* at 622.

110. *Id.* at 617.

111. *Id.*

112. *Id.* at 593.

113. *Bowen*, 487 U.S. at 617.

114. *Id.* at 617.

115. *Id.*

116. *Id.* at 622.

Even in *Bowen*, however, one finds an educational component in teaching sexual responsibility to teenagers, which may take it outside the narrower focus of Charitable Choice. Perhaps the most interesting message in *Bowen* is Justice O'Connor's concurring opinion, where she noted that funding for the moral issue of teenage sexuality was "inevitably more difficult than in other projects, such as ministering to the poor and sick."¹¹⁷ Accordingly, O'Connor's view suggests that government funding for health needs and hospitals that include faith-based providers would be constitutional.¹¹⁸

Not surprisingly then, there are no Supreme Court cases specifically restricting government financing of church-affiliated social services, so the case law on this issue is not particularly clear. In fact, there is a long history of government funding going to church hospitals and other non-educational social services starting at the turn of the century.

In *Bradfield v. Roberts*,¹¹⁹ a Catholic-run hospital in Washington, obtained a capital improvement grant from the government, with the Supreme Court indicating that organizations devoted to social welfare activities, such as this Catholic hospital, should not be otherwise denied governmental money on account of the First Amendment.¹²⁰ The Court then held that the secular charter granted to the hospital, and controlled by Congress, made the hospital a secular corporation, regardless of the Catholic sisters that operated it, which can be seen as a rather neutral holding.¹²¹ Arguably, religion has long played a part in religious health ministries from the early days of alms houses to religious drug and alcohol treatment centers which revolve around twelve-step recovery programs based on calling upon higher powers of the spiritual kind.¹²²

117. *Id.* at 623 (O'Connor, J., Concurring). See also Marshall J. Breger, *Don't Fight the Power of Faith*, JTS MAGAZINE, Spring 2000, available at <http://www.jtsa.edu/news/jtsmag/9.3/forum.shtml> (on file with Nova Law Review).

118. Characterizing Justice O'Connor's controlling votes on the Supreme Court in Establishment Clause cases, Bret Kavanaugh, a partner at Kirkland and Ellis in Washington, moderated a panel on Charitable Choice at the conservative Federalist Society which described O'Connor's influence to be most significant. See <http://www/fed-sco.org/2%20esbeck%205%20REVISED.html>.

119. 175 U.S. 291 (1899).

120. *Id.* at 298.

121. *Id.* at 299. See also Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 63 (1997).

122. Alice A. Noble et al., *Charitable Hospital Accountability: A Review and Analysis of Legal and Policy Initiatives*, 26 J. L. MED. & ETHICS 116-17 (1998).

C. *Judicial Action: The Establishment Clause and Health and Social Services in Trial Cases*

While there are no Supreme Court rulings specifically on the constitutionality of Charitable Choice, the Supreme Court has spoken on the issue of the use of tax money for religious purposes in *Mitchell v. Helms*.¹²³ In *Mitchell*, in a 6-3 decision, the Court upheld a program giving library and media materials, such as computer software and hardware, to mostly Catholic schools in Louisiana.¹²⁴ In *Mitchell*, the secular, neutral, and non-ideological nature of the aid was perceived as being within the law. The aid was allocated on private choices and with permissible content.

The opinion by Justice Thomas on behalf of a four-justice plurality held that in assessing such cases, the Court should no longer attempt to determine whether such aid goes to a pervasively sectarian school.¹²⁵ Justice Thomas noted that “nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs”¹²⁶ There are several pending trial court cases that will bear watching in light of *Mitchell* as they will test what that decision means for healthcare.¹²⁷

In July 2000, the American Jewish Congress and the Texas Civil Rights Project filed a suit in Texas state court. *American Jewish Congress and Texas Civil Rights Project v. Bost*¹²⁸ will consider the constitutionality of “welfare to work” funds flowing to the Jobs Partnership of Washington County, an organization whose evangelical Christianity, according to the petitioners, “permeates their curriculum.”¹²⁹ In April 2000, Americans United and the American Civil Liberties Union filed suit against the State of Kentucky and the Kentucky Baptist Homes, alleging discrimination on the basis of religion in hiring for publicly funded positions, in its welfare-to-work programs, representing a violation of the Constitution’s Establishment

123. 530 U.S. 793 (2000).

124. *Id.* at 836.

125. *Id.* at 828.

126. *Id.* at 829.

127. See Becker, *supra* note 19, at 18.

128. *Charitable Choice Lawsuits*, Center for Religion and Civic Culture at the University of Southern California, available at <http://www.usc.edu/dept/LAS/religion-online/welfare/lawsuits.html> (last visited Jan. 27, 2002). Summary of case available at http://ajcongress.org/pages/RELS2000/JUL_2000/juloo_04.htm (on file with Nova Law Review).

129. See *Charitable Choice Lawsuits*, *supra* note 128.

Clause.¹³⁰ It attempts to test a principle embodied in Charitable Choice, which allows religious institutions that receive government funds, to discriminate in their employment practices at least on the basis of religion.¹³¹

The American Jewish Congress filed suit January 5, 2001, in the Superior Court, State of California, in San Francisco.¹³² It charges that the California Employment Development Department solicited proposals for five million in funding out of TANF funds from the 2001 California state budget, designated solely for faith-based groups.¹³³ The Freedom from Religion Foundation sued the governor of Wisconsin alleging a Christian twelve-step course for addicted fathers is “pervasively sectarian.”¹³⁴

If there were a doctrinal shift underway, it would appear to be about recognizing secular activities as government-fundable through indirect aid such as vouchers and tax deductions, because the nature of indirect aid underscores the individual’s choice to receive the aid and spend it in different places. This premise was taken even further in *Mitchell v. Helms*¹³⁵ where the Supreme Court ruled that providing educational equipment to religious schools with taxpayer money meets constitutional muster.¹³⁶

Clearly, this decision altered the current law, which allowed local school boards to have the power to decide how the federal money allocated for Title VI block grants for technology would be spent. From the school

130. Eyal Press, *Faith-Based Furor*, NEW YORK TIMES MAG., April 1, 2001 at 62–65. This case centers on a therapist terminated because her “homosexual lifestyle is contrary to [Kentucky Baptist Homes for Children’s] core values,” according to the termination letter she received from her employer. *Id.*

131. “Participating faith-based organizations, notwithstanding their receipt of Federal funds, retain their exemption under Title VII of the Civil Rights Act of 1964, which permits employment discrimination on the grounds of religion. Organizations with fewer than 15 full-time employees are not subject to the nondiscrimination requirements of Title VII.” See *Faith Communities*, *supra* note 46, at 4.

