NOTE

FAITH-BASED INITIATIVES: EXPANDING GOVERNMENT COLLABORATION WITH FAITH-BASED SOCIAL SERVICE PROVIDERS

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I. Introduction

Since the advent of large-scale welfare programs in the 1960's, the federal government has traditionally interpreted the Establishment Clause as erecting a high wall of separation between secular social service programs and faith-based ones.[1] While secular social service programs have been eligible to receive Federal public assistance, many faith-based providers have not.[2]

In recent years this policy has been called into question.[3] Faith-based organizations have shown themselves to be as effective, and in some cases more effective, than their secular counterparts in combating social ills,[4] while constitutional theorists have argued the exclusion of faith-based organizations from government funding constitutes unequal treatment and religious discrimination.[5] The Supreme Court has also shifted its position regarding strict separation under the First Amendment; allowing Congress to consider new partnerships between government and faith-based organizations.[6]

A shift in federal policy began in 1996 when "Charitable Choice" provisions were introduced into several social welfare bills, making certain program funds available to faith-based social service providers.[7]

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[1] *See infra* Section II.C.

[2] *See infra* Section II.C.

[3] *See infra* Section II.D.

[4] *See infra* Section II.A.

[5] *See infra* Section II.C.

[6] *See infra* Section III.

[7] *See infra* Section II.D. Current programs that include "Charitable Choice" provisions are the Welfare Reform Act of 1996, Pub. L. No. 104-193 (codified as 42 U.S.C. § 604a (2003); the Community Services Block Grant Act of 1998, Pub L. No. 105-285 (codified as

These reforms have met with mixed success, not because of difficulties with the programs themselves, but because of the constitutional, political, and administrative challenges they have faced.[8]

Increased collaboration between government and faith-based providers received national attention when the issue became a featured item of George W. Bush's presidential campaign.[9] In one of his first acts in office, President Bush took measures to better implement existing Charitable Choice provisions and called for "faith-based and community initiatives" legislation that would expand the number of Federal programs providing funding.[10] The House of Representatives responded by approving the Community Solutions Act of 2001 (House Bill 7) on July 19, 2001.[11] The legislation then, in response to opposition, underwent considerable revision in the Senate through the CARE Act of 2002 Senate Bill 1924).[12]

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42 U.S.C. § 9920 (2003); the Substance Abuse and Mental Health Services Administration Act of 2000, Pub. L. No. 106-310 (codified as 42 U.S.C. § 300x-65 (2003), and the Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554 (codified as 42 U.S.C. § 290kk-1 (2003).

[8] *See infra* Section II.C. *See also* THE WHITE HOUSE, UNLEVEL PLAYING FIELD: BARRIERS TO PARTICIPATION BY FAITH-BASED AND COMMUNITY ORGANIZATIONS IN FEDERAL SOCIAL SERVICE PROGRAMS (2001) [hereinafter UNLEVEL PLAYING FIELD].

[9] *See infra* Section II.E.

[10] *See infra* notes 59 and 62-65 and accompanying text for a description of the Executive Orders and offices affected. In his executive order creating the White House Office of Faith-Based and Community Initiatives, President George W. Bush declared:

> Faith-based and other community organizations are indispensable in meeting the needs of poor Americans and distressed neighborhoods. Government cannot be replaced by such organizations, but it can and should welcome them as partners. The paramount goal is compassionate results, and private and charitable community groups, including religious ones, should have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes, such as curbing crime, conquering addiction, strengthening families and neighborhoods, and overcoming poverty. This delivery of social services must be results oriented and should value the bedrock principles of pluralism, nondiscrimination, evenhandedness, and neutrality.

Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001).

[11] H.R. 7, 107th Cong. (2001). House Bill 7 was introduced on March 29, 2001 by Rep. J. C. Watts, Jr. (R-OK), Rep. Tony Hall (D-OH) and Rep. Dennis Hastert (R-IL), and passed by a vote of 233-198 (Roll No. 254) on July 19, 2001. *See infra* Section IV for a full description of the legislation.

[12] Charity Aid, Recovery, and Empowerment Act of 2002, S. 1924, 107th Cong. (2002). Senate Bill 1924 was introduced on February 8, 2002 by Sen. Joseph Lieberman (D-CT) and Sen. Rick Santorum, (R-PA). *See infra* Section VI for a full description of the legislation.

Section II of this note describes the variety of faith-based organizations, their need for government funds, the obstacles they face when trying to participate in federal programs, and past and present efforts to increase access.[13] Section III describes the evolution of the Supreme Court's position surrounding the provision of government funds to faith-based organizations,[14] while Section IV shows how House Bill 7 pursues its goals within the limits of the First Amendment.[15] Part V summarizes the concerns opponents of faith-based initiatives have voiced,[16] Part VI shows how Senate Bill 1924 addresses these concerns,[17] and Part V describes the Bush's Administration's response to legislative developments.[18]

II. Faith-Based Organizations

A. *Types of Faith-Based Organizations and Their Effectiveness*

The term "faith-based organizations" encompasses a variety of organizations and programs, and includes local congregations, small non-profit organizations, and neighborhood groups.[19] Because of their diversity, these organizations cannot be assigned a single identity, though it is possible (and helpful) to categorize them into one of five types: faith-saturated,[20] faith-centered,[21] faith-related,[22] faith-

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13 *See infra* Section II.

14 *See infra* Section III.

15 *See infra* Section IV.

16 *See infra* Section V.

17 *See infra* Section VI.

18 *See infra* Section VII.

19 Part of the confusion in the debate surrounding faith-based initiatives is the fact that the term "faith-based and community initiatives" is vague, and can include "storefront inner city Protestant churches, Teen Challenge . . . Prison Fellowship Ministries . . . Habitat for Humanity, Catholic Social Services, [and] the YMCA." WORKING GROUP ON HUMAN NEEDS AND FAITH-BASED AND COMMUNITY INITIATIVES, FINDING COMMON GROUND: 29 RECOMMENDATIONS OF THE WORKING GROUP ON HUMAN NEEDS AND FAITH-BASED AND COMMUNITY INITIATIVES 32 (2002).

20 *Id.* "Faith-saturated" organizations have religious faith as an important aspect of every part of the organization, and most administrators and staff share the organization's faith commitment. *Id.* Programs sponsored by "faith-saturated" organizations often have an explicit, extensive, and mandatory religious aspect as an integral part of the program. *Id.*

21 WORKING GROUP ON HUMAN NEEDS AND FAITH-BASED AND COMMUNITY INITIATIVES, FINDING COMMON GROUND: 29 RECOMMENDATIONS OF THE WORKING GROUP ON HUMAN NEEDS AND FAITH-BASED AND COMMUNITY INITIATIVES 32 (2002). "Faith-centered" organizations are founded for a religious purpose. *Id.* The governing board and nearly all

background,[23] and faith-secular partnerships.[24] While such categories do not necessarily determine the mission or effectiveness of these organizations, their organizational character does affect their ability to receive government funding.[25]

Faith-based organizations play a large and vital role in the provision of social services and enjoy certain advantages because of their unique status.[26] The grassroots structure of many faith-based organizations enables them to better gather information to assist clients.[27] Because they are often the only institutions left in troubled

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staff are required to share in the organization's faith commitment. *Id.* "Faith centered" programs include explicit religious messages and activities, but expect positive outcomes even if participants are allowed to opt out of these activities. *Id.*

[22] *Id.* "Faith-related" organizations were founded by religious people and often display religious symbols. *Id.* While the executive leadership may be required to adhere to a particular religious belief, staff persons do not have such a requirement. *Id.* Faith-related programs have no explicitly religious messages or activities, though religious dialogue may be available to those who seek it out. *Id.*

[23] WORKING GROUP ON HUMAN NEEDS AND FAITH-BASED AND COMMUNITY INITIATIVES, FINDING COMMON GROUND: 29 RECOMMENDATIONS OF THE WORKING GROUP ON HUMAN NEEDS AND FAITH-BASED AND COMMUNITY INITIATIVES 32 (2002). "Faith-background" organizations have historical ties to a faith tradition but look and act secular. *Id.* Faith-background programs include no explicitly religious content. *Id.*

[24] *Id.* "Faith-secular partnerships" make no explicit reference to religion. *Id.* While the faith of participants and their religious companions adds value to the program, such programs do not believe religious change is necessary to achieve the goals of the program. *Id.*

[25] *See generally* Sections III and IV.

[26] As one study reports:

> These religious organizations represent a major part of the American welfare system. Tens of thousands of people in the Philadelphia area are being helped by all kinds of programs, from soup kitchens to housing services, from job training to educational enhancement classes. One can only imagine what would happen to the collective quality of life if these religious organizations would cease to exist.

RAM A. CNAAN ET AL., THE NEWER DEAL: SOCIAL WORK AND RELIGION IN PARTNERSHIP 275 (1999). *See also* VIRGINIA HODGKINSON, ET AL., FROM BELIEF TO COMMITMENT: THE COMMUNITY SERVICE ACTIVITIES AND FINANCES OF RELIGIOUS CONGREGATIONS IN THE UNITED STATES, 1993 EDITION: FINDINGS FROM A NATIONAL SURVEY (1993); COMMUNITY WORKS: THE REVIVAL OF CIVIL SOCIETY IN AMERICA (E. J. Dionne, Jr., ed., 1998); WHO WILL PROVIDE? THE CHANGING ROLE OF RELIGION IN AMERICAN SOCIAL WELFARE (Mary Jo Bane, et al., eds., 2000); BILL HANGLEY, JR. & WENDY S. MCCLANAHAN, MUSTERING THE ARMIES OF COMPASSION IN PHILADELPHIA: AN ANALYSIS OF ONE YEAR OF LITERACY PROGRAMMING IN FAITH-BASED INSTITUTIONS (2002).

[27] *State and Local Implementation of Existing Charitable Choice Programs: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong. 22-23 (2001) (statement of Rev. Donna Jones, Cookman United Methodist Church). One provider testified, "we were offering something that was unique to our community . . . [w]e

neighborhoods, faith-based organizations are also more easily accessible to clients than other providers.[28]

B. *Need for Federal Funds*

As the number and scope of government-funded welfare programs has grown, the tax revenue necessary to sustain them has similarly increased.[29] As a result of the demands of increasing Federal taxes over the past forty years, an ever widening "charity gap" between public funding and private giving has developed.[30] While the total amount of money given to charity has increased over time, the percentage of the population contributing to private charities and the proportion of income donated has declined substantially.[31] This shift in private charitable

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also found that we got greater information about family situation, about domestic violence, about other barriers to employment that were happening in the house than other agencies were receiving." *Id.* They also found that, "because we were a church, we were more flexible in our ability to deliver services." *Id.*

[28] *State and Local Implementation of Existing Charitable Choice Programs: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong. 38, 60 (2001) (statement of Charles Clingman, Executive Director, Jireh Development Corporation). Charitable organizations develop relationships with the people they serve because, "they are neighborhood residents who we see on a daily basis." *Id.* They are also available to serve clients "24/7," and "if someone gets in trouble at midnight we allow them to call, based on the crisis they have." *Id.*

[29] The increase in taxes upon the average American is considerable. In 1957 a two-income family paid approximately 25% of its income in taxes. *See* AMITY SHLAES, THE GREEDY HAND: HOW TAXES DRIVE AMERICANS CRAZY AND WHAT TO DO ABOUT IT 14 (1999) *cited in* H.R. REP. NO. 107-138, pt. 1, at 17 (2001). In 2000, approximately 45% of the average American's income was given to federal, state and local taxes. *See* AMERICANS FOR TAX REFORM FOUNDATION, COST OF GOVERNMENT DAY REPORT 10 (2000) *cited in* H.R. REP. NO. 107-138, pt. 1, at 16 (2001). The same two-income family in 2000 will pay more in taxes than the average family spends on their own food, clothing, and housing combined, leaving little room for contributions to private social service providers. *See* AMERICANS FOR TAX REFORM FOUNDATION, COST OF GOVERNMENT DAY REPORT 10 (2000) *cited in* H.R. REP. NO. 107-138, pt. 1, at 17 (2001).

[30] H.R. REP. NO. 107-138, pt. 1, at 18 (2001).

[31] Since the expansion of Federal welfare programs in the 1960's total federal spending has increased approximately 20% as a percentage of national income, while charitable giving by individuals has decreased approximately 25% during the same time. H.R. REP. NO. 107-138, pt. 1, at 17 (2001). The impact upon faith-based social service organizations has been dramatic. By the mid-1990's barely one American in three reported any charitable contribution in the previous month, and fewer than two in five claimed even occasional religious giving. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000) 123, 126 *cited in* H.R. REP. NO. 107-138, pt. 1, at 17 (2001). If Americans today contributed to charitable organizations in the same proportions as those of the 1960's, faith-based organizations would have $20 billion more per annum to devote to social services programs. *Id.*

giving has severely limited the ability of privately funded faith-based programs to provide social services, and advocates have increasingly sought the aid of the Federal government to enable them to carry out their mission.[32]

C. *The Problem of Unequal Treatment*

Since the welfare reform of 1996, federal social service grants utilize a privatization model that requires competitive bidding among social service providers.[33] When funds are due to be distributed, Federal, state and local agencies issue a request for proposals, known as a "RFP", which solicits bids to perform a specific service for a certain period of time.[34] Government agencies select the best proposal, and a contract incorporating by reference the requirements and conditions described in the RFP is signed with the designated provider.[35]

Faith-based social service providers face a number of challenges when trying to access this process.[36] Many clergy members have not sought government funds because they have not heard of their availability.[37] The Federal government has also traditionally preferred

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[32] "In a society . . . in which the median congregation has only 75 regular participants and an annual budget of only $55,000, the substantially increased delivery of social services by congregations can occur only via increases in government funding to congregations." Mark Chaves, *Religious Congregations and Welfare Reform: Who Will Take Advantage of Charitable Choice?*, 64 AMERICAN SOCIOLOGICAL REV. 836, 844 (1999), *in* H.R. REP. NO. 107-138, pt. 1, at 18 (2001).

[33] Matthew Diller, *Going Private – the Future of Social Welfare Policy*, 35 J. POVERTY L. & POL'Y 491, 493-94 (2002). The system is analogous to outsourcing in the private sector. *Id.* at 493. Supporters argue the policy promotes a more flexible welfare system by shifting discretion down to lower levels of management. *Id.* They also note it is easier to cancel an outsourced program than terminate a government employee. *Id.*

[34] David R. Reimer, *Government As Administrator vs. Government As Purchaser: Do Rules or Markets Create Greater Accountability in Serving the Poor?*, 28 FORDHAM URB. L.J. 1715, 1722-23 (2001). The RFP establishes the rights and responsibilities a social service provider possesses during the performance of its contract. *Id.* The White House Office of Faith-Based and Community Initiatives has established an excellent website to describe this process. *See* http://www.whitehouse.gov/government/fbci/grants.html (last visited Apr. 1, 2003).

[35] Reimer, *supra* note 34, at 1722-23. The contract also establishes such things as a payment schedule and system of resolving disputes. *Id.* Because programs may address the needs of large numbers of people in a particular geographical area, it is common for the government to fund more than one program per area for the same type of service. *Id.*

[36] *See generally* UNLEVEL PLAYING FIELD, *supra* note 8.

[37] Studies by the University of Pennsylvania have shown that over 90% of community-serving clergy have never even heard of Charitable Choice. John J. Dilulio Jr., *Unlevel Playing Field*, WALL ST. J., August 16, 2001, at A14.

to fund large secular organizations, and the system is rife with managerial and political biases.[38] As a further obstacle, agencies have relied upon a strict separation interpretation of the First Amendment, resulting in policies that require faith-based providers to be essentially secular in nature to receive public funding.[39] These principles are evident in many federal regulations and function as a total ban on grants to faith-based organizations, regardless of their organizational structure or operating rules.[40] Such institutional biases also exist on the state level.[41]

Faith-based social service providers fortunate enough to receive government funds also object to the secularizing influence of government policies that have the net effect of turning faith-based social service providers into mirror images of secular ones.[42] Federal welfare

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[38] UNLEVEL PLAYING FIELD, *supra* note 8, at 4. A White House report described traditional recipients of social services funds as "large and entrenched, in an almost monopolistic fashion." *Id.* These systemic biases result in "a relatively select group of large social-service and health non-profits [that] have long received the bulk of public funding." Peter Frumkin, *After Partnership: Rethinking Public-Nonprofit Relations, in* WHO WILL PROVIDE? 199 (Mary Jo Bane et al., eds., 2000), *cited in* UNLEVEL PLAYING FIELD, *supra* note 8, at 4.

[39] This policy of strict separation has its origins in the Supreme Court's decision in Everson v. Board of Education *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). *See infra* Section III for a description of how this policy has shifted over time. At a minimum, only programs whose religious character is "faith-background" or a "faith-secular partnership" could qualify for such assistance. *See supra* notes 23 & 24, for a description of these terms. It has, however, even been common for blanket exclusionary rules against faith-based organizations to be imposed by government grant and contract distributors. *See* CONGRESSIONAL RESEARCH SERVICE, REP. RS20809, PUBLIC AID AND FAITH-BASED ORGANIZATIONS (CHARITABLE CHOICE): AN OVERVIEW (2001).

[40] The 2001 guidelines for the allocation of HUD Community Development Block Grants state, "In accordance with First Amendment Church/State Principles, as a general rule, CDBG [Community Development Block Grant] assistance may not be used for religious activities or provided primarily to religious entities for any activities, *including secular activities.*" 24 C.F.R. §570.200 (2001) (emphasis added). *See also* 24 C.F.R. §92.257 (2001) ("HOME funds may not be provided to primarily religious organizations, such as churches, for any activity, including secular activities. In addition, HOME funds may not be used to rehabilitate or construct housing owned by primarily religious organizations or to assist primarily religious organizations in acquiring housing."). *See also* Emergency Shelter Grants Program, 51 Fed. Reg. 45,283 (Dec. 17, 1986) ("Grant amounts may not be used to renovate, rehabilitate, or convert buildings owned by primarily religious organizations or entities.").

[41] *See, e.g.*, Columbia Union Coll. v. Oliver, 254 F.3d 496 (4th Cir. 2001) (The Maryland Higher Education Commission denied funds to Columbia Union College because it believed the college was a "pervasively sectarian" institution and such funding would violate the Establishment Clause).

[42] Stanley Carlson-Thies, Address at States and Faith-Based Organizations as Allies in

programs operating under the strict separation model typically permit faith-based organizations to receive funds only if they are willing and able to create an entirely secular affiliate,[43] while agencies have also required faith-based providers to remove or conceal religious symbols and art when hosting their programs.[44]

D. *Charitable Choice*

A number of legal writers, most notably Carl Esbeck, challenged this system by arguing issues of equal protection and capitalizing on new interpretations of the First Amendment from the U.S. Supreme Court.[45] In response, Congress introduced opportunities for greater collaboration between government and faith-based organizations into a number of federal programs under the banner of "Charitable Choice"[46]

Human Services: Charitable Choice and Other Innovations (Aug. 16, 2001).

[43] This policy results in the creation of "faith-secular partnerships." *See supra* note 24. The policy is evident in HUD's HOME program, which states "a primarily religious entity may transfer title to its property to a wholly secular entity and the entity may participate in the HOME program." 24 C.F.R. § 92.257 (2001). This entity may be "an existing or newly established entity, which may be . . . established by the religious organization." *Id.* The completed housing project must be used "exclusively by the owner entity for secular purposes, [and be] available to all persons regardless of religion." *Id.*

[44] CONGRESSIONAL RESEARCH SERVICE, REP. RS20809, PUBLIC AID AND FAITH-BASED ORGANIZATIONS (CHARITABLE CHOICE): AN OVERVIEW 20 (2001). As example, a city agency notified the local branch of the Salvation Army that it would be awarded a contract to help the homeless only on the condition that the organization remove the word "Salvation" from its name. Stanley Carlson-Thies, *Faith-Based Institutions Cooperating with Public Welfare: The Promise of the Charitable Choice Provision*, *in* WELFARE REFORM AND FAITH-BASED ORGANIZATIONS 38 (D. Davis & B. Hankins eds., 1999).

[45] *See, e.g.*, Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation With Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 27 (1997); Carl H. Esbeck, *The Neutral Treatment of Religion and Faith-Based Social Service Providers: Charitable Choice and Its Critics*, *in* WELFARE REFORM AND FAITH-BASED ORGANIZATIONS 173 (Derek H. Davis & Barry Hankins eds., 1999); Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285 (1999); John H. Garvey, *What's Next After Separationism?*, 46 EMORY L.J. 75 (1997); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997); Michael W. McConnell, *Equal Treatment and Religious Discrimination*, *in* EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY (Stephen V. Monsma & J. Christopher Soper, eds., 1998).
See infra Section III for an analysis of the constitutional developments that made Charitable Choice possible.

[46] Senator John Ashcroft (R-Mo.) was a major proponent of Charitable Choice legislation. Interesting, Sen. Ashcroft was introduced to Carl Esbeck by a member of his staff who was Prof. Esbeck's student at the University of Missouri Law School. Interview with Daniel E. Katz, Director of Legislative Affairs and Alex J. Luchenitser, Esq.,

including: the Welfare Reform Act of 1996;[47] the Community Services Block Grant Act of 1998;[48] the Substance Abuse and Mental Health Services Act of 2000;[49] and the Community Renewal Tax Relief Act of 2000.[50] A number of states also passed similar provisions.[51]

Since their implementation, Charitable Choice programs have seen mixed success.[52] Some states were quick to implement the provisions, while others took little or no action.[53] Those programs that have received funds have demonstrated the benefits of their work.[54] Yet other programs have struggled to overcome obstacles such as institutional inertia, confusion over the constitutionality of such funding, and general difficulty in dealing with new programs.[55]

Litigation Counsel, Americans United for Separation of Church and State, in Washington, D.C. (Aug. 13, 2001).

[47] Welfare Reform Act of 1996, Pub. L. No. 104-193 (codified as 42 U.S.C. § 604a (2003)).

[48] Community Services Block Grant Act of 1998, Pub L. No. 105-285 (codified as 42 U.S.C. § 9920 (2003)).

[49] Substance Abuse and Mental Health Services Act of 2000, Pub. L. No. 106-310 (codified as 42 U.S.C. § 300x-65 (2003)).

[50] Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554 (codified as 42 U.S.C. § 290kk-1 (2003)).

[51] In addition to efforts at the national level, a number of states have passed similar statutes promoting the use of faith-based providers for social services. Alex J. Luchenitser, *Casting Aside the Constitution: The Trend Toward Government Funding of Religious Social Service Providers*, 35 J. POVERTY L. & POL'Y 615, 616 (2002). Some states closely followed the federal legislation. *Id.* at 616 (citing ARIZ. REV. STAT. ANN. § 41-3751 (West Supp. 2001); WIS. STAT. ANN. § 46.027 (West Supp. 2001)). Other states established certain programs with few specific requirements or safeguards. *Id.* (citing ARK. CODE ANN. § 20-76-109(4) (Michie 1999); FLA. STAT. ANN. § 445.024(5)(d) (West Supp. 2001)).

[52] *See* JOHN C. GREEN & AMY L. SHERMAN, FRUITFUL COLLABORATIONS: A SURVEY OF GOVERNMENT-FUNDED FAITH-BASED PROGRAMS IN 15 STATES (2002).

