CONSTITUTIONAL ROLE OF FAITH-BASED ORGANIZATIONS IN COMPETITIONS FOR FEDERAL SOCIAL SERVICE FUNDS

HEARING

BEFORE THE

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OF THE

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CONTENTS

JUNE 7, 2001

OPENING STATEMENT

WITNESSES

APPENDIX

CONSTITUTIONAL ROLE OF FAITH-BASED ORGANIZATIONS IN COMPETITIONS FOR FEDERAL SOCIAL SERVICE FUNDS

Thursday, June 7, 2001

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommitteee met, pursuant to call, at 10 a.m., in Room 2141, Rayburn House Office Building, Hon. Steve Chabot [Chairman of the Subcommitteee] presiding.

Mr. CHABOT. The Committee will come to order. This is the Subcommitteee on the Constitution. I am Steve Chabot, the Chairman of the Subcommittee. Also present is Jerry Nadler from New York, the Ranking Member of the Subcommittee. We have some other Members who are down at the White House at a signing ceremony on the tax cut bill, and some of our Democratic colleagues will be here shortly as well, but we are going to get started. I want to apologize to the witnesses. We are running a little bit late here, but the President of course had his schedule, and that was a very important ceremony. I know some of us would have liked to have been there as well, but we felt we needed to be here.

This is the second in a series of hearings to be held by this Subcommittee on the President's faith-based initiative. The subject matter of this particular hearing is the constitutional role of faith-based organizations in competitions for Federal social service funds.

While the first amendment to the Constitution provides that the government shall not establish a particular religion, or religion over nonreligion, the first amendment also provides that the government shall not prohibit the free exercise of religion. Consequently, government must ensure that Members of organizations seeking to take part in government programs designed to meet basic and universal human needs are not discriminated against because of their religious views.

The simple principles of charitable choice allow for the public funding for faith-based organizations with demonstrated ability to meet the basic needs of their neighbors in trouble, while preserving the religious character of those organizations by allowing them to choose their staff, board Members and methods. These principles also protect the rights of conscience of program beneficiaries by ensuring that alternative providers that are unobjectionable to them on religious grounds are always available.

Charitable choice simply means equal access. Charitable choice is not a new idea. Existing charitable choice programs passed by the Congress and signed into law by President Clinton have benefited thousands of persons in need without raising constitutional concerns in their implementation.

My own State of Ohio has benefited greatly from charitable choice programs. Taxes are so high in part because the government funds and administers social service programs that have for most of American history been run largely by faith-based organizations at the local level.

Today, a family with two earners pays over 40 percent of their budget in taxes, more than they spend on their own food, clothing, and housing combined. When the government takes so much, little is left for those families to give to the local charities, including faith-based organizations.

At the same time, the government too often excludes out of hand faith-based organizations from the receipt of government funds, even when such organizations can help meet basic human needs most effectively and in accordance with both the free exercise of religion and the establishment clause.

Charitable choice programs seek to address this problem. Charitable choice principles recognize that it is wrong to assume that religious people can't be trusted to follow rules against using Federal funds for proselytizing activase, and on that basis deny them equal opportunities. Charitable choice principles also recognize that people in need should have the benefit of the best social services available, whether the providers of those services are faith-based or otherwise.

That is the goal: helping the tens of thousands of Americans who need help in this country.

Some have tried to divert attention from the goal of helping people in need by raising the specter of federally funded discrimination. As the argument goes, religious organizations should not be allowed to maintain their religious character through hiring decisions if they receive Federal funds for the purpose of helping others. But the right of religious organizations to take religion into account when hiring staff has long been settled. That right is enshrined in the Civil Rights Act of 1964 and that right was upheld by a unanimous Supreme Court, including Justices Brennan and Marshall.

As the discussions of charitable choice programs have progressed, however, some opponents have objected that Federal funds should not be allowed to find their way to organizations that maintain their religious character through hiring decisions. That is a truly radical notion. It is not a recipe for maintaining the status quo but, rather, a recipe for withdrawing Federal funds from, among other things, religiously affiliated colleges and universities, religiously affiliated hospitals and religiously affiliated day-care centers, all of which already receive Federal funds through a variety of Federal programs and all of which are an essential part of our education, health-care and child-care systems in this Nation.

One survey found that 51 percent of nonprofit organizations delivering child services were religiously affiliated and, of those, 82 percent received public funds. The survey also found that 70 per-

cent of nonprofit colleges and universities were religiously affiliated and, of those, 97 percent receive public funds. The same survey found that 44 percent of the religiously affiliated nonprofit organizations delivering child services only hire staff who agree with their religious orientation, or give preference to them, and that 56 percent of the religious affiliated nonprofit colleges and universities do the same.

So this is the debate we engage in today: Does the Constitution require rolling back essential services or does it allow for improving them by letting religious organizations compete on an equal basis for Federal social service funds which they will use to help the poor and the helpless, and not to proselytize?

Finally, some critics of charitable choice argue that faith-based organizations should be required to create separate entities under section 501(c)(3) of the Internal Revenue Code before they should be allowed to compete for Federal social service funds. However 501(c)(3) status in this context is a red herring. Nothing in 501(c)(3) means an organization has to, for example, take down all religious symbols or refrain from staffing on a religious basis just because it receives a Federal grant. The provisions of 501(c)(3) allow a church or other religious organization to create an entity that is organized, governed, and funded separately, but they do not restrict what such a 501(c)(3) organization may do, other than restrict its involvement in political campaigns and require that no substantial part of its activity be devoted to lobbying. But we are not discussing political campaign work or lobbying at this hearing. We are discussing the constitutional role faith-based organizations can play to help people.

Following our April 24th hearing, which examined how States and localities were implementing existing charitable choice programs, today we explore the constitutional role of faith-based organizations in competitions for Federal social service funds. I look forward to hearing from the witnesses today, and I now yield 5 minutes to the gentleman from New York, the Ranking Member of the Subcommittee, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman. I especially want to thank the Chair for its consideration in holding the beginning of this hearing. As you know, a number of the Democratic Members of the Committee have a standing obligation to caucus business on Thursday morning from 9 to 10, and I greatly appreciate the Chair's indulgence in adhering to that, in dealing with that standing problem.

Today, we will explore an area of the law which is, I think it is fair to say, in great flux. Certainly the split opinion by the Supreme Court in *Mitchell v. Helms* demonstrates just how closely the justices are divided on the very difficult issues which surround new entanglement between government and religion.

While my sympathies are well known to my colleagues, the difficult issues with which the Court has been grappling—how much religious activity should be permitted in a publicly funded program, which program should be allowed to participate, what are the rights of program participants and employees with respect to a publicly funded benefit, how much separation, if at all, should

there be between the clearly sectarian and the clearly secular functions of an agency—are not trivial.

We would do a disservice to the Nation if we simply wished these difficulties away and pretended they did not exist.

I think Professor Laycock is correct in his observation that the framers were not necessarily thinking of government-funded social services on the scale we have today. The 18th century was a very different world from that of today and the framers could not have foreseen the sort of issues we are considering today. I think it is fair to say that on matters having to do with religion, the country was no more unified then than now, so the original intent again is at best problematic.

Having said that, I think certain principles are applicable. Certainly Madison's view as expressed in his "Memorial and Remonstrance" that it is a violation of individual religious liberty to compel one citizen to support another faith, is still valid, whether it applies to the hiring of teachers of religious instruction, as was the case in Madison's time, or in funding other pervasively sectarian activities, as Mr. Justice Thomas and three other justices hope to permit.

We are treading on very shaky ground here, and it is perhaps a good time to reflect on the fact that the free exercise clause exists not, as some have argued, to protect government from religion, but to protect religion from government and to protect the conscience of each individual from the prospect of anyone using the power or resources of the State to coerce people in any way on the most fundamental matters of belief.

Similarly, where government funding is used, issues of discrimination in employment or against potential program participants must be adequately address ed. As the Supreme Court pointed out nearly 20 years ago in the Bob Jones University case, which has been the subject of an alarming epidemic of amnesia over the last year, the United States does have a compelling interest in eliminating all vestiges of discrimination on the basis of race and, I would add, on other grounds as well, that the Congress as well as the State and local governments have found fit to include.

Public money comes from every American taxpayer regardless of race, religion, creed, national origin, disability, sexual orientation or identity and, no American should be denied employment opportunities or the ability to receive government-funded services on those bases.

Now, of course, under current law without charitable choice, sectarian organizations can and, as the Chairman pointed out with some figures, do participate in Federal Governments, but no discrimination in the spending of the Federal funds is allowed. And, contrary to what the Chair said a few minutes ago, sectarian organizations, churches, synagogues, and so forth certainly can discriminate on religious or racial or sexual grounds if they wish, but not in the spending of government funds. Any church or synagogue can say we won't have women as priests or ministers and so forth and so on. Government will not interfere with such decisions. But it is a very different thing, and under charitable choice law it is not permitted, to discriminate on the basis of sex or religion or race or anything else and who may ladle out the soup in the soup kitch-

en or who may participate in drinking the soup on the basis of race, religion or anything else. And that is what we are talking about today.

There is attention in the various proposals we have seen between religious autonomy guaranteed to the participating programs and the rights of participants and employees to be free from discrimination or proselytization. What happens when there is a conflict? How are these rights balanced? The legislation is woefully silent. Perhaps our witnesses can help us clarify the rules so that there will be no doubts when the time comes to expend public money.

Finally, on the subject of religious autonomy, I genuinely fear for religious autonomy in a world without the Lemon test and without the Sherbert rule. Religious institutions are being coaxed into a devil's bargain. There are precious few constitutional restrictions on the rules government may now apply to religious institutions, and in the wake of *Boerne*, Congress' efforts to provide such protections by statute, an effort in which three of our witnesses were key players, seem to have come to very little. The day may well come when having permitted excessive entanglement between religious institutions and the government, there will be no protection for religion when government flexes its muscles. I do not understand why some of my conservative colleagues suddenly have so much trust in big government that they are willing to take such a phenomenal risk.

I hope that at some point we will have the opportunity to hold at least one legislative hearing to examine the nuts and bolts of the proposals before the Congress. I think proponents and opponents of some of these proposals should agree that if we are going to change the rules, we should look very carefully at the specifics before we leap.

I look forward with anticipation to the testimony of our very distinguished panel and I thank you, Mr. Chairman.

Mr. CHABOT. Thank you.

Mr. CHABOT. Are there other Members of the panel that would like to make opening statements? Okay. If not, we will introduce the witnesses here this morning. We want to thank you all again for coming and again apologize for starting a little bit late.

Our first witness today is Carl H. Esbeck, Senior Counsel to the Deputy Attorney General at the Department of Justice. Mr. Esbeck, who works with the White House Office of Faith-Based and Community Initiatives, will offer the opinion of the Department on the constitutional role of faith-based organizations in competing for Federal social service program funds. Mr. Esbeck is presently on leave from the University of Missouri School of Law in Columbia, Missouri where he has taught courses in civil procedure, constitutional law, Federal civil rights litigation, and the first amendment and church State relations. Mr. Esbeck was formerly Director of the Center for Law and Religious Freedom, an advocacy organization and public interest law firm located in Washington, D.C. Mr. Esbeck has published widely on first amendment religious issues and he has been active in the development of charitable choice principles, and we welcome you here this morning.

Our second witness will be H. Douglas Laycock, who holds the Alice McKean Young Regent's Chair in Law and is Associate Dean

for Research at the University of Texas School of Law at Austin. Professor Laycock is a leading scholar on the law of religious liberty. He has argued many cases on religious liberty, including those before the United States Supreme Court. Professor Laycock is also a Member of the American Law Institute and an elected Fellow of the American Academy of Arts and Sciences. We welcome you also this morning.

Our third witness is Rabbi David N. Saperstein. Rabbi Saperstein is an Adjunct Professor of Law and Director and Counsel of the Religious Action Center of Reform Judaism at the Georgetown University Law Center. We welcome you here as well, Professor and Rabbi.

And our fourth and final witness is Ira C. Lupu, professor of law at the George Washington University School of Law. Professor Lupu's writings are primarily in the field of constitutional law with an emphasis on the religion clauses of the first amendment. Professor Lupu has also served as Professor-in-Residence on the appellate staff of the civil division of the U.S. Department of Justice, where he represented the government in a variety of cases in the courts of appeal.

We want to thank you all again for appearing this morning. And I would like to ask each of you to please try to summarize your testimony in 5 minutes or less, and, without objection, your written statement will be made part of the permanent hearing record. And we actually, as you probably all know, have a lighting system, and you have 5 minutes. When the yellow light comes on you have got 1 minute to kind of wrap it up, and when the red light comes up we would appreciate that you wrap up at that point. We will give you a little flexibility, but if you can keep within that, we would certainly appreciate it. And our first witness would be Mr. Esbeck.

STATEMENT OF CARL H. ESBECK, SENIOR COUNSEL TO THE DEPUTY ATTORNEY GENERAL, UNITED STATES DEPARTMENT OF JUSTICE

Mr. ESBECK. Thank you, Chairman and Members of the House. I do appreciate Mr. Nadler's opening remarks which I think sets that right tone that there is an exploration here where we do, I think, have several points of common ground and I want to touch on each one of those, at least as I see it.

First, it is easy to forget as we get into the constitutional issues that this is about people and, of course, people who are poor or have special needs. These faith-based groups are specially positioned to reach hard to reach people. I think that is because they have high access and high credibility. And by high access, I mean they are right there in the neighborhood. They are working with people who are their neighbors in that community. These are people that they cross paths with at their local grocery store. And by high credibility, I mean these are the leaders of that community in which the people in need are living and these leaders are highly trusted. They have experience with them. They are well known.

Charitable choice provides an option to take into account these specially positioned faith-based organizations. Charitable choice doesn't claim to be the only way, or it is just another way.

Second, everyone here wants faith-based organizations to retain their religious character. No one wants to give them funding beyond their means and then raise hopes and have them dashed. No one wants to silence what they call their prophetic voice, which is their way of saying they speak out and criticize government and culture, and no one wants them to become dependent on government funding and lose their religious moorings. And that is why charitable choice spends a good deal of time surrounding these organizations with their protection for autonomy. If they can retain their freedom, then they will be free to continue doing their good work.

A third area of common ground, no one wants to use government money to force religion upon somebody else, least of all beneficiaries. The statute is drafted to take care of that.

Fourth, there is continuing interest, maybe growing interest, in exploring indirect forms of aid. And this is sort of like how the G.I. Bill works. There is interest in it because there are less constitutional restrictions as to how the faith-based organizations ultimately use those resources.

And fifth and last, no one wants to do harm to that venerable American tradition, the separation of church and State. But the question here is not choosing between separation of church and State and something else; instead, the debate is over what do we mean by separation. Charitable choice, as you know, says separation doesn't entail discrimination against those faith-based groups that have a high religious character; so it shifts the question.