132. American Jewish Congress, *AJCongress Asks California Court to Invalidate Job Training Program Limited to Faith-Based Providers only*, available at http://ajcongress.org/pases/RELS2001/JAN_2001/jan01_06.htm.

133. *Id.*

134. See generally *Bowen v. Kendrick*, 487 U.S. 589 (1988).

135. 530 U.S. 793 (2000).

136. *Id.* at 835–36. According to University of Texas law professor Douglas Laycock, there are six theories espoused by various justices from time to time on how money can be allocated from government to religious groups. See Douglas Laycock, *A Survey of Religious Liberty in the United States*, 46 OHIO ST. L. J. 409, 443–46 (1986). They include: 1) no-aid theory; 2) purchase-of-services theory; 3) equal-treatment theory; 4) child-benefit theory; 5) tracing theory where the money is traced to be sure it only goes to a secular expenditure, and; 6) little-bit theory, where a little bit of money going to a religious school is all right. *Id.*

boards' perspective, this decision further chips away at the wall of separation, as they have no way of monitoring whether the computers will be used for religious purposes or not.¹³⁷

It is this background of neutrality and its nexus with individual choice that forges the entry to the era of Charitable Choice. While the Supreme Court did not rule on the constitutionality of Charitable Choice per se, it clearly indicated a plurality would likely find a voucher approach to government funding constitutionally acceptable. Judge Clarence Thomas wrote, "It is the students and their parents—not the government—who, through their choice of school, determine who receives Chapter 2 funds. The aid follows the child."¹³⁸

Thus, the principle that emerges in the context of Charitable Choice legislation is that the public purpose is for the government and the private sector to work together to address beneficiaries' needs for services. If the private sector providers are religious, and they perform a neutral service, the government's interest ends. Healthcare is neutral as to religion. Thus, Charitable Choice would presume to meet any constitutional test as long as the beneficiaries have a choice as to where they can obtain services, to ensure there is no religious coercion. The neutrality of healthcare then, sets the stage for health vouchers and health contracts based upon choice. Whether there is a real choice becomes the central issue of concern.

Some experts on Charitable Choice, notably Stanley Carlson-Thies of the Center for Public Justice and Carl Esbeck of the University of Missouri at Columbia, believe the Charitable Choice law strongly protects faith-based charities against government intrusion.¹³⁹ But others, such as the conservative Heritage Foundation's Joe Loconte and Baylor University law professor Derek Davis, believe the religious nature of faith-based groups will ultimately compromise Charitable Choice, a view many in the conservative community have also recently voiced.¹⁴⁰ Marvin Olasky, a University of Texas professor who is a close adviser to President Bush and the author of

137. See Press Release, National School Boards Association, National School Boards Association Says High Court Ruling in *Mitchell v. Helms* Chips away at Church-State Separation (June 28, 2000) (on file with author).

138. *Mitchell*, 530 U.S. at 830. See *Bowen v. Kendrick*, 487 U.S. 589 (1988).

139. The Center for Public Justice, *A Guide to Charitable Choice: The rules of Section 104 of the 1996 Federal Welfare Law Governing State Cooperation with Faith-based Social-Service Providers*, at <http://web.cyberis.net/vhosts/hlrc.org/public/docs/charity1.htm> (last visited Mar. 20, 2001).

140. Joe Loconte, *The Bully and the Pulpit*, POLICY REVIEW, Nov.–Dec., 1998, No. 92, at <http://www.policyreview.com/nov98/pulpit.html>. (on file with author).

his book on compassionate conservatism, does not think the Founders wanted the country to give preference to either secularism or atheism.¹⁴¹

It would seem for now that Charitable Choice has been crafted in a way that will pass First Amendment scrutiny. The greater concerns lie in the question raised in situations when there may be no viable alternative service provider, a situation that could easily result from the closing of community non-profit or public safety net hospitals, leaving only faith-based providers. How will they be monitored?

IV. CHARITABLE CHOICE IN ACTION: SOUTH FLORIDA

A. *Background: Catholic Health Care*

Clearly, there is nothing inherently wrong in adding a religious aspect to healthcare; indeed, religion provides a strong belief system and the positive effects of spiritualism and prayer are certain. In addition, a religious healthcare provision certainly is not new. Traditional religious providers, whether Catholic, Jewish, Methodist, or Baptist, all have long and successful hospital traditions. The Robert Wood Johnson Foundation, a preeminent healthcare charitable group, for example, has 1100 faith-based healthcare programs up and running with the support of nearly forty million in private charitable funds.¹⁴²

Catholic healthcare provides an interesting example of the traditional religious provider. The Sisters of Charity founded Catholic healthcare in this country 150 years ago.¹⁴³ Today, the Catholic system boasts 601 hospitals in forty-eight states that collectively admit sixty-five million patients per year.¹⁴⁴ "In nineteen states, more than twenty percent of hospital

141. Martin Morse Wooster, *Faith-Based Charity: Poised for Revival?*, CAPITAL RESEARCH CENTER (Apr. 2000), at <http://www.capitalresearch.org/ap/ap-0400.html>. (on file with author).

142. See *About Faith in Action*, A National Program of The Robert Wood Johnson Foundation, 2001, at <http://www.interfaithcare.org/about/index.htm>. This is the nation's largest philanthropy devoted solely to improving health and healthcare for Americans. *Id.* It created the Faith in Action program to fund community efforts in 1993 and since then, their Interfaith Volunteer Caregivers program has helped build over 1100 faith-based volunteer programs nationally with two thousand more partnerships planned. *Id.* These projects are privately supported with foundation charitable dollars.

143. Lawrence E. Singer & Elizabeth J. Lantz, *The Coming Millenium: Enduring Issues Confronting Catholic Health Care*, 8 ANN. HEALTH L. 299, 301 (1999).