[53] CENTER FOR PUBLIC JUSTICE, CHARITABLE CHOICE COMPLIANCE: A NATIONAL REPORT CARD (2000), *available at* http://www.cpjustice.org/stories/storyReader$296 (last visited Apr. 1, 2003). The report gave a grade of "A" to Texas, Indiana, Ohio and Wisconsin, a "B" to Arizona, Illinois, Pennsylvania, and Virginia, a "C" to Arkansas, California, Michigan and North Carolina, and a "F" to the remaining states. *Id.*

[54] DR. AMY L. SHERMAN, THE GROWING IMPACT OF CHARITABLE CHOICE: A CATALOGUE OF NEW COLLABORATIONS BETWEEN GOVERNMENT AND FAITH-BASED ORGANIZATIONS IN NINE STATES 8 (2000) ("All together, thousands of welfare recipients are benefiting from services now offered through FBOs [faith-based organizations] and congregations working in tandem with local and state welfare agencies."). *See also* LISA M. MONTIEL, THE USE OF PUBLIC FUNDS FOR DELIVERY OF FAITH-BASED HUMAN SERVICES (2002) *available at* http://www.religionandsocialpolicy.org/docs/bibliographies/9-242002_use_of_public_funds.pdf (last visited Apr. 1, 2003).

[55] UNLEVEL PLAYING FIELD, *supra* note 8, 10-25. An audit of existing Charitable Choice provisions has identified fifteen barriers to faith-based organizations seeking federal

E. *Faith-Based and Community Initiatives*

Charitable Choice received new attention when George W. Bush made it a centerpiece of his presidential campaign platform under the title of "Faith-Based and Community Initiatives".[56] Bush embraced the policy, in part, because "traditional social programs are often too bureaucratic, inflexible and impersonal to meet the acute and complex needs of the poor" while "faith-based and community organizations are close to the needs of the people and trusted by those who hurt."[57] Such language is striking in its blend of traditionally Republican themes of privatized providers and personal responsibility with the political left's language of community empowerment.[58]

Following his election, President George W. Bush took a number of steps to review the progress of existing Charitable Choice provisions and expand its provisions under the banner of "Faith-Based and Community Initiatives." On January 29, 2001, the President signed

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support, including: pervasive suspicion about faith-based organizations, outright bans on religious participants, excessive restrictions on religious activities, limited accessibility and complexity of federal grant information, improper bias in favor of previous grantees, and requiring formal 501(c)(3) status without statutory authority. *Id.*

[56] Before his election President Bush was the 46th Governor of the State of Texas. Under his direction, Texas became the first and most aggressive implementer of Charitable Choice, and created taskforces, rewrote procurement rules, and redesigned procurement and spending programs to maximize openness to faith-based organizations. CHARITABLE CHOICE COMPLIANCE: A NATIONAL REPORT CARD, *supra* note 53.

[57] PRES. GEORGE W. BUSH, RALLYING THE ARMIES OF COMPASSION, *at* http://www.whitehouse.gov/news/reports/faithbased.html (last visited Apr. 1, 2003). By citing the work of both faith-based organizations and community organizations, Bush recognized that local non-religious organizations are important partners in the War on Poverty. Proponents do, however, believe religious groups are particularly well suited to perform the functions that fighting poverty requires and that religious character is an asset in providing government-funded services. Diller, *supra* note 33, at 502.

[58] Bush characterized his politics as "compassionate conservatism," and his efforts regarding welfare embraced the War on Poverty in a manner unlike any previous Republican administration. Diller, *supra* note 33, at 499. To understand the source of his emphasis on compassion in politics, *see* MARVIN OLASKY, RENEWING AMERICAN COMPASSION (1996). Bush's mixing of themes is evident in several of his speeches:

> Lyndon Johnson advocated a War on Poverty which had noble intentions and some enduring successes. Poor families got basic health care; disadvantaged children were given a head start in life. . . . But our work is only half done. Now we must confront the second problem: to revive the spirit of citizenship—to marshal the compassion of our people to meet the continuing needs of our nation.

Pres. George W. Bush, Remarks at the University of Notre Dame, Notre Dame, Indiana (May 21, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/05/20010521-1.html (last visited Apr. 1, 2003).

Executive Order 13199, creating the White House Office of Faith-Based and Community Initiatives (White House OFBCI).[59] The office was charged with the responsibility of coordinating an expansion of Charitable Choice provisions to the fullest extent permissible by law.[60]

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[59] Exec. Order No. 13,199 § 1, 66 Fed. Reg. 8499 (Jan. 29, 2001). The Order decreed:

> There is established a White House Office of Faith-Based and Community Initiatives (White House OFBCI) within the Executive Office of the President that will have lead responsibility in the executive branch to establish policies, priorities, and objectives for the Federal Government's comprehensive effort to enlist, equip, enable, empower, and expand the work of faith-based and other community organizations to the extent permitted by law.

Id.

[60] Exec. Order No. 13,199 § 3, 66 Fed. Reg. 8499, 8499-8500 (Jan. 29, 2001). The specific responsibilities of the White House OFBCI were:

> (a)to develop, lead, and coordinate the Administration's policy agenda affecting faith-based and other community programs and initiatives, expand the role of such efforts in communities, and increase their capacity through executive action, legislation, Federal and private funding, and regulatory relief;
>
> (b)to ensure that Administration and Federal Government policy decisions and programs are consistent with the President's stated goals with respect to faith-based and other community initiatives;
>
> (c)to help integrate the President's policy agenda affecting faith-based and other community organizations across the Federal Government;
>
> (d)to coordinate public education activities designed to mobilize public support for faith-based and community nonprofit initiatives through volunteerism, special projects, demonstration pilots, and public-private partnerships;
>
> (e)to encourage private charitable giving to support faith-based and community initiatives;
>
> (f)to bring concerns, ideas, and policy options to the President for assisting, strengthening, and replicating successful faith-based and other community programs;
>
> (g)to provide policy and legal education to State, local, and community policymakers and public officials seeking ways to empower faith-based and other community organizations and to improve the opportunities, capacity, and expertise of such groups;
>
> (h)to develop and implement strategic initiatives under the President's agenda to strengthen the institutions of civil society and America's families and communities;
>
> (i)to showcase and herald innovative grassroots nonprofit organizations and civic initiatives;
>
> (j)to eliminate unnecessary legislative, regulatory, and other bureaucratic barriers that impede effective faith-based and other community efforts to solve social problems;
>
> (k)to monitor implementation of the President's agenda affecting faith-based and other community organizations; and
>
> (l)to ensure that the efforts of faith-based and other community organizations meet high standards of excellence and accountability.

Id.

The directorship of the new White House OFBCI fell to an unlikely candidate, John DiIulio, a professor at the University of Pennsylvania.[61]

To assist in the efforts of the White House Office, President Bush issued Executive Order 13198, creating an Office of Faith-Based and Community Initiatives (Department OFBCI's) in each of five cabinet level departments: the Department of Education, the Department of Labor, the Department of Health and Human Services, the Department of Housing and Urban Development, and the Department of Justice.[62] The offices were charged with the task of coordinating efforts to eliminate "regulatory, contracting and other programmatic obstacles" that prevented faith-based and community organizations from gaining full access to government funds.[63] The Department OFBCI's were instructed to increase the involvement of faith-based organizations in existing programs, develop new programs, and publicize available funding opportunities.[64] The Department OFBCI's were also

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[61] After serving in office for six months, Mr. DiIulio was succeeded by Jim Towey on January 31, 2002. Susan Milligan & Mary Leonard, *Faith-Initiative Chief Quits as Debate on Plan Heats Up*, BOSTON GLOBE, Aug. 18, 2001, at A1; Dana Milbank, *New Director for Faith-Based Office*, WASH. POST, Feb. 1, 2002, at A6.

[62] Exec. Order No. 13,198 § 1, 66 Fed. Reg. 8497 (Jan. 29, 2001). The Executive Order directed that, "The Attorney General, the Secretary of Education, the Secretary of Labor, the Secretary of Health and Human Services, and the Secretary of Housing and Urban Development shall each establish within their respective departments a Center for Faith-Based and Community Initiatives (Center)." *Id.* On December 12, 2002, additional Centers for Faith-Based and Community Initiatives were created at the Department of Agriculture and the Agency for International Development. Exec. Order No. 13,280 § 1, 67 Fed. Reg. 77,145 (Dec. 12, 2002).

[63] Exec. Order No. 13,198 § 2, 66 Fed. Reg. 8497 (Jan. 29, 2001). The Executive Order proclaims, "The purpose of the executive department Centers will be to coordinate department efforts to eliminate regulatory, contracting, and other programmatic obstacles to the participation of faith-based and other community organizations in the provision of social services." *Id.*

[64] Exec. Order No. 13,198 § 3, 66 Fed. Reg. 8497, 8497-98 (Jan. 29, 2001). The responsibilities of each Office were to:

> (b) coordinate a comprehensive departmental effort to incorporate faith-based and other community organizations in department programs and initiatives to the greatest extent possible;
>
> (c) propose initiatives to remove barriers identified pursuant to section 3(a) of this order, including but not limited to reform of regulations, procurement, and other internal policies and practices, and outreach activities;
>
> (d) propose the development of innovative pilot and demonstration programs to increase the participation of faith-based and other community organizations in Federal as well as State and local initiatives; and
>
> (e) develop and coordinate department outreach efforts to disseminate information more effectively to faith-based and other community

responsible for conducting an audit of the status of existing Charitable Choice provisions and evaluating the institutional structures that prevented full access to these programs.[65]

A report based on these findings revealed continued systemic bias against faith-based and community organizations.[66] Statistics were equally bleak for formula grants to state and local governments that were then contracted out to local organizations.[67] Despite these

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organizations with respect to programming changes, contracting opportunities, and other department initiatives, including but not limited to Web and Internet resources.

Id.

[65] Exec. Order No. 13,198 § 3(a), 66 Fed. Reg. 8497, 8498 (Jan. 29, 2001). Each Department OFBCI was to coordinate with the White House OFBCI to conduct:

> [A] department wide audit to identify all existing barriers to the participation of faith-based and other community organizations in the delivery of social services by the department, including but not limited to regulations, rules, orders, procurement, and other internal policies and practices, and outreach activities that either facially discriminate against or otherwise discourage or disadvantage the participation of faith-based and other community organizations in Federal programs.

Id.

[66] The report, UNLEVEL PLAYING FIELD, was published in August 2001. *See supra* note 8. It showed programs least likely to provide direct grants to faith-based and community providers of social services were under the Departments of Justice and Education. *Id.* at 6. The Department of Justice's Office of Justice Programs estimated that in FY 2001 it would award only .3% of its total discretionary funds to faith-based organizations ($1.9 million of $626.7 million) while community-based programs would receive 7.5% of available funds ($47.2 million). *Id.* In FY 2000, the Department of Education allocated 2% of its discretionary grants in eleven programs (25 of 1091 grants) to faith-based and community organizations. *Id.* The percentage was similar in FY 1999, and slightly less in FY 1997 and FY 1998. *Id.* The Departments of Housing and Urban Development and Health and Human Services faired somewhat better in providing access. *Id.* at 7. HUD's Continuum of Care program for the homeless reported 399 faith-based organizations won approximately 16% of available funds in FY 2000 ($139 million of $896 million). *Id.* Health and Human Services' Adolescent Family Life Program, which funds abstinence education to combat teen pregnancy, gave 21% of the funds it provided to non-profits to faith-based organizations. *Id.* The Department of Labor's performance was mixed, with some programs showing improved access, while others were quite limited. *Id.*. The Department of Labor's Youth Opportunity Program, which underwrites employment and job preparation services, provided 20% of its funds to community organizations in FY 2000 ($43 million of $220 million), but only 3% to faith-based groups ($6.7 million). *Id.* Despite efforts to include organizations not traditionally included for Welfare-to-Work services in FY 1998 and 1999, only 2% of the 1,800 applications were from faith-based organizations, and these groups won 3% of the awards. *Id.*

[67] For example, "The Office of Justice Programs at DOJ estimates that in FY 2001 only about 0.3% of the formula grant funds – or one-third of 1%-will go to faith-based providers ($8.1 million of $2.7 billion total) and only about 0.2% to community-based groups ($5.4

problems, successes in certain states demonstrated partnerships between government and faith-based programs could work when state governments overcame institutional obstacles and took affirmative steps to implement the policy.[68]

Parallel to the White House's efforts, Congressional leaders took up the cause of faith-based initiatives, and on March 29, 2001, Rep. J. C. Watts, Jr., Rep. Tony Hall and Rep. Dennis Hastert introduced House Bill 7, the Community Services Act of 2001.[69] Over the next several months, supporters of faith-based initiatives would shepherd the legislation through a number of constitutional and political issues.[70]

III. Constitutional Considerations

The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[71] When drafting legislation to authorize the provision of government aid to faith-based social service providers, the supporters of House Bill 7 needed to address how the First Amendment affected three major issues: direct funding of faith-based social programs;[72] indirect funding of such programs;[73] and whether faith-based organizations could be exempt from federal employment laws regarding religious-based hiring.[74] Decades of Supreme Court decisions have shaped these questions, and an analysis of the relevant case law demonstrates how legislation could be drafted to operate within the Court's interpretations.[75]

A. *Direct Funding*

The Supreme Court has never found unconstitutional a government

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million)." UNLEVEL PLAYING FIELD, *supra* note 8, at 7.

68 CHARITABLE CHOICE COMPLIANCE: A NATIONAL REPORT CARD, *supra* note 53.

69 Faith-Based and Community Initiatives are addressed in Title II of the Community Solutions Act of 2001, which would amend Title XXIV of the Revised Statutes of the United States by inserting the new provisions "after section 1990 (42 U.S.C. 1994)." H.R. 7, 107th Cong. § 201 (2001).

70 *See infra* Sections III and IV for an analysis of these issues.

71 U.S. CONST. amend. I, § 1.

72 *See infra* Section III.A.

73 *See infra* Section III.B.

74 *See infra* Section III.C.

75 *See infra* Section IV for an analysis of how the legislation was drafted in response to these issues.

program that provided funding to benefit social services or health care.[76] As early as 1899, the Court, in *Bradfield v. Roberts*, rejected the argument that every form of financial aid to a church-sponsored activity violates the Religion Clauses of the First Amendment.[77]

Modern Establishment Clause history began in 1947 with *Everson v. Board of Education*, which examined the constitutionality of a New Jersey statute authorizing school districts to provide for the transportation of pupils to and from schools, whether public, private or religious.[78] The Court embraced a strict separation interpretation of the Establishment Clause, declaring it could not approve "the slightest breach" in the "high and impregnable" wall of separation between church and state.[79] Yet the statute was upheld as constitutional because

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[76] Bowen v. Kendrick, 487 U.S. 589, 609 (1988) ("This Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.").

[77] Bradfield v. Roberts, 175 U.S. 291 (1899) (upholding a federal construction grant to a hospital operated by a Catholic religious order). The grant did not violate the Establishment Clause because the hospital was incorporated under an act of Congress, its property was acquired in its own name, and its business was managed independent of any ecclesiastical authority. *Id.* at 298-99. The hospital was therefore not a religious organization, but rather "a secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church." *Id.*

[78] Everson v. Bd. of Ed., 330 U.S. 1 (1947). The statute in question provided:

> When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part.

N.J. REV. STAT. § 18:14-8 (1941). From a historical perspective, *Everson* marked a shift in First Amendment theory from a permissive policy of government collaboration with Protestant institutions to a strict separation approach. Stanley Carlson-Thies, Address at States and Faith-Based Organizations as Allies in Human Services: Charitable Choice and Other Innovations (Aug. 16, 2001). The change came in response to an increased awareness of religious diversity in post-World War II American society. *Id.*

[79] *Everson*, 330 U.S. at 18. The Court was strident in its separation of church and state, asserting:

> The "establishment of religion" clause of the First Amendment means at least this: 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 from they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Id. at 15-16.

transportation funds were intended to promote a public purpose [80] and were provided on a religion neutral basis.[81]

While the *Everson* approach allowed government funds to benefit religion in certain circumstances, the Court limited the scope of these benefits the following year in *McCollum v. Board of Education*, which considered a Champaign County, Illinois program that allowed private religious groups to conduct religion classes at public schools during regular school hours.[82] The Court used a strict separation approach to analyze the case.[83] It found the policy objectionable because it both allowed tax supported public schools to disseminate religious doctrine and gave sectarian groups invaluable aid by providing religious instruction through the state's compulsory public school machinery.[84]

Four years later, in *Zorach v. Clauson*, the Court approved a New York City Board of Education policy that allowed "released time" for students to attend religious classes outside school.[85] The Court rejected

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[80] *Id.* at 6. The Court found the New Jersey Legislature "decided that a public purpose will be served by using tax-raised funds to pay the bus fares of all school children, including those who attend parochial schools." *Id.*

[81] *Id.* at 18. The Court found that while the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers," it does "not require the state to be their adversary," since governmental power "is no more to be used so as to handicap religions, than it is to favor them." *Id.*

[82] McCollum v. Bd. of Educ. of Sch. Dist. No. 71., 333 U.S. 203 (1948). Under the program, "religious teachers, employed by private religious groups, were permitted to come weekly into the school buildings during the regular hours set apart for secular teaching, and then and there for a period of thirty minutes substitute their religious teaching for the secular education provided under the compulsory education law." *Id.* at 205.

[83] *Id.* at 212. The Court clearly stated its position regarding strict separation:

> [T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment had erected a wall between Church and State which must be kept high and impregnable.

Id.

[84] *Id.* The Court found the Illinois program violated these principles because "not only are the state's tax supported public school buildings used for the dissemination of religious doctrines," but it also "affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery." *Id.* The Court therefore concluded "[t]his is not separation of Church and State." *Id.*

[85] Zorach v. Clauson, 343 U.S. 306 (1952). The policy permitted:

> [A]bsence during school hours for religious observance and education outside the school grounds (par. 1), where conducted by or under the control of a duly constituted religious body (par. 2). Students must obtain written requests from their parents or guardians to be excused for such training (par. 1), and must

arguments that the First Amendment requires courts to separate church and state so strictly that it becomes "hostile to religion."[86] It instead determined the school policy was constitutional, since adjusting the schedule of public events merely "accommodates the public service" to religious needs.[87]

In 1971, a test to analyze the constitutionality of various programs was developed in *Lemon v. Kurtzman*, which invalidated school programs in Pennsylvania and Rhode Island that provided salary supplements to teachers of secular subjects in parochial schools.[88] The three-part *Lemon* test required, "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster 'an excessive government entanglement with religion.'"[89] The

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> register for the training and have a copy of their registration filed with the public school authorities (par. 3). Weekly reports of their attendance at such religious schools must be filed with their principal or teacher (par. 4). Only one hour a week is to be allowed for such training, at the end of a class session (par. 5), and where more than one religious school is conducted, the hour of release shall be the same for all religious schools (par. 6).

N.Y. EDUC. LAW, c. 16, § 3210, subdiv. 1(b), *quoted in Zorach*, 343 U.S. at 303.

[86] *Zorach*, 343 U.S. at 314. The Court found "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence," finding instead that an overly strict separation standard:

> [W]ould be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person.

Id.

[87] *Id.* at 313-14. The Court recognized "[w]e are a religious people whose institutions presuppose a Supreme Being," and when the state "encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions" because it "respects the religious nature of our people and accommodates the public service to their spiritual needs." *Id.*

[88] Lemon v. Kurtzman, 403 U.S. 602 (1971). Under the Rhode Island statute, the state would directly pay teachers in nonpublic elementary schools a supplement of 15% of their annual salary. R.I. GEN. LAWS § 16-51-1 *et seq.* (1970), *quoted in Lemon,* 403 U.S. at 607. The Pennsylvania statute provided financial support to nonpublic elementary and secondary schools by reimbursing the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. PA. STAT. ANN., tit. 24, §§ 5601-5609 (Supp. 1971), *quoted in Lemon,* 403 U.S. at 609.

[89] *Lemon*, 403 U.S. at 612-13. While the principles are called "tests" they are not necessarily empirical standards. As the Court noted in *Tilton v. Richardson* :

> There are always risks in treating criteria discussed by the Court from time to

programs failed the "excessive entanglement" part of the *Lemon* test because they required state monitoring.[90]

Following the reasoning in *Lemon*, the Court in *Tilton v. Richardson*, which was decided the same day as *Lemon*, validated grants that went to church-related colleges and universities for the construction of academic facilities under the Higher Education Facilities Act of 1963.[91] The Court upheld the Act because it provided aid to schools on a neutral basis while prohibiting its use for religious purposes.[92] It is also interesting to note that while the Court considered the restrictions and surveillance necessary to ensure teacher compliance in *Lemon* to be excessive, the prohibitions on the use of facilities for religious purposes in *Tilton* were not.[93]

> time as 'tests' in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired.

Tilton v. Richardson, 403 U.S. 672, 678 (1971). In doing so, the Court admitted its limitations, declaring "candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication." *Id.*

[90] *Lemon*, 403 U.S. at 616. The Court determined:

> The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid. Although the District Court found that concern for religious values did not inevitably or necessarily intrude into the content of secular subjects, the considerable religious activities of these schools led the legislature to provide for careful governmental controls and surveillance by state authorities in order to ensure that state aid supports only secular education.

Id. The Court therefore concluded "the very restrictions and surveillance necessary to ensure that teachers play a strictly non-ideological role give rise to entanglements between church and state" and that the statutes "foster this kind of relationship." *Id.* at 620.

[91] *Tilton*, 403 U.S. at 676. The legislation at issue was the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 711-721 (repealed 1972).

[92] *Tilton*, 403 U.S. at 676-77. The Court declared:

> We are satisfied that Congress intended the Act to include all colleges and universities regardless of any affiliation with or sponsorship by a religious body. . . . Certain institutions, for example, institutions that are neither public nor nonprofit, are expressly excluded, and the Act expressly prohibits use of the facilities for religious purposes.

Id.

[93] The reason for this apparent disparity is attributable to the "significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." *Id.* at 685. The Court noted that "[t]he 'affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age.'" *Id.* at 685-86, (quoting Walz v. Tax Comm'n, 397 U.S. 664, 671 (1970)). In contrast,

The *Lemon* test provided clarity to the difficult question of government aid to religious organizations, but debate surrounding its importance continued, prompting important changes to the test.[94]

The 1988 case *Bowen v. Kendrick*, which upheld a program that provided federal funds to faith-based organizations for counseling teenagers on adolescent sexuality, marked an important shift in the Court's analysis of programs sponsored by faith-based organizations.[95] The Court used the *Lemon* test in its analysis of the program.[96] While the program increased the role of religious organizations in providing social services, the fact that it was designed to combat the social and economic problems caused by teenage pregnancy satisfied the requirement of a secular legislative purpose.[97] Because funds were

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"college students are less impressionable and less susceptible to religious indoctrination," and "[t]he skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations." *Tilton*, 403 U.S. at 686.

[94] *See, e.g.*, Jesse Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680-81 (1980); Antonin Scalia, *On Getting It Wrong By Making It Look Easy*, *in* PRIVATE SCHOOLS AND THE PUBLIC GOOD: POLICY ALTERNATIVES FOR THE EIGHTIES 173 (Edward Gaffney ed., 1981); John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847, 847-48 (1984); John H. Garvey, *Another Way of Looking at School Aid*, 1985 SUP. CT. REV. 61, 67; LEONARD LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 128-29 (1986); Thomas Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693 (1997); Marci Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 824-25 (1999).