No longer is it an exploration of those—their character, trying to ascertain are you somehow too religious, whatever that line means. Instead, the question is what can you do, can you do it, are you willing to do it in accordance with the statutory and constitutional parameters?So what are those—well, I am sure we will explore them in more depth in a bit.

But first, there can be no government aid diverted to sectarian activity; and second, no one receiving welfare benefits can be compelled to participate in sectarian activities against their will. Charitable choice funding is not for every faith-based organization. If there is a total integration of sectarian activities and delivery of social services, then surely they cannot participate in direct funding. But for those faith-based organizations that are able and willing to follow those rules, then charitable choice provides a valuable option, another option for raising people out of poverty.

Mr. CHABOT. Thank you very much Mr. Esbeck.

[The prepared statement of Mr. Esbeck follows:]

PREPARED STATEMENT OF CARL H. ESBECK

INTRODUCTION

By letter of May 22, 2001, the House Subcommittee on the Constitution, Committee on the Judiciary, invited the views of the U.S. Department of Justice concerning statutory and constitutional issues raised by § 1994A (charitable choice) of H.R. 7, The Community Solutions Act of 2001. Thank you for the invitation. This document is the Department's response to the Subcommittee's letter.

Charitable choice is already part of three federal social service programs. The provision first appeared in the Personal Responsibility and Work Opportunity Rec-

onciliation Act of 1996 (PRWORA),[1] two years later it was incorporated into the Community Services Block Grant Act of 1998,[2] and last year it was made part of the reauthorization of funding for the Substance Abuse and Mental Health Services Administration (SAMHSA).[3] Each of these programs has the overarching goal of helping those in poverty or treating those suffering from chemical dependency, and the programs seek to achieve their purpose by providing resources in the most effective and efficient means available. The object of charitable choice, then, is not to support or sponsor religion or the participating religious providers. Rather, the goal is secular, namely, to secure assistance for the poor and individuals with needs, and to do so by leveling the playing field for providers of these services who are faith-based.

Charitable choice is often portrayed as a source of new federal financial assistance made available to—indeed earmarked for—religious charities. It is not. Rather, charitable choice is a set of grant rules altering the terms by which federal funds are disbursed under existing programs of aid. As such, charitable choice interweaves three fundamental principles, and each principle receives prominence in the legislation.

First, charitable choice imposes on both government and participating FBOs the duty to not abridge certain enumerated rights of the ultimate beneficiaries of these welfare programs. The statute rightly protects these individuals from religious discrimination by FBOs, as well as from compulsion to engage in sectarian practices against their will.

Second, the statute imposes on government the duty to not intrude into the institutional autonomy of faith-based providers. Charitable choice extends a guarantee to each participating faith-based organization [FBO] that, notwithstanding the receipt of federal grant monies, the organization "shall retain its independence from Federal, State, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs."[4] In addition to this broadly worded safeguard, there are more focused prohibitions on specific types of governmental interference such as demands to strip religious symbols from the walls of FBOs and directives to remake the governing boards of these providers.[5] A private right of action gives ready means of enforcement to these protections of institutional autonomy.[6]

Third, the statute reinforces the government's duty to not discriminate with respect to religion when determining the eligibility of private-sector providers to deliver social services.[7] In the past, an organization's "religiosity," obviously a matter of degree not reducible to bright- lines, was said to disqualify providers found to be "pervasively sectarian." That inquiry was always fraught with difficulties. Now, rather than probing into whether a service provider is thought to be "too religious" as opposed to "secular enough," charitable choice focuses on the nature of the desired services and the means by which they are to be provided. Accordingly, the relevant question is no longer "Who are you?" but "What can you do?" So long as a provider is prepared to operate in line with all statutory and constitutional parameters, then an organization's degree of "religiosity" is no longer relevant.

Because they are a useful way of framing the most pertinent statutory and constitutional questions, we expand on these three principles below. Moreover, as will be discussed, the Department of Justice recommends certain amendments to § 1994A of H.R. 7.

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[1] 42 U.S.C. § 604a (Supp. 1996). Charitable choice appeared as § 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105, 2161 (1996). Section 604a applies to two federal revenue streams: Temporary Assistance to Needy Families and Welfare to Work monies. Welfare to Work funds were made subject to PRWORA in the 1997 Balanced Budget Act.

[2] 42 U.S.C. § 9920 (Supp. 1998). Charitable choice appeared as § 679 of the Community Services Block Grant Act, which was Title II of the Coats' Human Services Reauthorization Act of 1998, Pub. L. No. 105–285, 112 Stat. 2702, 2749 (Oct. 27, 1998).

[3] 42 U.S.C. § 300x–65 (Supp. 2000). SAMHSA concerns expenditures for substance abuse treatment and prevention under Titles V and XIX of the Public Health Services Act. The charitable choice provision pertaining to SAMHSA, signed by President Clinton on October 17, 2000, appeared as Title XXXIII, § 3305 of the Children's Health Act of 2000, Pub. L. No. 106–310, 114 Stat. 1212 (2000).

SAMHSA substance abuse treatment and prevention expenditures were again made subject to a charitable choice provision in the Community Renewal Tax Relief Act of 2000, signed by President Clinton on December 21, 2000. *See* 42 U.S.C. § 290kk (Supp. 2000). This Act was incorporated by reference in the Consolidated Appropriation Act of 2001, Pub. L. No. 106–554.

[4] 42 U.S.C. § 604a(d)(1). The parallel subsection in H.R. 7 is § 1994A(d)(1).

[5] 42 U.S.C. § 604a(d)(2). The parallel subsection in H.R. 7 is § 1994A(d)(2).

[6] 42 U.S.C. § 604a(i). The parallel subsection in H.R. 7 is § 1994A(l).

[7] 42 U.S.C. § 604a(b) and (c). The parallel subsection in H.R. 7 is § 1994A(c)(1).

I. THE RIGHTS OF BENEFICIARIES

In programs subject to charitable choice, when funding goes directly to a social service provider the ultimate beneficiaries are empowered with a choice.[8] Beneficiaries who want to receive services from an FBO may do so, assuming, of course, that at least one FBO has received funding.[9] On the other hand, if a beneficiary has a religious objection to receiving services at an FBO, then the government is required to provide an equivalent alternative.[10] This is the "choice" in charitable choice. Moreover, some beneficiaries, for any number of reasons, will inevitably think their needs better met by an FBO. This possibility of choosing to receive their services at an FBO is as important a matter as is the right not to be assigned to a religious provider. There is much concern voiced by civil libertarians about the latter choice, whereas the former is often overlooked. Supporters of charitable choice regard both of these choices—to avoid an FBO or to seek one out—as important.

If a beneficiary selects an FBO, the provider cannot discriminate against the beneficiary on account of religion or a religious belief.[11] Moreover, the text's explicit protection of "a refusal to actively participate in a religious practice" insures a beneficiary's right to avoid any unwanted sectarian practices.[12] Hence, participation, if any, is voluntary or noncompulsory. When direct funding is involved, one recent court decision suggested that this "opt-out" right is required by the first amendment.[13] Beneficiaries are required to be informed of their rights.[14]

The Department of Justice recommends that § 1994A of H.R. 7 be strengthened by amending subsection (i) along the lines indicated in the note below.[15] This proposal has a clearer statement of the voluntariness requirement. The provision on separating the government-funded program from sectarian practices is discussed in Part III, below. The suggested Certificate of Compliance has the purpose of impress-

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[8] Charitable choice contemplates both direct and indirect forms of aid. 42 U.S.C. § 604a(a)(1). This is most apparent in H.R. 7 by comparing the subparts of § 1994A(g). If the means of funding is indirect, as with, for example, federal child-care certificates, then choice is intrinsic to the beneficiary's selection of a child care center at which to "spend" his or her certificate.

[9] It may be that on some occasions no FBOs successfully compete for a grant or cooperative agreement. This is to be expected. Charitable choice is not a guarantee that resources will flow to FBOs. Rather, charitable choice guarantees only that FBOs will not be discriminated against with respect to religion.

[10] 42 U.S.C. § 604a(e)(1). The parallel subsection in H.R. 7 is § 1994A(f)(1). The alternative may be another provider not objectionable to the beneficiary, or the government may find it more cost efficient to purchase the needed services on the open market.

[11] 42 U.S.C. § 604a(g) (FBOs may not discriminate against beneficiaries "on the basis of religion [or] a religious belief"). The parallel subsection in H.R. 7 is § 1994A(g)(1).

[12] 42 U.S.C. § 604a(g) (FBOs may not discriminate or otherwise turn away a beneficiary from the organization's program because the beneficiary "refus[es] to actively participate in a religious practice"). Thus, a beneficiary cannot be forced into participating in sectarian activity. For reasons not apparent, § 1994A(g)(1) of H.R. 7 omits this right of beneficiaries to avoid unwanted sectarian practices. As will be noted below, the Department of Justice recommends an amendment to correct this omission.

By virtue of § 604a(j), any such sectarian practices must be privately funded in their entirety and, hence, conducted separate from the government-funded program. *See* Part III, below, discussing the need to separate sectarian practices from the government-funded program.

[13] *See* DeStefano v. Emergency Housing Group, Inc., 2001 WL 399241* 10–12 (2d Cir. Apr. 20, 2001) (dictum expressing belief that it would be violative of Establishment Clause should beneficiaries of state-funded alcohol treatment program be compelled to attend Alcoholics Anonymous sessions, such sessions being deemed religious indoctrination).

[14] The "actual notice" requirement first appeared in the SAMHSA reauthorization. *See* 42 U.S.C. § 300x–65(e)(2). The parallel subsection in H.R. 7 is § 1994A(f)(2). Of course, nothing in prior versions of charitable choice prevents the government/grantor from ensuring actual notice of rights to beneficiaries. Moreover, while it may be prudent for the grantor to provide notice of rights whether required by the underlying legislation or not, the absence of a requirement in older versions of the law hardly rises to the level of a constitutional concern.

[15] (i) LIMITATIONS ON USE OF FUNDS *FOR CERTAIN PURPOSES*; VOLUNTARINESS.—No funds provided through a grant or COOPERATIVE AGREEMENT *contract* to a religious organization to provide assistance under any program described in subsection (c)(4) shall be expended for sectarian *worship*, instruction, WORSHIP, or proselytization. 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 THIS SUBPART. A certificate shall be SEPARATELY signed by RELIGIOUS *such* organizations, and filed with the government agency that disbursed the funds, CERTIFYING that *gives assurance* the organization IS AWARE OF AND will comply with this subsection. FAILURE TO COMPLY WITH THE TERMS OF THE CERTIFICATION MAY, IN ADDITION TO OTHER SANCTIONS AS PROVIDED BY LAW, RESULT IN THE WITHHOLDING OF THE FUNDS AND THE SUSPENSION OR TERMINATION OF THE AGREEMENT. [NOTE: *Italics* represent Strike-through text & CAPS represent Highlighted text]

ing upon both the government/grantor and the FBO the importance of both voluntariness and the need to separate sectarian practices.

II. THE AUTONOMY OF FAITH-BASED PROVIDERS

Care must be taken that government funding not cause the religious autonomy of FBOs to be undermined. Likewise, care must be taken that the availability of government funding not cause FBOs to fall under the sway of government or silence their prophetic voice. Accordingly, charitable choice was drafted to vigorously safeguard the "religious character" of FBOs, explicitly reserving to these organizations "control over the definition, development, practice, and expression" of religious belief.[16] Additionally, congressional protection for the institutional autonomy of FBOs was secured so as to leave them free to succeed at what they do well, namely reaching under-served communities. Finally, protecting institutional autonomy was thought necessary to draw reluctant FBOs into participating in government programs, something many FBOs are unlikely to do if they face invasive or compromising controls.

One of the most important guarantees of institutional autonomy is an FBO's ability to select its own staff in a manner that takes into account its faith. Many FBOs believe that they cannot maintain their religious vision over a sustained time period without the ability to replenish their staff with individuals who share the tenets and doctrines of the association. The guarantee is central to each organization's freedom to define its own mission according to the dictates of its faith. It was for this reason that Congress wrote an exemption from religious discrimination by religious employers into Title VII of the Civil Rights Act of 1964. And charitable choice specifically provides that FBOs retain this limited exemption from federal employment nondiscrimination laws.[17] While it is essential that FBOs be permitted to make employment decisions based on religious considerations, FBOs must, along with secular providers, follow federal civil rights laws prohibiting discrimination on the bases of race, color, national origin, gender, age, and disability.[18]

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[16] Religious organizations often serve a useful role as moral critics of culture and, in particular, the actions of government. The mention of "control over . . . expression" in 42 U.S.C. § 604a(d)(1), prohibits government from using the threat of denial of a grant, or withholding monies due under an existing grant, as a means of "chilling" the prophetic voice of the FBO.

[17] 42 U.S.C. § 604a(f). The parallel subsection in H.R. 7 is § 1994A(e)(2). In order that these employment protections be more clear to all concerned, while still achieving the intended purpose, the Department of Justice recommends that the "Employment Practices" subsection to § 1994A be amended as set out below:

> (e) EMPLOYMENT PRACTICES.—
>
> (1) IN GENERAL.—In order to aid in the preservation of its religious character AND AUTONOMY, a religious organization that provides assistance under a program described in subsection (c)(4) may, notwithstanding any other *provision of* FEDERAL law PERTAINING TO RELIGIOUS DISCRIMINATION IN EMPLOYMENT, *require that its employees adhere to the religious beliefs and practices of the organization* TAKE INTO ACCOUNT THE RELIGION OF THE MEMBERS OF THE ORGANIZATION WHEN HIRING, PROMOTING, TRANSFERRING, OR DISCHARGING AN EMPLOYEE.
>
> (2) TITLE VII.—The exemption of a religious organization *provided* under section 702(A), AND THE EXEMPTION OF AN EDUCATIONAL INSTITUTION UNDER SECTION *or* 703(e)(2) of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e–1(A), 2000e–2(e)(2)), *regarding employment practices* shall not be affected by the *religious* organization's OR INSTITUTION'S provision of assistance *under*, or receipt of funds *from*, PURSUANT TO a program described in subsection (c)(4). NOTHING IN THIS SECTION ALTERS THE DUTY OF A RELIGIOUS ORGANIZATION TO OTHERWISE COMPLY WITH THE NONDISCRIMINATION PROVISIONS IN TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (42 U.S.C. § 2000E ET SEQ.).[NOTE: *Italics* represent Strike-through text & CAPS represent Highlighted text]

This proposed amendment would ensure that FBOs may continue to staff on a religious basis. However, in this proposal religious considerations may not affect the terms of the compensation package. Hence, there is no intended "religious override" of minimum wage laws, or matters like social security or unemployment compensation. Additionally, under this proposal any employment nondiscrimination provisions imbedded in the underlying federal program legislation cannot affect an FBO's right to staff on a religious basis. Finally, the §§ 702(a), 703(e)(2) exceptions in Title VII, while not broadened in any respect, are expressly preserved.