144. Lois J. Uttley, *Religious Hospital Mergers & HMOs: The Hidden Crisis for Reproductive Health Care*, MERGERWATCH, 1997-98 ed., 12-13.

admissions are to a Catholic facility In 1997, Catholic hospitals generated thirty-five billion in net patient revenues."¹⁴⁵ Including respite, rehabilitation, and skilled nursing care, Catholic facilities collectively comprise the single largest provider of institutional care in the country.

The impact of Roman Catholic healthcare is particularly interesting because all Catholic hospitals are governed by a single, unifying set of religious principles known as the "Ethical and Religious Directives for Catholic Health Care Services."¹⁴⁶ Developed and issued by the National Conference of Catholic Bishops, the directives contain seventy rules that spell out which health services can and cannot be provided based on whether or not they are deemed "morally and spiritually harmful."¹⁴⁷ Contraception, sterilization, abortion, and infertility services are among the types of healthcare which are specifically disapproved.¹⁴⁸ There have been problems in communities across the country in acceptance of these restrictive policies.

As collaboration and demographic trends have affected the healthcare ministry, consolidation of Catholic healthcare has increased under its New Covenant Initiative and has called for sponsoring religious congregations to work together in furtherance of the Church.¹⁴⁹ Twelve separate Catholic religious community sponsors have merged to form single governance and management structures, such as Catholic Health East, Catholic Health West, and Catholic Health Care Partners.¹⁵⁰ "[I]n some markets, Catholic healthcare finds itself aggressively growing, and in many instances converting heretofore nonsectarian non-profit facilities to Catholic facilities."¹⁵¹

B. Hospital Consolidation in West Palm Beach

One such proposed consolidation by a Catholic organization attempted to join two hospitals, St. Mary's and Good Samaritan, in West Palm Beach, Florida. On March 23, 2001, Intracoastal Health Systems agreed to sell its two non-profit hospitals in West Palm Beach, to Tenet Healthcare Corporation, the nation's second largest for-profit chain. This proposed sale ended more than a year of intense media scrutiny, public criticism, and a

145. Singer, *supra* note 143, at 301

146. Uttley, *supra* note 144, at 12–13.

147. *Id.* at 13.

148. *Id.*

149. Singer, *supra* note 143, at 302.

150. *Id.* at 302–03.

151. *Id.* at 303.

lawsuit by Florida's Attorney General to prevent Intracoastal from closing its unionized St. Mary's Medical Center, or from consolidating St. Mary's acute care, emergency, and trauma services at the non-unionized Good Samaritan campus, two and one-half miles away.

For thirty-eight years, St. Mary's Medical Center was a Catholic-owned hospital run by the Franciscan Sisters of Allegany. St. Mary's operates the largest emergency room in Palm Beach County, including one of two county trauma centers that specialize in treating accident victims. Licensed to operate 460 beds, St. Mary's Medical Center had formed a jointly operated health system in 1994, with secular, Good Samaritan Hospital, hoping to reap combined efficiencies in a changing healthcare reimbursement environment.

The entity created under this Joint Operating Agreement, called Intracoastal Health Systems, was organized on a parity basis (50/50), but like many other attempted mergers across the country, failed to bring together its two disparate cultures. While the merger agreement had contemplated an unwinding if certain objectives were not met, the board did not act upon that. Instead, they subsequently approved one of the two parity sponsors, Catholic Health East,¹⁵² to become the primary creditor, holding approximately \$150 million in tax-exempt bonds through its master trust indenture.¹⁵³

By the end of fiscal year 2000, losses including one-time write-offs totaled \$88 million. Clearly, this was not a sustainable scenario.¹⁵⁴ To stem the losses, Intracoastal proposed to consolidate all of its acute, trauma, and emergency room services at its more compact, lakeside 341-bed Good Samaritan site. The proposed plan set off a firestorm of intense community reaction. The hospital system blamed reduced reimbursements and the rising costs of treating the uninsured and poor for its predicament, but critics blamed the hospital's failed billing system, its inability to sign up eligible uninsured for coverage, and management missteps, for the river of red ink that administrators predicted would cause the hospitals to run out of cash by May 2001.¹⁵⁵

152. The Franciscan Sisters of Allegany merged as a sponsor with Catholic Health East (CHE) in 1998; they consider themselves an owner of CHE.

153. See Community Advising Board, *Consultants' Study of Intracoastal Health Systems*, Oct. 30, 2000, at 27.

154. *Id.* at 55.

155. *Id.* I served on a twelve-member community board that commissioned six nationally recognized experts in healthcare to form a consulting team to study the problems facing the West Palm Beach hospitals. The consultants studied whether both hospital campuses could be maintained without consolidation. The Consulting Team included Apache National Health Advisors for strategy; SMG Marketing Group for marketing assessment;

The process the hospital system used to make its consolidation decision was deemed inadequate. It did not seek community input until forced to do so; discussions took place largely behind closed doors; and its decisions were perceived as politically motivated to favor a demographically upscale location over the needs of the minority community, which identified almost exclusively with the St. Mary's campus.¹⁵⁶

Further, a crisis of credibility grew within the community over what was perceived as a disastrous decision to move the trauma system, coupled with no real transition plan to meet the needs of the nearly 90,000 people who visit the St. Mary's emergency room annually.¹⁵⁷ Community activists came together to push for an independent study of the situation.¹⁵⁸ A local healthcare conversion foundation granted \$500,000 toward such a study and national consulting experts were hired to analyze the situation. That study determined there was insufficient political will to create a public trust hospital, but as a compromise, consolidation could proceed if there was a major redesign of the St. Mary's campus to convert it to ambulatory and specialty care uses, with urgent care capabilities there.

Community outcry attracted the attention of Florida Attorney General Bob Butterworth, who filed suit in January to block the plan.¹⁵⁹ After court-ordered mediation failed, Intracoastal abandoned its consolidation plan and agreed to sell its hospitals to Tenet,¹⁶⁰ a move that for some triggered concerns that the "grass-roots" community activism that had fanned the controversy, was really a purposeful strategy all along, designed to push the hospitals into the private, for-profit sector.¹⁶¹

Hamilton HMC for facilities assessment; Gill/Balsano consulting for physician issues; McDermott, Will and Emery for legal issues; and Kaufman Hall for financial analysis.

156. Executive Summary, *Consultants Study of Intracoastal Health Systems*, Oct. 30, 2000 at 3 (on file with author).

157. *Id.* at 14. Of the nearly 90,000 who visited the emergency room, only 12,000 were admitted.