[95] Bowen v. Kendrick, 487 U.S. 589 (1988). The Adolescent Family Life Act (AFLA) [Adolescent Family Life Act, Pub. L. 97-35, 95 Stat. 578, 42 U.S.C. §300z *et seq.*, (1982 ed. and Supp. IV)] provided direct grants to organizations "for services and research in the area of premarital adolescent sexual relations and pregnancy," and was intended to reduce the "severe adverse health, social, and economic consequences" of pregnancy and childbirth among unmarried teenagers. S. REP. NO. 97-161, at 1 (1981), *quoted in Bowen*, 487 U.S. at 593.

[96] The Court applied the *Lemon* test, noting:

> Under the *Lemon* standard, which guides '[t]he general nature of our inquiry in this area,' Mueller v. Allen, 463 U.S. 388, 394 (1983), a court may invalidate a statute only if it is motivated wholly by an impermissible purpose, Lynch v. Donnely, 465 U.S. 668, 680 (1984); Stone v. Graham, 449 U.S. 39, 41 (1980), if its primary effect is the advancement of religion, Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708 (1985), or if it requires excessive entanglement between church and state, *Lemon*, 403 U.S. 602, 613 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970).

Bowen, 487 U.S. at 602.

[97] *Bowen*, 487 U.S. at 603-04. The Court recognized:

> Congress expressly intended to expand the services already authorized by Title VI, to insure the increased participation of parents in education and support

distributed on a neutral basis,[98] not directed to pervasively sectarian institutions,[99] and sufficient safeguards existed to prevent the diversion of funds for sectarian purposes,[100] the Court found the program did not

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> services, to increase the flexibility of the programs, and to spark the development of new, innovative services. S. REP. NO. 97-161, 7-9 (1981). These are all legitimate secular goals that are furthered by the AFLA's additions to Title VI, including the challenged provisions that refer to religious organizations.

Id. It therefore concluded, "[t]here simply is no evidence that Congress' 'actual purpose' in passing the AFLA was one of 'endorsing religion.'" *Id.* (citing Edwards v. Aguillard, 482 U.S. 578, 589-94 (1987)). The Court further found, "no reason to conclude that the AFLA serves an impermissible religious purpose simply because some of the goals of the statute coincide with the beliefs of certain religious organizations." *Bowen*, 487 U.S. at 589 n.8.

[98] *Bowen*, 487 U.S. at 608. The Court recognized the neutral stance the AFLA took regarding faith-based providers, stating:

> The AFLA defines an "eligible grant recipient" as a "public or nonprofit private organization or agency" which demonstrates the capability of providing the requisite services. § 300z-1(a)(3). As this provision would indicate, a fairly wide spectrum of organizations is eligible to apply for and receive funding under the Act, and nothing on the face of the Act suggests it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution. *See* S. REP. NO. 97-161, p. 16 ("Religious affiliation is not a criterion for selection as a grantee . . . ").

Id.

[99] *Bowen*, 487 U.S. at 610. The Court found "nothing on the face of the AFLA indicates that a significant proportion of the federal funds will be disbursed to 'pervasively sectarian' institutions." *Id.* It further noted that arguments regarding the funding of "pervasively sectarian organizations" were undercut by the AFLA's facially neutral grant requirements, the wide spectrum of public and private organizations which are capable of meeting the AFLA's requirements, and the fact that, of the eligible religious institutions, many will not deserve the label of "pervasively sectarian." *Id.* The neutrality of the program was also borne out in practice. In fiscal year 1986, $10.7 million was awarded under the AFLA to a total of 86 organizations, of which $3.3 million went to twenty-three religiously affiliated grantees. *Id.* at 611 n.12. Of this $3.3 million, only $1.3 million went to the thirteen projects cited by the District Court for constitutional violations. *Id.*

[100] *Bowen*, 487 U.S. at 615. While there were no explicit provisions prohibiting the use of funds for sectarian purposes, the Court found a regulatory scheme in the overall effect of the program's reporting requirements:

> [T]he AFLA requires each grantee to undergo evaluations of the services it provides, § 300z-5(b)(1), and also requires grantees to "make such reports concerning its use of Federal funds as the Secretary may require," § 300z-5(c). The application requirements of the Act . . . require potential grantees to disclose in detail exactly what services they intend to provide and how they will be provided. § 300z-5(a). These provisions, taken together, create a mechanism whereby the Secretary can police the grants that are given out under the Act to ensure that federal funds are not used for impermissible purposes.

Id.

have the primary effect of advancing religion. In a shift in its analysis in *Lemon* and *Tilton*, the Court ruled the monitoring required by AFLA did not constitute an excessive government entanglement with religion because the organizations that received benefits were not "pervasively sectarian."[101]

Over the following years, the third prong of the *Lemon* test continued to raise concerns within the Court.[102] In 1997, the Court, in *Agostini v. Felton*, addressed these concerns when considering a program that allowed government-funded tutors to teach special education classes in parochial schools.[103] In its decision, the Court both affirmed the *Lemon* test and altered it by changing the criteria by which the various prongs of the test were evaluated.[104] The most important of these changes was the Court's merging of the "primary effect" and

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[101] *Bowen*, 487 U.S. at 615-17. Monitoring was required to "ensure that public money is to be spent in the way that Congress intended and in a way that comports with the Establishment Clause" and included "a review of . . . the educational materials" and visits to "the clinics or offices where AFLA programs are being carried out." *Id.* The Court found, however, that "this type of grant monitoring does not amount to 'excessive entanglement,' at least in the context of a statute authorizing grants to religiously affiliated organizations that are not necessarily 'pervasively sectarian.'" *Id.* *See supra* note 90 for an analysis of monitoring in *Lemon*, and note 93 for the issue in *Tilton*.

[102] *See, e.g., Lemon*, 403 U.S. 602, 666-68 (1971) (White, J., concurring and dissenting). *See also* Lynch v. Donnely, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 109-10 (1985) (Rehnquist, J., dissenting); Aguilar v. Felton, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting).

[103] Agostini v. Felton, 521 U.S. 203 (1997). The program was authorized under Title I of the Elementary and Secondary Education Act of 1965, 79 Stat. 27, as modified, 20 U.S.C. § 6301 *et seq., quoted in Agostini*, 521 U.S. at 209.

[104] *Agostini*, 521 U.S. at 222. The Court noted, "the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since *Aguilar*." *Id.* For example:

> [W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged. *See* Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481, 485-86 (1986); Bowen v. Kendrick, 487 U.S. 589, 602-04 (1988) (concluding that Adolescent Family Life Act had a secular purpose); Board of Educ. Of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226, 248-49 (1990) (concluding that Equal Access Act has a secular purpose); cf. Edwards v. Aguillard, 482 U.S. 578 (1987) (striking down Louisiana law that required creationism to be discussed with evolution in public schools because the law lacked a legitimate secular purpose).

Id. at 222-23. The Court did, however, acknowledge a change had occurred in "our understanding of the criteria used to assess whether aid to religion has an impermissible effect." *Id.* at 223.

"excessive entanglement" prongs into a single question of "effect"[105] and the establishment of three criteria to gauge whether this effect either impermissibly advanced religion or constituted an endorsement of religion.[106] By incorporating this change, the Court relaxed its standard for government involvement, noting that involvement between church and state was "inevitable" and only became objectionable when it was "excessive."[107] After considering the program according to the revised *Lemon* test, the Court found the program constitutional.[108]

The 2000 case of *Mitchell v. Helms*, which upheld a program that allowed state-owned computers to be used in parochial schools, demonstrates the Court's application of the *Agostini/Lemon* test.[109] In

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[105] *Agostini*, 521 U.S. at 232-33. The Court found it "simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect," arguing:

> [W]e have looked to "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Lemon*, [403 U.S.] at 615. Similarly, we have assessed a law's "effect" by examining the character of the institutions benefited (*e.g.*, whether the religious institutions were "predominantly religious"), *see* Meek v. Pittenger, 421 U.S. 349, 363-64 (1975); cf. Hunt v. McNair, 413 U.S. 734, 743-44 (1973), and the nature of the aid that the State provided (*e.g.*, whether it was neutral and nonideological), *see Everson*, 330 U.S. at 18; Wolman v. Walter, 433 U.S. 229, 244 (1977). Indeed, in *Lemon* itself, the entanglement that the Court found "independently" to necessitate the program's invalidation also was found to have the effect of inhibiting religion. *See, e.g.*, 403 U.S. at 620 ("[W]e cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion . . .").

Id.

[106] *Agostini*, 521 U.S. at 234. The three primary criteria were whether the action (1) resulted in government indoctrination, (2) defined its recipients by reference to religion, or (3) created an excessive entanglement. *Id.* ("New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement."). The criteria can be used to determine both whether the effect impermissibly advanced religion and whether it represented an endorsement of religion. *Id.* at 223, 235.

[107] *Id.* at 233 ("Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, *see Lemon*, 403 U.S. at 614, and we have always tolerated some level of involvement between the two. Entanglement must be "excessive" before it runs afoul of the Establishment Clause.").

[108] *Id.* at 234-35 ("To summarize, New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.").

[109] Mitchell v. Helms, 530 U.S. 793 (2000). The program in question was Chapter 2 of

her plurality opinion, Justice O'Connor, joined by Justice Breyer, rejected efforts to have the Court take a broader approach when analyzing direct funding issues.[110] She instead relied upon the two-part test articulated in *Agostini*: "'whether the government acted with the purpose of advancing or inhibiting religion' and 'whether the aid has the 'effect' of advancing or inhibiting religion.'"[111]

The Court restricted its analysis to a consideration of whether the program defined recipients with reference to religion or resulted in

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Title I of the Elementary and Secondary Education Act of 1965 (ESEA), §§ 6001-6403, as amended, 20 U.S.C.A. §§7301-7373, which distributes funds to state and local governmental agencies, who in turn lend educational materials and equipment to public and private schools. *Mitchell*, 530 U.S. at 801-02.

[110] In a plurality judgment, the concurrence in judgment on the narrowest grounds is controlling. Marks v. United States, 430 U.S. 188, 193 (1977). Justice O'Connor summarized the position of Justice Thomas' plurality as follows:

> [T]he plurality announces a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government school aid programs. Reduced to its essentials, the plurality's rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content. The plurality also rejects the distinction between direct and indirect aid, and holds that the actual diversion of secular aid by a religious school to the advancement of its religious mission is permissible.

Mitchell, 530 U.S. at 837 (O'Connor, J., plurality opinion) (construing *Mitchell*, 530 U.S. at 809-14 (Thomas, J., plurality opinion)). Justice O'Connor's objections to this position were quite specific:

> First, the plurality's treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school aid programs. Second, the plurality's approval of actual diversion of government aid to religious indoctrination is in tension with our precedents and, in any event, unnecessary to decide the instant case.

Mitchell, 530 U.S. at 837-38 (O'Connor, J., plurality opinion) (construing *Mitchell*, 530 U.S. at 809-14 (Thomas, J., plurality opinion)).

[111] *Mitchell*, 530 U.S. at 837-38 (O'Connor, J., plurality opinion) (quoting *Agostini*, 521 U.S. at 222-23). Justice O'Connor also recognized the three part "effect" test articulated in *Agostini*:

> [W]e articulated three primary criteria to guide the determination whether a government-aid program impermissibly advances religion: (1) whether the aid results in governmental indoctrination, (2) whether the aid program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion. [*Agostini*, 521 U.S.] at 234. ... [T]he same criteria could be reviewed to determine whether a government-aid program constitutes an endorsement of religion. [*Agostini*, 521 U.S.] at 235.

Mitchell, 530 U.S. at 837-38 (O'Connor, J., plurality opinion).

governmental indoctrination.[112] It first concluded that the statute was neutral regarding religion because the program allocated aid according to "wholly neutral and secular criteria."[113] In making this analysis, the Court refused to consider statistics regarding the percentage of aid passing to religious schools, concluding it was not "willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid."[114]

An important innovation in *Mitchell* was the establishment of a "presumption of good faith" with regard to aid recipients.[115] The Court rejected claims that the distribution of aid would automatically result in abuse by religious institutions, finding instead that, "in the absence of evidence showing that teachers were actually using the Title I aid to inculcate religion, we would presume that the instructors would comply with the program's secular restrictions."[116] A proposed "divertibility rule" which would automatically exclude certain classes of potentially divertible aid was similarly dismissed, since "only the actual diversion of aid was constitutionally impermissible."[117] Because of the presumption of good faith, the Court also found "no need for *pervasive* monitoring" of programs.[118] Instead, the Court found existing safeguards, which included signed assurances from non-public schools and monitoring visits to each site every three years, to be sufficient.[119]

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[112] *Mitchell*, 530 U.S. at 845 (O'Connor, J., plurality opinion). The Court did not consider other issues because the Respondents neither questioned the secular purpose of the program nor argued it created an excessive entanglement. *Id.*

[113] *Id.* at 846 (O'Connor, J., plurality opinion).

[114] *Id.* at 848 (O'Connor, J., plurality opinion) (quoting *Agostini*, 521 U.S. at 229).

[115] *Mitchell*, 530 U.S. at 863-64 (O'Connor, J., plurality opinion) ("it is entirely proper to presume that these school officials will act in good faith."). *See also Tilton*, 403 U.S. 672, 679 (1971) ("A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. . . . But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional.").

[116] *Mitchell*, 530 U.S. at 847 (O'Connor, J., plurality opinion) (construing *Agostini*, 521 U.S. at 223-24, 226-27).

[117] *Mitchell*, 530 U.S. at 857 (O'Connor, J., plurality opinion).

[118] *Id.* at 861 (O'Connor, J., plurality opinion). The Court concluded that "because we had 'abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that *pervasive* monitoring of Title I teachers is required.'" *Id.* (quoting *Agostini*, 521 U.S. at 234) (emphasis in original).

[119] *Mitchell*, 530 U.S. at 861-62 (O'Connor, J., plurality opinion). Existing monitoring procedures found some violations did exist, but the Court found "the presence of so few

As the Court's thinking now stands, a government program that provides funds directly to faith-based providers must first establish that it has a secular purpose.[120] When evaluating this purpose, the Court will not consider the percentage of aid that passes to faith-based providers.[121] It will also presume programs will comply with government restrictions,[122] though the actual diversion of aid will still have constitutional significance.[123]

The Court will also require a program to demonstrate it does not have the effect of advancing or inhibiting religion.[124] The program may not define its recipients by reference to religion, nor use government funds for religious instruction and worship, nor create excessive entanglement.[125] The Court will regard a certain level of involvement between government and religion as inevitable,[126] but will object if the program involves providers who are "pervasively sectarian."[127]

B. *Indirect Funding*

A second question when considering government involvement with faith-based organizations is the issue of indirect funding.[128] Such funding is not new, and dates as far back as the G.I. Bill, which was established in 1944.[129] The Supreme Court has considered indirect

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examples over a period of at least 4 years . . . tends to show not that the 'no-diversion' rules have failed, but that they have worked." *Id.* at 866. The Court also found these violations to be *de minimis*. *Id.* For example, a routine examination of a school library in Jefferson Parrish discovered 191 religious library books had been purchased with government funds, but these books constituted "less than 1% of the total allocation of Chapter 2 aid to Jefferson Parrish." *Id.* Justice O'Connor declared she knew of "no case in which we have declared an entire aid program unconstitutional on Establishment Clause grounds solely because of violations on the minuscule scale of those at issue here." *Id.*

120 *Mitchell*, 530 U.S. at 846 (O'Connor, J., plurality opinion).

121 *Id.*

122 *Id.* at 847 (O'Connor, J., plurality opinion) (construing *Agostini*, 521 U.S. at 223-24, 226-27).

123 *Mitchell*, 530 U.S. at 857 (O'Connor, J., plurality opinion).

124 *Agostini*, 521 U.S. at 232-33.

125 *Agostini*, 521 U.S. at 234; *Mitchell*, 530 U.S. at 837-38.

126 *Agostini*, 521 U.S. at 233.

127 *Bowen*, 487 U.S. at 615-17.

128 According to House Bill 7, indirect assistance are funds received "through a voucher, certificate, or other form of disbursement." H.R. 7, 107th Cong. § 201, § 1991(l) (2001).

129 The G.I. Bill covered tuition costs through a voucher system while allowing veterans to attend the college of their choice, whether public or private, sectarian or non-sectarian. Serviceman's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284, 288-89 (1944).

assistance four times, and has always found it to be constitutional, even when a provider is "faith-saturated".[130]

In 1983, the Supreme Court, in *Mueller v. Allen*, examined a Minnesota program that authorized tax deductions for certain educational expenses, including private religious school tuition.[131] The Court found little reason to question the secular purpose of the program, noting its "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute."[132] It was also found to neither advance nor inhibit religion, because the deduction was available to all parents without distinguishing among the schools their children attended[133] and benefits were provided to "so broad a spectrum of groups."[134]

The Court distinguished the program from those that were directly funded, noting that funds became available to religious schools only through the "numerous, private choices of individual parents of school-age children."[135] Because the aid flowed to religious organizations through the decisions of individuals, and not the state, there could be no improper endorsement of religion or a particular religion.[136] The Court refused to give weight to the fact that a majority of beneficiaries directed the aid to religious institutions, arguing it would be improper to

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The current program provides for direct payments to eligible servicemen and women. 38 U.S.C. § 3014 (2003).

130 *See* Mueller v. Allen, 463 U.S. 388, 399 (1983); Witters v. Washington Dept. of Serv. for the Blind, 474 U.S. 481, 487 (1986); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993); Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2473 (2002). *See supra* note 20 for a definition of a "faith-saturated" organization.

131 *Mueller*, 463 U.S. 388. The challenged statute was MINN. STAT. § 290.09(22), ch. 268, art. 1, § 127 (repealed 1987). Of the beneficiaries, 96% had children in private religious schools. *Mueller*, 463 U.S. at 401.

132 *Mueller*, 463 U.S. at 394-95. Governmental assistance programs have consistently survived this element of the *Lemon* test, even when they have run afoul of others. *Id. Mueller*, 463 U.S. at 394. *See also Lemon*, 403 U.S. at 91; Meek v. Pittenger, 421 U.S. 349, 363 (1975); Wolman v. Walter, 433 U.S. 229, 236 (1977).

133 *Mueller*, 463 U.S. at 394-95 ("[T]he deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend non-sectarian private schools or sectarian private schools.").

134 *Id.* at 398-99 (citing Widmar v. Vincent, 454 U.S. 263, 274 (1981)).

135 *Id.* at 399.

136 *Id.* at 399 ("Where . . . aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of State approval,' *Widmar*, [454 U.S.] at 274, can be deemed to have been conferred on any particular religion, or on religion generally.").

judge the constitutionality of a facially neutral law on the basis of how beneficiaries used the aid.[137]

Also decided in 1983 was the case of *Witters v. Washington Department of Services for the Blind*, which considered the Washington State Commission for the Blind's denial of financial vocational assistance to a blind student pursuing a degree in bible studies at a Christian college.[138] The Court found the "mere circumstance" that neutrally available state aid helped to pay for religious education did not "confer any message of state endorsement of religion."[139] The program made funds available "without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited," and therefore demonstrated no preference regarding religion.[140] Furthermore, the aid in question did not constitute an impermissible funding of religion because "the vocational assistance provided . . . is paid directly to the student, who transmits it to the educational institution of his or her choice" and "[a]ny aid provided . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients."[141] For these reasons, the state's funding of Mr. Witters' religious studies was constitutional.[142]

In the 1993 case *Zobrest v. Catalina Foothills School District*, the Court applied the principles of *Mueller* and *Witters* to the question of whether a sign-language interpreter could be provided to a deaf child in a religious school.[143] The Court noted that the aid in question was

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[137] *Id.* at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.").

[138] *Witters*, 474 U.S. at 483 (Mr. Witters was pursuing his education for a career "as a pastor, missionary, or youth director"). The financial aid was available under Wash. Rev. Code § 74.16.181, ch. 194, § 30 (repealed 1983).

[139] *Witters*, 474 U.S. at 488-89 ("Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion."). *See also* Lynch v. Donnelly, 465 U.S. 668, 688 (1984).

[140] *Witters*, 474 U.S. at 488 (quoting Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 782-83 (1973)).

[141] *Id.* at 488.

[142] *Id.* at 489 ("We therefore reject the claim that . . . extension of aid under Washington's vocational rehabilitation program to finance petitioner's training at a Christian college to become a pastor, missionary, or youth director would advance religion in a manner inconsistent with the Establishment Clause of the First Amendment.").

[143] *Zobrest*, 509 U.S. 1. The aid was available under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* (1991), and its Arizona counterpart, Ariz.

neutrally distributed and "part of a general government program that distributes benefits neutrally to any child qualifying as 'disabled' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school."[144] Consequently, no government endorsement of religion occurred through the program because disabled children were the primary beneficiaries and any benefit to sectarian schools was "only incidental."[145] The Court further recognized that the statute provided aid to a sectarian school "only as a result of the private decision of individual[s] . . . [and] cannot be attributed to state decisionmaking."[146] Because the program allowed the parents of beneficiaries to select the best learning environment for their child, "the circuit between government and religion was broken" and the Establishment Clause was not implicated.[147]

The latest Supreme Court case regarding this issue is *Zelman v. Simmons-Harris*, which examined an Ohio program that gave tuition aid to children in failing school districts to attend a participating public or private school of their choosing.[148] The Court found the program to be "neutral in all respects toward religion" because it conferred "educational assistance directly to a broad class of individuals defined without reference to religion" and permitted "the participation of *all* schools within the district, religious or nonreligious."[149]

The Court rejected arguments that the program created a "public perception that the State is endorsing religious practices and beliefs."[150] It instead affirmed the "repeatedly recognized" principle that, "no reasonable observer" would find the program to carry the *imprimatur* of

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Rev. Stat. § 15-761 *et seq.* (1991 and Supp.1992).

144 *Zobrest*, 509 U.S. at 10.

145 *Id.* at 12. *See also id.* at 8 ("[G]overnment programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.").

146 *Id.* at 10.

147 Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2467 (2002) (construing *Zobrest*, 509 U.S. 1).

148 *Zelman*, 122 S. Ct. 2460. The program was known as the Pilot Project Scholarship Program. OHIO REV. CODE ANN. §§ 3313.974-3313.979 (Anderson 1999 and Supp. 2000).

149 *Zelman*, 122 S. Ct. at 2467-68 (emphasis in original). The program gave the children of low-income families additional assistance and priority for admission to participating schools, but this preference was constitutionally permissible because it fulfilled the secular purpose of assisting those in need. *Id.* at 2468-69.

150 Brief for Respondents Simmons-Harris *et. al.* 37-38, *cited in Zelman*, 122 S. Ct. at 2468.

government endorsement when state aid reaches religious schools "solely as a result of the numerous independent decisions of private individuals."[151] The Court also refused to attribute constitutional significance to statistics showing an overwhelming number of religious schools participated in the program.[152] It instead found the situation did not arise as a result of the program and was a phenomenon common to many American cities, including those without voucher programs.[153] It further noted that a judgment of constitutionality based on the percentage of participants patronizing religious programs would lead to the "absurd result" of a neutral school-choice program being valid in some places but not others.[154] As a result of these findings, the Court found the program to be "entirely neutral with respect to religion" and one of "true public choice," that provided benefits to a diverse group of beneficiaries, defined solely by financial need, who exercised genuine

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[151] *Zelman*, 122 S. Ct. at 2468 (citing *Mueller*, 463 U.S. at 399; *Witters*, 474 U.S. at 488-89; *Zobrest*, 509 U.S. at 10-11). The Court concluded that any objective observer "familiar with the full history and context of the Ohio program" would find it valid. *Zelman*, 122 S. Ct. at 2469.