[18] In addition to Title VII of the Civil Rights Act of 1964, *see, e.g.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (1994) (prohibiting discrimination on the bases of race, color, and national origin); Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681–1688 (1994) (prohibiting discrimination in educational programs and activities on the bases of sex and visual impairment); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994) (prohibiting discrimination against otherwise qualified disabled individuals, including individuals with a contagious disease or an infection such as HIV); The Age Discrimination Act of 1975, 29 U.S.C. § 706(8)(c) (1994) (prohibiting discrimination on the basis of age).

Opponents of charitable choice have charged that it permits a form of "government-funded job discrimination." We do not believe this is the case for the following reasons. *First*, there is a certain illogic to the claim that charitable choice is "funding job discrimination." The purpose of charitable choice, and the underlying federal programs, is not the creation or funding of jobs. Rather, the purpose is to fund social services. The FBO's employment decisions are wholly private. Because the government is not involved with an FBO's internal staffing decisions, there is no causal link between the government's singular and very public act of funding and an FBO's numerous and very private acts related to its staffing. Importantly, these internal employment decisions are manifestly not "state or governmental action" for purposes of the Fifth and Fourteenth Amendments.[19] Hence, because the Constitution restrains only "governmental action," these private acts of religious staffing cannot be said to run afoul of constitutional norms.[20]

Second, critics of charitable choice are wrong when they claim to have detected a contradiction. Why, they ask, is it important to staff on a religious basis when the FBOs cannot engage in religious indoctrination within a government-funded program? Since there can be no such indoctrination, they go on, what possible difference could it make that employees share the FBO's faith? There is no contradiction, however, once this line of argumentation is seen as failing to account for the FBO's perspective. From the government's perspective, to feed the hungry or house the destitute is secular work. But from the perspective of the FBO, to operate a soup kitchen or open a shelter for the homeless are acts of mercy and thus spiritual service. In his concurring opinion in *Corporation of the Presiding Bishop v. Amos*, Justice William Brennan, remembered as one of the Court's foremost civil libertarians, saw this immediately when he wrote that what government characterizes as social services, religious organizations view as the fulfillment of religious duty, as service in grateful response to unmerited favor, as good works that give definition and focus to the community of faithful, or as a visible witness and example to the larger society.[21] All of which is to observe that even when not engaged in "religious indoctrination" such as proselytizing or worship, FBOs view what they are doing as religiously motivated and thus may desire that such acts of mercy and love be performed by those of like-minded creed.[22]

Third, it is not always appreciated that private acts of religious staffing are not motivated by prejudice or malice. In no way is religious staffing by FBOs comparable to the invidious stereotyping, even outright malice, widely associated with racial and ethnic discrimination. Rather, the FBO is acting—and understandably so—in accord with the dictates of its sincerely held religious convictions. Justice William Brennan, once again, was quick to recognize the importance of such civil rights exemptions to the autonomy of faith-based organizations:

> 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. Solicitude for a church's ability to do so reflects the idea that further-

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[19] *See* Blum v. Yaretsky, 457 U.S. 991 (1982) (holding that pervasive regulation and the receipt of government funding at a private nursing home does not, without more, constitute state action); Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (holding that a private school heavily funded by the state is not thereby state actor); Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 164 (1978) (holding that the enactment of a law whereby the state acquiesces in the private acts of a commercial warehouse does not thereby convert the acts of the warehouse into those of the state).

[20] That an act of religious staffing is not attributable to the government and thus not subject to Establishment Clause norms restraining actions by government has already been ruled on by the Supreme Court. *See* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 337 (1987) ("A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose . . . [I]t must be fair to say that the *government itself* has advanced religion through its own activities and influence."); *id*. at 337 n.15 ("Undoubtedly, [the employee's] freedom of choice in religious matters was impinged upon, but it was the Church . . . and not the Government, who put him to the choice of changing his religious practices or losing his job.").

[21] 483 U.S. at 342–44 (Brennan, J., concurring).

[22] We acknowledge that many FBOs do not staff on a religious basis, nor do they desire to do so. But many others do, and desire to continue doing so. Further, many FBOs that staff on a religious basis do so with respect to some jobs but not others. Finally, many FBOs do not staff on the basis of religion in any affirmative sense, but they do require that employees not be in open defiance of the organization's creed. The employment practices of FBOs, as well as their religious motives, are varied and complex, yet another reason for government to eschew attempts to regulate the subject matter.

ance of the autonomy of religious organizations often furthers individual religious freedom as well.[23]

Which is to say, not all discrimination is malevolent.[24] A religious organization favoring the employment of those of like-minded faith is comparable to an environmental organization staffing only with employees devoted to preserving the environment, a feminist organization hiring only those devoted to the cause of expanded opportunities for women, or a teacher's union hiring only those opposed to school vouchers. To bar a religious organization from hiring on a religious basis is to assail the very animating cause for which the organization was formed in the first place. If these FBOs cannot operate in accord with their own sense of self-understanding and mission, then many will decline to compete for charitable choice funding. If that happens, the loss will be borne most acutely by the poor and needy.

Fourth, in a very real sense Congress already made a decision to protect religious staffing by FBOs back in 1964, and then to expand on its scope in 1972.[25] Section 702(a) of Title VII of the Civil Rights Act of 1964[26] exempts religious organizations from Title VII liability for employment decisions based on religion.[27] Opponents claim that the § 702(a) exemption is waived when an FBO becomes a federally funded provider of social services. The law is to the contrary. Waiver of rights is disfavored in the law, and, as would be expected, the case law holds that the § 702(a) exemption is not forfeited when an FBO becomes a provider of publicly funded services.[28] Indeed, charitable choice expressly states that the § 702(a) exemption is preserved.[29] In light of the fact that the statutory language makes clear to FBOs that they will not be "impair[ed]" in their "religious character" if they participate in charitable choice, it is wholly contradictory to then suggest that FBOs have impliedly waived this valuable autonomy right.

Charitable choice affirmatively enables and requires government to stop "picking and choosing" between groups on the basis of religion. No longer can there be wholesale elimination of able and willing providers found by regulators or civil magistrates to be "too religious," a constitutionally intrusive and analytically problematic determination.[30] With charitable choice, religion is irrelevant during the grant

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[23] 483 U.S. at 342–43 (Brennan, J., concurring).

[24] *Cf.* op-ed column by Nathan J. Diament, *A Slander Against Our Sacred Institutions*, Washington Post p. A23 (May 28, 2001) ("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.").

[25] The nature and history of this expansion in the Equal Employment Opportunity Act of 1972 is set forth in *Amos*, 483 U.S. at 332-33. A co-sponsor of the 1972 expansion, Senator Sam Ervin, explained its purpose in terms of reinforcing the separation of church and state. The aim, said Senator Ervin, was to "take the political hands of Caesar off the institutions of God, where they have no place to be." 118 Cong. Rec. 4503 (1972).

[26] 42 U.S.C. § 2000e–1(a) (1994). Religious educational institutions are separately exempt under 42 U.S.C. § 2000e–2(e)(2) (1994).

[27] The Title VII religious exemption was upheld in Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987). *Amos* held that the exemption was not a religious preference violative of the Establishment Clause. Moreover, the Establishment Clause permits Congress to enact exemptions from regulatory burdens not compelled by the Free Exercise Clause, as well as regulatory exemptions that accommodate only religious practices and organizations. *Id.* at 334, 338.

[28] *See* Hall v. Baptist Memorial Health Care Corp., 215 F.3d 618, 625 (6th Cir. 2000) (dismissing religious discrimination claim filed by employee against religious organization because organization was exempt from Title VII and the receipt of substantial government funding did not bring about a waiver of the exemption); Siegel v. Truett-McConnell College, 13 F. Supp.2d 1335, 1343–45 (N.D. Ga. 1994), *aff'd*, 73 F.3d 1108 (11th Cir. 1995) (table) (dismissing religious discrimination claim filed by faculty member against religious college because college was exempt from Title VII and the receipt of substantial government funding did not bring about a waiver of the exemption or violate the Establishment Clause); Young v. Shawnee Mission Medical Center, 1988 U.S. Dist. LEXIS 12248 (D. Kan. Oct. 21, 1988) (holding that religious hospital did not lose Title VII exemption merely because it received federal Medicare payments); *see* Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991) (exemption to Title VII for religious staffing by a religious organization is not waivable); Arriaga v. Loma Linda University, 10 Cal.App.4th 1556, 13 Cal. Rptr.2d 619 (1992) (religious exemption in state employment nondiscrimination law was not lost merely because religious college received state funding); Saucier v. Employment Security Dept., 954 P.2d 285 (Wash. Ct. App. 1998) (Salvation Army's religious exemption from state unemployment compensation tax does not violate Establishment Clause merely because the job of a former employee in question, a drug abuse counselor, was funded by federal and state grants).

[29] 42 U.S.C. § 604a(f). The parallel subdivision in H.R. 7 is § 1994A(e)(2).

[30] In regard to the constitutional and practical difficulties with sorting out, and then barring from program participation, those FBOs thought to fit that slippery category of "pervasively sectarian," the plurality in Mitchell v. Helms, 120 S. Ct. 2530 (2000), said as follows:

awarding process. Nor does the government, in making awards, need to sort out those groups thought "genuinely" religious from those deemed pseudo- religious. This means that, contrary to the critics' fears, charitable choice leads to less, rather than more, regulation of religion.

Additionally, welfare beneficiaries have greater choice when selecting their service provider. For those beneficiaries who, out of spiritual interests or otherwise, believe they will be better served by an FBO, such choices will now be available in greater number. Expanding the variety of choices available to needy individuals in turn reduces the government's influence over how those individual choices are made.

III. THE NEUTRALITY PRINCIPLE

When discussing Establishment Clause restraints on a government's program of aid, a rule of equal-treatment or nondiscrimination among providers, be they secular or religious, is termed "neutrality" or the "neutrality principle." Charitable choice is consistent with neutrality, but courts need not wholly embrace the neutrality principle to sustain the constitutionality of charitable choice.

The U.S. Supreme Court distinguishes, as a threshold matter, between direct and indirect aid.[31] For any given program, charitable choice allows, at the government's option, for direct or indirect forms of funding, or both. Indirect aid is where the ultimate beneficiary is given a coupon, or other means of free agency, such that he or she has the power to select from among qualified providers at which the coupon may be "redeemed" and the services rendered. In a series of cases, and in more recent commentary contrasting indirect aid with direct-aid cases, the Supreme Court has consistently upheld the constitutionality of mechanisms providing for indirect means of aid distributed without regard to religion.[32] The Child Care and Development Block Grant Program of 1990,[33] for example, has been providing low income parents indirect aid for child care via "certificates" redeemable at, *inter alia*, churches and other FBOs. The act has never been so much as even challenged in the courts as unconstitutional.

In the context of direct aid, the Supreme Court decision that has most recently addressed the neutrality principle is *Mitchell v. Helms*.[34] The four-Justice plurality, written by Justice Thomas, and joined by the Chief Justice, and Justices Scalia and Kennedy, embraced, without reservation, the neutrality principle. In the sense of positive law, however, Justice O'Connor's opinion concurring in the judgment is controlling in the lower courts and on legislative bodies.[35]

Before proceeding in greater detail, the controlling principle coming from *Mitchell v. Helms can be briefly stated: A government program of aid that directly assists the delivery of social services at a faith-based provider, one selected by the government without regard to religion, is constitutional, but real and meaningful controls must*

> [T]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs . . . Although the dissent welcomes such probing . . . we find it profoundly troubling.

Id. at 2551 (citations omitted).

The problem is more thoroughly addressed at Vol. 42 Wm & Mary L. Rev. 883, 907–14 (2001) (collecting cases suggesting that to require distinguishing between pervasively and non-pervasively sectarian organizations is inconsistent with the Court's case law elsewhere holding that civil authorities should refrain from probing the inner workings of religious organizations).

[31] *See* Mitchell v. Helms, 120 S. Ct. 2530, 2558–59 (2000) (O'Connor, J., concurring in the judgment).

[32] See Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (providing special education services to Catholic high school student not prohibited by Establishment Clause); Witters v. Washington Dept. of Servs. For the Blind, 474 U.S. 481 (1986) (upholding a state vocational rehabilitation grant to disabled student that elected to use the grant to obtain training as a youth pastor); Mueller v. Allen, 463 U.S. 388 (1983) (upholding a state income tax deduction for parents paying school tuition at religious schools); *see also* Rosenberger v. Rector and Visitors, 515 U.S. 819, 878–79 (1995) (Souter, J., dissenting) (distinguishing cases upholding indirect funding to individuals, admitted to be the law of the Court, from direct funding to religious organizations).

[33] 42 U.S.C. §§ 9858–9858q (1994).

[34] 120 S. Ct. 2530 (2000) (plurality opinion).

[35] *Id*. at 2556 (O'Connor, J., concurring in the judgment). Her opinion was joined by Justice Breyer. See Marks v. United States, 430 U.S. 188, 193 (1977) (when Supreme Court fails to issue a majority opinion, the opinion of the members who concurred in the judgment on narrowest grounds is controlling).

be built into the program so that the aid is not diverted and spent on religious indoctrination.[36]

Based on Justice O'Connor's opinion, when combined with the four Justices comprising the plurality, it can be said that: (1) neutral, indirect aid to a religious organization does not violate the Establishment Clause;[37] and (2) neutral, direct aid to a religious organization does not, without more, violate the Establishment Clause.[38] Having indicated that program neutrality is an important but not sufficient factor in determining the constitutionality of direct aid, Justice O'Connor went on to say that: (a) *Meek v. Pittenger*[39] and *Wolman v. Walter*[40] should be overruled; (b) the Court should do away with all presumptions of unconstitutionality; (c) proof of actual diversion of government aid to religious indoctrination would be violative of the Establishment Clause; and (d) while adequate safeguards to prevent diversion are called for, an intrusive and pervasive governmental monitoring of FBOs is not required.