158. See Laycock, *supra* note 121.

159. *State of Florida, Dept. of Legal Affairs ex rel. Robert A. Butterworth, Attorney General of the State of Florida on behalf of the Citizens of the State of Florida, v. Intracoastal Health Systems*, (Fla. 15th Cir. Ct. 2001), in and for Palm Beach County, Florida, Civil Division, Case Number CL 01-0068 AB. Order on Defendants Motion for Judgment on the Pleadings, granted Feb. 27, 2001 by Judge Jorge Labarga. A settlement agreement between the parties was negotiated on March 4, 2001, avoiding trial. (on file with author).

160. See Press Release, Tenet Healthcare Corporation & Intracoastal (Mar. 23, 2001) (on file with author).

161. Both Tenet and HCA were bidders for the hospitals and are members of the Federation of American Hospitals, a powerful healthcare advocacy group which supports

But the hospital's financial predicament could be a microcosm for what is happening to safety net hospitals across the United States. St. Mary's payer mix had changed over the years to include seventy percent of the Medicaid and non-paying patients in Palm Beach County.¹⁶² St. Mary's central location in the northern part of West Palm Beach, in close proximity to inner city neighborhoods right off the interstate highway, ideally situates it geographically to serve as an access point of entry to the lower income population. Its Catholic tradition also made it welcoming to immigrants and people of color who were historically made to feel unwelcome at Good Samaritan Hospital, which did not even accept Medicare patients until 1964.¹⁶³

Good Samaritan Hospital sits on the Intracoastal Waterway overlooking the island of Palm Beach. The decision to do a wholesale consolidation on the Good Samaritan site seemed to many in the Palm Beach County community as counter-intuitive.¹⁶⁴ The Good Samaritan site was only twenty-three acres, landlocked on the Intracoastal Waterway. St. Mary's campus, on the other hand, was 105 acres, with good access from the interstate and with an approved, intact trauma system.

The average per capita income of Good Samaritan's immediate area exceeds \$88,000 per year. St. Mary's Hospital sits adjacent to an urbanized area where the per capita income is \$17,889 per year.¹⁶⁵ Perhaps most striking is the payer mix between the two hospitals, for the uninsured are not evenly distributed. Medicaid covers 6.1% of Palm Beach County residents and 16.1% of Palm Beach County residents are uninsured (compared to 13.5% for Florida and 14% nationally).¹⁶⁶

St. Mary's Medical Center has 40% of the Medicaid market and 67% of the Medicaid HMO market in the county. About 80,000 people qualify for Medicaid in Palm Beach County.¹⁶⁷ The people who qualify for Medicaid must fall at or below 150% of the poverty level and meet designated criteria

market-driven initiatives and runs a grassroots advocacy center. During the crisis, there was some workforce speculation that there were also "grass-tops" at work, "AstroTurf" groups that a number of healthcare coalitions front, that are actually public relations tactics or groups that pose as community-based organizations to promote a product or political aim.

162. See Consultants Study of Intracoastal Health Systems, Oct. 30, 2000, at 51.

163. *Id.* at 10.

164. *Id.* at 17.

165. *Id.* at 8.

166. See Consultants Study of Intracoastal Health Systems, Oct. 30, 2000, at 51.

167. Interview with Dwight Chenette, Deputy Director of Health Care District of Palm Beach County (Apr. 4, 2001) [hereinafter "Chenette"] (on file with author).

on income, assets, residency, and identification. There are fourteen Medicaid HMOs run in Palm Beach County, one of which is run by the public Health Care District of Palm Beach County (HCD). The reason the HCD set up its own Medicaid HMO was to ensure a safety net if the private insurers were to ever decide to exit the market due to insufficient margins. There are about 3000 enrollees in the HCD-run Medicaid HMO currently.¹⁶⁸

The taxpayer-supported HCD raises more than \$80 million annually through its 1.05 millage rate.¹⁶⁹ It has built up a surplus equity reserve of nearly \$100 million which they intend to fund down in the future. This is a purposeful strategy intended to smooth out any millage hiccups to avoid any unexpected major increases for taxpayers. The HCD formerly ran two hospitals but consciously got out of that business to focus its mission on financing healthcare. There are policy implications in whether it is doing enough to have amassed an equity surplus of \$100 million while the safety net hospitals suffer significant losses.

The HCD, however, believes that hospitals should not be bailed out from their own management missteps.¹⁷⁰ More importantly, it perceives that it should run more like a healthy insurer than like a provider. To be able to pay out claims, it intends to assure an adequate surplus. At this time, the HCD Board, which is politically appointed, has tabled any consideration for increasing eligibility rates above 150% below poverty. However, the board is working on improving its ability to reach the target market it currently serves through easier sign-up procedures and improved data management. Five of its seven members turned over in the past year with some additional gubernatorial appointments.¹⁷¹ Yet, St. Mary's share of the Medicaid market is three times the share of the next highest provider and five times the Medicaid HMO share of the third highest provider. Furthermore, demographics do not suggest there will be fewer poor people in the future.

In many respects, private not-for-profit St. Mary's functioned like a government hospital or a hospital of last resort, accepting non-paying

168. *Id.*

169. The Health Care District of Palm Beach County serves as an unregulated health insurance company for low income residents. Three programs serve these populations including Medicaid, Florida Healthy Kids and the Health Care District's Coordinated Care program which runs through the Health Department at five clinics. The voters approved up to 2 mils in 1987. However, the District almost went bankrupt in 1992 when they discontinued services at 1.47 mils due to poor eligibility decisions. They reinstated the program the next year at 1.25 mils. They have rolled back the millage rate during the subsequent years as they gained operating experience. *Id.*

170. *Id.*

171. Chenette, *supra* note 167.

patients, even as referrals from joint-venture activities on their own campus. For all practical purposes, St. Mary's became the public safety net hospital for Medicaid and indigent patients from a wide geographic area, but without adequate financial assistance from others.¹⁷² Even though nearly 90,000 Palm Beach County residents use the St. Mary's emergency room annually, and even as the hospital faced closure, *not one additional dime of public subsidy* was forthcoming from county officials, city officials, or the Health Care District of Palm Beach County.¹⁷³ The main source of uncertainty, perhaps, which chills public health safety net providers to augment its involvement, lies in the threat of losing Medicaid revenues because of the push to enroll beneficiaries in managed care.