[152] *Zelman*, 122 S. Ct. at 2464. In the 1999-2000 school year, 46 (or 82%) of the 56 private schools participating in the program had a religious affiliation, while 96% of the 3,700 participating students were enrolled in religiously affiliated schools). *Id.*

[153] *Id.* at 2469-70. *See supra* note 151 for the reasons why the "history and context" underlying a challenged program must be considered. The Court also noted that the 96% figure for participating students enrolled in religiously affiliated schools entirely discounted (1) the more than 1,900 Cleveland children enrolled in alternative community schools, (2) the more than 13,000 children enrolled in alternative magnet schools, and (3) the more than 1,400 children enrolled in traditional public schools with tutorial assistance. *Id.* at 2470. If some or all of these children were added to the denominator of children enrolled in nontraditional schools during the 1999-2000 school year, the percentage of children enrolled in religious schools drops from 96% to under 20%. *Id.* at 2471.

[154] *Id.* at 2470. The Court reasoned:

> To attribute constitutional significance to this figure . . . would lead to the absurd result that a neutral school-choice program might be permissible in some parts of Ohio, such as Columbus, where a lower percentage of private schools are religious schools, but not in inner-city Cleveland, where Ohio has deemed such programs most sorely needed, but where the preponderance of religious schools happens to be greater. Likewise, an identical private choice program might be constitutional in some States, such as Maine or Utah, where less than 45% of private schools are religious schools, but not in other States, such as Nebraska or Kansas, where over 90% of private schools are religious schools.

Id. (citations omitted). It is important to note that while the diversity of beneficiary programs may be evidence of a secular purpose, *see Mueller*, 463 U.S. at 394-99, the absence of such diversity does not necessarily demonstrate a non-secular purpose. *Zelman*, 122 S. Ct. at 2470.

choice among public, private, secular, and religious options.[155]

The Court's reasoning in *Zelman* was critical to the determination of the Seventh Circuit case of *Freedom from Religion Foundation v. McCallum*.[156] At issue was a Wisconsin Department of Corrections program that allowed recipients to choose a state-funded placement in either a secular or religious halfway house following their release from prison.[157] Judge Posner, writing for the majority, found that because beneficiaries exercised a private choice among programs, the policy was akin to a voucher system and therefore a constitutionally permissible form of indirect funding.[158]

From these rulings, it is clear that a government program providing funds indirectly to faith-based providers will face fewer obstacles than a directly funded one.[159] The Supreme Court will find little reason to question the secular purpose of an indirect funding program so long as "a plausible secular purpose for the state's program may be discerned from the face of the statute."[160] Funds must be available on a completely neutral basis and pass to faith-based programs only through "the genuinely independent and private choices of aid recipients."[161] Regarding effect, the Court will ask whether a reasonable observer would find the program conveys the *imprimatur* of government endorsement, but no such question will be deemed to exist where government aid reaches faith-based providers "solely as a result of the numerous independent decisions of private individuals."[162] Finally, the Court will not consider statistics regarding disparities in distribution so

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155 *Zelman*, 122 S. Ct. at 2473.

156 Freedom from Religion Found., Inc. v. McCallum, 2003 WL 1733521 (7th Cir. 2003). At issue was the government's funding of Faith Works, a halfway house that extensively incorporates Christianity into its treatment program. *Id.* at *1.

157 *Id.*

158 *Id.* Judge Posner recognized that "the state has dispensed with the intermediate step by which the recipient of the publicly funded private service hands his voucher to the service provider," but so far as the Establishment Clause is concerned, "there is no difference between giving the voucher recipient a piece of paper that directs the public agency to pay the service provider and the agency's asking the recipient to indicate his preference and paying the provider whose service he prefers." *Id.*

159 *See supra* notes 120-27 and accompanying text for the constitutional requirements for a directly funded government program.

160 *Mueller*, 463 U.S. at 394-95. *See also Zelman*, 122 S. Ct. at 2464.

161 *Witters*, 474 U.S. at 488. *See also Zobrest*, 509 U.S. at 12; *Zelman*, 122 S. Ct. at 2467.

162 *Zelman*, 122 S. Ct. at 2468 (citing *Mueller*, 463 U.S. at 399). *See also Witters*, 474 U.S. at 488-89; *Zobrest*, 509 U.S. at 10-11.

long as they arise from the social situation and are not a result of the program itself.[163]

C. *Employment Practices*

A final issue for supporters of faith-based initiatives is whether religious exemptions from certain employment laws should be extended to faith-based programs that receive government funding.[164] Advocates of faith-based initiatives believe protection for religious-based hiring is essential to the successful implementation of the program.[165] It should be recognized, however, that not all faith-based programs make religiously based staffing decisions.[166]

Religious organizations are not automatically exempt from certain laws.[167] This principle was most recently affirmed in *Employment Division v. Smith*, where the Court upheld the denial of unemployment benefits to two practitioners of the Native American Church because

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163 *Zelman*, 122 S. Ct. at 2469-70.

164 A religious exemption is extended to faith-based providers in H.R. 7, 107th Cong. § 201, § 1991(e) (2001).

165 *See, e.g.*, Esbeck, NEUTRAL TREATMENT, *supra* note 45, at 173 ("The importance of a faith-based social service provider being able to hire and promote only the faithful cannot be overstated."). George Hood, a senior official with the Salvation Army, has also stated that the hiring of employees whose lifestyle is inconsistent with their beliefs "really begins to chew away at the theological fabric of who we are." Dana Milbank, *Charity Cites Bush Help in Fight Against Hiring Gays*, WASH. POST, July 10, 2001, at A1. Many faith-based organizations have objected to the way in which the exemption issue has been framed. *See* Nathan J. Diament, *A Slander Against Our Sacred Institutions*, WASH. POST, May 28, 2001, at A23 ("Their assumption is that faith-based hiring by institutions of faith is equal in nature to every other despicable act of discrimination in all other contexts. This is simply not true.").

166 *Section 701 (Charitable Choice) of S. 304 Drug Abuse Education, Prevention, and Treatment Act of 2001: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (June 14, 2001) (statement of Carl H. Esbeck, Senior Counsel to the Deputy Attorney General). Many organizations do not staff on a religious basis, and many that staff on a religious basis do so only with respect to certain jobs. *Id.* at n.22. Many organizations do not staff on the basis of religion in any affirmative sense, but do require that employees not be in open defiance of the organization's creed. *Id.*

167 *See* Reynolds v. United States, 98 U.S. 145 (1870) (polygamy laws); Prince v. Massachusetts, 321 U.S. 158 (1944) (prohibition on the distribution of religious tracts by children); Gillette v. United States, 401 U.S. 437 (1971) (religiously motivated draft resistance); United States v. Lee, 455 U.S. 252 (1982) (payment of Social Security tax). *See also* Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 878-79 (1990) ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.").

they were fired from a private drug rehabilitation program for using peyote.[168] The Court held that while the government may neither compel nor punish a person's religious beliefs, those beliefs do not excuse them from being bound by otherwise valid laws.[169] The government can, and does, make religious exemptions for certain laws, but such exemptions are not constitutionally required.[170] Exemptions may be necessary if the right to free exercise of religion can be tied to another constitutional protection,[171] but the vast majority of cases are left to the determination of Congress and state and local legislatures.[172]

Because religious organizations are not automatically exempt from certain laws, Title VII of the Civil Rights Act of 1964 provided an exemption to religious organizations, allowing them to use religion as a basis for hiring when filling ministerial and educational positions.[173] In 1972, the exemption was expanded to include all employees of religious

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168 494 U.S. at 921. Applications for unemployment compensation were denied under an Oregon state law disqualifying employees discharged for work-related "misconduct." *Id.* at 874.

169 *Id.* at 879 ("The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.").

170 *Id.* at 890 ("[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required.").

171 *Id.* at 881 ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press ... "). *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).

172 *Smith*, 494 U.S. at 890 ("It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.").

173 Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 702, 78 Stat. 255 (codified as amended at 42 U.S.C. § 2001e-1) (amended 1972). The provision, known as the "ministerial exemption" when enacted in 1964, provided:

> This title shall not apply . . . to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.

Id.

organizations.[174] While the Title VII exemption applies to the religiously motivated employment decisions of religious organizations,[175] it does not permit them to make decisions based on race, sex or national origin.[176]

In *Corporation of the Presiding Bishops of the Church of Jesus Christ of Latter-Day Saints v. Amos*, the Supreme Court unanimously upheld the Title VII religious exemption for a nonprofit gym open to the public and run by the Mormon Church.[177] The Court first observed that an accommodation for religion is not an automatic violation of the First Amendment, since there is ample room under the Establishment Clause for "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[178] Applying the *Lemon* test, the Court found the exemption promoted the legitimate legislative purpose of alleviating "significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[179] The exemption was particularly valuable in this regard,

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[174] Civil Rights Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (codified at 42 U.S.C. § 2001e-1). When amended in 1972, Section 702 provided, "This title shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." *Id.*

[175] *See, e.g.*, Cline v. Catholic Diocese of Toledo, 206 F.3d 651 (6th Cir. 2000) (upholding the right of a Catholic school to dismiss a pregnant teacher on the grounds she violated the religious and moral precepts against premarital sex); Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410 (6th Cir. 1996) (upholding the right of a religiously affiliated pre-school to dismiss a pregnant teacher on the grounds she had violated its prohibition against premarital sex); Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991) (Catholic schoolteacher was dismissed for remarrying without obtaining an annulment of her first marriage); Maguire v. Marquette Univ., 814 F.2d 1213 (7th Cir. 1987) (upholding a Catholic university's decision to refuse to hire a female professor because her opinions were inconsistent with the teaching of the Catholic church); Ganzy v. Allen Christian Sch., 995 F. Supp. 340 (E.D.N.Y. 1998) (teacher was dismissed when school learned she was pregnant outside of marriage).

[176] *See, e.g.*, E.E.O.C. v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 282 (5th Cir. 1981) (enforcing Title VII reporting requirements); E.E.O.C. v. Pacific Press Publ'g Ass'n, 676 F.2d 1272, 1277 (9th Cir. 1982) (gender-based discrimination and retaliatory firings); Rayburn v. Seventh-Day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985) (sexual and racial discrimination).

[177] 483 U.S. 327 (1987). The case involved the termination of an employee for his failure to qualify for a temple recommend, a certificate showing he was a Mormon in good standing and eligible to attend its temples. *Id.* at 329-30.

[178] *Id.* at 330 (citing Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970)). *Walz* upheld property tax exemptions for religious organizations. *Walz*, 397 U.S. at. 692-93.

[179] *Amos*, 483 U.S. at 335. The Court also agreed with the District Court's finding that

because it would be a significant burden to require churches to distinguish, and potentially litigate, whether a particular activity was religious and therefore exempt.[180] The Court also found the primary effect of the legislation neither advanced nor inhibited religion, because while religious organizations could better advance their purposes with the exemption, it merely allowed the advancement to occur and did not involve "government activities and influence."[181] Finally, the Court found no impermissible entanglement between church and state, concluding that the statute, "effectuates a more complete separation of the two."[182]

Justices Brennan's concurrence, while not controlling, contributes significantly to understanding why the categorical exemption of §702 was upheld.[183] It recognizes that a religious community defines itself through certain activities, and if certain activities constitute part of its practice, it "should be able to require that only members of its community perform those activities."[184] Justice Brennan also recognized that while laws restricting the secular activity of religious organizations do not affect religious self-definition, non-profit activities are "not purely secular" and are "most likely to present cases in which characterization of the activity as religious or secular will be a close question."[185] A categorical exemption for nonprofit activity is therefore justified by the "substantial potential for chilling religious activity" of

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"Congress' purpose was to minimize governmental 'interference with the decision-making process in religions.'" *Id.* at 336 (quoting Corp. of the Presiding Bishops of the Church of Jesus Christ of Latter-Day Saints v. Amos, 594 F. Supp. 791, 812 (D. Utah 1984)). When making its analysis, the Court inquired as to whether Congress had a rational basis for its decision, since "where a statute is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion, we see no justification for applying strict scrutiny to a statute that passes the *Lemon* test." *Amos*, 483 U.S. at 339.

[180] *Amos*, 483 U.S. at 335. A second issue for the Court was whether the exemption should be applied on a case-by-case basis or as a categorical exclusion.

[181] *Id.* at 337. A law violates *Lemon* only if "the *government itself* has advanced religion through its own activities and influences," and is not unconstitutional "simply because it allows churches to advance religion." *Id.*

[182] *Id.* at 339. It was also noted that such a position "avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case." *Id.*

[183] *Id.* at 340 (Brennan, J., concurring).

[184] *Id.* at 342-43. (Brennan, J., concurring) ("Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself.").

[185] *Id.* at 343-45 (Brennan, J., concurring).

having courts make a case-by-case determination of the character of a nonprofit organization.[186]

Supporters of faith-based initiatives further note that the state action necessary to invoke constitutional protection is lacking because there is no causal link between government funding and an organization's numerous and very private acts related to staffing.[187] Because such employment decisions are not state or governmental action for the purposes of the Fifth and Fourteenth Amendment, they cannot be said to violate the Constitution.[188]

The Supreme Court has yet to rule on the extension of the Title VII exemption for a program funded by the government, but cases in lower courts indicate certain trends.

In *Siegel v. Truett-McConnell College*, a private, Christian college fired a professor because he was not a Christian.[189] The plaintiff argued, based on *Dodge v. Salvation Army*,[190] that the Title VII exemption was nullified because his position was funded "so substantially by the federal and state government."[191] The court distinguished the case from *Dodge*, ruling that while various grants and government programs provided money to students to attend the college of their choice, the

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[186] *Amos*, 483 U.S. at 345 (Brennan, J., concurring) (The categorical exemption is permissible because "[i]t permits infringement on employee free exercise rights in those instances in which discrimination is most likely to reflect a religious community's self-definition.").

[187] *Section 701 (Charitable Choice) of S. 304 Drug Abuse Education, Prevention, and Treatment Act of 2001: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (June 14, 2001) (statement of Carl H. Esbeck, Senior Counsel to the Deputy Attorney General).

[188] *See* Blum v. Yaretsky, 547 U.S. 991 (1982) (holding that a private nursing home's receipt of government funding and the existence of pervasive regulation did not, without greater ties, constitute state action); Rendall-Baker v. Kohn, 457 U.S. 830 (1982) (holding that a private school that was heavily funded by the state was not a state actor); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164 (1978) (holding that state acquiescence in the private acts of a commercial warehouse did not convert the private acts into state action).

[189] Siegel v. Truett-McConnell Coll., 13 F. Supp. 2d 1335, 1336-37 (N.D. Ga., 1994). The College's faculty handbook stated "[a] faculty applicant who is considered for employment must be a professing Christian, an active church member, and must indicate an appreciation for and commitment to the stated purpose of Truett-McConnell College." *Id.* 66% of full-time faculty and 52% of part-time faculty on the main campus, for the period 1988-1993, were Baptist; 100% were Christians. *Id.* at 1341. For a statistical breakdown of faculty religious affiliations, *see id.*

[190] Dodge v. Salvation Army, 48 Empl. Prac. Dec. (CCH) 38,619, 1989 WL 53857 (S.D. Miss. 1989). *See infra* notes 322-23 and accompanying text for a discussion of this case.

[191] *Siegel*, 13 F. Supp. 2d at 1344.

assistance was indirect and did "not directly pay for any one teacher's salary."[192] The court also recognized that while the college received direct funding from the government, this money was available to all institutions of higher learning regardless of religious affiliation and did not constitute direct support of religion.[193] Consequently, even direct aid did not invalidate the Title VII exemption, since "[t]he government is not promoting a particular point of view in religious matters."[194]

The question of religious rights and government funding was also raised in *Seale v. Jasper Hospital District and Jasper Memorial Hospital Foundation*, which challenged the granting of a lease of a hospital to a Catholic religious order on the grounds that the hospital would subsequently refuse to perform sterilizations or abortions.[195] The Texas Court of Appeals found the lease fulfilled the secular purpose of providing hospital facilities and did not "create any 'excessive' government entanglement with religion."[196] The court recognized denominational hospitals have a right to freedom of religion and can refuse to participate in activities that would violate their religious or moral beliefs.[197] The court also established a more general principle: that a policy which forced a religious organization to surrender its religious principles before it could participate in a government funded social service program "is not neutral towards religion, but instead is

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[192] *Id.* ("[V]arious grants and government programs . . . provide money to *students* to attend colleges of their choice. The *students* then choose which school they will attend and, thus, which school will receive their tuition. The government money does not go directly to any particular school."). *See supra* notes147-155 and accompanying text, for a further discussion of *Zelman* and description of this principle.

[193] *Siegel*, 13 F. Supp. 2d at 1344. *See also Siegel*, 13 F. Supp. 2d at 1344 n.8. ("At one point plaintiff refers to federal monies received through the Department of Energy as well. The College may receive some financial assistance to implement energy conservation projects pursuant to Title III of the National Energy Conservation Policy Act. However, the arguments that pertain to student aid also pertain to grants provided to institutions or organizations, be they religious or not, that receive federal monies for energy conservation. Such a grant cannot be said to directly support religion."). While the decision stated, "Truett-McConnell is not receiving direct financial support from the government," the court was referring to aid that directly supported religion and not direct aid in general. *Id.* at 1344.

[194] *Id.* at 1344.

[195] Seale v. Jasper Hosp. Dist. and Jasper Mem'l Hosp. Found., 1997 WL 606857 at *4-5 (Tex. App. 1997).

[196] *Id.* at *4

[197] *Id.* at *5 (citing Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974)).

hostile toward religion" and therefore unconstitutional.[198]

The Sixth Circuit case of *Hall v. Baptist Memorial Health Care Corporation* addressed the termination of a lesbian student activity coordinator who was terminated from her position after she became a lay minister in a Christian church with a large gay and lesbian membership.[199] The court ruled that the college did not waive its right to the Title VII exemption because it received federal funds.[200] It further found that her termination was motivated not by religious discrimination, but because her influence over student activities conflicted with her leadership position in a pro-homosexual church.[201]

Such as position was further affirmed in *Pedreira v. Kentucky Baptist Homes for Children, Inc.*, which upheld the termination of a lesbian employee for failure to comply with a code of conduct that required consistency with the home's religious beliefs.[202] Because the policy required conduct consistent with KBHC's religious beliefs, but not the beliefs themselves, no religious discrimination existed under Title VII.[203] The court did, however, refuse to dismiss on summary judgment the claim that funding of KBHC had the primary effect of advancing religion in violation of the Establishment Clause because the issue required further development.[204]

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198 *Seale*, 1997 WL 606857, at *5.

199 *Hall*, 215 F.3d 618, 622 (6th Cir. 2000). Hall was responsible for "interpreting school policies and ensuring that all student activities were consistent with the mission of the College." *Id.* Holy Trinity Community Church is a non-denominational Christian church that teaches there is nothing inherently inconsistent between the homosexual lifestyle and Christianity. *Id.* The Southern Baptist Convention, which runs Baptist Memorial College, is outspoken in its condemnation of the homosexual lifestyle. *Id.*

200 *Id.* at 625.

201 *Id.* at 628 ("Because she exerted influence over students and student activities at the College, her leadership position at Holy Trinity conflicted with her job.").

202 *Pedreira*, 186 F. Supp. 2d 757, 761 (W.D. Ky. 2001). The decision involved a number of motions from the defendant seeking dismissal of the complaint. *Id.* at 760. KBHC required all its employees to "exhibit values in their professional conduct and personal lifestyles that are consistent with the Christian mission and purpose of the institution." *Id.* at 761. The Home also adopted an employment policy which stated:

> [h]omosexuality is a lifestyle that would prohibit employment with Kentucky Baptist Homes for Children. The Board does not encourage or intend for staff to seek out people within the organization who may live an alternative lifestyle, we will however, act according to Board policy if a situation is brought to our attention.

Id.

203 *Id.* at 761.

204 *Id.* at 765-66.

Given the current state of the law on this subject, the constitutionality of extending the Title VII exemption to organizations receiving funds under Faith-Based Initiatives legislation is in question.[205] It is likely, in light of recent rulings, that the exemption will be upheld to protect the religious autonomy of faith-based providers.

IV. House Bill 7: Community Solutions Act of 2001

With these constitutional parameters in mind, the drafters of House Bill 7 faced the task of tailoring their legislation to the boundaries established by the Establishment and Free Exercise Clauses.[206] In response to constitutional concerns, the legislation underwent several revisions, resulting in a bill that was more constitutionally precise.[207]

A. *Secular Purpose and Scope*

Title II begins by announcing its purpose is to improve social services by delivering it "in the most effective and efficient manner."[208] To achieve this end, the bill declares its intention to increase the involvement of current faith-based programs and facilitate the entry of new ones.[209] House Bill 7 is further designed to remove the obstacles faith-based organizations face in gaining access to federal funding while preserving their religious character and autonomy.[210] The bill also

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205 *See* the Title VII exemption provisions in H.R. 7, 107th Cong. § 201, § 1991(e) (2001).

206 *See supra* Section III for a summary of these constraints.

207 Marvin Olasky, *Rolling the Dice*, WORLD MAGAZINE, Aug. 4, 2001, at 4, *available at* http://worldmag.com/world/issue/08-04-01/cover_1.asp (last visited Apr. 1, 2003). Rep. F. James Sensenbrenner (R-WI), a twenty-two year veteran of the House Committee on the Judiciary and its current Chairman, raised many of these constitutional concerns. *Id.*

208 H.R. 7, 107th Cong. § 201, § 1991(b). The subsection recognizes the purpose of the bill is "to enable assistance to be provided to individuals and families in need in the most effective and efficient manner." H.R. 7, § 201, § 1991(b)(1). By beginning with this principle, the legislation announces its intent to satisfy the requirement of a secular legislative purpose under the *Agostini/Lemon* test. *See supra* notes 103-108 and accompanying text.

209 H.R. 7, § 201, § 1991(b). The subsection recognizes the purpose of the bill is "to supplement the Nation's social service capacity by facilitating the entry of new, and the expansion of existing, efforts by religious and other community organizations in the administration and distribution of government assistance under the government programs described in subsection (c)(4)." H.R. 7, § 201, § 1991(b)(2). This emphasizes House Bill 7's purpose as a means to enhance current welfare programs.

210 H.R. 7, § 201, § 1991(b). Subsection (b) recognizes the purpose of the bill is:

(3) to prohibit discrimination against religious organizations on the basis of

affirms its intent to protect the religious freedom of program beneficiaries by allowing them to receive services from a religious organization of their choosing rather than be forced into a secular program.[211]

House Bill 7 does not create any new welfare programs, but instead modifies the administration of several existing ones.[212] The legislation moves further than previous Charitable Choice legislation by covering a large number of programs that exist under the auspices of the Department of Education, the Department of Labor, the Department of Health and Human Services, the Department of Housing and Urban Development, and the Department of Justice.[213] In a decision that

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religion in the administration and distribution of government assistance under such programs;

(4) to allow religious organizations to participate in the administration and distribution of such assistance without impairing the religious character and autonomy of such organizations

H.R. 7, § 201, § 1991(b)(3, 4).