The federal program in *Mitchell* entailed aid to K-12 schools, public and private, secular and religious, allocated on a per-student basis. The same principles apply, presumably, to social service and health care programs, albeit, historically the Court has scrutinized far more closely direct aid to K-12 schools compared to social welfare and health care programs.[41]

In cases involving programs of direct aid to K-12 schools, Justice O'Connor started by announcing that she will follow the analysis first used in *Agostini v. Felton.*[42] She began with the two-prong *Lemon* test as modified in *Agostini*: is there a secular purpose and is the primary effect to advance religion? Plaintiffs did not contend that the program failed to have a secular purpose, thus she moved on to the second part of the *Lemon/Agostini* test.[43] Drawing on *Agostini*, Justice O'Connor noted that the primary-effect prong is guided by three criteria. The first two inquiries are whether the government aid is actually diverted to the indoctrination of religion and whether the program of aid is neutral with respect to religion. The third criterion is whether

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[36] *Mitchell* does not speak—except in the most general way—to the scope of the Establishment Clause when it comes to other issues such as religious exemptions in regulatory or tax laws, religious symbols on public property, or religious expression by government officials. In that regard, *Mitchell* continues the splintering of legal doctrine leading to different Establishment Clause tests for different contexts.

[37] *Id.* at 2558–59.

[38] *Id.* at 2557. Justice O'Connor explained that by "neutral" program of aid she meant "whether the aid program defines its recipients by reference to religion." *Id.* at 2560. To be "neutral" in this sense, a grant program must be facially nondiscriminatory with respect to religion, and, where there is discretion in awarding a grant, nondiscriminatory as applied.

[39] *Id.* at 2556, 2563–66. Meek v. Pittenger, 421 U.S. 349 (1975) (plurality in part), had struck down loans to religious schools of maps, photos, films, projectors, recorders, and lab equipment, as well as disallowed services for counseling, remedial and accelerated teaching, and psychological, speech, and hearing therapy.

[40] 120 S. Ct. at 2556, 2563–66. Wolman v. Walter, 433 U.S. 229 (1977) (plurality in part), had struck down use of public school personnel to provided guidance, remedial and therapeutic speech and hearing services away from the religious school campus, disallowed the loan of instructional materials to religious schools, and disallowed transportation for field trips by religious school students.

[41] *See* Bowen v. Kendrick, 487 U.S. 589 (1989) (upholding, on its face, religiously neutral funding of teenage sexuality counseling centers); Bradfield v. Roberts, 175 U.S. 291 (1899) (upholding use of federal funds for construction at a religious hospital). In sharp contrast, the Court has been "particularly vigilant" in monitoring compliance with the Establishment Clause in K-12 schools, where the government exerts "great authority and coercive power" over students through a mandatory attendance requirements. Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987).

[42] *Mitchell*, 120 S. Ct. at 2556, 2560. Agostini v. Felton, 521 U.S. 203 (1997), upheld a program whereby public school teachers go into K-12 schools, including religious schools, to deliver remedial educational services.

[43] *Mitchell*, 120 S. Ct. at 2560. Plaintiffs were well counseled not to argue that the program lacked a secular purpose. The secular-purpose prong of the test is easily satisfied. *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 602 (1988) ("a court may invalidate a statute only if it is motivated wholly by an impermissible purpose").

the program creates excessive administrative entanglement,[44] now clearly downgraded to just one more factor to weigh under the primary-effect prong.[45]

After outlining for the reader the Court's *Lemon/Agostini* approach, Justice O'Connor then inquired into whether the aid was actually diverted, in a manner attributable to the government, and whether program eligibility was religion neutral. Because the federal K-12 educational program under review in *Mitchell* was facially neutral, and administered evenhandedly, as to religion,[46] she spent most of her analysis on the remaining factor, namely, diversion of grant assistance to religious indoctrination. Justice O'Connor noted that the educational aid in question was, by the terms of the statute, required to supplement rather than to supplant monies received from other sources,[47] that the nature of the aid was such that it could not reach the "coffers" of places for religious inculcation, and that the use of the aid was statutorily restricted to 'secular, neutral, and nonideological" purposes.[48] Concerning the form of the assistance, she noted that the aid consisted of educational materials and equipment rather than cash, and that the materials were on loan to the religious schools.[49]

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[44] In *Mitchell*, plaintiffs did not contend that the program created excessive administrative entanglement. 120 S. Ct. at 2560. Prior to *Agostini*, entanglement analysis was a separate, third prong to the *Lemon* test.

The Supreme Court has long since stop using "political divisiveness" inquiry as a separate aspect of entanglement analysis. *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 617 n.14 (1988) (rejecting political divisiveness alone as a basis for invalidating governmental aid program). Hence, neither the plurality nor Justice O'Connor gave even passing mention to "political divisiveness." We follow their lead.

[45] Alternatively, the same evidence shifted under the effect prong of *Lemon/Agostini* can be examined pursuant to Justice O'Connor's no-endorsement test. *Mitchell*, 120 S. Ct. at 2560. The no-endorsement test asks whether an "objective observer" would feel civic alienation upon examining the program of aid and learning that some of the grants are awarded to FBOs. A finding of government endorsement of religion is unlikely unless a facially neutral program, when applied, singles out religion for favoritism. In *Mitchell*, Justice O'Connor did not utilize the alternative no-endorsement test when doing the *Lemon/Agostini* analysis. We follow her lead. She did, however, use the no-endorsement test for another purpose. *See id.* at 2559 (explaining why she thought the plurality was wrong to abandon the direct-aid/indirect-aid distinction).

[46] Religious neutrality, explained Justice O'Connor, ensures that an aid program does not provide a financial incentive for the individuals intended to ultimately benefit from the aid "to undertake religious indoctrination." *Mitchell*, 120 S. Ct. at 2561 (quoting *Agostini*).

[47] One of the aims of charitable choice is that faith-based and other community organizations be able to expand their capacity to provided for the social service needs of under-served neighborhoods. In that sense, then, charitable choice is supplemental. For many neutral programs of aid, application of the supplement/not-supplant factor would, if allowed to be controlling, conflict with long-settled precedent. For example, the Court has long since allowed state-provided textbooks and bussing for religious schools. *See* Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930) (textbooks); Everson v. Board of Educ., 330 U.S. 1 (1947) (bussing). Once the government provided textbooks and bussing, monies in a school's budget could be shifted to other uses, including to sectarian uses. Yet such aid is in apparent conflict with the admonition to supplement/not-supplant. *See also* Committee for Public Education v. Regan, 444 U.S. 646, 661–62 (1980), where the Court upheld aid that "supplanted" expenses otherwise borne by religious schools for state-required testing. Even the dissent in Mitchell concedes that reconciliation between *Regan* and an absolute prohibition on aid that supplants rather than supplements "is not easily explained." 120 S. Ct. at 2588 n.17 (Souter, J., dissenting). *Regan* suggests that no "blanket rule" exists. *Id.* at 2544 n.7 (plurality).

The Supreme Court's past practice is to trace the government funds to the point of expenditure, rejecting any requirement whereby government funds must not be provided where the public funds thereby"free up" private money which then might be diverted to religious indoctrination. *See Regan*, 444 U.S. at 658 ("The Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends."); New York v. Cathedral Academy, 434 U.S. 125, 134 (1977) ("this Court has never held that freeing private funds for sectarian uses invalidates otherwise secular aide to religious institutions").

[48] 120 S. Ct. at 2557, 2562.

[49] *Id.* at 2562. On at least one occasion the Supreme Court upheld direct cash payments to religious K-12 schools. *See* Committee for Public Education v. Regan, 444 U.S. 646 (1980). The payments were in reimbursement for state-required testing. Rejecting a rule that cash was never permitted, the *Regan* Court explained:

> We decline to embrace a formalistic dichotomy that bears so little relationship either to common sense or the realities of school finance. None of our cases requires us to invalidate these reimbursements simply because they involve [direct] payments in cash.

Id. at 658. *See also Mitchell*, 120 S. Ct. at 2546 n.8 (plurality noting that monetary assistance is not "per se bad," just a factor calling for more care).

Justice O'Connor explained that monetary aid is of concern because it "falls precariously close to the original object of the Establishment Clause prohibition." *Mitchell*, 120 S. Ct. at 2566. Part of that history, explicated in Everson v. Board of Educ., 330 U.S. 1 (1947), was the defeat spear-

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Justice O'Connor proceeded to reject a rule of unconstitutionality where the character of the aid is merely capable of diversion to religious indoctrination, hence overruling *Meek* and *Wolman*.[50] As the Court did in *Agostini*, Justice O'Connor rejected employing presumptions of unconstitutionality and indicated that henceforth she will require proof that the government aid was actually diverted to indoctrination.[51] Because the "pervasively sectarian" test is such a presumption, indeed, an irrebutable presumption (i.e., any direct aid to a highly religious organization is deemed to advance sectarian objectives), [52] Justice O'Connor is best understood to have rendered the "pervasively sectarian" test no longer relevant when assessing neutral programs of aid.[53]

Justice O'Connor requires that no government funds be diverted to "religious indoctrination," thus religious organizations receiving direct funding will have to separate their social service program from their sectarian practices.[54] If the federal assistance is utilized for educational functions without attendant sectarian activities, then there is no problem. If the aid flows into the entirety of an educational program and some "religious indoctrination [is] taking place therein," then the indoctrination "would be directly attributable to the government." [55] Hence, if any part of an FBO's activities involve "religious indoctrination," such activities must be set apart from the government-funded program and, hence, are privately funded.

A welfare-to-work program operated by a church in Philadelphia illustrates how this can be done successfully. Teachers in the program conduct readiness-to-work classes in the church basement weekdays pursuant to a government grant. During a free-time period the pastor of the church holds a voluntary Bible study in her office up on the ground floor. The sectarian instruction is privately funded and separated in both time and location from the welfare to work classes.

In the final part of her opinion, Justice O'Connor explained why safeguards in the federal educational program at issue in *Mitchell* reassured her that the program, as applied, was not violative of the Establishment Clause. A neutral program of aid need not be failsafe, nor does every program require pervasive monitoring.[56] The statute limited aid to "secular, neutral, and nonideological" assistance and expressly prohibited use of the aid for "religious worship or instruction." [57] State educational

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headed in Virginia by James Madison of a proposed tax. As more precisely explained by Justice Thomas, the legislation defeated in Virginia was a tax ear-marked for the support of clergy. Rosenberger v. Rector and Visitors, 515 U.S. 819, 852 (1995) (Thomas, J., concurring). Opposition to a tax ear-marked for explicitly religious purposes indeed does go to the heart of the adoption of the Establishment Clause. Charitable choice monies, however, come from general tax revenues, are awarded in a manner that is neutral as to religion, and do not fund sectarian practices.

[50] 120 S. Ct at 2561–68.

[51] Justice O'Connor's statement sidelining future reliance on presumptions that employees of highly religious organizations cannot or will not follow legal restraints on the expenditure of government funds is as follows:

> I believe that our definitive rejection of [the] presumption [in *Agostini*] also stood for—or at least strongly pointed to—the broader proposition that such presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause.

Id. at 2567.

[52] *See id.* at 2561 (noting that *Agostini* rejected a presumption drawn from *Meek* and later *Aguilar); id.* at 2563–64 (quoting from *Meek* the "pervasively sectarian" rationale and noting it created an irrebutable presumption which Justice O'Connor later rejects); *id.* at 2567 (requiring proof of actual diversion, thus rendering "pervasively sectarian" test irrelevant); *id.* at 2568 (rejecting presumption that teachers employed by religious schools cannot follow statutory requirement that aid be use only for secular purposes); and *id.* at 2570 (rejecting presumption of bad faith on the part of religious school officials).

[53] While Justice O'Connor did not join in the plurality's denunciation of the "pervasively sectarian" doctrine as bigoted, her opinion made plain that the doctrine has lost relevance. Thus, while not taking issue with the plurality's condemnation of the doctrine as anti-Catholic, she in fact explicitly joined in overruling the specific portions of *Meek* that set forth the operative core of the "pervasively sectarian" concept. 120 S. Ct. at 2563.

[54] *Id.* at 2568.

[55] *Id.* A lower court recently applied this principle by striking down direct monetary payments, unrestricted as to use, to reimburse schools, including religious schools, to reimburse them for the cost of Internet access. See Freedom From Religion Foundation v. Bugher, 2001 WL 476595 (7th Cir. Apr. 27, 2001). Once received, the money went into general revenues and could later be used for sectarian purposes. On the other hand, the lower trial court decision in the same case upheld a parallel program whereby the state provided a below-cost Internet link to schools, including religious schools. Hence, the aid could not be diverted to sectarian use. 55 F. Supp.2d 962 (W.D. Wis. 1999). While on appeal, the plaintiffs' challenge to this parallel program was dropped when, in the interim, *Mitchell v. Helms* was handed down.

[56] 120 S. Ct. at 2569.

[57] *Id.*

authorities required religious schools to sign Assurances of Compliance with the above-quoted spending prohibitions being express terms in the grant agreement.[58] The state conducted monitoring visits, albeit infrequently, and did a random review of government-purchased library books for their sectarian content.[59] There was also monitoring of religious schools by local public school districts, including a review of project proposals submitted by the religious schools and annual program-review visits to each recipient school.[60] The monitoring did catch instances of actual diversion, albeit not a substantial number, and Justice O'Connor was encouraged that when problems were detected they were timely corrected.[61]

Justice O'Connor said that various diversion-prevention factors such as supplement/not-supplant, aid not reaching religious coffers, and the aid being in-kind rather than monetary are not talismanic. She made a point not to elevate them to the level of constitutional requirements.[62] Rather, effectiveness of these diversion-prevention factors, and other devices doing this preventative task, are to be sifted and weighed given the overall context of, and experience with, the government's program.[63]

Charitable choice is responsive to the *Lemon/Agostini* test and Justice O'Connor's opinion in *Mitchell v. Helms*:

1. The legislation gives rise to neutral programs of aid and expressly prohibits diversion of the aid to "sectarian worship, instruction, or proselytization." Thus, sectarian aspects of an FBO's activities would have to be segmented off and, if continued, privately funded. An amendment recommended by the Department of Justice is set out in the note below.[64] Under this proposal, direct monetary funding is allowed where an FBO, by structure and operation, will not permit diversion of government funds to religious indoctrination.[65] Some FBOs, of course, will be unable or unwilling to separate their program in the required fashion. Charitable choice is not for such providers. Those FBOs who do not qualify for direct funding should be considered candidates for indirect means of aid.
2. Participation by beneficiaries is voluntary or noncompulsory. A beneficiary assigned to an FBO has a right to demand an alternative provider. Having elected to receive services at an FBO, a beneficiary has the additional right to "refuse to participate in a religious practice." *See* discussion in Part I, above.
3. Government-source funds are kept in accounts separate from an FBO's private-source funds, and the government may audit, at any time, those accounts that receive government funds.[66] Thus, charitable choice does take

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[58] *Id.*
[59] *Id.*
[60] *Id.* at 2569–70.
[61] *Id.* at 2571–72.
[62] *Id.* at 2572 ("[r]egardless of whether these factors are constitutional requirements . . .").
[63] Monetary payments are just a factor to consider, not controlling. This makes sense given Justice O'Connor's concurring opinion in *Bowen v. Kendrick*, wherein she joined in approving cash grants to religious organizations, even in the particularly"sensitive" area of teenage sexual behavior, as long as there is no actual "use of public funds to promote religious doctrines." Bowen v. Kendrick, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring). *See also supra* note 49.
[64] The Department of Justice recommends that H.R. 7 be clarified by the following amendment:

> (i) LIMITATIONS ON USE OF FUNDS; VOLUNTARINESS *FOR CERTAIN PURPOSES*.—No funds provided through a grant or COOPERATIVE AGREEMENT *contract* to a religious organization to provide assistance under any program described in subsection (c)(4) shall be expended for sectarian *worship*, instruction, WORSHIP, or proselytization. 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 THIS SUBPART. A certificate shall be SEPARATELY signed by RELIGIOUS *such* organizations, and filed with the government agency that disbursed the funds, CERTIFYING that *gives assurance* the organization IS AWARE OF AND will comply with this subsection. FAILURE TO COMPLY WITH THE TERMS OF THE CERTIFICATION MAY, IN ADDITION TO OTHER SANCTIONS AS PROVIDED BY LAW, RESULT IN THE WITHHOLDING OF THE FUNDS AND THE SUSPENSION OR TERMINATION OF THE AGREEMENT.[NOTE: *Italics* represent Strike-through text & CAPS represent Highlighted text]

[65] Justice O'Connor nowhere defined what she meant by "religious indoctrination." However, elsewhere the Supreme Court has found that prayer, devotional Bible reading, veneration of the Ten Commandments, classes in confessional religion, and the biblical creation story taught as science are all inherently religious. 42 Wm & Mary, *supra* note 30, at 915 (collecting cases).
[66] In the Substance Abuse and Mental Health Services Administration reauthorization the segregation of accounts is required. 42 U.S.C. § 300x-65(g)(2). This improves accountability, espe-

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special care, because the aid is in the form of monetary grants, in two ways: separate accounts for government funds are established, hence, preventing the diversion of "cash to church coffers;"[67] and direct monetary grants are restricted to program services, hence, must not be diverted to sectarian practices.[68]

4. For larger grantees, the government requires regular audits by a certified public accountant. The results are to be submitted to the government, along with a plan of correction if any variances that are uncovered.[69]

Nothing in charitable choice prevents officials from implementing reasonable and prudent procurement regulations, such as requiring providers to sign a Certification of Compliance promising attention to essential statutory duties.[70] Additionally, it is not uncommon for program policies to require of providers periodic compliance self-audits. Any discrepancies uncovered in a self-audit must be promptly reported to the government along with a plan to timely correct any deficiencies.[71] The Department of Justice believes it prudent to add these additional provisions to § 1994A of H.R. 7.

CONCLUSION

Charitable choice facially satisfies the constitutional parameters of the *Lemon/Agostini* test, including Justice O'Connor's application of that test in *Mitchell v. Helms*. Adoption of the Department of Justice's recommendations in notes 15, 17, 64, and 71, above, will further clarify and strengthen § 1994A's provisions, as well as ease its scrutiny in the courts. Moreover, for many cooperating FBOs, those willing to properly structure their programs and be diligent with their operating practices, it appears that charitable choice can be applied in accord with the applicable statutory and constitutional parameters.

Mr. CHABOT. Professor Laycock.

STATEMENT OF DOUGLAS LAYCOCK, ASSOCIATE DEAN FOR RESEARCH AND ALICE McKEAN YOUNG REGENTS CHAIR IN LAW, THE UNIVERSITY OF TEXAS LAW SCHOOL

Mr. LAYCOCK. I need to be clear that I am speaking for myself and not for the University of Texas. I agree with much of what Mr. Nadler said in his opening statement. I was heavily involved in the recent religious liberty legislation over the last several years. I was involved, representing the parents who objected to prayer at Texas high school football games. I think we need to do as much as we can to separate the religious choices of the American people from the power of government. I think this bill or these proposals are a step in that direction.

The trap of government money has already been set and to some extent sprung. Billions of dollars are spent, government money, on social services delivered through religious providers in government contracts and grants. And many of those, all of that money is subject to no particular statutory standards designed to protect reli-

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cially in helping to avoid diversion to "religious coffers," with little loss of organizational autonomy. The parallel subsection in H.R. 7 is § 1994A(h)(1).

[67] *See* 42 U.S.C. 300x–65(g)(1).

[68] *See* 42 U.S.C. 300x–65(i).

[69] All federal programs involving financial assistance to nonprofit institutions require annual audits by a certified public accountant whenever the institution receives more than $300,000 a year in total federal awards. Executive Office of the President of the United States, Office of Management and Budget, Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations, 62 Fed. Reg. 35289 to 35302 (June 30, 1997). The independent audit is not just over financial expenditures, but includes a review for program compliance.

[70] *See* notes 15 and 64, *supra*, for an example of a "Certification of Compliance" requirement drafted into the charitable choice provision.

[71] A self-audit subpart for insertion into H.R. 7 at § 1994A(h)(3), would read as follows: "An organization providing services under a program described in this section 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."

gious liberty, and much of it is distributed on condition that the religious provider secularize itself, to abandon or suppress much of the religious part of its mission.

Charitable choice proposals contain three principles designed to protect the religious liberty of both the providers and of the beneficiaries. I think there are some real questions about how we implement those three principles, but plainly these three principles are a step in the right direction.

First, nondiscrimination. The executive branch, when it awards a grant or contract, cannot discriminate against religious organizations in favor of the secular. I think it would be better to also say neither can it discriminate in favor of the religious and against the secular or among different religions. There is no such provision in place today, and we have evidence in prior hearings that some agencies contract regularly with religious providers. Some agencies refuse to contract with religious providers. I would not be at all surprised to learn that there are some agencies that contract with Catholic charities but not Jewish charities, or the other way around. There are simply no visible standards in place. A nondiscrimination rule on charitable choice is the first principal step in the right direction.

Two, deregulation of the religious providers. Charitable choice says when the religious provider takes the government money, it has to deliver full secular value for that money but it does not have to secularize the associated parts of its operation. It can continue to operate as a religious organization, do whatever religious functions it wants on top of or alongside the secular services the government is paying for. The standard is it has to provide full secular value.

And, three, protect beneficiaries. Beneficiaries are entitled under these proposals to an alternate provider, a secular provider if they prefer, simply by asking for it. They are entitled not to be required to participate actively in religious exercises even if they choose the religious providers. Those protections don't exist in current law either. If the Federal agency in your community has contracted with Catholic Charities and they are the only game in town, you get the service from Catholic Charities. You have don't have a current right to an alternate provider. Charitable choice will provide that right.

So three principles, deregulation, nondiscrimination, and protecting beneficiaries are all protective of religious liberty. They are plainly steps in the right direction.

Now, as I have indicated in my written testimony, and don't have a whole lot of time to elaborate here, I don't think those three protections are going to be easy to implement. I am not an expert on the delivery of social services, but I think there is a lot of work to be done by the witnesses, by the administration and by the Congress about how we actually make those three protections work. But today we are not trying to make them work. We don't have them in place. We don't have any rule of nondiscrimination. We don't have any rule of protecting beneficiaries and we certainly don't have any rule of deregulating the religious providers. I think attention to implementation is the right thing.

Let me say just a little bit about this controversy over hiring. It is an essential part of deregulating the religious providers to the extent that very few of them refuse to hire any Member not of their own church, but many of them prefer Members of their own church—grant a preference. It is a serious intrusion into religious liberty to take that away. Title 7 protects that right today. There has been much talk that, well, if you are federally funded, that Title 7 right goes away. Well, certainly nothing in Title 7 says that, and there is no general Federal spending clause statute like there is with respect to race.

With respect to race we say if you take Federal money, you can't discriminate based on race. Period, no exceptions. There is no such statute with respect to religion. We do not have a spending clause statute that says if you take government money you cannot discriminate on the basis of religion. Simply does not exist in any kind of general form.

Think about the case at Yale just a year ago when Yale was discriminating against Orthodox Jews in its dormitories. There was no claim under Federal law because they took Federal money; there were only claims under State law.

So the status quo is religious organizations get to prefer their own Members. That is a sensible status quo, and we should not offer them Federal money on condition that they surrender that essential part of the free exercise of their religion. Thank you, Mr. Chairman.

Mr. CHABOT. Thank you, professor.

[The prepared statement of Mr. Laycock follows:]

PREPARED STATEMENT OF DOUGLAS LAYCOCK

Thank you for the opportunity to testify on the legal issues surrounding charitable choice. This statement is submitted in my personal capacity as a scholar. I hold the Alice McKean Young Regents Chair in Law at The University of Texas at Austin, but of course The University takes no position on any issue before the Committee.

I. SEPARATION OF CHURCH AND STATE.

The debate over charitable choice has been cast as a debate over separation of church and state. I think the usual formulation of the charitable choice debate is misleading, for reasons I will explain. But let me begin by making clear my own starting premises.

I support the separation of church and state. The religious choices and commitments of the American people should be as separated as possible from the influence of government. The religious choices and commitments of believers and of non-believers should be equally protected, and equally insulated from government influence.

Church-state questions arise in three great clusters of issues: government regulation, government speech, and government money. With respect to government regulation, I have often testified to this committee about the need to separate religious practices from government regulation. With respect to government speech, most recently I represented the parents who objected to Texas high schools opening their football games with prayer. *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). In Texas, that is a more radically separationist position than anyone outside Texas can fully appreciate.

With respect to government money, I long accepted the widespread fallacy that the ultimate goal is to separate religion from government *money*. But I have gradually come to realize that that is a means, not an end. The goal is to separate private religious choices and commitments from government *influence*, including the powerfully distorting influence that government can buy with its money. Government should minimize its influence over the religious choices and commitments of both the providers and the beneficiaries of government-funded social services. That goal is difficult to achieve, but charitable choice is a step in the right direction.

Think of government setting out to buy secular goods and services in the marketplace. It wants wine for the State Department, or sausage for the Army. Or it wants medical care for its citizens, or child care, or drug treatment. Government spends a lot of money on these things.

When it purchases secular goods or services, government has three choices with respect to religion:

1. Government can prefer religious providers.

2. Government can prefer secular providers.

3. Government can buy without regard to religion (e.g., from all qualified providers, or from the low bidder, or on some other neutral criterion).

Which rule better separates the religious choices and commitments of the American people from the influence of government? Buying only from the religious, or only from the secular, creates powerful incentives to change religious behavior. Rule 1 says, "Get religion and we'll do business with you." Rule 2 says, "Secularize yourself, and we'll do business with you." Some potential providers cannot or will not change; under the first two rules, they will be penalized for their religious or secular commitments. Other potential providers are more pliable; government will coerce them into changing their religious behavior.

It is actually Rule 3, buying without regard to religion, that minimizes government's influence on religious choices and commitments. If government buys without regard to religion, no one has to change their religious behavior to do business with the government. That is the key concept of charitable choice. It is a good concept. Despite the conventional wisdom of many separationists, funding everyone equally separates private religious choice from government influence more effectively than funding only secular providers.

So what does the Establishment Clause mean under this view? It means a lot. Government cannot sponsor, endorse, or pay for religious beliefs or religious functions. It can buy from religious providers, but it can buy only *secular* goods or services. The essential safeguards of the establishment clause are that government must get full secular value for its money, and that no one may be coerced, steered, or encouraged towards or away from a religious practice or a religious provider of services. If a religious provider wants to add religious services in conjunction with the government-funded secular services, the religious provider must pay for the religious services itself, and no beneficiary of the government-funded program can be required to participate.

Charitable choice would be an important step in the right direction. Even so, there are problems of implementation, and many ways to get this wrong. And there are many misconceptions in the current debate.

II. WHAT IS OLD.

Throughout most of our nation's history, government has paid religious organizations to deliver social services. The founders did it without apparent controversy; even Thomas Jefferson sent missionaries to run schools for Indians. Current programs, not under the rubric of charitable choice, spend vast sums through religious charities.

You will likely hear that charitable choice flatly violates the original understanding of the Establishment Clause. That claim is not true; it conflates two issues that the founders treated separately. I have studied that history at length, and I have written two separationist articles, refuting overbroad historical claims of those who want more government support for religion. Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875 (1986); Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 Val. U.L. Rev. 37 (1992). There is simply no doubt that the founders squarely rejected financial support for churches, even if that support were even-handed and nonpreferential.

But the issue in the 1780s was the funding of the religious functions of churches—the salaries of clergy and the building and maintenance of places of worship. Funding education or social services was simply not an issue in their time. The modern question is whether government can pay religious and secular providers even-handedly to deliver secular services. The founders had nothing to say about that issue.

The modern issue first arose in the nineteenth-century battle over schools. Protestants controlled the public schools, conducted Protestant religious exercises and taught Christianity in ways acceptable to Protestants. Catholics objected and sought funding for their own schools. Protestants were more numerous, and they won the

fight. They said that their own religious exercises in the public schools were nonsectarian, and therefore constitutionally unobjectionable, but that Catholic schools were sectarian, and that funding those schools even for math and reading would be like funding the church itself. The Supreme Court has rejected the first half of this remarkable theory; it now prohibits religious exercises in the public schools. The second half—that funding religious schools is like funding churches—still affects Supreme Court doctrine in the school cases, but to an ever declining extent. This doctrine is not traceable to the founders or to the First Amendment. It originates in the Protestant position in the nineteenth-century school wars, and the nineteenth-century Protestants conspicuously failed in their effort to write this doctrine explicitly into the Constitution.

The Protestant hostility to funding religious schools never extended to funding religious social services—probably for the simple reason that many Protestants provided social services but until recently, few Protestants ran schools. Whatever the reasons, funding of religious social services has been remarkably uncontroversial. We have had more than a century of bitter political and legal battles over funding religious schools, but until now, almost no conflict over funding religious social services.

I know of only two Supreme Court cases. *Bradfield v. Roberts*, 175 U.S. 291 (1899), upheld a contract in which Congress paid for a new building at a religious hospital and paid the hospital to care for indigent patients. *Bowen v. Kendrick*, 487 U.S. 589 (1988), upheld the Adolescent Family Life Act, under which the government contracted with many providers, including religious ones, to provide counseling and services related to adolescent sexuality and pregnancy. The Court noted "the long history of cooperation and interdependency between governments and charitable or religious organizations." *Id.* at 609.

So we have a long and largely uncontroversial history of government funding social services through religious providers. That is what charitable choice does, yet there is suddenly a huge controversy. Why? What is new about charitable choice? Three things so far as I can tell: protection against discrimination, deregulation of religious providers, and protection of program beneficiaries.