C. Managed Care and the Shift to Market-Based Systems

Florida has moved the majority of its TANF population into Medicaid managed care, and the state has been among the leaders nationwide in moving elderly and disabled Medicaid enrollees into managed care as well.¹⁷⁴ An estimated 205,000 non-elderly people with disabilities, or 66.4% of the total caseload of that type, were in Medicaid managed care in Florida in 1998. Florida continues to shift to a managed care model.

With a shift away from the model that there is only one provider with an entitlement to the money, (such as the role Jackson Memorial Hospital provides in Miami-Dade County), there will likely be a shift to the new market-based systems. Jackson is a public hospital with 1567 licensed beds and is affiliated with the medical school at the University of Miami. Medicaid and charity cases account for 44% of Jackson Memorial's gross patient charges, compared with only 14% at Cedars and 6% at Baptist, the next highest providers in Miami-Dade County.¹⁷⁵ Charity care is negligible

172. *Id.*

173. The HCD limited their support to only their regular \$9 million a year contract for trauma services and ongoing support through their Medicaid HMO, the Florida Healthy Kids project, and their Coordinated Care program through the Health Department. They may increase penetration levels for those who qualify at 150% poverty level, or consider raising their hospital in-patient reimbursement rates, which have not increased since 1993. *Id.*

174. Larry Lipman, *Bush Picks Brother's Nominee*, PALM BEACH POST, Mar. 31, 2001, at 8A. Ruben King-Shaw, Jr. will become deputy administrator of Health Care Financing Administration based upon his leadership record of moving people into managed care. This may bode well for Florida in structuring Medicaid waivers or other future policy decisions.

175. See J.P. Bender, *Seven Hospitals Sue Miami Dade*, SOUTH FLA. BUS. JOURNAL, Apr. 5, 2001, at 51A. Seven hospitals in Miami-Dade County have filed a lawsuit over Jackson Memorial Hospital's exclusive use of county general revenue and a half-penny sales

at all other hospitals in Miami-Dade County; all thirty-five hospitals combined provide only 29% of what Jackson does in one year. Jackson has unusually secure sources of external funding to cover an operating loss that is relatively small to begin with, at about 25% of expenses.¹⁷⁶ But even Jackson must factor in the threat of losing Medicaid revenues because of the push to enroll beneficiaries in managed care.

Much of the market-based approach to cost-effective healthcare strategy features early intervention, outreach, and primary care structured in a community-wide strategy. In such a solution, providers like Jackson would have to compete for funds, by responding along with other institutions, to a Request For Proposals (RFP) developed by the County. Jackson would have to make its competitive case on how it would help Miami-Dade County fulfill its public health goal. It is likely that as the state complies with its requirement to allow faith-based providers a chance to compete for provision of services in lower-cost facilities, faith-based providers will gain many of these contracts, particularly since the most vulnerable residents often live in urban neighborhoods far from the hospitals.

The distance factor, combined with a lack of public transportation, and poor English proficiency on the part of the beneficiaries, present a significant barrier to care. While Jackson runs a network of clinics designed to involve community outreach, other operators that are more familiar with these satellite communities could provide a competitive threat.¹⁷⁷ There are also equity concerns about letting each county in Florida fend for itself in devising ways to treat its indigents. While Miami-Dade chooses to fund a public hospital, the 1.5% hospital revenue tax collected by Florida from all providers, which is redistributed on a county-specific basis tied to indigent care, proves to be disadvantageous to Palm Beach County.

From the four million dollar Intracoastal Health Systems paid in hospital revenue tax in fiscal year 1999, less than \$400,000 comes back in return, because Miami-Dade County providers apparently soak up the distribution.¹⁷⁸ While there may be advantages to distribution by counties,

tax to care for the indigent. Plaintiffs want the dollars to follow the patients at some proportionate share and object to Jackson's strategy to continue to expand its cash reserves, while other area hospitals provide substantial uncompensated indigent healthcare without a single dollar of public compensation. *Id.*

176. Jack Meyer et al., *The Role of Local Governments in Financing Safety Net Hospitals*, URBAN INSTITUTE, at 11–12 (June 1999), available at <http://newfederalism.urban.org/html/occa25.html>.

177. *Id.* at 29–39.

178. See Consultants Study, *supra* note 166, at 30.

this equity concept has not moved forward. There are many differences in access to care for many lower-income households. Access to care depends on the generosity of local taxpayers, and the priorities placed on indigent healthcare. The need for greater access is pressing. In Palm Beach County, few private doctors accept Medicaid; in fact, in the West Palm Beach service area, only six out of seventy-four family practitioners accept Medicaid or Health Care District clients.¹⁷⁹ Thus, while Miami-Dade and Broward County both tax its residents to meet healthcare needs of the indigent with a hospital care subsidy, other counties, such as Palm Beach County, deal with the burden differently.

Palm Beach County's philosophy mirrors national policy. According to national healthcare public policy adviser Christopher Jennings,¹⁸⁰ there are two possible solutions to the St. Mary's situation and other situations like it around the nation. First, the burgeoning cost of uninsured indigent care, particularly in the efforts to fill the deficits at specific safety-net hospitals, can be covered with public subsidy, a solution many find to be inefficient.¹⁸¹ Alternatively, the income threshold of eligibility for Medicaid insurance coverage can be raised to include more people, allowing them to obtain coverage from various providers under prevailing market forces. The latter type of plan is the more efficient solution in a changing market according to Jennings.¹⁸²

Discussions with local healthcare planners at the Palm Beach County Healthcare District suggest that the latter strategy is more appealing to them as well.¹⁸³ The potential closing of the St. Mary's emergency room showed that out of 90,000 annual emergency room visits, only 12,000 converted to admissions to the hospital, meaning 78,000 patients were treated and released, and could arguably therefore be more appropriately cared for in an Urgi-Care Center were such a system to be redesigned to improve delivery

179. Letter from Edwin W. Brown, President, Florida Community Health Centers, Inc., to Bureau of Primary Health Care (Jan. 5, 2001) seeking Federally Qualified Health Center application for St. Mary's Campus, (on file with author).

180. Interview with Christopher Jennings, former Clinton Health Care Policy adviser and Goodwin Seminar speaker at Shepard Broad Law Center, Nova Southeastern University (Jan. 26, 2001) (on file with author).