[211] H.R. 7, § 201, § 1991(b). Subsection (b)(5) recognizes the purpose of the bill is "to protect the religious freedom of individuals and families in need who are eligible for government assistance, including expanding the possibility of their being able to choose to receive services from a religious organization providing such assistance." H.R. 7, § 201, § 1991(b)(5). The passage is striking in that it recognizes the right of beneficiaries to choose programs from a religious organization as an element of religious freedom.

[212] These programs are described throughout House Bill 7 as "covered programs."

[213] The number of programs affected by House Bill 7 are sweeping:

(4) PROGRAMS- For purposes of this section, a program is described in this paragraph—

(A) if it involves activities carried out using Federal funds—

(i) related to the prevention and treatment of juvenile delinquency and the improvement of the juvenile justice system, including programs funded under the Juvenile Justice and Delinquency Prevention Act of 1974 (42 U.S.C. 5601 *et seq.*); (ii) related to the prevention of crime and assistance to crime victims and offenders' families, including programs funded under title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3701 *et seq.*);

(iii) related to the provision of assistance under Federal housing statutes, including the Community Development Block Grant Program established under title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5301 *et seq.*);

(iv) under subtitle B or D of title I of the Workforce Investment Act of 1998 (29 U.S.C. 2801 *et seq.*);

(v) under the Older Americans Act of 1965 (42 U.S.C. 3001 *et seq.*);

(vi) related to the intervention in and prevention of domestic violence, including programs under the Child Abuse Prevention and Treatment Act (42 U.S.C. 5101 *et seq.*) or the Family Violence Prevention and Services Act (42 U.S.C. 10401 *et seq.*);

reflects political concerns, the legislation covers secondary school equivalency programs and non-school hour programs run by the Department of Education, while programs providing education to elementary and secondary school children are not.[214]

The bill makes an important distinction between direct and indirect funding. An organization that provides assistance through "a grant or cooperative agreement" under a covered program is deemed to receive direct funding. [215] Organizations that provide assistance though "a voucher, certificate, or other form of indirect assistance" are considered indirect funding recipients.[216]

(vii) related to hunger relief activities; or

(viii) under the Job Access and Reverse Commute grant program established under section 3037 of the Federal Transit Act of 1998 (49 U.S.C. 5309 note [sic]);

H.R. 7, § 201, § 1991(c)(4). The identity of several of these programs was clarified during the amendment process, including the additional of "and assistance to crime victims and offenders' families" in subsection (ii), "under subtitle B or D" in subsection (iv), and "including programs under the Child Abuse Prevention and Treatment Act (42 U.S.C. 5101 *et seq.*) or the Family Violence Prevention and Services Act (42 U.S.C. 10401 *et seq.*)" in subsection (vi). H.R. 7, § 201, § 1991(c)(4).

214 H.R. 7, § 201, § 1991(c)(4)(B). Educational programs for school age children during school hours were excluded from House Bill 7 to avoid a conflict with the National Education Association. Interview with Daniel E. Katz, Director of Legislative Affairs and Alex J. Luchenitser, Esq., Litigation Counsel, Americans United for Separation of Church and State, in Washington, D.C. (Aug. 13, 2001). The bill includes programs:

(i) if it involves activities to assist students in obtaining the recognized equivalents of secondary school diplomas and activities relating to nonschool hours programs, including programs under—

(I) chapter 3 of subtitle A of title II of the Workforce Investment Act of 1998 (Pub. L. No. 105-220); or

(II) part I of title X of the Elementary and Secondary Education Act (20 U.S.C. 6301 *et seq.*)

H.R. 7, § 201, § 1991(c)(4)(B)(i). Subsections (I) and (II) were introduced during amendment to clarify the scope of the coverage. H.R. 7, 107th Cong. § 201, § 1991(c)(4)(B)(i) (2001) (introduced in House); H.R. 7, 107th Cong. § 201, § 1991(c)(4)(B)(i) (2001). It does, however, exclude the following programs:

[E]xcept as provided in subparagraph (A) and clause (i), does not include activities carried out under Federal programs providing education to children eligible to attend elementary schools or secondary schools, as defined in section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801).

H.R. 7, § 201, § 1991(c)(4)(B)(ii).

215 H.R. 7, § 201, § 1991(h)(1).

216 H.R. 7, § 201, § 1991(h)(2). The bill also states: "'[I]ndirect assistance' constitutes assistance in which an organization receiving funds through a voucher, certificate, or other form of disbursement under this section receives such funding only as a result of the private

The legislation acknowledges the difficulties faith-based organizations faced when applying for funds in the past by prohibiting discrimination against an organization because it "is religious or has a religious character."[217] It also recognizes the limits imposed by the Constitution by explicitly requiring covered programs to be implemented in a manner consistent with the First Amendment's Establishment and Free Exercise Clauses.[218] Toward this end, the bill notes that funds received by faith-based organizations under the Act are aid to needy individuals and families, and do not constitute support for religion or an organization's religious beliefs or practices.[219] House Bill 7 does not set aside special money for faith-based providers.[220] Instead, covered program grants are required to select social service providers on religion-neutral grounds, with faith-based organizations considered on the same basis as secular ones.[221]

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choices of individual beneficiaries and no government endorsement of any particular religion, or of religion generally, occurs." H.R. 7, § 201, § 1991(l) (2001).

217 H.R. 7, § 201, § 1991(c)(1)(B) (2001). "Neither the Federal Government, nor a State or local government receiving funds under a program described in paragraph (4), shall discriminate against an organization that provides assistance under, or applies to provide assistance under, such program on the basis that the organization is religious or has a religious character." *Id.*

During the amendment process the phrase "is religious" was added to the subsection to emphasize the fact that an organization can be religious without necessarily having a particular religious character or identity. *Id.*

218 H.R. 7, § 201, § 1991(c)(1)(A). The legislation is careful to state that faith-based organizations are not to be preferred, but must instead be considered on the same basis as other non-governmental providers. *Id.* "[T]he program shall be implemented in a manner that is consistent with the establishment clause and the free exercise clause of the first amendment to the Constitution." *Id.*

219 H.R. 7, § 201, § 1991(c)(3) ("The receipt by a religious organization of Federal, State, or local government funds or other assistance under this section is not an endorsement by the government of religion or of the organization's religious beliefs or practices"). This reaffirms House Bill 7's fundamental secular purpose of supplementing the Nation's social service capacity. H.R. 7, § 201, § 1991(b)(2). It is interesting to note that the language of this section changed from "not aid to the religious organization" H.R. 7, § 201, § 1991(c)(3) (2001) (Introduced in House) to read "not support for religion or the organization's religious beliefs or practices." H.R. 7, § 201, § 1991(c)(3). This makes the legislative intent of the bill more precise by emphasizing the fact that while it is constitutionally permissible to provide aid to a religious organization for the secular purpose of helping the beneficiaries of a program, the federal government must avoid funding programs in such a way that it supports the religious beliefs that may underlie the program. H.R. 7, § 201, § 1991(c)(2).

220 H.R. 7, § 201, § 1991. Such a policy of preference for religious organizations would violate the Establishment Clause by preferring religion or a particular religion over non-religion. *See supra* notes 124-126 and accompanying text.

221 H.R. 7, § 201, § 1991(c)(1)(A). "For any program . . . that is carried out by the

To preserve the religious nature of faith-based providers, federal, state, and local governments are explicitly prohibited from requiring faith-based organizations to alter their form of internal governance or remove "religious art, icons, scripture, or other symbols" in order to receive funds.[222] The legislation also gives each faith-based provider the right to preserve its autonomy from federal, state, and local governments in areas affecting the "definition, development, practice, and expression of its religious beliefs."[223]

Federal Government, or by a State or local government with Federal funds, the government shall consider, on the same basis as other nongovernmental organizations, religious organizations to provide the assistance under the program." *Id.* The requirement is imposed upon any program funded by the Federal Government, or a State or local government with Federal funds. *Id.* This qualification was necessary because funds can pass from the Federal level to the state or local level before being distributed.

222 H.R. 7, § 201, § 1991(d)(2) (2001). The bill provides that:

> Neither the Federal Government, nor a State or local government with Federal funds, shall require a religious organization, in order to be eligible to provide assistance under a program described in subsection (c)(4), to—
>
> (A) alter its form of internal governance or provisions in its charter documents; or
>
> (B) remove religious art, icons, scripture, or other symbols, or to change its name, because such symbols or names are of a religious character.

Id.

The phrase "with Federal funds" was introduced during amendment to narrow the focus of the legislation so that it only limits state and local governments to the extent they participate in federal programs under House Bill 7. H.R. 7, § 201, § 1991(d)(2) (2001) (introduced in House); H.R. 7, § 201, § 1991(d)(2) (2001). If such language was not inserted, House Bill 7's provisions would preempt state and local decisions, regardless of whether they distributed federal funds.

The phrase "of a religious character" was inserted during amendments to address the fact that a symbol may be of a religious character without making reference to any particular religion. H.R. 7, § 201, § 1991(d)(2) (2001) (introduced in House); H.R. 7, § 201, § 1991(d)(2) (2001).

The phrase "or provisions in its charter documents" was inserted during amendments to protect both the governance structure and general organizational character of faith-based organizations. H.R. 7, 107th Cong. § 201, § 1991(d)(2) (2001) (introduced in House); H.R. 7, 107th Cong. § 201, § 1991(d)(2) (2001).

223 H.R. 7, 107th Cong. § 201, § 1991(d)(1) (2001).

> A religious organization that provides assistance under a program described in subsection (c)(4) shall have the right to retain its autonomy from Federal, State, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs.

Id.

The phrase "right to [retain]" was inserted during amendment to emphasize the fact that religious entities have the Constitutional right under the free exercise clause to

To ensure these protections are enforced whenever federal funds are involved, subsection (k) preempts any restrictions imposed on funds contributed by state and local governments if those funds are mixed with federal funds.[224] It is important to note, however, that the decision to allow state or local funds to be commingled with federal funds is left entirely to the state and local governments, so preemption will occur only if the state or local agencies allow commingling.[225]

While these protections are necessary on constitutional grounds, in areas not related to religious activity and identity, such as bookkeeping and evaluating program performance, faith-based and secular providers are subject to the same requirements.[226] Faith-based organizations are also required to conduct a self-audit to review compliance with their fiduciary duties and must provide copies of such audits to the appropriate government agencies.[227]

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determine their own organizational character and identity." H.R. 7, 107th Cong. § 201, § 1991(d)(1) (2001) (introduced in House); H.R. 7, 107th Cong. § 201, § 1991(d)(1) (2001).

[224] H.R. 7, 107th Cong. § 201, § 1991(k) (2001). "If the State or local government commingles the State or local funds, the provisions of this section shall apply to the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds." *Id.*

By allowing preemption, subsection (k) protects the sovereignty of the Federal government over the use of its funds. It should also be noted that state and local rules, because they were drafted before faith-based providers were recipients of government funds, do not necessarily contain adequate religious protections for such providers. *See infra* notes 330-332 and accompanying text for objections to the preemption provisions of § 201, § 1991(k).

[225] H.R. 7, 107th Cong. § 201, § 1991(k) (2001). Subsection (k) provides:

> If a State or local government contributes State or local funds to carry out a program described in subsection (c)(4), the State or local government may segregate the State or local funds from the Federal funds provided to carry out the program or may commingle the State or local funds with the Federal funds.

Id.

[226] H.R. 7, 107th Cong. § 201, § 1991(i) (2001). "[A] religious organization providing assistance under any program described in subsection (c)(4) shall be subject to the same regulations as other nongovernmental organizations to account in accord with generally accepted accounting principles for the use of such funds and its performance of such programs." *Id.*

The phrase "and its performance" was added during amendment to emphasize the fact that faith-based programs would be evaluated according to the same standards as other non-governmental programs. H.R. 7, 107th Cong. § 201, § 1991(h) (2001) (introduced in House); H.R. 7, 107th Cong. § 201, § 1991(i) (2001).

[227] H.R. 7, 107th Cong. § 201, § 1991(i)(3) (2001). "A religious organization providing services under any program described in subsection (c)(4) shall conduct annually a self audit for compliance with its duties under this section and submit a copy of the self audit to

As a final means of protecting the rights of all parties covered under House Bill 7, the legislation allows a party who believes its rights have been violated to bring suit for injunctive relief in a civil action.[228]

B. *Direct Funding*

Because direct funding creates a special relationship between the government and a faith-based provider, certain restrictions must be placed on its use.[229] House Bill 7 prohibits the use of funds provided through "a grant or cooperative agreement"[230] for "sectarian worship, instruction, or proselytization."[231] Religious activities that are offered by a faith-based provider must be strictly voluntary and offered separately from the program.[232] To ensure compliance, each program is required to

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the appropriate Federal, State, or local government agency, along with a plan to timely correct variances, if any, identified in the self audit." *Id.*

This entire section was introduced during the amendment process to clarify how the fiscal responsibilities of faith-based providers would be reviewed. H.R. 7, 107th Cong. § 201, § 1991(h) (2001) (introduced in House); H.R. 7, 107th Cong. § 201, § 1991(i)(3) (2001).

228 H.R. 7, 107th Cong. § 201, § 1991(n) (2001). A party alleging that its rights have been violated by a State or local government "may bring a civil action for injunctive relief pursuant to section 1979 against the State official or local government agency that has allegedly committed such violation." *Id.* A party alleging that its rights have been violated by the Federal government "may bring a civil action for injunctive relief in Federal District Court against the official or government agency that has allegedly committed such violation." *Id.*

During amendment the remedy permitted by House Bill 7 was significantly narrowed in scope. When first introduced, the subsection permitted "a civil action" as a remedy for a violation by a State or local government and "appropriate relief" as a remedy for a violation by the Federal government. H.R. 7, 107th Cong. § 201, § 1991(l) (2001) (introduced in House).

229 *See supra* notes124-127 and accompanying text.

230 According to House Bill 7, a grant or cooperative agreement is direct aid. *See supra* note 215 and accompanying text.

231 H.R. 7, 107th Cong. § 201, § 1991(j) (2001). "No funds provided through a grant or cooperative agreement to a religious organization to provide assistance under any program described in subsection (c)(4) shall be expended for sectarian instruction, worship, or proselytization." *Id.*

The Supreme Court has found a number of activities to be inherently religious, including: prayer, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); devotional Bible reading, School Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963); veneration of the Ten Commandments, Stone v. Graham, 449 U.S. 39 (1980); and classes in confessional religion, McCollum v. Bd. of Educ. of School Dist. No. 71, 333 U.S. 203 (1948).

232 H.R. 7, 107th Cong. § 201, § 1991(j) (2001). "If the religious organization offers such an activity, it shall be voluntary for the individuals receiving services and offered separate from the program funded under subsection (c)(4)." *Id.*

file a certificate with the government affirming the fact that it is aware of the policy and will abide by it.[233]

In another effort to ensure compliance with established standards of conduct, direct beneficiaries are also required to segregate all government funds into a special account for auditing purposes.[234] To ensure the government does not involve itself in activities of the organization outside the provision of social services, it may only audit those accounts with government funds.[235]

Providers are also prohibited from discriminating against beneficiaries on the basis of religion, a religious belief, or refusal to hold a religious belief when conducting of their programs.[236] Should a beneficiary or applicant object to the religious character of the organization providing assistance, the government is required to provide a religiously unobjectionable alternative of equal value.[237] To further

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Because of their pervasive religiosity, faith-saturated programs would likely not qualify for direct funding, though faith-centered and other categories of programs would. *See supra* notes 20-24 for a description of these categories. It is important to note that programs submitting a bid in response to a RFP must demonstrate their program stands on its merits and functions as a whole without religious activity. Faith-based providers may believe that religious activities are necessary, and religious activities may even enhance the efficiency of these programs, but unless the religious activity is entirely voluntary and separable, it will not qualify for direct funding under House Bill 7.

This restriction is not imposed on faith-based providers who are funded by indirect assistance. *See infra* note 243 for a comparison.

233 H.R. 7, 107th Cong. § 201, § 1991(j) (2001) ("A certificate shall be separately signed by religious organizations, and filed with the government agency that disburses the funds, certifying that the organization is aware of and will comply with this subsection.").

In *Mitchell*, a similar certificate program that required "all nonpublic schools to submit signed assurances that they will use Chapter 2 aid only to supplement and not to supplant non-Federal funds, and that the instructional materials and equipment will only be used for secular, neutral and nonideological purposes" was found to be constitutionally sufficient. *Mitchell*, 530 U.S. at 862.

234 H.R. 7, 107th Cong. § 201, § 1991(i)(2)(A) (2001). "A religious organization providing assistance through a grant or cooperative agreement under a program described in subsection (c)(4) shall segregate government funds provided under such program into a separate account or accounts." *Id. See infra* note 246 for a comparison of this restriction with that on indirect assistance.

235 H.R. 7, 107th Cong. § 201, § 1991(i)(2)(B) (2001) ("Only the separate accounts consisting of funds from the government shall be subject to audit by the government.").

236 H.R. 7, 107th Cong. § 201, § 1991(h)(1) (2001). In a direct aid program, "[a] religious organization providing assistance through a grant or cooperative agreement . . . shall not discriminate in carrying out the program." *Id.*

See infra note 244 for a comparison of this restriction with that on indirect assistance.

237 H.R. 7, 107th Cong. § 201, § 1991(g)(1)(A) and (B) (2001). The section reads:

(1)IN GENERAL- If an individual described in paragraph (3) has an

ensure the rights of beneficiaries, government agencies must notify beneficiaries of this right to "opt out" of an objectionable program.[238]

This subsection, which came to be known as the "opt out" provision, generated a major outcry from Christian conservatives.[239] Opponents of the "opt out" argue it is unnecessary because the voluntariness requirement for all religious activities offered by directly funded faith-based providers already protects beneficiaries from improper exposure to religion.[240]

> objection to the religious character of the organization from which the individual receives, or would receive, assistance funded under any program described in subsection (c)(4), the appropriate Federal, State, or local governmental entity shall provide to such individual (if otherwise eligible for such assistance) within a reasonable period of time after the date of such objection, assistance that—
>
> (A)is an alternative that is accessible to the individual and unobjectionable to the individual on religious grounds; and
>
> (B)has a value that is not less than the value of the assistance that the individual would have received from such organization.

H.R. 7, 107th Cong. § 201, § 1991(g)(1) (2001).

During amendments the description of the alternative program was changed from "including a nonreligious alternative" to "unobjectionable to the individual on religious grounds". H.R. 7, 107th Cong. § 201, § 1991(f)(1) (2001) (introduced in House); H.R. 7, 107th Cong. § 201, § 1991(g)(1) (2001). This reflects the reality that a beneficiary may prefer a faith-based program of a different nature rather than a non-religious one. It also creates the possibility that the funding of a single faith-based program may result in the funding of several other programs in the area because participants decided to "opt out". The provision parallels a similar one in the Welfare Reform Act of 1996, which reads:

> 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.

Welfare Reform Act of 1996, Pub. L. No. 104-193 (codified at 42 U.S.C. § 604a(e)(1) (2003)).

238 H.R. 7, 107th Cong. § 201, § 1991(g)(2) (2001) ("The appropriate Federal, State, or local governmental entity shall guarantee that notice is provided to the individuals . . . of the rights of such individuals under this section.").

239 *See* Marvin Olasky, *Rolling the Dice*, WORLD MAGAZINE, Aug. 4, 2001, *available at* http://worldmag.com/world/issue/08-04-01/cover_1.asp (last visited Apr. 1, 2003). William Murray of the Religious Freedom Coalition insisted "once a person chooses a Christian program there should not be an 'opt out' provision that allows the recipient to dictate a custom program to the provider." *Id.* at 4-5.

240 H.R. 7, 107th Cong. § 201, § 1991(j) (2001). *See supra* note 231 and accompanying

C. *Indirect Funding*

House Bill 7 acknowledges that indirect funding passes to faith-based providers through the private choices of individual beneficiaries and without government endorsement.[241] Because their indirect nature, indirect grants avoid many of the First Amendment concerns raised by direct funding and have fewer restrictions under House Bill 7.[242]

Most notable among these exceptions is the fact that indirectly funded faith-based programs are not subject to the ban on the use of funds for sectarian instruction, worship or proselytization contained in § 1991(j).[243] This does not mean, however, that indirect providers are exempt from all responsibilities. Providers may not deny any applicant admission to a program on the basis of religion, a religious belief, or refusal to hold a religious belief.[244] Indirect beneficiaries have the option to segregate government funds into a special account for auditing purposes.[245] If the funds are segregated, only the segregated accounts will be subject to government audit.[246]

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text for a description of the provisions of subsection (j).

[241] H.R. 7, 107th Cong. § 201, § 1991(l) (2001). The bill states:

> For purposes of this section, 'indirect assistance' constitutes assistance in which an organization receiving funds through a voucher, certificate, or other form of disbursement under this section receives such funding only as a result of the private choices of individual beneficiaries and no government endorsement of any particular religion, or of religion generally, occurs.

Id.

[242] *See supra* notes 160-163 and accompanying text for a summary of the restrictions on indirect aid. *See also supra* notes 120-127 and accompanying text for a summary of the restrictions on direct aid.

[243] The restrictions of subsection (j) only apply to funds provided "through a grant or cooperative agreement" and not indirect assistance. H.R. 7, 107th Cong. § 201, § 1991(j) (2001). *See supra* note 232 and accompanying text for a comparison of this restriction with that on direct assistance. While faith-saturated programs would likely not qualify for direct funds, they would be eligible to receive funds indirectly. *See supra* note 20 for a description of faith-saturated organizations.

[244] H.R. 7, 107th Cong. § 201, § 1991(h)(2) (2001) ("A religious organization providing assistance through a voucher, certificate, or other form of indirect assistance . . . shall not deny an individual . . . admission into such program.").

See supra note 236 for a comparison of this restriction with that on direct assistance.

[245] H.R. 7, 107th Cong. § 201, § 1991(i)(2)(B) (2001) ("A religious organization providing assistance through a voucher, certificate, or other form of indirect assistance under a program described in subsection (c)(4) may segregate government funds provided under such program into a separate account or accounts.").

[246] H.R. 7, 107th Cong. § 201, § 1991(i)(2)(B) (2001) ("If such funds are so segregated, then only the separate accounts consisting of funds from the government shall be subject to audit by the government."). *See supra* note 234 for a comparison of this restriction with

To give agencies greater flexibility in the delivery of services to beneficiaries, the bill allows the Secretary of the departments administering the programs to convert (or "voucherize") direct aid into indirect assistance.[247] Because indirectly funded faith-based programs enjoy greater flexibility, voucher programs become important political capital for supporters of House Bill 7, and the provision was inserted, in part, to rally support for the bill from those upset with the "opt out" provisions of subsection (g).[248]

D. *Employment Practices*

In the most controversial part of the bill, House Bill 7 preserves faith-based organizations' right to hire employees on the basis of religion by extending the religious exemption of Section 702 of the Civil Rights Act to social service programs receiving funds under the legislation.[249] The provision is intended to ensure faith-based providers

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that on indirect assistance. Since unsegregated funds in a mixed account are subject to audit, indirectly funded faith-based providers must segregate government funds if they wish to avoid a general audit of their accounts.