III. WHAT IS NEW.

A. Ending Government Discrimination.

Under most of our existing and historic programs, contracting with a religious provider is discretionary with the executive. Some bureaucrats prefer to deal with religious organizations; some prefer to avoid them. Some bureaucrats may prefer certain religions and avoid others. There has generally been no statutory obligation of equal treatment. Any constitutional obligation of equal treatment is little known and undeveloped. Bureaucrats have felt free to discriminate, and they have done so. Opinion polls show that much of the public wants to discriminate openly and flagrantly, funding services from churches they admire, and refusing to fund services from churches they do not admire.

Charitable choice prohibits discrimination against religious providers. This is a step forward for religious liberty. It tells the executive that it cannot use its control of government spending to influence or penalize religious choices and commitments; it must instead try to minimize its influence on those choices and commitments. It would be even better to prohibit all discrimination on the basis of religion—to equally prohibit discrimination against secular providers, against religious providers, or among religious providers of different faiths.

B. Deregulating Providers.

Charitable choice proposals deregulate the religious providers. They state that religious providers need not secularize themselves to be eligible. These provisions protect religious liberty and enhance separation of church and state.

It has been common for religious providers to create a separate not-for-profit corporation to contract with the government. I am not an expert on the details of social service programs; I don't know how often such a requirement appears in statutes, how often it is imposed by the executive, or how often it is just the common practice and only assumed to be a requirement. But this tradition is a centerpiece of the opposition to charitable choice. Opponents say government can't pay the church to feed the homeless, but that the church can create a wholly-owned subsidiary or affiliate corporation, and government can pay this church affiliate to feed the homeless.

This is a formalistic distinction that does nothing to protect religious liberty. Corporate affiliates exist in filing cabinets and the minds of lawyers; they may be wholly intertwined operationally. Either the church or its affiliate may respect or abuse the religious liberty of the clients it serves under the government-funded program.

I am concerned about the actual operation of the program, not about how many corporations have been formed.

There is some support in the cases for this notion that two corporations matter—but not much. *Bradfield v. Roberts*, the 1899 opinion upholding government money to a religious hospital, is written on the ground that the hospital is not the church, but merely a corporation controlled by the church. This has always struck me as classic nineteenth-century formalism, but at any rate, the opinion does not create a requirement of separate incorporation. It simply decides the case before it, in which separate incorporation was one of the facts.

In the cases on religious schools, the Court has created a category of institutions it calls "pervasively sectarian." Even at the height of restrictions on aid to religious schools, some forms of aid could go to pervasively sectarian institutions, but aid to those institutions was more tightly restricted than aid to other religious institutions that were not pervasively sectarian. This doctrine is said to support the requirement of two corporations; opponents of charitable choice presume that the church itself is pervasively sectarian, but that its affiliate may not be. The presumption is fallacious; a church might operationally separate its delivery of social services from its purely religious functions, whether or not it separately incorporates them, and the separately incorporated affiliate might combine its religious and secular work.

With respect to social services, the Court reserved the question of pervasively sectarian providers in *Bowen v. Kendrick*. *See* 487 U.S. at 611, following cases which it characterized as having "left open the consequences which would ensue if they allowed federal aid to go to institutions that were in fact pervasively sectarian." More recently, four justices in a school case repudiated the whole concept of pervasively sectarian, correctly noting that the Court had steadily reduced its reliance on the concept, that the concept had originated as a code word for Catholic, and that it had grown directly out of virulent nineteenth-century anti-Catholicism. *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (plurality opinion). Two more Justices, concurring, did not join in the concept's overt repudiation, but neither did they rely on it. *Id.* at 836-67 (O'Connor, J., concurring). It seems quite unlikely that the distinction between pervasively sectarian institutions and other religious institutions will be revived and actually extended to control cases about social services. Charitable choice legislation should not codify this discredited concept.

Whether there is one corporation or two, the real question is whether the religious provider must secularize the part of its operation that delivers government-funded services. Certainly it must fund any religious elements itself; government can pay only for secular services. But must it abandon religious elements altogether? Charitable choice proposals say no, and that is the right answer.

To say that a religious provider must conceal or suppress its religious identity, refrain from religious speech, remove religious symbols from its work area, or hire people who are not committed to its mission, is an indirect way of saying that government can contract only with secular providers. Attaching such conditions to a government contract uses the government's power of the purse to coerce people to abandon religious practices. Such coercion is just as indefensible as if the government coerced people to participate in religious practices. Charitable choice provisions that protect the religious liberty of religious providers are pro-separation; they separate the religious choices and commitments of the American people from government influence.

The ultimate irony in this debate are the people who oppose charitable choice on the ground that if religious organizations take government money, they will eventually be regulated and secularized—and then also oppose charitable choice on the ground that it protects religious providers against secularizing regulation. They cannot have it both ways. The status quo, in which bureaucrats have discretion to contract with religious providers or boycott them, on whatever conditions the executive chooses to impose, is far more dangerous to religious organizations than a charitable choice bill with clear protections against discrimination and against secularization.

C. Protecting Beneficiaries.

The third change in charitable choice is that it provides explicit protection for the religious liberty of the beneficiaries of government programs. They are entitled by statute to a secular provider on demand. If they choose to accept a religious provider, they may be exposed to religious exercises, but they cannot be required to actively participate.

These are important protections, and I would not support any bill that omitted them. They do not exist in present law. When a bureaucrat chooses to contract with Catholic Charities, no current law requires that he have a secular provider available for all those who request it. And any constitutional protections for program beneficiaries are, like the protections for providers, little known and undeveloped.

IV. IMPLEMENTATION.

Charitable choice is in principle a great improvement for religious liberty. But the difficulties of implementation are serious. Those difficulties are not new; they exist under the status quo, where they have received no serious attention from either side. These difficulties are more visible under charitable choice, because contracts with religious providers are more visible, and both sides have begun thinking about the difficulties. I doubt that either side has thought enough.

I am no expert on government grants and contracts or on the delivery of social services. I cannot offer full solutions to these problems, but I can flag some of the more obvious risks.

A. Ending Government Discrimination.

Charitable choice says government cannot discriminate in the award of grants and contracts. How do you enforce that? Legislatures have found it necessary to enact procurement laws with so many protections against corruption that the process of buying anything for the government has come to be a standard source of jokes. To the usual risks of government contracting, add the religious biases of the general public and of the officers awarding the grants and contracts. Some of them are deeply religious; some of them are strongly secularist; nearly all of them like some religions more than others, and have some religions they really mistrust. Choosing someone to deliver social services is more complex than picking the low bidder on a pencil contract. How do you keep thousands of government employees, federal, state, and local, from discriminating on religious grounds when they award grants and contracts?

I don't know the answer to that question. We are learning that just telling them not to discriminate doesn't work. It appears that open and obvious religious discrimination continued under the limited charitable choice provisions enacted in 1996. Amy Sherman's study, reported at a House hearing in April, found that some states are contracting frequently with religious providers, and that others are not doing so at all.

I don't know how you police bureaucrats, but I think you have to assume that many of them will continue to engage in religious discrimination despite the enactment of charitable choice. Some will refuse to deal with religious providers; some will refuse to deal with non-Christian religions, or non-Western religions; some will prefer religious providers and discriminate against secular providers. You at least need a reporting requirement, so that implementation can be monitored, and you may need to require explanations of any obvious over-or-under representation of religious providers. As we have learned from the civil rights experience, resolving claims of subtle discrimination is a difficult task.

Decentralization reduces the risk of discrimination. For those services that can feasibly be delivered through vouchers, vouchers privatize the choice of providers and thus deprive government employees of the opportunity to discriminate. Decentralized contract awards, with many government employees choosing providers, spreads the risk of discrimination better than centralized contract awards with one or a few employees choosing providers.

B. Deregulating Providers.

Charitable choice proposals have made the most conceptual progress with respect to deregulating providers. Existing legislation and other pending proposals have clear and specific provisions to protect the religious liberty of providers who accept government grants or contracts.

These protections have to be in the statute, because no one can count on the courts to provide them constitutionally. The federal courts systematically underprotect the free exercise of religion, and the Supreme Court believes that when the government awards a contract, it can define the job very precisely and attach all sorts of conditions to ensure that the contractor adheres to the job specifications. Rust v. Sullivan, 500 U.S. 173 (1991). When Congress means to deregulate, it has to say so.

It would be better to vote down charitable choice than to remove the deregulation of religious providers. From a religious liberty perspective, the worst outcome would be to codify a rule that government offers money to religious providers but only on condition that they agree to secularize themselves. An unambiguous and highly visible offer of government payments to change one's religious practice would be worse than the muddled, regulated, and discriminatory status quo.

These protections will be somewhat easier to enforce than the basic rule of no discrimination in the award of contracts, because victims of violations will know immediately when government asks them to change their hiring rules or downplay their religious message. Still, you have to assume that there will be political and bureau-

cratic resistance to the deregulation of religious providers, and that continued vigilance will be necessary to make it work.

C. Protecting Beneficiaries.

Most charitable choice proposals provide equally clear protections for program beneficiaries. Beneficiaries should be entitled to a secular provider on demand, to decline to actively participate in religious exercises, and to clear notice of these rights. But these rights may be very difficult to implement.

Social service programs have never been funded sufficiently to meet the need, and recent legislation ensures that these programs will be even more severely starved for funds in the future. We have not succeeded in guaranteeing even one provider for all the people who need these services. How can we plausibly guarantee a choice of providers?

The problem is hard enough in big cities; it is far worse in small towns and rural areas. It is hard to envision religious and secular providers operating side by side with government funds in New York City. It is impossible to imagine in Waxahachie, Texas. Nor do I think it is just a matter of sending one or a few dissenters to a private practitioner. Private practitioners tend not to locate in low-income areas, and anyway, there may be *many* beneficiaries who don't want a religious provider. The beneficiaries are vulnerable and dependent and may be afraid to assert their rights, but government and government-funded providers should not take advantage of that. The goal should be to give each beneficiary his free choice of a religious or secular provider, and at the very least, not to push a religious provider on anyone. I suspect that is a much bigger challenge than the sponsors of charitable choice have talked about in public.

Again, these problems are probably no worse than under the status quo; they are just more visible. When government contracts with religious providers today, I am not aware that it makes any effort to provide secular alternatives. Once gain, charitable choice is an improvement in concept. But implementation is likely to be difficult.

D. Program Efficacy.

A frequent policy question about charitable choice is whether religious providers will help *more* beneficiaries than secular providers. I don't know; social services are not my field. But my work on religious liberty and the associated experience of religious diversity makes me nearly certain that that is the wrong question.

The right question is whether religious providers will help *different* beneficiaries than secular providers. If some people in need respond to religious messages but not secular ones, and other people in need respond to secular messages but not religious ones, then the only way to help both groups is to make available both religious and secular providers.

Whether there are significant numbers of people in both groups is an empirical question, but the answer will surely be yes. There are many Americans for whom God is the only source of ultimate meaning and for whom religious messages are more motivating than any secular message ever could be. There are many others for whom stories of God are a giant fraud or a giant game of pretend. And there are yet many others in between, whose views of God are not strong enough to motivate either reform or resistance. Given the enormous diversity of religious views in the country, it seems almost inevitable that there will be a similar diversity of responses to religious and secular providers of social services, and that each type of provider may reach some beneficiaries that the other type of provider could not.

In any event, the question to ask is not whether religious providers will help more people than secular providers, or vice versa. The question to ask is whether offering people a choice of religious or secular providers will help more people than exclusive reliance on one or the other.

V. CONCLUSION.

Religion should not be forced on any American, but neither should any American be excluded from the operation of social welfare programs because of his religion, or lack thereof. The Religion Clauses are designed to let people of fundamentally different views about religion live together in peace, in mutual liberty, and in equality. Religious choices and commitments are left to the private sector, and to that end, government should neither prefer the religious nor prefer the secular. In its own operations, it must necessarily be secular. But when it chooses to contract out to the private sector, it should contract without regard to religion. This principle minimizes government influence on religion and thus maximizes religious liberty, and this is the true meaning and purpose of separation of church and state.

Minimizing government influence is easier said than done. Charitable choice is admirable in its commitments to nondiscrimination on the basis of religion, to deregulating religious providers, and to protecting program beneficiaries. But each of these commitments will be difficult to implement; each of them requires careful attention from the Congress and from those expert in the delivery of social services.

Mr. CHABOT. Professor Saperstein.

STATEMENT OF DAVID N. SAPERSTEIN, ADJUNCT PROFESSOR OF LAW; DIRECTOR, RELIGIOUS ACTION, CENTER OF REFORM JUDAISM, GEORGETOWN UNIVERSITY LAW CENTER

Mr. SAPERSTEIN. Good morning, Mr. Chairman, and distinguished Members of the Subcommittee. I am here today to urge that you reject charitable choice. Charitable choice is bad for religion. It is bad public policy. It is unconstitutional and it is socially divisive. And all this for a program that may not result in one more needy person being helped.

Let me address some of the policy issues first. With government money comes government rules, regulations, audits, monitoring, interference and control. It will result in a limitation of religious autonomy and freedom.

Second, with government money comes compromises in the religious mission of the churches, synagogues, mosques of America.

Third, by opening up our Nation's limited funding for social services to, potentially, scores of thousands of houses of worship, millions of dollars will be diverted from and thus weaken what is widely regarded as the finest, most effective social service providers today: the superb, albeit overwhelmed, religiously affiliated social service providers such as Catholic Charities, Jewish Federation, Lutheran Social Services, all of which abide by the vast majority of regulations applicable to all charities.

Fourth, charitable choice will lead to increased religious competition and divisiveness in America. Choosing between professional social service agencies is one thing. Choosing between local houses of worship comes much closer to choosing between religion. You are going to find the Episcopal Church, the AME Zion Church, and the local mosque competing against each other for grants, and they are going to come to you here on Capitol Hill for assistance. One will receive it in the end, and one won't; and they will want to know from you why. And, of course, politics will determine who gets these grants, and that means it will be the smaller minority religious groups that are likely to be left out.

Indeed these very political realities already result in many minority religious groups facing particular problems, for example, in finding locations to build houses of worship. In the recent Pew poll, it shows that substantial majorities of Americans feel that, for example, Buddhist and Muslim social service providers should not receive government Federal funds. This is not helpful to either religion or poor people in America.

And fifth, such funding violates the religious rights of taxpayers. As Jefferson said, to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical. And this helps explain why so many religious leaders on the left and the right oppose the program.

Let me then address the legal and constitutional issues. First, in all of the discussions of all the cases that you will be reading about

and hearing about, there is one central principle, one legal standard you must keep in mind. The Supreme Court of the United States, and the vast majority of lower courts as well, has never upheld direct government cash support for pervasively sectarian institutions. Indeed, in cases where it has given indirect support, it has distinguished it; either direct versus indirect, cash versus in-kind, or pervasively sectarian institution against religiously affiliated or other religious organization.

Secondly, the rights of beneficiaries would inevitably be infringed. As Professor Laycock and others have noted, in the real world, protecting beneficiaries will be difficult and, I might add, all but impossible.