181. See Bender, *supra* note 175. While Jackson Memorial continues to use this strategy, to understand its effect on other hospitals in its region. *Id.*

182. See generally Ruth Faden & Madison Powers, *Incrementalism: Ethical Implications of Policy Choices*, The Kaiser Project on Incremental Health Reform, Oct. 1999, available at <http://www.kff.org/content/1999/1534/faden.pdf> (last visited Jan. 30, 2002).

183. Chenette, *supra* note 167.

through greater access.¹⁸⁴ In fact, local funders and social providers proposed a comprehensive redesign of the St. Mary's campus if the consolidation had occurred. These plans were conceptual and revolved around attracting a federally qualified health center.¹⁸⁵ It is unclear whether the collaborations and leveraging of the 120-acre St. Mary's site for new community uses might also have provided opportunities under Charitable Choice for new types of religious or social service provider *entrepreneurs* to step in. But leaving it all to the marketplace may be dangerous, as can be seen in this real-life example of what can be proposed by the marketplace if left entirely to its own design.

D. *The Initial Intracoastal Plan: Faith-Based Clinics*

In Palm Beach, healthcare planners seem to support the increasing involvement of faith-based providers. At the time that the plans to close St. Mary's were first announced, the solution offered by Intracoastal Health Systems was to moderate demand by getting people to *more appropriate* care, and that much of the care provided today in hospitals can be moderated by greater access to lower-cost ambulatory facilities.¹⁸⁶ Specifically, the *more appropriate* care that Intracoastal initially believed would be the best solution for the 90,000 people annually, who would no longer be served by closing its emergency room, was to offer a partnership with a faith-based provider clinic. Intracoastal proposed to create walk-in clinics in poor neighborhoods. Initially, the company ran full-page newspaper ads in June 2000¹⁸⁷ that cited its partnership with First Baptist Church as its model for those community clinics.

Intracoastal spokesmen said then that its board began studying the concept in 1998, and began to partner with First Baptist Church in opening its first clinic, which offers basic medical, dental, and vision care in February 2000. There is also a Pregnancy Resource Center and a Christian Care Center housed on the church grounds offering food, clothing, and services to the poor. Teen mothers and their children are housed at the site for up to a year. The First Baptist Church clinic offers walk-in care in its office suites on two weeknights. When a prospective patient arrives, there is "a video about Jesus playing on the television, framed Scripture hung on the walls, and patients [are provided] little pamphlets titled Steps to Peace with

184. See Consultants Study of Intracoastal Health Systems, *supra* note 156.

185. *Id.*

186. *Id.*

187. See generally, PALM BEACH POST, June 2000.

God.”¹⁸⁸ The patients also get a free gift along with their free healthcare, “The New Believer’s Bible,” courtesy of the First Baptist Church of West Palm Beach, where the clinic sits on its grounds.

Before getting the free care and gift, the clinic also uses a “spiritual history” questionnaire during the intake process, after the patients’ eligibility is determined, before they see a doctor. The spiritual survey is intended as a tool to ensure evangelism “gets done” in the frantically busy office, the director says. “The most important reason we’re there is ministering to them and sharing our love of Jesus Christ,” said the clinic’s medical director, Dr. Tom Rose. The questionnaire asks: “If you were to die today, do you know for certain whether you would go to Heaven or Hell?” and, “Do you consider yourself a Christian?”¹⁸⁹

Nonprofit healthcare funders, like the Quantum Foundation, who paid for dental equipment in the clinic, found the proselytizing unseemly. “They’re saying it’s optional, but this is a very vulnerable population they’re serving; people know how they should answer,” said Quantum health policy director Tim Henderson.¹⁹⁰ “To have that questionnaire literally as a first step in the process and the questions, it’s inappropriate.”¹⁹¹ “God? I love very, very much God,” said Haitian immigrant Alexandre Magloire, at the clinic for the first time after hearing through the grapevine that he’d see a doctor for free.¹⁹²

Intracoastal has abandoned its consolidation proposal by settlement agreement with the Attorney General and its proposed hospitals’ sale to Tenet. Any future role for the First Baptist Clinic as the model for the community’s safety net provider is now unclear. Under the new Charitable Choice provisions, such a scenario as described in the First Baptist Church Health Clinic is apparently fine. Religious organizations, with a contract for services as described under section 104 may operate with total religious autonomy.¹⁹³

188. Marian Dozier, *Church Clinic Ministers to Body and Soul*, SUN-SENTINEL (Fl. Lauderdale), June 18, 2000, at 1B.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *See* Personal Responsibility & Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2161, (codified at 42 U.S.C. 604a (1996)). Under section 104(a)(2)(A), states that accept certificates, vouchers, or other forms of disbursement under subsection (a)(1)(B) shall retain their independence from federal, state, and local governments, including any governmental control over the definition; development, practice, and expression of the organizations’ religious beliefs. In addition, neither the federal government nor a state

Beneficiaries of assistance, such as Mr. Magloire, may object if he has an objection to the religious character of the organization and must be offered an alternative provider of equal value. But, is it reasonable to assume that an indigent person, with limited English skills, and possibly alien status, feeling vulnerable due to sickness, would not feel a subtle coercion to be dependent upon those who offer him comfort at the time of his affliction? The subtle manipulation of this kind of exchange, with its generally one-way communication, strikes some as inappropriate, even if the person is not turned away for not listening, and lies at the heart of the religious coercion issue central to the debate as to how far government should go in deregulating religious providers.

Here, a Baptist church clinic is not a government actor, even if it receives its funding indirectly from the government, through tax exemption, vouchers, or directly through contract.¹⁹⁴ If the state elects to use federal welfare funds to provide services solely through its own governmental agencies, not utilizing any independent providers, then it has not violated the antidiscrimination requirement of section 104, by not involving faith-based providers.¹⁹⁵

The question arises of whether the federal Charitable Choice law can even be applied to the State of Florida. Florida's Constitution actually expressly prohibits such uses of funds:

There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.¹⁹⁶

shall require a religious organization to (A) alter its form of internal governance; or (B) remove religious art, icons, scripture or other symbols. *Id.*

194. In *Employment Division v. Smith*, 494 U.S. 872, (1990), the Supreme Court eliminated the requirement that government justify burdens on religion imposed by laws neutral toward religion and the compelling interest test in prior federal court rulings is a workable test for striking sensible balances between religious liberty and competing government interests.