247 H.R. 7, 107th Cong. § 201, § 1991(l) (2001).

> INDIRECT ASSISTANCE- When consistent with the purpose of a program described in subsection (c)(4), the Secretary of the department administering the program may direct the disbursement of some or all of the funds, if determined by the Secretary to be feasible and efficient, in the form of indirect assistance.

Id.

248 Marvin Olasky, *Rolling the Dice*, WORLD MAGAZINE, Aug. 4, 2001, at 6, *available at* http://worldmag.com/world/issue/08-04-01/cover_1.asp (last visited Apr. 1, 2003). The voucher provisions of subsection § 201, § 1991(l) were added to bolster political support after conservative Christians objected to the "Opt Out" provisions of § 201, § 1991(g)(1). *Id. See also supra* note 239.

249 The subsection reads as follows:

> EMPLOYMENT PRACTICES- A religious organization's exemption provided under section 702 of the Civil Rights Act of 1964, (42 U.S.C. 2000e-1) regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described in subsection (c)(4), and any provision in such programs that is inconsistent with or would diminish the exercise of an organization's autonomy recognized in section 702 or in this section shall have no effect. Nothing in this section alters the duty of a religious organization to comply with the nondiscrimination provisions of title VII of the Civil Rights Act of 1964 in the use of funds from programs described in subsection (c)(4).

H.R. 7, 107th Cong. § 201, § 1991(e) (2001).

When introduced to the House, this section also included an exemption from section 702(e)(2) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1 (2001), but this provision was

receiving funds under House Bill 7 do not lose the right to preserve their organizational character and autonomy because they elect to participate in a government social services program.[250]

It is important to note that while the legislation allows faith-based providers to preserve the autonomy of faith-based organizations, it does not excuse these organizations from other federal laws prohibiting discrimination[251] including: race, color, and national origin;[252] sex, blindness and visual impairment;[253] disabilities of otherwise qualified persons;[254] and age.[255]

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dropped in the final version. H.R. 7, 107th Cong. § 201, § 1991(e)(2) (2001) (introduced in House); H.R. 7, 107th Cong. § 201, § 1991(e) (2001).

It should be noted that language similar to § 201, § 1991(e) first appeared in the Welfare Reform Act of 1996, Pub. L. No. 104-193, and has been law for the past six years. 42 U.S.C.A. § 604a(f) (2001). Other Title VII exemptions appear in existing Charitable Choice legislation at 42 U.S.C.A. § 290kk-1(e), 300x-65(d)(2), 604a(f), 9920(b)(3) (2003).

Section 702 of the Civil Rights Act of 1964 is the same religious exemption that was the subject of *Amos*, 483 U.S. 327 (1987). *See supra* notes 177-182 and accompanying text for a discussion of *Amos*.

See infra Section V.D for a discussion of the controversy surrounding this provision.

250 The goal of preserving the organizational character and autonomy of faith-based organizations is also affirmed in Section (d) of House Bill 7:

> (1)IN GENERAL- A religious organization that provides assistance under a program described in subsection (c)(4) shall have the right to retain its autonomy 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 or local government with Federal funds, shall require a religious organization, in order to be eligible to provide assistance under a program described in subsection (c)(4), to—
>
> (A)alter its form of internal governance or provisions in its charter documents; or
>
> (B)remove religious art, icons, scripture, or other symbols, or to change its name, because such symbols or names are of a religious character.

H.R. 7, 107th Cong. § 201, § 1991(d) (2001).

251 H.R. 7, 107th Cong., § 201, § 1991(f) (2001).

> Nothing in this section shall alter the duty of a religious organization receiving assistance or providing services under any program described in subsection (c)(4) to comply with the nondiscrimination provisions in title VI of the Civil Rights Act of 1964 . . . title IX of the Education Amendments of 1972 . . . section 504 of the Rehabilitation Act of 1973 . . . and the Age Discrimination Act of 1975.

Id.

252 Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (2001).

253 Title IX of the Education Amendments of 1972, 20 U.S.C. 1681-1688 (2001).

254 Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (2001).

E. *Technical Assistance*

The final section of Title II is notable, not for constitutional concerns, but because it overcomes systemic problems by providing technical assistance to faith-based organizations seeking government funding.[256] While House Bill 7 provides for equal treatment of all social services bidders, faith-based organizations are also disadvantaged because they lack experience and technical expertise in competing for program funds.[257] House Bill 7 was amended to provide a minimum of $5 million dollars to train smaller social service providers, whether faith-based or secular, in such critical areas as: the creation of 501(c)(3) organizations; grant writing; accounting, legal and tax issues; and compliance with Federal non-discrimination laws.[258] The only

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255 Age Discrimination Act of 1975, 42 U.S.C. 6101-6107 (2001).

256 H.R. 7, 107th Cong. § 201, § 1991(o) (2001). Subsection (o) was added during the amendment process in response to political concerns from smaller faith-based providers. H.R. 7, 107th Cong. . § 201, § 1991 (2001) (introduced in House); H.R. 7, 107th Cong. . § 201, § 1991(o) (2001).

257 Subsection (o) was introduced during the amendment process to address the concerns of faith-based providers organizations who believed their lack of experience in grant writing would result in a system that was facially neutral but biased in favor of programs with more experience in responding to RFP's.

258 H.R. 7, 107th Cong. § 201, § 1991(o)(3) (2001) ("An amount of no less than $5,000,000 shall be reserved under this section."). The money is to come "From amounts made available to carry out the purposes of the Office of Justice Programs." H.R. 7, 107th Cong. § 201, § 1991(o)(1) (2001). Funds are authorized "to provide training and technical assistance, directly or through grants or other arrangements, in procedures relating to potential application and participation in programs identified in subsection (c)(4) to small nongovernmental organizations, as determined by the Attorney General, including religious organizations." *Id.*

This assistance may include:

> (A) assistance and information relative to creating an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 to operate identified programs;
>
> (B) granting writing assistance which may include workshops and reasonable guidance;
>
> (C) information and referrals to other nongovernmental organizations that provide expertise in accounting, legal issues, tax issues, program development, and a variety of other organizational areas; and
>
> (D) information and guidance on how to comply with Federal nondiscrimination provisions including, but not limited to, title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*), title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), the Fair Housing Act, as amended (42 U.S.C. 3601 *et seq.*), title IX of the Education Amendments of 1972 (20 U.S.C. 1681-1688), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 694), and the Age Discrimination Act of 1975 (42 U.S.C. 6101-6107).

preference the legislation makes regarding the granting of such assistance is to "small nongovernmental organizations serving urban and rural communities."[259]

V. Dissenting Opinions

Because of the sweeping character of House Bill 7, groups from diverse segments of the population have come out against the bill.[260] Their claims fall into a number of categories.

A. *Theological Considerations*

Some religious leaders have expressed concern that government partnerships with faith-based organizations will dampen religion's message.[261] They argue programs will become dependent upon tax dollars, making religion less likely to assume its prophetic role of criticizing government.[262]

H.R. 7, 107th Cong. § 201, § 1991(o)(2) (2001).

Provisions are even made to help groups make their programs accessible to the disabled. H.R. 7, 107th Cong. § 201, § 1991(o)(3) (2001). ("Small nongovernmental organizations may apply for these funds to be used for assistance in providing full and equal integrated access to individuals with disabilities in programs under this title.").

259 H.R. 7, 107th Cong. § 201, § 1991(o)(3) (2001). ("In giving out the assistance described in this subsection, priority shall be given to small nongovernmental organizations serving urban and rural communities.").

260 Opponents include such organizations as Americans United for Separation of Church and State; the American Civil Liberties Union; the American Federation of Government Employees, AFL-CIO; the American Federation of State, County and Municipal Employees; American Federation of Teachers; Anti-Defamation League; Baptist Joint Committee on Public Affairs; Central Conference of American Rabbis; Friends Committee on National Legislation; Jewish Council for Public Affairs; United Church of Christ; Leadership Conference on Civil Rights; National Association for the Advancement of Colored People (NAACP); National Education Association; National PTA; NOW Legal Defense Fund; Union of American Hebrew Congregations; Unitarian Universalist Association and Women of Reform Judaism. Press Release, Americans United for Separation of Church and State, Religious, Labor and Public Policy Organizations Urge House to Reject 'Faith-Based' Legislation (July 16, 2001) *at* http://www.au.org/press/pr71601.htm (last visited Apr. 1, 2003).

261 *H.R. 7, the "Community Solutions Act of 2001": Hearing Before the Subcomm. on Human Resources and Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 107th Cong. 1 (June 14, 2001) (statement of J. Brent Walker, Executive Director, Baptist Joint Committee on Public Affairs) Prof. Walker argues religion has historically stood outside of government control and has served as a critic of government. *Id.*

262 According to Walker, "Federal funding is a narcotic" and "once addicted, recipients find it hard to live without." *H.R. 7, the "Community Solutions Act of 2001": Hearing*

Supporters of faith-based initiatives note that there are theological arguments that favor churches' use of government funds.[263] Government funding has not undermined other institutions, such as colleges receiving government funding, scholars involved in federally subsidized research, and artists funded by the National Endowment for the Arts.[264] Proponents do, however, concede that not all partnerships between government and faith-based providers would be helpful for all churches.[265] Congregations will need to determine for themselves whether their traditions and present conditions make it proper and prudent to participate in such programs.[266]

Before the Subcomm. on Human Resources and Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means, 107th Cong. 1 (June 14, 2001) (statement of J. Brent Walker, Executive Director, Baptist Joint Committee on Public Affairs). Even John DiIulio has admitted that "once any organization, religious or secular, receives more than a quarter to half of its funding from any single source, it risks its independence and ability to remain faithful to core values and original missions." John J. DiIulio, Jr., Compassion in Truth and Action: How Sacred and Secular Places Serve Civic Purposes, and What Washington Should and Should Not Do To Help, Address at the National Association of Evangelicals (March 7, 2001).

Opponents further fear that if church do not recapture their prophetic zeal, they "will become an irrelevant social club without moral or spiritual authority." *H.R. 7, the "Community Solutions Act of 2001": Hearing Before the Subcomm. on Human Resources and Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 107th Cong. 1 (June 14, 2001) (statement of J. Brent Walker, Executive Director, Baptist Joint Committee on Public Affairs).

263 Dean Trulear, Address at Making a Difference: Working Together to Serve the Needy (Dec. 8, 1998). Rev. Trulear points to the Book of Ezra, where King Cyrus used the money taken from the defeated King Nebuchadnezzar to enable the Jews to return from their exile in Babylon and rebuild the Temple. *Id.* (citing *Ezra* 1:1-11). He notes that while some churches "don't want any of Pharaoh's money" they may be willing to accept "some of Nebuchadnezzar's." *Id.*

264 Letter from Ronald J. Sider, President, Evangelicals for Social Action, Why Democrats Should Support Charitable Choice – Including the Hiring Exemption, 4 (on file with the Seton Hall Legislative Journal).

265 John DiIulio, *The New Civil Rights Struggle*, WALL ST. J., June 23, 2001, at A16. For example, the Mormon church has refused to seek government funding because "the church doesn't want the government telling it how to do what the church sees as the church's job." Christy Karras, *LDS Keeps Charity in Neutral Funding*, L.A. TIMES, June 17, 2001, at B4.

266 STANLEY W. CARLSON-THIES, CHARITABLE CHOICE: TOP 10 TIPS FOR FAITH-BASED ORGANIZATIONS (1999). Several organizations have published handbooks to help faith-based groups determine their compatibility with government partnerships. *See, e.g.*, BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS & THE INTERFAITH ALLIANCE FOUNDATION, KEEPING THE FAITH: THE PROMISE OF COOPERATION, THE PERILS OF GOVERNMENT FUNDING: A GUIDE FOR HOUSES OF WORSHIP (2001); STANLEY W. CARLSON-THIES, CHARITABLE CHOICE: TOP 10 TIPS FOR FAITH-BASED ORGANIZATIONS (1999).

B. *Secular Purpose and Scope*

Critics first challenge the efficacy of faith-based programs, claiming that while some limited studies have been made, a comprehensive survey has yet to be made.[267] It must be noted, however, that, "virtually none of the big nonprofit organizations that big government has funded for years have undergone even a single systematic evaluation of performance."[268]

Opponents of faith-based initiatives next question the need for House Bill 7, noting that "faith-secular partnerships," "faith-background," and "faith-related" programs such as Catholic Charities, Lutheran Family Services, and United Jewish Appeal have provided social services under government contract for years.[269] Though these established programs have provided services without raising constitutional concerns, strict separationists worry when new "faith-saturated" or "faith-centered" providers become eligible for government funding.[270]

The provision of government funds to faith-based social service

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[267] Benjamin Soskis, *Act of Faith: What Religion Cannot Do*, THE NEW REPUBLIC, Feb. 26, 2001, at 1, *available at* http://www.tnr.com/022601/soskis022601.html (last visited Apr. 1, 2003). Mark Chaves, professor of sociology at the University of Arizona has stated, "The claim that religious organizations work better is completely without empirical basis." *Id.*

David Reingold of the Indiana University School of Public Affairs has also noted, "there's absolutely no research out there that systematically demonstrates this. From my perspective, it's a horrible exaggeration, to the point that it's fabrication." *Id.* This lack of study is due, in part, to the fact that academics did not consider faith-based social service providers worthy of serious study. Soskis, *Act of Faith*, at 2. *But see* JASON D. SCOTT, THE SCOPE AND SCALE OF FAITH BASED SERVICES (2002), *available at* http://www.religionandsocialpolicy.org/docs/bibliographies/9-4-2002_scope_and_scale.pdf (last visited Apr. 1, 2003) for a bibliography of existing research studies.

[268] John J. DiIulio Jr., *Unlevel Playing Field*, WALL ST. J., August 16, 2001, at A14. Fewer that one in five programs have received a General Accounting Office of Agency Inspector General's review to analyze actual performance and results. UNLEVEL PLAYING FIELD, *see supra* note 8, at 8.

[269] Alex J. Luchenitser, *Casting Aside the Constitution: The Trend Toward Government Funding of Religious Social Service Providers*, 35 J. POVERTY L. & POL'Y 615, 615 (2002) (citing Steven K. Green, *Charitable Choice and Neutrality Theory*, 57 N.Y.U. ANN. SURV. AM. L. 33, 35-37 (2000)). These groups typically provide secular services without reference to religious activities and did not hire on the basis of religion. *Id. See supra* notes 22, 23 & 24 for definitions of these categories.

[270] *See supra* notes 20-21 for descriptions of these terms. It should be noted that even advocates concede "faith-saturated" programs would not qualify for direct government funding. *See supra* note 232.

providers creates "special risks that governmental aid will have the effect of advancing religion."[271] While direct monetary grants are not *per se* unconstitutional, critics doubt faith-based programs can segregate their activities to such a degree that government funds will only support the secular aspects of these programs.[272]

Faith-based programs operating under existing Charitable Choice provisions have addressed some of these issues. A church-run welfare-to-work program in Philadelphia includes the singing of hymns, showing of religious videos, and faith discussions, but uses government money only for the secular portions of the program.[273] Similarly, a teen mentoring and adult job training program run by a Virginia church divided program time into fifteen minute segments and only billed the government for the secular segments.[274] Critics do, however, doubt the efficacy of such measures.[275]

There are cases where such distinctions have been found inadequate. The Second Circuit case of *DeStefano v. Emergency Housing Group, Inc.* held unconstitutional a state-funded private alcoholic treatment center that required clients to attend religious Alcoholic Anonymous meetings.[276] The court determined Alcoholics Anonymous to be "a 'religion' for Establishment Clause purposes,"[277] and direct state funding of personnel who inculcated these religious

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[271] Mitchell v. Helms, 530 U.S. 793, 820 n.8 (2000). *See supra* Section III.B for a description of how indirect funding reduces these risks.

[272] Alex J. Luchenitser, *Casting Aside the Constitution: The Trend Toward Government Funding of Religious Social Service Providers*, 35 J. POVERTY L. & POL'Y 615, 623 (2002).

[273] Laura Meckler, *Philadelphia Church Seizes Opportunity for Charitable Choice*, A.P. WIRE, Mar. 19, 2001; *State and Local Implementation of Existing Charitable Choice Programs: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong. (April 24, 2001) (statement of Rev. Donna Lawrence Jones), *available at* www.house.gov/judiciary/jones_042401.htm.

[274] *See* Henry G. Brinton, *It's Tempting, But My Church Says No Thanks*, WASH. POST, Sept. 10, 2000, at B1; Mark O'Keefe, *Church Charities with Public Funds: It's the Faithful Who Have Doubts*, NEWARK STAR LEDGER, Oct. 22, 2000, at 1.

[275] Luchenitser, *see supra* note 272, at 623.

[276] *DeStefano*, 247 F.3d 397, 419 (2nd Cir. 2001). At issue was the Middletown Alcohol Crisis Center, a non-medical, short-term alcohol detoxification and treatment facility that received approximately 95% of its annual funding of $500,000 from the New York State Office of Alcoholism and Substance Abuse Services. *DeStefano*, 247 F.3d at 419-20.

[277] *DeStefano*, 247 F.3d at 407 (citing Warner v. Orange County Dept. of Prob., 115 F.3d 1068 (2nd Cir. 1997)); Griffin v. Coughlin, 88 N.Y.2d 674, 683 (1997), *cert. denied*, 519 U.S. 1054 (1997) (a review of A.A. materials "demonstrates beyond peradventure that doctrinally and as actually practiced in the 12-step methodology, adherence to the A.A. fellowship entails engagement in religious activity and religious proselytization.").

beliefs "crosse[d] the vague but palpable line between permissible and impermissible government action under the First Amendment."[278]

In similar manner, the Texas Supreme Court, in *Williams v. Lara*, found unconstitutional a "Chaplain's Education Unit" that placed inmates in a religious-education program under the control of the sheriff and prison chaplain.[279] The court determined the program endorsed a particular Christian view while excluding others, and was an unconstitutional preference of one religion over another.[280]

Opponents are also quick to pounce on any efforts to make certain grants available exclusively to faith-based providers.[281] One such improper allocation of funds in March of 2001 was swiftly revoked after protests.[282]

C. *Direct and Indirect Funding*

Critics argue direct monetary grants pose particular problems because they are fungible and may be diverted.[283] House Bill 7 prohibits

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278 *DeStefano*, 247 F.3d at 416.

279 *Williams*, 52 S.W.3d 171 (Tex. 2001).

280 *Id.* at 182-83, 192. Under the Establishment Clause government policies may not "prefer one religion over another." *See, e.g.*, Larson v. Valente, 456 U.S. 228, 246 (1982). Chaplains may be hired to ensure prisoners' rights under the Free Exercise Clause. *See* School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 296-98 (1963) (Brennan, J., concurring); Theriault v. A Religious Office in the Structure of the Gov't, 895 F.2d 104, 107 (2nd Cir. 1990). The County could not, however, convey a message that endorsed the personal religious beliefs of county officials in an effort to rehabilitate criminal offenders. *Williams*, 52 S.W.3d at 192.

281 *See* Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (stating that government may not "pass laws which aid one religion, aid all religions, or prefer one religion over another").

282 On March 20, 2001 the U.S. Department of Health and Human Services announced a multi-million dollar initiative to fund substance abuse and AIDS prevention programs in minority communities. Steve Benen, *"Faith-Based" Quota, Bush Administration Backs Down On Funding For Religious Set-Aside*, at 1, *at* http://www.au.org/churchstate/cs7012.htm (last visited Apr. 1, 2003). One $4 million HHS program was limited to "faith-based organizations" and "youth-serving organizations collaborating with faith-based organizations". *Id.* After complaints by Americans United for Separation of Church and State the preference was removed. *Id.*

283 Justice O'Connor, in *Mitchell*, noted that "we have seen 'special Establishment Clause dangers,' Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819, 842 (1995), when *money* is given to religious schools or entities directly rather than, as in *Witters* [Witters v. Washington Dept. of Serv. for the Blind, 474 U.S. 481, 485-86 (1986)] and *Mueller* [Mueller v. Allen 463 U.S. 388, 394 (1983)], indirectly." *Mitchell*, 530 U.S. at 818-19. It should be noted, however, that Justice Blackmun's dissent in *Zobrest* argued cash was less of an endorsement than a sign language interpreter, since "government involvement ended with the disbursement of funds." *Zobrest*, 509 U.S. at 22 (Blackmun, J.,

the use of government funds for "sectarian instruction, worship, or proselytization," and requires programs to certify they are aware of this provision [284] and prepare a self-audit to demonstrate compliance.[285] Critics note that the costs of monitoring are considerable.[286] They further doubt the adequacy of such provisions, and argue the provisions are weaker prior laws.[287]

In support of this alleged inadequacy, opponents cite the Seventh Circuit's decision in *Freedom from Religion Foundation v. Bugher*, which found a Wisconsin program that subsidized telecommunications access for public and private schools to be unconstitutional.[288] The court found inadequate a letter from the state restricting the use of funds to secular purposes, and further noted there were insufficient safeguards to monitor compliance.[289] Because of the absence of safeguards, the court found the subsidies to be unrestricted cash payments and therefore

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dissenting).

[284] House Bill 7 requires,

> A religious organization providing services under any program described in subsection (c)(4) shall conduct annually a self audit for compliance with its duties under this section and submit a copy of the self audit to the appropriate Federal, State, or local government agency, along with a plan to timely correct variances, if any, identified in the self audit.

H.R. 7, 107th Cong. § 201, § 1991(i)(3) (2001).

[285] House Bill 7 states "No funds provided through a grant or cooperative agreement to a religious organization to provide assistance under any program described in subsection (c)(4) shall be expended for sectarian instruction, worship, or proselytization." H.R. 7, 107th Cong. § 201, § 1991(j) (2001). House Bill 7 further requires programs to submit "A certificate . . . certifying that the organization is aware of and will comply with this subsection." H.R. 7, 107th Cong. § 201, § 1991(j) (2001).

[286] Marcia Yablon, *Growth Spurt: How Including Religion Will Make Government Bigger*, THE NEW REPUBLIC, Feb. 26, 2001, at 3, *available at* http://www.tnr.com/022601/yablon022601.html (last visited Apr. 1, 2003). When the AmeriCorps program began in 1994, each state created a commission to ensure government funds were not used for religious purposes. *Id.* Each of these commissions employed between 15 and 25 people at a cost of between $125,000 and $750,000 annually. *Id.*

[287] Alex J. Luchenitser, *Casting Aside the Constitution: The Trend Toward Government Funding of Religious Social Service Providers*, 35 J. POVERTY L. & POL'Y 615, 628 (2002).

[288] *Bugher*, 249 F.3d 606 (7th Cir. 2001).

[289] *Bugher*, 249 F.3d at 612. In making its determination, the court found:

> The possible effect of religious indoctrination is not altered by the letter from the TEACH board which accompanies the grant and purports to restrict the use of the grant money. There is no authority in the statute for such a limitation, nor is there any penalty for failure to comply. [citation omitted] In addition, there is no evidence of any ability or attempt to monitor the use of the grant money received by the religious schools.