Third, churches and synagogues have rightly been exempted from many laws that would compromise their religious freedom, including the right to discriminate whom they hire on religious grounds. Major government funding for programs with such exemptions is a debatable constitutional point, but if constitutional, such federally funded programs will be part of a campaign that will weaken civil rights in America and give government sanction for unintentionally dividing America along religious lines.

So in deciding on charitable choice, you on Capitol Hill are faced with a wrenching tension between two valid moral principles. The first is that government should accommodate the ability of religious organizations to function, and it is only that exemption that is given in the *Amos* decision—as the *Amos* decision described it—only to further the religious function of the entity. And to take away that exemption is to curtail that religious freedom in a manner that will threaten other exemptions.

On the other hand, we have an equally valid principle that with government money we shouldn't be discriminating against people. The notion that under these programs, government-funded social service programs run by a Protestant church might run ads that read, "Jews, Catholics, Muslims need not apply", "no unmarried mothers will be hired;" and, unless I read Watts-Hall incorrectly, even that "no blacks need apply," should be deeply troubling to all.

Mr. Chairman, there is much in the President's program on which we can work together with everyone across the board on ways to stimulate through the tax system more money to religious organizations, as well as others providing aid to the poor; much in terms of technical assistance. There is much that we can do. What we shouldn't do is tear this country apart over this fight about whether to directly fund religious organizations. We have programs in effect. Let's stop, take a look at how they work in real life, and then come back and address this very problematic issue.

Mr. CHABOT. Thank you, Professor.

[The prepared statement of Rabbi Saperstein follows:]

PREPARED STATEMENT OF RABBI DAVID SAPERSTEIN

Good morning Mr. Chairman, distinguished members of the Committee. I am Rabbi David Saperstein, Director of the Religious Action Center of Reform Judaism which represents over 1,700 rabbis and 900 synagogues with 1.5 million members. I am also an attorney and for many years have taught church-state law on the faculty of Georgetown University Law School.

I am honored to share this hearing today with three such distinguished constitutional law scholars. Each one is a friend and dedicated champion of religious free-

dom. I remain disappointed by their support for charitable choice. It seems to contradict so many of the goals and principles we have together espoused elsewhere.

Mr. Chairman, almost all of our 900 synagogues run social service programs. They range from homeless shelters to day care for homeless children so the parents can look for or go to work; from feeding programs to health care provision; from transitional housing programs aimed at helping the homeless get off the streets to literacy programs for kids in our schools. We are enormously proud of these efforts and we commend the President for his call to strengthen this work and to create closer partnership between the government and the faith community. There is much that can and should be done and we are willing to work with him and others in advancing shared goals; but we strongly oppose that component of the Faith Based Initiative that would involve direct government funding our synagogues, indeed of any of America's pervasively sectarian institutions.

So I am here today to urge you to reject charitable choice. Charitable choice is bad for religion, bad public policy, unconstitutional, and socially divisive. All this for a program that will not necessarily help one more needy person.

CHARITABLE CHOICE IS BAD PUBLIC POLICY

The politician's version of the old lawyer's adage goes, "when the law is against you, argue the public policy; and when the public policy is against you, argue the law." There are, in this case, however, strong public policy *and* legal arguments against charitable choice. So before discussing the vital constitutional and legal reasons to oppose charitable choice, I want to review a number of the policy reasons to be deeply alarmed about charitable choice concerned.

First, with government money comes government rules, regulation, audits, monitoring, interference, and control. Your colleague Representative Chet Edwards has warned "it will be a religious nightmare to have federal agents, including IRS agents auditing the finance of churches, synagogue and mosques across the land." And he's right. Even on the issue of effectiveness of the programs there will be intrusive monitoring. President Bush, for one, has often stressed the importance of accountability, arguing that schools and other recipients of federal funds need to be held accountable for the results they achieve, or fail to achieve. And he's not wrong. Taxpayers have a right to know what results are being achieved with what the President often reminds us is their money. So, too, it seems, for religious organizations, including houses of worship. In April, Dr. John DiIulio, the Director of the White House office on Faith Based and Community Outreach, said that the Administration would conduct annual audits to ensure that funds did not continue to go to groups whose programs failed. (Of course, the government's definition of failure and the church's definition may be quite different.)

Second, with government money comes compromises in the religious mission of the churches, synagogues and mosques of America. Reliance on government funding, creates the temptation to mute the prophetic obligation of calling the government to account. Further, when there are limits placed on religious activity in government-funded programs (as the Constitution demands), those churches committed to including such activities as essential to their programs must either compromise their mission to obtain the money or ignore the rules with potentially serious negative consequences to the beneficiaries of services and to the churches.

In addition to the threat to their traditional—and cherished—autonomy, government funding of houses of worship provides another, more subtle but equally alarming, danger—the undermining of the mission of the institution. To be sure, I don't think that erosion of the character of religious institution will be intentional or immediate. But it's likely nonetheless.

The *Wall Street Journal* reported an interesting example of the type of "mission creep" that is likely, perhaps inevitable, as religious institutions look to the government for funding. Massachusetts subsidizes portion a large of charitable work undertaken by Catholic Charities in that state. In the mid-1990's, the state began to shift its funding priority from other areas to substance abuse. As the funding shifted, so did the programs offered by Catholic Charities. Programs such as soup kitchens and childcare closed, and drug and alcoholic treatment centers opened. By 1995, Catholic Charities in Massachusetts spent 80% of its funds on substance abuse programs.

Stanley Carlson-Theis, a leading policy analyst now working in the White House Faith-Based Initiative office, has termed this shift of emphasis "vendorism." Vendorism, he notes, is a "process in which government grants end up diverting the priority of charities, changing their direction and turning them into mere vendors of government programs." What a loss to our nation if our houses of worship were to become "vendors of government programs!"

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

Fourth, charitable choice will lead to increased religious competition and divisiveness in America. For Catholic charities and the Jewish federations to compete for grants is one thing. The local agencies they support are professional social service providers that, over the years, have worked out the pattern of funding and working relationships. Local houses of worship are altogether different. Choosing between them (local houses of worship) comes much closer to choosing between religions. It is difficult to know how many of our 350,000 houses of worship (some 60% of whom, according to the studies, provide social service programs) will seek government funding for their social service. Let's assume it will be only one-tenth. That will mean 35,000 local churches, together with local religious ministries and schools will be competing. The prospect of the Episcopal Church, the AME Zion Church, and the local mosque, competing one against the other for grants is deeply troubling and should be so for Congress; they all come to you here on Capitol Hill for assistance. One gets it and the others don't and they want to know from you: Why? And, of course, politics will often determine who gets these grants and that means that it is the smaller, minority religious groups who are likely to be left out. Indeed, these very political realities already result in many minority religious groups facing particular problems in finding locations to build houses of worship. The recent Pew polls showed that substantial majorities feel that Buddhist and Muslim social service providers should *not* receive federal funds.

The prospect of intense competition for limited funding; the politicizing of church affairs to obtain funds; the impact on those made to feel they are the outsiders when they fail to obtain the funds—this leads to the very kind of sectarian competition and divisiveness that have plagued so many other nations and which we have been spared because of the separation of church and state. The debate over these programs thus far suggests the potential for real ugliness that lies ahead if we move forward. Rev. Jerry Falwell, for example, suggested that Islamic organizations should never be eligible for funding, because the "Muslim faith teaches hate." Rev. Eugene Rivers (who runs such effective programs) has argued that opponents of Charitable Choice on the right and on the left are racially-motivated, claiming that their concern is that federal money will go to inner- city, and largely African-American, churches. The religious right and the secular left, Rivers told the website Beliefnet.com, "share an indifference to the needs of the poor and the inner city."

And fifth, such funding violates the religious rights of the taxpayers. Even in cases where courts have held that taxpayers do not have standing to assert a free exercise claim to contest the use of their tax dollars for religious purposes, it still is wrong on a policy level and it exacerbates religious tensions. As Jefferson said: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." This helps explain why so many religious leaders—on the left and the right—oppose the program.

This last issue has been particularly problematic for my community. We have often been the targets of people who seek to convert us to their religion. You may remember that last year during our High Holiday celebrations, a period they referred to as a time of heightened spiritual awareness, the Southern Baptist Convention specifically targeted Jews for conversion. And two weeks ago, the head of Teen Challenge, a group often trumpeted by the President as the kind of faith based organizations he believes ought to get government funding (and to which he provided funding in Texas), acknowledged that his program has the effect of converting (in his term, "completing") Jewish kids. They have every right to engage in this activity (as wrong as I may think it would be). But the notion that their efforts to convert our children will now be enhanced by our tax dollars which have freed up money to go about this work is, I hope, as troublesome to you as it is painful to us.

CHARITABLE CHOICE IS UNCONSTITUTIONAL

Four constitutional and legal issues compel rejection of these charitable choice proposals.

First, in all the discussion of all the cases that you have heard here today, there is one central principle, one legal standard, that you must keep in mind. The Su-

preme Court of the United States (and the vast majority of the lower courts as well) has never upheld direct government cash support for pervasively sectarian institutions. Indeed, in cases (many of which have been alluded to here today) where the High Court and other courts have upheld some type of government support for religious institutions, they have gone out of their way to distinguish it from exactly the kind of direct government subsidy of houses of worship and religious ministries and parochial schools that is entailed in charitable choice.

In *Bowen*, the case that upheld government support for religious groups that provided pregnancy care services and prevention services, the Court said: " Even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion. One way in which direct government aid might have that effect is if the aid flows to institutions that are 'pervasively sectarian.' We stated in *Hunt* that:

> [a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission."

In *Rosenberger*, upholding the use of student fees at a state university to pay for publications including religious publications, the court observed:

> The neutrality of this program distinguishes the student fees from a tax levied for the direct support of a church . . . The Court of Appeals and the dissent) are correct to extract from our decisions the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions."

Thus, even if the pervasively sectarian doctrine is dead, as some suggest after *Mitchell v. Helms*, even those justices who wrote the plurality in *Helms* recognize there are special concerns in funding such entities.

But I believe this misreads *Helms*. The principle articulated in *Bowen and Rosenberger* was reaffirmed as recently as last year when a majority of the Court in *Helms*—two Justices who concurred in the holding allowing the loan of federally-funded computers to religious schools, joined by three dissenting Justices—noted the special concerns associated with the flow of government funds to pervasively religious organizations. As Justice O'Connor noted in her concurring opinion, "Our concern with direct monetary aid is based on more than just [concern about] diversion [of tax-funded aid to religious uses]. In fact, the most important reason for according special treatment to direct money grants is that this form of aid follows precariously close to the original object of the Establishment Clause's prohibition."

The Supreme Court has noted that in pervasively sectarian institutions, religion is so subsumed in the entire program that it cannot be separated out, and since funding is fungible, a major program of support to any part of the institution will constitute government funding of religion, thereby violating the Establishment Clause. Common sense says the justices are right. And because support to any part of the institution is support to all of it, such government funding violates what has been a first principle of the First Amendment. As James Madison wrote: "The Appropriation or funding of the United States for the use and support of religious societies contrary to the article of the Constitution which declares that Congress shall make no law respecting an establishment of religion."

Second, the rights of beneficiaries would inevitably be infringed. As Professor Laycock and others have noted, in the real world, protecting beneficiaries will be difficult, and, I might add, all but impossible. How can we ensure that the promise of a non-sectarian provider of social services is made real, especially given the challenge of providing such services in rural or inner- city areas? How can we ensure that beneficiaries have the right, not just in theory but also in practice, to decline to participate in religious exercises without jeopardizing their benefits? No matter what kind of protections charitable choice legislation tries to create, without extensive government surveillance such abuses will continue. And such surveillance, of course, poses its own set of risks for religious institutions.

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

Since the High Court has determined that these exemptions are not mandated by the Constitution but are rather a constitutionally permissible means for the legislative body to accommodate religion, this debate over whether the flow of government

funds should result in a lifting of the exemption is a statutory and policy argument. (It should be noted that there is a constitutional argument that granting a "religion specific" exemption for government funded programs is a violation of the Establishment Clause under the second prong of the *Lemon* test i.e. primary effect of advancing religion, particularly as applied in the *Texas Monthly* case, prohibited the singling out of religion for a benefit. This remains an unresolved issue.)

So in deciding on Charitable Choice, you are faced with a wrenching tension between two valid moral principles. The first is that government should accommodate the ability of religious organizations to function. To take the exemption away is to curtail that religious freedom in a manner that will threaten other exemptions. When religious groups buy into that, they could be jeopardizing their birthright of a unique constitutional and legal status in exchange for the privilege of lining up at the public trough to fight among themselves over the porridge of government funds. The second is that government money should not be used to discriminate against protected classes of people. To grant the exemption, with anything more than incidental government funding behind it, is to turn back the clock on civil rights in this country, allowing for widespread discrimination on the basis of religious identity and practice. This is the approach of the Watts/Hall Bill. The notion that a job notice could be placed in the newspaper seeking employees for a government funded social service program run by a Protestant church that reads "Jews, Catholics, Muslims need not apply" or "No unmarried mothers will be hired;" or, if I read Watts-Hall correctly, "no Blacks need apply," is deeply and profoundly troubling to many in the religious community, on Capitol Hill, and, according to a recent Pew Poll on this issue, to 78% of the American public.

There is only one way to prevent this problem: don't violate the constitutional prohibition against direct government funding of sectarian organizations.

Only this will both protect religion and allow for robust, unqualified protections of civil rights. To give the money and then choose either to allow the exemption or to deny it, will pit many religious communities of America against the other civil rights communities. As was the case with the Religious Liberty Protection Act last year, this will foist on Congress an anguishing and politically explosive choice for the many Republican, Democratic, and Independent Members of Congress who are committed both to religious freedom and strong protections of other civil rights.

Finally, much has been made of the argument that all the proponents of charitable choice want is a level playing field, i.e., neutrality between religions and other groups. But it is not the opponents of charitable choice who concocted the idea of treating religion differently; it was the framers of the Constitution. Only religion has an Establishment Clause with all of the attendant protections and limitations that imposes. To abandon this idea in pursuit of "a level playing field" is a political time bomb for religion in America. To insist that religion be treated just like everything else is, again, to jeopardize the many special treatments and exemptions that religion enjoys. Why would those who intend to enhance religious protections advocate that? If we insist on treating religion "equally" to obtain funding, others will argue we should do so in all matters. This is particularly puzzling from some of my colleagues here who have been eloquent in arguing in the Free Exercise realm that facial neutrality, (i.e., treating religion like everything else), is not what is constitutionally called for. Rather the Constitution requires the functional neutrality of government towards religion. And the best way to achieve that is to keep government and religion separate even at the cost of direct government funding of religious institutions. For 200 years, the wall separating church and state has kept religion free of government interference, protecting the religious freedom of all, and allowing religion to flourish with remarkable vitality and strength. Taking the sledgehammer of government funding to the wall would be a major retreat from the vision of our founders.