195. See Section 104(g) Nondiscrimination Against Beneficiaries—"Except as otherwise provided in law, a religious organization shall not discriminate against an individual in regard to rendering assistance funded under any program described in subsection (a)(2) on the basis of religion, a religious belief, or refusal to actively participate in a religious practice." *Id.*

196. FLA. CONST. art. I, § 3.

The State Constitution specifically forbids use of state or county revenues to directly or indirectly aid churches, but it has not posed a roadblock to Charitable Choice proponents.¹⁹⁷ While Charitable Choice does not preempt state constitutions which restrict or prohibit disbursement of state funds to religious organizations, Charitable Choice applies to federal funds.

Proponents claim federal Charitable Choice legislation provisions trump state constitutional rights.¹⁹⁸ Actually, all federal welfare funds are subject to the Charitable Choice provision, and states choosing to involve nongovernmental providers must follow the provision's rules regarding nondiscrimination against faith-based organizations. In states which commingle state and federal welfare funding, in order to comply with its own constitutional provisions, a state must segregate state funds from federal grants. If necessary, a state may keep its own funds separate to expend in accordance with its own constitutional provision, while allowing federal funds to flow to religious organizations to serve the poor.¹⁹⁹ This conclusion follows from the Supremacy Clause of the United States Constitution, which provides that rights granted by congressional action are exempt from any state or local laws to the contrary.²⁰⁰

There seems to be nothing to prohibit a state from choosing to contract with a faith-based organization to be the sole provider of services in a particular area, other than the requirement that there be an alternative provider available, if requested. In essence, Charitable Choice grants all religious organizations a statutory right to be eligible to contract with a state to administer social service. This right can be enforced with a lawsuit against the state.²⁰¹ It stands to reason, however, that in areas where there are few providers and to obtain greatest efficiency, it will, for practical purposes, be impossible to find nonfaith-based providers in certain circumstances. In this situation, where nonfaith-based providers are not available, certain issues must be considered. Since there is no specific time framework for the alternative provider to be set up, and no limits on where the alternative might be geographically provided, alternatives provided might be totally impractical if offered some distance away.

197. *Id.*

198. Daniel Katz, *Constitutional and Policy Problems with Senator Ashcroft's "Charitable Choice Provisions,"* American Civil Liberties Union, Mar. 11, 1996 at <http://www.aclu.org/congress/ashcrtf.html>.

199. 42 U.S.C. § 604a(k) (Supp. 1999).

200. U.S. CONST. art. VI.

201. *See* Chenette, *supra* note 167.

Florida certainly has encouraged contracting out and providing grants to faith-based and religious organizations. The Florida Pregnant Women Act²⁰² for example, authorizes five county health departments including those in Miami-Dade, Broward, and Palm Beach County to contract with “faith-based organizations . . . and other social-services related entities.”²⁰³ This legislation targets outreach to high-risk pregnant women who may not seek proper prenatal care, who suffer from substance abuse, or who are infected with HIV, in order to provide services to them.²⁰⁴

E. *Concerns About Charitable Choice and Its Operation*

The issues that Charitable Choice raises are far ranging. Currently, there are three different federal revenue streams that pick up Charitable Choice—TANF, Welfare to Work, and Community Services Block grants—and many more are planned. But in the broader sense, these concepts represent a shift in the political thinking about whether faith-based organizations might deliver more and more social services that previously were delivered by state and local governments. The wall of separation began to collapse in the 1980s with the increasing political development under Ronald Reagan and George Bush of the privatization of the public sector. Liberals and conservatives alike both lost confidence in the ability of government to provide welfare and education services in the inner cities. African-Americans grew tired of no improvements coming and turned increasingly to help from black churches.²⁰⁵

The central thrust of Charitable Choice is to involve faith-based providers in providing services to the poor, while protecting the religious integrity of the organizations. Building on the work of Marvin Olasky and other religious liberty scholars, the policy shift reflects a view that government welfare programs have failed, and should be replaced by private and religious charities. Faith-based organizations have literally “fed the hungry, clothed the naked, sheltered the homeless, cared for the sick, visited the imprisoned, counseled and recovered the addicted, trained the unem-

202. FLA. STAT. § 381.0045 (2000).

203. § 381.0045(5).

204. *Id.*

205. South Florida’s Donors Forum has for five years run its Philanthropy and the Black Church project for private funders to fund faith-based programs addressing problems such as affordable housing, foster care, and child care availability in low income neighborhoods.

ployed, educated the ignorant, protected the weak, and advocated for the powerless.”²⁰⁶

Faith-based organizations have carried on their works of mercy, love, peace, and justice, with and without government money because of a divine mandate. The key questions are these: who are the credible partners and stakeholders in the local communities that genuinely care? Who has the capacity to deliver the services? And do American citizens let government off the hook of responsibility by caring for its needy citizens by transferring that responsibility to faith groups?²⁰⁷

On the surface it would seem that the key consideration for capacity is whether the program has a secular purpose and that the organizations selected for service delivery be effective and efficient. This is a capacity question that seems to beg for compliance mechanisms whether they be monitoring, self-reporting, audits, or regulatory actions.²⁰⁸ This then opens up the question of whether state agencies will now write rules of accountability into their contracts, opening up religious providers to a scrutiny they may not be willing to accept.²⁰⁹

Some Christian conservatives are leading the charge against Charitable Choice in that they see how problematic it might be. They fear an adverse effect on religious mission. If a state were to completely shift government social services for a certain area or a type of service to a religious institution, one can foresee the possibilities that beneficiaries may be subjected to religious indoctrination while they are attending the religious organization to obtain their government benefits. There is no way one can detect this unless one is on the scene. It stands to reason that this kind of governmental monitoring could lead to the type of excessive entanglement prohibited currently.²¹⁰

206. Reverend Edward King, Jr., speaking on Faith Based Initiatives, Urban Institute Media Relations Project, Carol City, Fla. (Mar. 1, 2001) (on file with author).

207. *Id.*

208. *Id.* (quoting Reverend Ana Price, Universal Truth Center, speaking on Faith-Based Initiatives at the Donor Forum, “Government grants to faith-based organizations will have a better chance of success and continuity if they require infrastructure, written proposals, evaluation criteria, budget plans and other criteria . . .”).