Id.

unconstitutional.[290]

With respect to monitoring, the drafters of House Bill 7 must navigate between a constitutional Scylla and Charybdis.[291] Some monitoring is clearly necessary.[292] Yet while insufficient monitoring results in unrestricted cash payments that are unconstitutional under the Establishment Clause, pervasive monitoring constitutes an excessive entanglement between government and religion in violation of the Free Exercise Clause.[293]

Monitoring provisions in existing "Charitable Choice" programs appear to be working, since "the [government] contract becomes the oversight mechanism."[294] Since *Mitchell*, there is a presumption that faith-based organizations will comply with government restrictions,[295] and faith-based providers may even be more likely than their secular counterparts to comply with the provisions.[296] The existing compliance provisions of House Bill 7 may therefore be the best means to achieve

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[290] *Bugher*, 249 F.3d at 612. The court noted:

> Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities.

Id.

[291] According to Homer, Charybdis, nymph-daughter of Poseidon and Gaia, lived in a cave at one side of the Strait of Messina, opposite the monster Scylla. HOMER, THE ODYSSEY, XII: 234-50. The two of them formed a dangerous threat to passing ships. *Id.* Odysseus was able to pass through these dangerous straits, but lost several members of his crew in the process. *Id.*

[292] *Bowen*, 487 U.S. at 615-18 (holding that because faith-based social services are not inherently religious, regulation necessary for the administration of the program does not constitute excessive entanglement); Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 305-06 (1985) (regulation of the commercial operations of a religious organization undertaken for a commercial purpose does not amount to excessive entanglement).

[293] *See Agostini*, 521 U.S. at 233.

[294] Martin Davis, *Faith, Hope, and Charity*, NAT'L JOURNAL, Apr. 28, 2001, at 1232. Even Julie Segal, legislative counsel for Americans United for the Separation of Church and State, has stated, "With charitable choice, we're finding that, out there, a lot of churches are complying with the constitution" and "they're not proselytizing." Robert S. Greenberger, *"Charitable Choice" Tests Lines Between Church, State*, WALL ST. J., Aug. 24, 1999, at A20.

[295] *Mitchell*, 530 U.S. at 847 (O'Connor, J., plurality opinion) (construing *Agostini*, 521 U.S. at 223-24, 226-27).

[296] Martin Davis, *Faith, Hope, and Charity*, NAT'L JOURNAL, Apr. 28, 2001 at 1232-33. One religious leader noted, "If I'm living like God wants me to live, we're going to work harder than secular groups to be above board because I care about people." *Id.*

compliance without pervasive monitoring.[297]

Indirectly funded social services programs, though less likely to cause constitutional concerns, are not beyond scrutiny.[298] Critics question why non-discrimination provisions designed to protect applications to voucher programs apply only to program admissions, and not the programs themselves.[299] There is additional concern that the "voucherization" provision of House Bill 7 § 1991(l)[300] is a means to increase funding to "faith-saturated" programs that would not otherwise qualify for government funding.[301]

This concern is heightened in light of the provisions of § 1991(l), which authorizes Federal agencies to convert "some or all" of their direct funds into vouchers.[302] Opponents argue the provision effectively takes $47 billion in government funds away from the oversight of Congress and places it in the hands of the Secretaries of these departments.[303]

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297 H.R. 7, 107th Cong. § 201, § 1991(i), (j) (2001).

298 *Can Vouchers Hurdle Church-State Wall?*, N.Y. TIMES, June 12, 1991, at B5 (quoting Laurence Tribe, professor, Harvard Law School). Prof. Laurence Tribe has even conceded, "Any objection that anyone would have to a voucher program would have to be policy-based and could not rest on legal doctrine." *Id.* *See supra* Section III.B for a discussion of the diminished constitutional constraints on indirect funding.

299 § 201, § 1991(h)(2) states, "A religious organization providing assistance through a voucher, certificate, or other form of indirect assistance . . . shall not deny an individual . . . admission into such program," H.R. 7, 107th Cong. § 201, § 1991(h)(2) (2001), while in a direct aid program, "[a] religious organization providing assistance through a grant or cooperative agreement . . . shall not discriminate in carrying out the program." H.R. 7, 107th Cong. § 201, § 1991(h) (1) (2001).

300 *See supra* note 247 and accompanying text for a description of the "voucherization" language of § 201, § 1991(l).

301 Marvin Olasky, *Rolling the Dice*, WORLD MAGAZINE, Aug. 4, 2001, at 6-7, *available at* http://worldmag.com/world/issue/08-04-01/cover_1.asp (last visited Apr. 1, 2003) (comments of Richard Land, President of the Ethics and Religious Liberty Commission of the Southern Baptist Convention). Voucherization is "almost like a magic wand that deals with almost all the thorny church state problems." *Id.* Critics are concerned the voucherization provisions will give institutional inertia to "faith-saturated" programs that would otherwise not receive funds. *Id.* Rep. Tom Tancredo (R-CO), a supporter of House Bill 7, notes, "If you take a voucher, you don't have to change your program," and "if we have three years at least of a program which hundreds of thousands of people are voucher recipients, it will become harder to change that." *Id.* at 6-7.

302 H.R. 7, 107th Cong. § 201, § 1991(l) (2001). ("When consistent with the purpose of a program described in subsection (c)(4), the Secretary of the department administering the program may direct the disbursement of some or all of the funds, if determined by the Secretary to be feasible and efficient, in the form of indirect assistance.").

303 147 CONG. REC. E1433 (daily ed. July 25, 2001) (statement of Rep. Moore).

D. *Employment Practices*

Critics of faith-based initiatives find the extension of the Title VII religious exemption to be the most objectionable part of the program.[304] While supporters of faith-based initiatives believe the exemption protects the integrity of religious organizations under the Free Exercise Clause of the First Amendment,[305] opponents argue it is nothing less than federally funded religious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.[306]

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[304] During debates on House Bill 7, Rep. Robert C. Scott (D-VA) repeatedly denounced the Title VII extension as government sanctioned and funded discrimination. *See, e.g., Faith-Based Solutions: What are the Legal Issues?: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 2 (2001) (statement of Rep. Scott, Member, House Comm. on the Judiciary); *H.R. 7, the "Community Solutions Act of 2001": Hearing Before the Subcomm. on Human Resources and the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 107th Cong. 2 (2001) (statement of Rep. Scott, Member, House Comm. on the Judiciary).

The Working Group on Human Needs and Faith-Based and Community Initiatives, which was formed at the request of faith-based initiatives supporter Senator Rick Santorum, indicates it would support the bill only if the discrimination provisions of the bill were removed. WORKING GROUP ON HUMAN NEEDS AND FAITH-BASED AND COMMUNITY INITIATIVES, FINDING COMMON GROUND: 29 RECOMMENDATIONS OF THE WORKING GROUP ON HUMAN NEEDS AND FAITH-BASED AND COMMUNITY INITIATIVES 24-25 (2002).

See also Alex J. Luchenitser, *Casting Aside the Constitution: The Trend Toward Government Funding of Religious Social Service Providers*, 35 J. POVERTY L. & POL'Y 615, 616 (2002); Laura B. Mutterperl, *Employment at (God's) Will: The Constitutionality of Antidiscrimination Exemptions in Charitable Choice Legislation*, 37 HARV. C.R.-C.L. L. REV. 389 (2002).

[305] *See supra* Section III.C for a description of the constitutional arguments in favor of the extension of the Title VII religious exemption and Section IV.D for the Title VII religious exemption provisions of House Bill 7.

[306] U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

Congressman Robert C. Scott, an outspoken opponent of House Bill 7, testified:

> [T]here is another important policy question that has to be addressed: should we allow employment discrimination in a federally funded program? There was a time when some Americans, because of their religion, were not considered qualified for certain jobs. . . . Sixty years ago this month, President Roosevelt established the principal in an executive order that you cannot discriminate in government defense contracts on the basis of race, religion, color or national origin, and the civil rights laws of the 1960s outlawed schemes which allowed job applicants to be rejected solely because of their religious beliefs. . . . Some of us are frankly shocked that we would even have to debate whether sponsors of a federal program can discriminate in hiring. But then we remember that passage of the civil rights laws in the 1960s was not unanimous, and it is clear that we now are using Charitable Choice to redebate the passage of basic anti-discrimination laws. Mr. Chairman, I believe that

Religion is a suspect class under the Equal Protection Clause,[307] and state sponsored preferences based upon these suspect classifications are acceptable only when they serve a compelling government interest and are narrowly tailored to advance that interest.[308] If House Bill 7's extension of the Title VII religious exemption allows government funds to pass to organizations that discriminate in hiring based on religion without fitting within well established, narrowly tailored parameters, the Equal Protection Clause would be violated and the provision found unconstitutional.[309]

In *Norwood v. Harrison*, the Supreme Court found unconstitutional a Mississippi program that distributed textbooks to private schools that discriminated on the basis of race.[310] The Court found the Constitution does not permit the state to provide tangible financial aid "if that aid has a significant tendency to facilitate, reinforce, and support private discrimination."[311] Government has a constitutional obligation to avoid giving "significant aid to institutions that practice racial or other invidious discrimination,"[312] and the state may not "induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish."[313]

While religious criteria for hiring can be understood as

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publicly funded employment discrimination was wrong in the 1960's and it is still wrong.

Faith-Based Solutions: What are the Legal Issues?: Hearing Before the Senate Comm. on the Judiciary, 107th Cong. 2 (2001) (statement of Rep. Scott, Member, House Comm. on the Judiciary).

It should be noted that other civil rights leaders, most notably Rosa Parks, have endorsed House Bill 7. Rebecca Carr, *Bush Gets an Ally on Faith Plan: Rights Pioneer Joins Push*, ATLANTA CONST., June 25, 2001, at A1.

307 *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Burlington N. R.R. Co. v. Ford, 504 U.S. 648, 651 (1992).

308 *See, e.g.*, Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 666 (1990); DeHart v. Horn, 227 F.3d 47, 61 (3d Cir. 2000).

309 *Bowen*, 487 U.S. at 615-17; Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

310 Norwood v. Harrison, 413 U.S. 455 (1973).

311 *Id.* at 466. Such aid was improper, "even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school." *Id.*

312 *Id.* at 467. The Court further affirmed this principle in City of Richmond v. J.A. Croson Co., which found "any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Crosson*, 488 U.S. 469, 492 (1989).

313 *Norwood*, 413 U.S. at 465 (citing Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, 475-76 (M.D. Ala. 1967)).

discrimination, it must be noted that the Court in *Norwood* distinguished the Mississippi program from the constitutionally permissible aid provided to parochial schools.[314] Government can provide assistance to religious organizations performing their secular functions because "the transcendent value of free religious exercise in our constitutional scheme leaves room for 'play in the joints.'"[315] The extension of the Title VII religious exemption therefore involves the Free Exercise and Establishment Clauses of the First Amendment under *Corporation of Presiding Bishops v. Amos* and the Equal Protection of the Fourteenth Amendment under *Norwood*.[316]

Some courts have found religious employment discrimination in publicly funded positions to be unconstitutional. The Fifth Circuit case of *Robinson v. Price* addressed the issue through an analysis of state action and the Free Exercise Clause.[317] In *Robinson*, an employee of a private nonprofit corporation receiving federal funding alleged he was dismissed for racial and religious reasons.[318] The court first noted that relief could be granted only if there was "a sufficiently close nexus between the state and the plaintiff's employer so that the actions of the latter may be fairly treated as that of the state itself."[319] The court found such a nexus existed because the handling of welfare related problems is "a function that has been traditionally dealt with by the state," and a broad interpretation of state action is applied in cases of racial discrimination.[320] Following a remand to the trial court, the Fifth Circuit later ruled that the facts of the allegations supported a finding that the plaintiff's free exercise rights had also been violated.[321]

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[314] *Norwood*, 413 U.S. at 468. The Court reasoned:

> Religious schools "pursue two goals, religious instruction and secular education." Board of Education v. Allen[392 U.S. 236, 245 (1968)]. And where carefully limited so as to avoid the prohibitions of the "effect" and "entanglement" tests, States may assist church-related schools in performing their secular functions.

Id.

[315] *Norwood*, 413 U.S. at 469.

[316] *See supra* Section III.C for a discussion of Title VII and *Amos*.

[317] *Robinson*, 553 F.2d 918 (5th Cir. 1977). *Robinson* overturned a dismissal by the United States District Court for the Southern District of Texas for failure to state a claim on which relief could be granted under FED. R. CIV. PROC. 12(b)(6). *Id.* at 919.

[318] *Robinson*, 553 F.2d at 920. The plaintiff was employed by Harris County Community Action Association, an antipoverty agency that received funding through federal block grants to the Texas state government. *Id.*

[319] *Id.* (citing Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974)).

[320] *Robinson*, 553 F.2d at 920-21.

[321] Robinson v. Price, 615 F.2d 1097, 1099-1100 (5th Cir. 1980).

A different approach to the issue was constructed in *Dodge v. Salvation Army*, where a Salvation Army employee, whose position was funded by government money, was fired after she used an office machine to copy manuals and information of Satanic/Wiccan rituals.[322] The District Court refused to follow *Presiding Bishops v. Amos*, finding instead that the government's funding of a position that can be filled based on religious preference "clearly has the effect of advancing religion" and creates "an excessive government entanglement with religion" that is unconstitutional.[323]

A final legal argument is that religion-based employment discrimination in government-funded programs has the primary effect of advancing religion.[324] Opponents argue the hiring of co-religionists with government funds allows religious organizations to provide additional jobs to their members and enhances their ability to promulgate their faith.[325]

Beyond these legal arguments, significant political arguments have been made against the Title VII extension. Opponents note that since the creation of Title VII some welfare bills have refused to extend the religious exemption.[326] They also emphasize that the preemption

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[322] *Dodge*, 48 Empl. Prac. Dec. (CCH) 38,619, 1989 WL 53857 at *1-2 (S.D. Miss. 1989). The *Dodge* decision involved defendant's Motion for Summary Judgment and plaintiff's Cross-Motion for Summary Judgment. The court found the position was "funded substantially, if not entirely, by federal, state and local government." *Dodge*, 1989 WL 53857 at *2.

[323] *Dodge*, 1989 WL 53857 at *3-4. The court noted the Supreme Court "went to great lengths to distinguish *Amos* from *Lemon* on the questions of financial support and active involvement by the sovereign." *Dodge*, 1989 WL 53857 at *3-4 (citing *Amos*, 483 U.S. at 336).

[324] *See supra* notes 88-107 and accompanying text for a description of the *Lemon/Agostini* test for the advancement of religion.

[325] *See* Alan E. Brownstein, *Constitutional Questions About Charitable Choice*, *in* WELFARE REFORM AND FAITH-BASED ORGANIZATIONS 219, 239 (Derek H. Davis & Barry Hankins eds., 1999); Steven K. Green, *The Ambiguity of Neutrality*, 86 CORNELL L. REV. 692, 722-24 (2001).

[326] Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d(c)(1) (2001) ("No person in any State shall on the ground of race, color, religion, national origin, or sex be . . . denied employment in connection with any programs or activity funded in whole or in part with funds made available under this chapter."); Crime Control and Safe Streets Act of 1984, 42 U.S.C. § 10,504(a) (2001) ("No person in any State shall, on the ground of race, color, religion, national origin, or sex, . . . be denied employment in connection with any activity for which Federal law enforcement assistance is provided under this chapter."); Victims of Crime Act of 1984, 42 U.S.C. § 10,604(e) (2001) ("No person shall on the ground of race, color, religion, national origin, handicap, or sex be . . . denied employment in connection with, any undertaking funded in whole or in part with

provision of § 1991(k), which preempts state and local discrimination laws when federal funds are mingled with state and local funds, strips employees of employment protections that are more expansive than Federal ones.[327] The preemption controversy was particularly heated in the debate surrounding state and local laws that prohibit discrimination against homosexuals.[328] These concerns were heightened when it was revealed that the Salvation Army had contacted the White House in support of the exclusion.[329]

E. *Other Issues*

There is also concern that the preemption clause of § 1991(k) will override state and local health and safety regulations.[330] Critics point to

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sums made available under this chapter").

Supporters of House Bill 7 argue these non-exemptions were holdovers from Congress' attempt to avoid constitutional controversy during the strict separation and pervasively sectarian requirements of *Lemon*. They clearly do not reflect the Supreme Court's decision in *Amos*.

327 H.R. 7, 107th Cong. § 201, § 1991(k) (2001). The preemption clause reads, "If the State or local government commingles the State or local funds, the provisions of this section shall apply to the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds." *Id. See supra* note 224 and accompanying text for a further discussion of § 201, § 1991(k).

328 Memorandum from Mark Levine, counsel to Rep. Barney Frank 2 (Jul. 11, 2001) (on file with Seton Hall Legislative Journal). The provision pre-empts "the law of twelve states and more than 100 localities that currently protect lesbians and gay men from arbitrary discrimination." *Id.* According to another source, some 200 American communities now ban discrimination on the basis of sexual orientation, and 160 require domestic partner benefits. Marvin Olasky, *Rolling the Dice*, WORLD MAGAZINE, Aug. 4, 2001, at 4, *available at* http://worldmag.com/world/issue/08-04-01/cover_1.asp (last visited Apr. 1, 2003).

There is a certain irony in the controversy, since predominantly homosexual ministries stand to benefit from faith-based initiatives. Rev. Troy Perry, leader of the nation's association of homosexual churches, has recommended that his congregations "step forward as worthy of bidding for federal welfare funds" in such areas as HIV and AIDS services, prison ministries, poverty, and "at risk LGBT [lesbian, gay, bisexual and transgendered] youth." Larry Witham, *Faith-based Role Is Seen For Gay Churches*, WASHINGTON TIMES (D.C.), August 2, 2001, at A4.

329 Dana Milbank, *Charity Cites Bush Help in Fight Against Hiring Gays*, WASH. POST, July 10, 2001, at A1. This issue attracted considerable public attention when it was revealed that the Salvation Army had received a "firm commitment" from the White House to protect charities from state and local efforts to prevent discrimination against homosexuals in hiring and domestic partner benefits. *Id.* The Salvation Army policy is based on their belief that any sexual activity outside of marriage, whether homosexual or heterosexual, is unchaste and therefore improper for their employees. *Id.*

330 The so-called preemption clause reads, "If the State or local government commingles

the exemption of faith-based social services programs in Texas from certain certification provisions as grounds for their concern.[331] Supporters argue, however, that there is a shortage of professional social workers to handle the cases that remain and programs must call on all their resources to respond to the pressing needs of those at risk.[332]

Critics further argue that while the "Opt Out" provisions of § 1991(g)(1) were adopted to secure constitutional protections for beneficiaries, obliging government agencies to provide programs that are "unobjectionable to the individual on religious grounds," creates a problematic unfunded mandate.[333] They believe a system of parallel faith-based and secular programs covering the same geographical area will increase government bureaucracy that will result in fewer funds for beneficiaries.[334]

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the State or local funds, the provisions of this section shall apply to the commingled funds in the same manner, and to the same extent, as the provisions apply to the Federal funds." H.R. 7, 107th Cong. § 201, § 1991(k) (2001). *See supra* note 224 for a further discussion of § 201, § 1991(k).

Preemption controversy is rather ironic; since the "beauty of the block grant" was that it allowed state and local governments to reflect local sentiments without federal interference. Interview with James A. Davids, Counsel to the Deputy Attorney General, in Washington, D.C. (Aug. 15, 2001).

331 Martin Davis, *Faith, Hope, and Charity*, NAT'L JOURNAL, Apr. 28, 2001 at 1230. In 1996, a Texas commission recommended faith-based groups be permitted to run treatment programs, even without trained medical personnel, so long as they could prove they were a church or non-profit organization; did not provide medical care, drug detoxification, or withdrawal services; and complied with all local fire, health, and safety codes. *Id.* With the support of then-Governor George W. Bush, the recommendations were codified in 1997 in House Bill 2481. *Id.* After five years, serious flaws in the system were detected, including confirmed abuse and neglect rates twenty-five times higher than state-licensed facilities and a complaint rate of 75%, as compared to 5.4% in licensed programs. Don Monkerud, *Faith No More: Texas' Record Shows Danger of Faith-Based Policy*, IN THESE TIMES, March 10, 2003.

332 Martin Davis, *Faith, Hope, and Charity*, NAT'L JOURNAL, Apr. 28, 2001 at 1234.

333 *H.R. 7, the "Community Solutions Act of 2001": Hearing Before the Subcomm. on Human Resources and Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 107th Cong. 2 (June 14, 2001) (statement of Rep. Nadler, Member, House Comm. on the Judiciary), 2001 WL 675505. *See supra* note 237 for a description of the "Opt Out" provisions of § 201, § 1991(g)(1).

334 Marcia Yablon, *Growth Spurt: How Including Religion Will Make Government Bigger*, THE NEW REPUBLIC, Feb. 26, 2001, at 2, *available at* http://www.tnr.com/022601/yablon022601.html (last visited Apr. 1, 2003). *See infra* note 286 for a description of increased bureaucratic costs as a result of monitoring.

VI. Senate Response: CARE Act of 2002

While the concerns of critics did not prevent the passage of House Bill 7 in the House on July 19, 2001, it did not face a warm reception when it reached the Senate.[335] While initially supported by Senators Richard Santorum and Joseph Lieberman, the funding of religious organizations and the extension of the Title VII exemption to federally funded positions in faith-based programs proved significant political obstacles in the then-Democratically controlled Senate.[336] Progress on the issue was stalled for several months until Senate Bill 1924, the Charity Aid, Recovery, and Empowerment Act of 2002, was introduced on February 8, 2002.[337]

A. *Secular Purpose and Scope*

While House Bill 7's stated purpose was to enhance the delivery of social services, facilitate the entry of new providers, prohibit discrimination against religious organizations, and allow beneficiaries to receive social services from a faith-based organization, Senate Bill 1924 makes no reference to the purpose of the legislation.[338]

Like House Bill 7, Senate Bill 1924 does not create any new welfare programs, but instead modifies the administration of existing programs.[339] Senate Bill 1924 covers "any social service program,"[340] which is defined in extremely broad terms.[341] The scope of coverage in

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335 House Bill 7 was approved by a vote of 233-198. 107th Cong., (Roll No. 254).

336 When House Bill 7 was first introduced, the Republicans held the majority in the Senate. When Senator James Jeffords' announced he was leaving the Republican Party, the Democrats took control of the Senate. *See* John Lancaster and Helen Dewar, *Jeffords Tips Senate Power; Democrats Prepare to Take Over as Vermont Senator Quits GOP*, WASH. POST, May 25, 2001, at A1.

337 S. 1924, 107th Cong. (2001). Because Title III and Title V of Senate Bill 1924 echo certain provisions of House Bill 7 but exclude others, some commentators have referred to it as "Charitable Choice Lite"." Stanley Carson-Thies, *Why We Should Care About CARE*, CAPITAL COMMENTARY (Center for Public Justice), August 12, 2002, at 1.

338 H.R. 7, 107th Cong. § 201, § 1991(b)(4) (2001); S. 1924, 107th Cong. §301(2002). The drafters of House Bill 7 took pains to define the secular purpose of House Bill 7 to ensure it promoted a secular purpose acceptable under the *Agostini/Lemon* test. *See supra* notes 208-211 and accompanying text.

339 *See* H.R. 7, 107th Cong. § 201, § 1991(c)(4) (2001); S. 1924, 107th Cong. §301(e)(2) (2002).