209. *Id.* Charisse Grant, Dade Community Foundation, stated that, “Churches must not lose sight of their conviction or mission if they accept federal funding for social service work . . . It will be important not to let the availability of money detract from that power.”

210. Reverend Donna Schaper, Address at the donor Forum’s Media Breifing, Coral Gables Congregational Church, (Mar. 1, 2001), “Will faith-based organizations be able to

It is interesting how closely the positions of some of the justices correspond to their own religious backgrounds. Three of the four most ardent supporters of equal treatment for religion, Antonin Scalia, Anthony Kennedy and Clarence Thomas, are practicing Catholics,²¹¹ while Stephen Breyer and Ruth Bader Ginsburg, are both Jewish, and maintain more separationist instincts.²¹² President George W. Bush, who has described himself as a born-again Christian, has allied himself with the pro-prayer camp.²¹³ Since he may have the chance to appoint one or more justices who could make a majority shift in the Court, this could usher in a largely privatized public sphere in which education and welfare services are contracted out to religious organizations on a far broader scale.

In relation to Medicare and Medicaid, many are projecting that we are just a heartbeat away from seeing churches directly administer the Medicaid program.²¹⁴ What churches will those be? Only about three percent of the congregations surveyed in a recent study of 1200 churches receive government funds today.²¹⁵ Catholic and moderate Protestant denominations were more likely to apply for government funds than conservative or evangelical congregations.²¹⁶ But sixty-four percent of African-American congregations expressed interest in bidding for charitable choice contracts.²¹⁷ This shift could likely turn religious groups into social service providers with multimillion dollar budgets, and the risks of corruption and patronage

speak freely about government policy if they are receiving vital federal grants?" *Id.* This concept was further expanded at the same seminar by Rick Englert for Project Teamwork when he said, "An intermediary organization can help a church to stand by its principles while also acknowledging and meeting government expectations. It is also important for churches to know when to part company with government programs if they do not suit the church's principles or mission." *Id.*

211. Jeffrey Rosen, *Is Nothing Secular?* N.Y. TIMES, Jan. 30, 2000, § 6, at 40.

212. *Id.*

213. *Id.*

214. Rev. Barry Lynn, Americans United for Separation of Church and State, is quoted on whether Medicare and Medicaid would ever be administrated directly by faith-based providers:

I would not be surprised to see that as a proposal somewhere down the line, if this concept becomes emboldened by more and more presidential candidates supporting it. But I do not want to see the local church on the corner compete with the synagogue on the corner, and the temple on the third corner to decide who is going to be the administrators of the Medicaid program. I think that is exactly where you go if you let this concept fester.

See Debate, *supra* note 21, at 20.

215. Chaves, *supra* note 43.

216. *Id.* at 2.

217. See Chaves, *supra* note 43.

that inevitably accompany large government grants will also likely loom. There are already signs of the entrepreneurial types that have lined up to take advantage of school vouchers to also be in line to make money off government contracts as religious providers.

V. CONCLUSION

Prospectively, the pendulum has swung to such a degree that Charitable Choice legislation—similar to the programs being broadly developed in Indiana, Texas, and California—seems inevitable for Florida as the trend in public policy continues. Justice Thomas' analysis for the plurality in *Mitchell v. Helm*²¹⁸ and the likelihood of President Bush moving the Supreme Court more to the right, suggest Charitable Choice programs will be upheld constitutionally, even if doing so means moving well beyond its current view of the legal interpretation of the Establishment Clause. In recent years the Court has increasingly shown accommodation of religious organizations, even pervasively sectarian ones.

It is increasingly likely that the Court will reflect the trend supporting a shift toward a more market based system and away from government provision in social services. This is really a redirection of money, and likely not an expansion. It suggests the Court will permit public monies to go to organizations that mix secular and sectarian activities together for neutral purposes like healthcare. In essence, this is taking a limited pot of money and diverting some of it to religion, to shift more services to the private sector and weaning the responsibility for entitlement programs from government.

Such a shift will require more attention in implementation. There is reason to believe that the field implementation may be significantly flawed. It is likely that there will not be adequate provider capacity. Particularly in the poorer inner city neighborhoods, where black churches are more likely to want to fulfill this charge, without there being a further blurring of the line between church and state. As Charitable Choice develops, there will need to be more government regulation to monitor and support its implementation.

To minimize problems like the civil rights employment discrimination disputes in Kentucky and the religious liberty disputes in California, or the blatant over the top proselytizing or coercion that went on in the West Palm Beach health clinic, there will need to be certain technical assistance packages and workshops for faith-based organizations (FBOs). These

218. 530 U.S. 793 (2000).

training programs will need to make sure government staffs understand Charitable Choice guidelines, how to reform their procurement procedures, and how to market and subcontract these joint ventures to best ensure a broad variety of vendors, particularly in communities faced with only one choice of faith-based provider.

There will need to be a far greater strategy to reach out to congregations that are not part of the human services network, in order to initiate meetings, advertise, and to provide dialogue, partnership environments, and mentoring for these FBOs prior to monitoring its efforts. States will need to change their internal rules on procurement, update contract language, and delete religious prohibitions on hiring decisions. FBOs will need to mandate noticing requirements to give choice to providers, and beneficiaries, as well as to draft and codify formal contracts.

There will need to be fiscal audit monitoring, tracking projects, performance based bill or invoice submission systems, and receipt of vouchers. There could also be extensive rulemaking on the provision of vehicles, machinery, office space, and other outside reference, referral, and outsourcing policies. There will need to be help in attracting working capital, to finance the administration of these contracts, originate requests for proposals, and initiate some kind of on-site field monitoring to detect religious proselytizing. There will also need to be case management to monitor contract performance, documentation in keeping eligibility for attendance, work requirements and volunteer requirements intact, as well as a willingness to accept government sanctions. It all needs to be developed and operationally monitored.

If a client is not comfortable with a religious aspect, it is the responsibility of the program designers to provide the service in another way, or withdraw their religious messages in order to retain certain clients. In rural areas, where there are no alternative providers, or in communities where the provider inventory has shrunk due to market place factors, government will need to keep an alternative, such as a government run HMO, and to provide services through private providers. For Charitable Choice to be effective, the boundaries between church and state must be respected to the degree that the beneficiary feels that its choice has been adequately served and properly protected.

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