340 S. 1924, 107th Cong. §301(a) (2002).

341 S. 1924, 107th Cong. §301(e)(2)(A) (2002). A social service program is defined as a program that:

areas such as child care, transportation, job training, hunger relief, crime prevention and housing is similar to that of House Bill 7,[342] while Senate

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(i) is administered by the Federal Government, or by a State or local government using Federal financial assistance; and

(ii) provides services directed at helping people in need, reducing poverty, improving outcomes of low-income children, revitalizing low-income communities, and empowering low-income families and low-income individuals to become self-sufficient, including—

(I) child care services, protective services for children and adults, services for children and adults in foster care, adoption services, services related to the management and maintenance of the home, day care services for adults, and services to meet the special needs of children, older individuals, and individuals with disabilities (including physical, mental, or emotional disabilities);

(II) transportation services;

(III) job training and related services, and employment services;

(IV)information, referral, and counseling services;

(V) the preparation and delivery of meals, and services related to soup kitchens or food banks;

(VI)health support services;

(VII) literacy and mentoring programs;

(VIII) services for the prevention and treatment of juvenile delinquency and substance abuse, services for the prevention of crime and the provision of assistance to the victims and the families of criminal offenders, and services related to the intervention in, and prevention of, domestic violence; and

(IX) services related to the provision of assistance for housing under Federal law.

Id.

342 S. 1924, 107th Cong. §301(e)(2)(A). Certain subsections of Senate Bill 1924 parallel those of House Bill 7. The programs described in Senate Bill 1924, §301(e)(2)(A)(I) are:

> child care services, protective services for children and adults, services for children and adults in foster care, adoption services, services related to the management and maintenance of the home, day care services for adults, and services to meet the special needs of children, older individuals, and individuals with disabilities (including physical, mental, or emotional disabilities).

S. 1924, 107th Cong. §301(e)(2)(A)(I) (2002), and include the benefits described in H.R. 7, 107th Cong. § 201, § 1991(c)(4)(A)(v) (2001) ("under the Older Americans Act of 1965 (42 U.S.C. 3001 *et seq.*)") and H.R. 7, 107th Cong. § 201, § 1991(c)(4)(A)(vi) (2001) ("related to the intervention in and prevention of domestic violence, including programs under the Child Abuse Prevention and Treatment Act (42 U.S.C. 5101 *et seq.*) or the Family Violence Prevention and Services Act (42 U.S.C. 10401 *et seq.*)").

S. 1924, 107th Cong. §301(e)(2)(A)(II) (2002) ("transportation services") includes programs covered under H.R. 7, 107th Cong. § 201, § 1991(c)(4)(A)(viii) (2001) ("under the Job Access and Reverse Commute grant program established under section 3037 of the Federal Transit Act of 1998 (49 U.S.C. 5309)").

S. 1924, 107th Cong. §301(e)(2)(A)(III) (2001) ("job training and related services, and employment services") includes programs covered under H.R. 7, 107th Cong. § 201, § 1991(c)(4)(A)(iv) (2001) ("under subtitle B or D of title I of the Workforce Investment Act

Bill 1924 includes additional programs as well.[343]

B. *Faith-Based Providers*

Title II of Senate Bill 1924, "Equal Treatment for Nongovernmental Providers" makes no explicit reference to faith-based organizations, instead referring to all social services programs as "nongovernmental organizations."[344] This pattern of treatment is also evident in Senate Bill 1924's requirement that all social service providers be treated on an equal basis.[345]

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of 1998 (29 U.S.C. 2801 *et seq.*)").

S. 1924, 107th Cong. §301(e)(2)(A)(V) (2002) ("the preparation and delivery of meals, and services related to soup kitchens or food banks") is similar to H.R. 7, 107th Cong. § 201, § 1991(c)(4)(A)(vii) (2001) ("related to hunger relief activities").

S. 1924, 107th Cong. §301(e)(2)(A)(VIII) (2002) ("services for the prevention and treatment of juvenile delinquency and substance abuse, services for the prevention of crime and the provision of assistance to the victims and the families of criminal offenders, and services related to the intervention in, and prevention of, domestic violence") includes programs covered under H.R. 7, 107th Cong. § 201, § 1991(c)(4)(A)(i) (2001) ("related to the prevention and treatment of juvenile delinquency and the improvement of the juvenile justice system, including programs funded under the Juvenile Justice and Delinquency Prevention Act of 1974 (42 U.S.C. 5601 *et seq.*)") and H.R. 7, 107th Cong. § 201, § 1991(c)(4)(A)(ii) (2001) ("related to the prevention of crime and assistance to crime victims and offenders' families, including programs funded under title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3701 *et seq.*)").

S. 1924, 107th Cong. §301(e)(2)(A)(XI) (2002) ("services related to the provision of assistance for housing under Federal law") is similar to H.R. 7, 107th Cong. § 201, § 1991(c)(4)(A)(iii) (2001) ("related to the provision of assistance under Federal housing statutes, including the Community Development Block Grant Program established under title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5301 *et seq.*)").

Educational issues are covered under S. 1924, 107th Cong. §301(e)(2)(A)(VII) (2002) ("literacy and mentoring programs"), but certain programs are excluded under S. 1924, 107th Cong. §301(e)(2)(B) (2001) ("The term does not include a program having the purpose of delivering educational assistance under the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6301 *et seq.*) or under the Higher Education Act of 1965 (20 U.S.C. 1001 *et seq.*)"). These exclusions are broader than those in H.R. 7, 107th Cong. § 201, § 1991(c)(4)(B)(ii) (2001) ("except as provided in subparagraph (A) and clause (i), does not include activities carried out under Federal programs providing education to children eligible to attend elementary schools or secondary schools, as defined in section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801)").

343 S. 1924, 107th Cong. §301(e)(2)(A) (2002). Programs unique to Senate Bill 1924 are "information, referral, and counseling services", S. 1924, 107th Cong. §301(e)(2)(A)(IV) (2002) and "health support services," S. 1924, 107th Cong. §301(e)(2)(A)(VI) (2002).

344 S. 1924, 107th Cong. §301 (2002).

345 S. 1924, 107th Cong. §301(b) (2002). A nongovernmental organization that has not previously been awarded a contract, grant, or cooperative agreement from an agency shall not, for that reason, be disadvantaged in a competition to secure a

While not explicitly referring to faith-based providers, Senate Bill 1924 includes provisions similar to those of House Bill 7 to protect the religious character of faith-based providers.[346] The legislation prohibits government agencies from requiring faith-based organizations to change their name, alter their chartering documents, remove "art, icons, scripture, or other symbols," or change its name because they are religious.[347]

As a final means of protecting the rights of social services providers, the legislation allows social services providers who believe their rights have been violated to bring suit for injunctive relief in a civil

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contract, grant, or cooperative agreement to deliver services under a social service program from the agency administering the program.

Id.

While the subsection recognizes that certain organizations have not received assistance in the past and that this factor should not affect their future eligibility, it refuses to recognize that past denials were based in part on the religious character of the provider. This is quite different from the treatment of this subject in H.R. 7, 107th Cong. § 201, § 1991(c)(1)(B) (2001). *See supra* note 218.

346 S. 1924, 107th Cong. §301(a) (2002).

347 S. 1924, 107th Cong. §301(a) (2002).

For any social service program, a nongovernmental organization that is (or is applying to be) involved in the delivery of social services for the program shall not be required—

(1) to alter or remove art, icons, scripture, or other symbols, or to alter its name, because the symbols or name are religious;

(2) to alter or remove provisions in its chartering documents because the provisions are religious

Id.

This provision is similar to that in House Bill 7, which reads:

Neither the Federal Government, nor a State or local government with Federal funds, shall require a religious organization, in order to be eligible to provide assistance under a program described in subsection (c)(4), to—

(A)alter its form of internal governance or provisions in its charter documents; or

(B)remove religious art, icons, scripture, or other symbols, or to change its name, because such symbols or names are of a religious character.

H.R. 7, 107th Cong. § 201, § 1991(d)(2) (2001).

It is interesting to note that while the final version of House Bill 7 was amended to include the words "of a religious character", the drafters of Senate Bill 1924 chose to revert to the earlier term "religious". H.R. 7, 107th Cong. § 201, § 1991(d)(2) (2001) (introduced in House); H.R. 7, 107th Cong. § 201, § 1991(d)(2) (2001); S. 1924, 107th Cong. §301(a) (2002). The phrase "of a religious character" was added to House Bill 7 during amendments to address the fact that a symbol may be of a religious character without making reference to any particular religion. H.R. 7, 107th Cong. § 201, § 1991(d)(2) (2001) (introduced in House); H.R. 7, 107th Cong. § 201, § 1991(d)(2) (2001).

action.[348]

C. *Employment Practices*

The most striking difference between the two bills is their treatment of religious hiring requirements.[349] The bill protects certain aspects of faith-based organizations' religious character by preserving their right to hold religious qualifications for membership on their governing boards.[350] It does not, however, extend this same protection to religiously based employment qualifications for faith-based providers and refuses to extend the religious exemption of Section 702 of the Civil Rights Act as well.[351]

D. *Technical Assistance*

Title V of Senate Bill 1924, the "Compassion Capital Fund", provides a total of $150 million for technical assistance to social services providers.[352] This aid is made available to "community-based

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[348] S. 1924, 107th Cong. §301(d) (2002). An organization that alleges that its rights have been violated by Federal agency or official "may bring an action for injunctive relief in an appropriate United States district court." *Id.* An organization that alleges its rights have been violated by a State or local agency or official "may bring an action for injunctive relief in an appropriate State court of general jurisdiction." *Id.* This relief is different from that offered in House Bill 7, where organizations "may bring a civil action for injunctive relief pursuant to section 1979 against the State official or local government agency that has allegedly committed such violation" and "a civil action for injunctive relief in Federal district court against the [Federal] official or government agency that has allegedly committed such violation." H.R. 7, 107th Cong. § 201, § 1991(n) (2001). *See also* note 228 and accompanying text.

[349] *See supra* Sections III.C and V.D to understand the debate surrounding this issue.

[350] S. 1924, 107th Cong. §301(a)(3) (2002). No agency shall require a nongovernmental organization "to alter or remove religious qualifications for membership on its governing boards." *Id.*

[351] S. 1924, 107th Cong. §301(a)(2) (2002). While Senate Bill 1924 prohibits agencies from requiring organizations to remove religious charter provisions, "no such charter provisions shall affect the application to a nongovernmental organization of any law that would (notwithstanding this paragraph) apply to the nongovernmental organization." *Id.*

[352] S. 1924, 107th Cong. §501-504 (2002). This money is allocated to four different Federal agencies:

> $85 million to the Secretary of Health and Human Services.; S. 1924, 107th Cong. §501(e) (2002); $15 million to the Corporation for National and Community Service; S. 1924, 107th Cong. §502(d) (2002); $35 million to the Attorney General; S. 1924, 107th Cong. §503(d) (2002);
>
> $15 million to the Secretary of Housing and Urban Development; S. 1924, 107th Cong. §504(d) (2002).

organizations", which the bill defines as organizations with an annual budget of less than $450,000 and no more than six full-time employees.[353]

Some of the assistance offered parallels that of House Bill 7, including: grant writing, incorporation, tax-exempt status, and accounting, legal, and program development.[354] Other provisions add

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Id.

[353] S. 1924, 107th Cong. §501(f), §502(e), §503(e), §504(e) (2002). The definition is repeated in each of the four sections authorizing aid, and reads similarly in each section:

> [T]he term 'community-based organization' means a nonprofit corporation or association that has—
>
> (1) not more than 6 full-time equivalent employees who are engaged in the provision of social services; or
>
> (2) a current annual budget (current as of the date the entity seeks assistance under this section) for the provision of social services, compiled and adopted in good faith, of less than $450,000.

Id. While the section benefits smaller programs, it would not benefit those organizations that face systemic obstacles but are larger in size.

[354] S. 1924, 107th Cong. §501(a)(1), §502(a)(1), §503(a)(1), §504(a)(1) (2002). The scope of the program is repeated in each of the four sections authorizing aid, and provides technical assistance which may include:

> (A) grant writing and grant management assistance, which may include assistance provided through workshops and other guidance;
>
> (B) legal assistance with incorporation;
>
> (C) legal assistance to obtain tax-exempt status; and
>
> (D) information on, and referrals to, other nongovernmental organizations that provide expertise in accounting, on legal issues, on tax issues, in program development, and on a variety of other organizational topics;

Id.

Subsection (A), which covers "grant writing and grant management assistance, which may include assistance provided through workshops and other guidance," S. 1924, 107th Cong. §501(a), §502(a), §503(a), §504(a) (2002), is similar to that of H.R. 7, 107th Cong. § 201, § 1991(o)(2)(B) (2001) ("granting writing assistance which may include workshops and reasonable guidance;").

Subsection (B), which covers "legal assistance with incorporation," and subsection (C), which covers "legal assistance to obtain tax-exempt status," S. 1924, 107th Cong. §501(a), §502(a), §503(a) (2002); S. 1924, 107th Cong. §504(a) (2002) is similar to that of H.R. 7, 107th Cong. § 201, § 1991(o)(2)(A) (2001) ("assistance and information relative to creating an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 to operate identified programs").

Subsection (D), which covers "information on, and referrals to, other nongovernmental organizations that provide expertise in accounting, on legal issues, on tax issues, in program development, and on a variety of other organizational topics," S. 1924, 107th Cong. §501(a), §502(a), §503(a), §504(a) (2002) is similar to that of H.R. 7, 107th Cong. § 201, § 1991(o)(2)(C) (2001) ("information and referrals to other nongovernmental organizations that provide expertise in accounting, legal issues, tax issues, program development, and a variety of other organizational areas").

assistance in new areas, including capacity building and research on best practices.[355] In a provision unique to the Health and Human Services grant, funds are provided to States to enable them to establish state and local offices of faith-based and community initiatives, and provide technical assistance to enable them to administer the provisions of Senate Bill 1924.[356]

VII. Executive Response

At present, the legislative future of Faith-Based Initiatives is uncertain. No further action has been taken to advance the provisions of House Bill 7 or Senate Bill 1924, though the Senate has passed the Charity, Aid, Recovery and Empowerment (CARE) Act of 2003 (S. 272) on April 9, 2003.[357] The bill contains only one faith-based initiatives provision – a $150 million Compassion Capital Fund to provide technical assistance to small faith-based and community groups

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See supra note 258.

[355] S. 1924, 107th Cong. §501(a), §502(a), §503(a), §504(a) (2002). Assistance is given to:

> (2) provide information and assistance for community-based organizations on capacity building;
> (3) provide for community-based organizations information on and assistance in identifying and using best practices for delivering assistance to persons, families, and communities in need;
> (4) provide information on and assistance in utilizing regional intermediary organizations to increase and strengthen the capabilities of nonprofit community-based organizations;
> (5) assist community-based organizations in replicating social service programs of demonstrated effectiveness; and
> (6) encourage research on the best practices of social service organizations.

Id.

[356] S. 1924, 107th Cong. §501(b) (2002). This is the only section of Senate Bill 1924 that makes reference to faith-based initiatives. Under the legislation, the Secretary of Health and Human Services:

> (1) may award grants to and enter into cooperative agreements with States and political subdivisions of States to provide seed money to establish State and local offices of faith-based and community initiatives; and
> (2) shall provide technical assistance to States and political subdivisions of States in administering the provisions of this Act.

Id. The aid would help states to overcome the institutional inertia and other obstacles that have slowed the implementation of Charitable Choice. *See supra* Section II.C for a discussion of the institutional obstacles faith-based organizations face.

[357] S. 272, 108th Cong. (2003). S. 272 was introduced on Jan. 30, 2003 by Sen. Rick Santorum (R-Pa.) and Sen. Joseph Lieberman (D-Conn.), and passed by a vote of 95-5 on April 9, 2003.

that compete for federal grants.[358]

Because legislative efforts have been frustrated, the Bush Administration has sought other means to implement Faith-Based Initiatives. For example, the Secretary of Health and Human Services announced the inauguration of a $30 million Compassion Capital Fund to provide technical assistance to faith-based and community organizations competing for federal grants long before the technical assistance provisions of the CARE Act of 2003 were passed by the Senate.[359]

The most sweeping of these actions was President Bush's signing of Executive Order 13,279 on December 12, 2002, which introduced many of the provisions contained in House Bill 7.[360] Under the Order, faith-based organizations are to compete on an equal footing for federal funds, and no organization may be discriminated against on the basis of religion.[361] Social service providers that engage in religious activities

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[358] S. 272, 108th Cong. §701-705 (2003). The provisions mirror those of S. 1924, 107th Cong. §501-504 (2002), *see supra* note 352, and provide funds to the following:

Department of Health and Human Services: $85 million for FY 2003, and such sums as may be necessary for fiscal years 2004 through 2007. S. 272, 108th Cong. §701 (2003).

Corporation for National and Community Services: $15 million for FY 2003, and such sums as may be necessary for fiscal years 2004 through 2007. S. 272, 108th Cong. §702 (2003).

Department of Justice: $35 million for FY 2003, and such sums as may be necessary for fiscal years 2004 through 2007. S. 272, 108th Cong. §703 (2003).

Department of Housing and Urban Development: $15 million for FY 2003, and such sums as may be necessary for fiscal years 2004 through 2007. S. 272, 108th Cong. §704 (2003).

[359] Press Release, U.S. Dep't of Health and Human Services, HHS Announces Availability of Funds to Assist Faith-Based and Community Organization (June 5, 2002), *at* http://www.hhs.gov/news/press/2002pres/20020605a.html (last visited Apr. 1, 2003). The program provides $25 million to intermediary organization that will provide technical assistance and $5 million to establish a National Resource Center to research the role of faith-based and community organizations play in their communities. *Id.*

[360] Exec. Order No. 13,280, 68 Fed. Reg. 16,564-01 (Dec. 12, 2002).

[361] Exec. Order No. 13,280, § 2 (c, d), 68 Fed. Reg. 16,564-01 (Dec. 12, 2002). The Order provides:

> (c) No organization should be discriminated against on the basis of religion or religious belief in the administration or distribution of Federal financial assistance under social service programs;
>
> (d) All organizations that receive Federal financial assistance under social services programs should be prohibited from discriminating against beneficiaries or potential beneficiaries of the social services programs on the basis of religion or religious belief. Accordingly, organizations, in providing services supported in whole or in part with Federal financial assistance, and in their outreach activities

are required to offer these services separately from any portion of the program funded by government money,[362] and may not discriminate against beneficiaries on the basis of religion.[363] Faith-based groups retain the right to define, develop, and express their religious beliefs.[364]

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related to such services, should not be allowed to discriminate against current or prospective program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice.

Id. The provisions parallel those of H.R. 7, 107th Cong. § 201, § 1991(c)(1)(A, B) (2001). *See supra* notes 217-218.

362 Exec. Order No. 13,280, § 2 (e), 68 Fed. Reg. 16,564-01 (Dec. 12, 2002). The Order provides:

> The Federal Government must implement Federal programs in accordance with the Establishment Clause and the Free Exercise Clause of the First Amendment to the Constitution. Therefore, organizations that engage in inherently religious activities, such as worship, religious instruction, and proselytization, must offer those services separately in time or location from any programs or services supported with direct Federal financial assistance, and participation in any such inherently religious activities must be voluntary for the beneficiaries of the social service program supported with such Federal financial assistance.

Id. The provision parallels that of H.R. 7, 107th Cong. § 201, § 1991(j) (2001). *See supra* note 231.

363 Exec. Order No. 13,280, § 2 (d), 68 Fed. Reg. 16,564-01 (Dec. 12, 2002). The Order provides:

> All organizations that receive Federal financial assistance under social services programs should be prohibited from discriminating against beneficiaries or potential beneficiaries of the social services programs on the basis of religion or religious belief. Accordingly, organizations, in providing services supported in whole or in part with Federal financial assistance, and in their outreach activities related to such services, should not be allowed to discriminate against current or prospective program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice.

Id. The provision parallels that of H.R. 7, 107th Cong. § 201, § 1991(h) (2001). *See supra* note 236.

364 Exec. Order No. 13,280, § 2 (f), 68 Fed. Reg. 16,564-01 (Dec. 12, 2002). The Order provides:

> Consistent with the Free Exercise Clause and the Free Speech Clause of the Constitution, faith-based organizations should be eligible to compete for Federal financial assistance used to support social service programs and to participate fully in the social service programs supported with Federal financial assistance without impairing their independence, autonomy, expression, or religious character. Accordingly, a faith-based organization that applies for or participates in a social service program supported with Federal financial assistance may retain its independence and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct Federal financial assistance to support any inherently religious activities, such as worship, religious

Finally, the order exempts faith-based organizations from the provisions of § 202 of Executive Order 11246,[365] thereby allowing them to make hiring decisions based on religion.[366]

While broad in scope, Executive Order 13279 only reaches so far as the law permits, and its provisions will be effective only so far as they are consistent with the stated directives of Congress.[367] For example, the Order is limited by the Workforce Investment Act, which prohibits employment discrimination on religious grounds and has no exemption for religious providers.[368]

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instruction, or proselytization. Among other things, faith-based organizations that receive Federal financial assistance may use their facilities to provide social services supported with Federal financial assistance, without removing or altering religious art, icons, scriptures, or other symbols from these facilities. In addition, a faith-based organization that applies for or participates in a social service program supported with Federal financial assistance may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other chartering or governing documents.

Id. The provisions parallel those of H.R. 7, 107th Cong. § 201, § 1991(c)(2), § 201, § 1991(d) (2001). *See supra* note 222.

365 Exec. Order No. 11,246, § 202, 30 Fed. Reg. 12,319 (Sept. 24, 1965). The Order provides:

> Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:
> (1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.

Id.

366 Exec. Order No. 13,280, § 4 (c), 68 Fed. Reg. 16,564-01 (Dec. 12, 2002). The exemption, which amends § 204 of Exec. Order No. 11,246, provides:

> Section 202 of this Order shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.

Id. The exemption only pertains to religious-based hiring, and parallels the religious exemption of H.R. 7, 107th Cong. § 201, § 1991(e) (2001). *See supra* note 249.

367 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

368 29 U.S.C. § 2938(a)(2) (2003). The statute provides:

> No individual shall be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in the administration of or in connection with, any such program or activity because of race, color, religion, sex (except as otherwise permitted under title IX of the Education Amendments of 1972), national origin, age, disability, or political affiliation or belief.

VIII. Conclusion

Faith-Based Initiatives is the only new idea currently being discussed in Congress to bring reform to the Federal welfare system. Faith-based providers are aiding the needy in ways current programs do not, and they possess special advantages when providing this assistance.[369] Faith-based providers have been excluded from the Federal system for far too long.[370] While faith-based providers present certain First Amendment challenges, recent Supreme Court decisions make direct and indirect aid programs possible.[371]

Carefully constructed, constitutionally precise legislation can create greater collaboration between government and faith-based providers.[372] The related issue of the extension of the Title VII exemption for religious based hiring is both legally and politically contentious,[373] particularly because the constitutionality of the extension is currently unresolved by the Supreme Court.[374] Because of these concerns, as well as general objections to the funding of faith-based providers,[375] the future of Faith-Based Initiatives hangs in the balance. The policy is constitutionally permissible, but the question remains as to whether the political will to implement the policy still exists.

Id.

369 *See supra* Section II.A.

370 *See supra* Section II.C.

371 *See supra* Sections III.A, III.B.

372 *See supra* Sections IV.A, IV.B, IV.C, VI.A, VI.B.

373 *See supra* Section IV.D, V.D.

374 *See supra* Section III.C.

375 *See supra* Section V.