A BETTER PATH

There is much to commend in the President's proposed Faith Based Initiative and there are myriad ways that government and the religious community can partner to strengthen the religious community's social service work and, together, to better serve our nation's poor and needy.

There are many constitutional ways to achieve our common goals: providing technical assistance and training programs for staff of all groups; best practice sharing; targeted research on how to improve programs; reducing, or even eliminating, fees for all small organizations, including churches and synagogues, to establish separately incorporated 501(C) social service arms to assist the poor; providing more and better information to the public about available programs; and encouraging charitable contributions through appropriate tax relief.

To those who support Charitable Choice, I would say: with so many arguments and dilemmas, let's take the time to evaluate the Charitable Choice programs that exist, find out what works and what doesn't, and, examine what the real life impact on beneficiaries.

Together, with mutual respect and some hard work, we can respect religious liberty, protect our Constitution and our religious institutions, maintain religion's vital role in the public square, and promote the excellent work our religious institutions do in carrying out their prophetic mission to help those in need.

Mr. CHABOT. And our final witness this morning will be Professor Lupu.

STATEMENT OF IRA C. LUPU, LOUIS HARKEY MAYO RESEARCH PROFESSOR OF LAW, THE GEORGE WASHINGTON UNIVERSITY SCHOOL OF LAW

Mr. LUPU. Thank you, Mr. Chairman. Like Professor Laycock, I am here from a university, but of course I am not representing that university or its interests in this conversation. I am here as a scholar. I have interests and concerns of my own about the issues we are talking about this morning.

I think there are a number of things that I believe all the witnesses and probably most people in this room would agree on. First, faith-based organizations perform crucial functions in helping poor and others, other people, in need in America. Second, if we are going to have a regime of charitable choice, we should be very careful to have schemes to protect beneficiaries against various kinds of coercion, and it won't be easy to do.

Third, if we have a regime of charitable choice, we should be concerned about the autonomy of religious providers up to some limits of the Constitution and competing policies, but sometimes those competing policies are serious and we have to take them into account.

And, fourth, if we are to have a regime of charitable choice, we should be very careful about setting it up so there is no sectarian discrimination among the various providers who are competing for possible contracts. I don't think any of us would disagree with any of those four statements.

I think there is some disagreement in the room about two things. One is the scope of the establishment clause limits on the methods and means and particularities of government transfers to faith-based organizations, and those are constitutional limits that the courts eventually will be called on to enforce. And, second, the question of the so-called co-religionist exemption from Title 7 and whether or not it should extend to faith-based organizations when they are operating under government contracts. And I think the question of the co-religionist exemption is a question of policy; it is not a question in which the Constitution requires the Congress to act one way or the other. It is a question to be determined as a matter of policy about whether or not social services will be best delivered to those in need if we permit the exemption to be preserved or if we do not.

So I want to spend my brief time—and I hope we will return to both these subjects in questions later—on those two issues of potential or actual disagreement, the scope of establishment clause limits and the policy questions implicit in the question of the hiring discrimination exemption.

First, with respect to the establishment clause limits, there has been for many years in this country a debate between what I consider two paradigms of the establishment clause: the separationist paradigm which says no aid to religious organizations for a variety of reasons, including some that Rabbi Saperstein identified and that I think are actually quite paternalistic. They are reasons to say we shouldn't have programs of government aid through religious organizations because the religious organizations will be tempted to accept it and they will then be corrupted by it.

My own view, and I think the courts have been moving in this direction, is that we should trust faith-based organizations to make their own judgments about whether these programs will be good or bad for them. The law has been moving away from the paradigm of strict separation and toward but not completely to a paradigm of government neutrality as between religious and secular groups in the distribution of aid. And as I understand the current law, the requirements are that aid from government to sectarian organizations must have no religious content.

This rule is broader than no indoctrination, no proselytizing, no worship, no sectarian teaching. The rule, as I understand it, is the government aid must have no religious content. That means the goods that the government pays for must have no religious content. The government can pay for peanut butter and it can pay for mattresses for homeless people to sleep on, but it cannot pay for Bibles or religious instructional material. And services also must have no religious content, and services are more complicated than goods because services will include counseling services, and it will be difficult to monitor whether faith-based organization counseling services to beneficiaries have or do not have religious content. But that is the constitutional rule that these programs must be designed to follow.

Now, I see I have very little time left and I have barely begun to scratch the edge of the question of the co-religionist exemption, but let me just repeat my general view of it. This is a matter of policy, not a matter of constitutionality. There are good policy arguments to maintain the exemption for faith-based organizations, even with Federal funds. They will go to religious community, religious cohesion, and perhaps to the effectiveness of the delivery of social services to those in need. But there are also, of course, some very good policy arguments not to maintain that exemption, and they go to the heart of this country's commitment to nondiscrimination; that is to say, it is ordinarily unfair and inefficient to exclude people from jobs based on their faith.

Those policies are in conflict in this debate, and I think we should pursue those questions among others as we proceed in this conversation. Thank you.

Mr. CHABOT. Thank you very much.

[The prepared statement of Mr. Lupu follows:]

PREPARED STATEMENT OF PROFESSOR IRA C. LUPU

Mr. Chairman and members of the Subcommittee:

Thank you for the opportunity to testify on the constitutional role of faith-based organizations in competition for federal social service funds (commonly known as "Charitable Choice"). I am a professor of law at The George Washington University,

but I am not here on behalf of the University or any other organization. I am here as a citizen and constitutional scholar,[1] concerned about the questions before you.

Throughout our history, faith-based organizations have made impressive and deeply important contributions to social well-being in America. Many such organizations, along with their secular counterparts, have been especially committed to serving our most vulnerable and disadvantaged citizens. These organizations have helped alleviate the cruelties associated with poverty in America, and have aided countless people in making strides toward self-reliance and a better life.

Any involvement between religious organizations and government, however, raises serious constitutional issues under both the Establishment Clause and the Free Exercise Clause of the First Amendment. The inclusion of faith-based organizations in federally financed social service programs[2] implicates four categories of constitutional concern: 1) religious coercion, in violation of the Free Exercise Clause, of both beneficiaries and providers of federally funded social service programs; 2) government financial support and supervision, in violation of the Establishment Clause, of private activity with religious content; 3) the risks of sect-based discrimination by government officials against some faith-based providers seeking contracts with government; and 4) government involvement with religious discrimination in the employment practices of faith-based organizations. Moreover, these four categories of concern must be addressed in both the design and the implementation, at all levels of government, of any federal legislation of this character.

My conclusions, elaborated below, are that any such legislation: 1) should recognize the rights of program beneficiaries to be free of unwanted religious experience, and to have meaningful access to secular options for the receipt of federally financed services; 2) should recognize the rights of religious freedom of providers, up to the limits of the Establishment Clause; 3) should prohibit the use of federal funds to purchase materials with religious content or to compensate labor for services that include religious content; 4) should include specification of award criteria sufficient to provide safeguards against sectarian discrimination by award-granting officers; and 5) may EITHER forbid OR permit faith-based organizations to limit hiring to their coreligionists, whether or not the hiring is done with federal funds (i.e., the Constitution does not require either of those policy choices, and does permit the Congress to choose between them). With respect to all of the above issues, Congress should be mindful to design legislation with constitutional limits explicitly recognized and should be sensitive to the many ways in which administration of such schemes may touch upon constitutional values.

I. RESPECT FOR THE RELIGIOUS FREEDOM OF BENEFICIARIES.

Of all the issues presented by the inclusion of faith-based organizations in federal social service programs, this one produces the least disagreement. Proponents and opponents of such legislation concur that beneficiaries should never be forced to accept religiously influenced social services, or be forced to accept any such services in a religious setting. Accordingly, the 1996 Welfare Reform Act, and subsequent enactments or proposals of this variety, include provisions forbidding religious organizations from conditioning services upon a beneficiary's religious participation,[3] and provisions guaranteeing to beneficiaries the right to receive services from an alternative, secular provider.[4]

The principal concern about the rights of beneficiaries involves the possibility that they will face subtle pressures to relinquish those rights. Beneficiaries may feel that they cannot object to religious content in the social services they are receiving without risking their benefits; moreover, the alternative secular providers typically required by law may be geographically remote or otherwise inaccessible to beneficiaries. Here, it is very important that there be clear rules, disclosed in advance

[1] Much of my writing has focused on questions arising under the Religion Clauses of the Constitution. I (and my co-author Robert Tuttle) discuss the inclusion of faith-based organizations in federally financed social service projects in an article entitled "The Distinctive Place of Religious Entities in Our Constitutional Order," 46 Villanova Law Review, No, 5 (forthcoming, October, 2001).

[2] Under current law, such organizations are explicitly included as eligible providers of services under the 1996 Welfare Reform Act, a variety of other services to low-income individuals and families pursuant to the Community Development Block Grant Act, and both federal grants and federally funded state grants to programs designed to treat substance abuse. The proposed Community Solutions Act of 2001, H.R. 7, 107th Cong., 1st sess. (hereafter "H.R. 7") would extend the explicit inclusion of faith-based providers to a wide range of additional federally funded services, including matters involving relief of hunger, control of crime and delinquency, domestic violence, and secondary school equivalence programs, among others. H.R. 7, sec. 201(c)(4).

[3] This provision in the 1996 Welfare Reform Act is codified at 42 U.S.C. sec. 604a(g).

[4] See, e.g., id. at sec. 604a(e)(1).

to beneficiaries, that they need not participate or acquiesce in religious activities as a condition of receiving federally funded services. These requirements of disclosure should be written into every government contract with a faith-based organization, and failure to abide by such requirements should be made grounds for contract termination. It is also constitutionally necessary that state and local governments take affirmative steps to ensure that secular, alternative service providers are available and reasonably accessible to all, and that information about such providers is made readily available to beneficiaries.

II. RESPECT FOR THE RELIGIOUS AUTONOMY OF PROVIDERS.

This is a relatively new proposition in the discourse about the role of faith-based organizations in provision of government-financed service, and it is in some tension with Establishment Clause limits, discussed below, on that role. Despite that tension, I believe that existing and proposed Charitable Choice legislation is on sound ground in explicitly providing that religious providers do not have to surrender autonomy in matters of religious symbolism, internal governance, or theology in exchange for participation in a federally funded program.[5] Indeed, for the government to require alteration of religious trappings, governance, or teaching as a condition of participation might itself violate the Constitution, especially if the requirements extended to any part of the religious provider's enterprise that was not funded by the government. To put this another way, the government should not be using its power of the purse to induce religious providers to alter the iconography, internal governance or teachings of their faith, nor should government be creating disincentives for the provision of religiously themed social services, if such services are to be financed entirely with private support.

III. ESTABLISHMENT CLAUSE LIMITS ON RELIGIOUS CONTENT OF FEDERALLY FUNDED GOODS AND SERVICES.

The inclusion of faith-based providers in government social service programs raises subtle and difficult issues involving constitutional limitations, generated by the Establishment Clause, on government expenditures. Virtually all constitutional scholars agree that government may not finance sectarian proselytizing and worship, but the agreement quickly breaks down on issues of the more general scope of the prohibition of the Establishment Clause, and how best to enforce that prohibition.

Discourse over Establishment Clause limits typically divides into two camps, both of which tend to press their claims beyond the contours of existing law. One group, the strict separationists, argues that government may not directly finance the provision of secular goods and services in a sectarian setting, and argues further that the government may not directly aid "pervasively sectarian" organizations at all, because of the inseparability of the secular and sectarian in such organizations. The other group, the neutralists, argues that government must include religious providers (including the so-called "pervasively sectarian") in social programs on the same terms as secular providers, and that religious content of the programs should not be of concern to government so long as private parties create that religious content and no one is coerced into participation.

The law of the Establishment Clause is evolving in a way that is inconsistent with both of these polar positions. First, the Supreme Court has been moving toward permitting government to provide direct assistance to the secular functions of religious organizations. The Court's opinions in *Bowen v. Kendrick*, 487 U.S. 589 (1988), *Agostini v. Felton*, 521 U.S. 203 (1997), and most recently in *Mitchell v. Helms*, 530 U.S. 793 (2000), all uphold government provision of such assistance so long as the overall program is religion-neutral and there are programmatic safeguards against diversion of government aid to religious use.[6] Second, the Court has been moving away from a categorical prohibition on the distribution of government resources to so- called "pervasively sectarian" organizations. Although *Bowen v. Kendrick*, decided in 1988, had seemed to reinforce the vitality of that category, the recent deci-

[5] Id. secs. 604a(d)(1), 604a(d)(2)(A), 604a(d)(2)(B). Section 201(d) of H.R. 7 contains similar safeguards of the religious autonomy of providers.

[6] A four-Justice plurality in *Mitchell* would have gone still further, and would permit private diversion of government assistance to religious use so long as the overall program is religion-neutral and the government aid itself lacks religious content. 530 U.S. at 820-24. The concurring opinion of Justice O'Connor, joined by Justice Breyer, rejected this view, and emphasized the no-diversion principle. Id. at 857-860. Grouped with the three dissenters in *Mitchell*, the O'Connor-Breyer opinion means that a majority of the current Court would not approve of any program of aid to faith-based groups that would permit them to use the aid in explicitly religious ways.

sion in *Mitchell v. Helms* has undermined it considerably. In *Mitchell*, a four-Justice plurality repudiated the idea of a separate juridical category of "pervasively sectarian" organizations,[7] and the concurring Justices, while not joining in this explicit repudiation, refused to abide by any such categorization and approved of aid for secular educational purposes to highly sectarian schools.

Indeed, the categorical prohibition on direct government transfers to "pervasively sectarian" organizations is deeply flawed. Courts and agencies have no business trying to measure the degree of sectarianism of any particular group, especially when sectarian commitments are difficult to understand from the outside. Government may not finance religious exercises and practices, but questions of whether government is doing so should be analyzed program-by-program, practice-by-practice, rather than on the basis of gross generalizations about religious organizations as a whole.

The law of the Establishment Clause has thus been changing in ways that are consistent with the philosophy of Charitable Choice. Government may become a partner in the secular activities of faith-based organizations whose efforts advance secular purposes, but may not become a partner in—nor regulate—the private project of religious worship, transformation, and belief. These latter concerns, like matters encompassed by the right of privacy, are in our constitutional scheme beyond the scope of government's jurisdiction; such distinctively religious concerns must be left in private hands to ensure their integrity and to keep government within the bounds of the temporal.[8] Government may not act with the purpose or effect of "advancing or inhibiting religion,"[9] and "excessive entanglement between government and religion"[10] will be among the criteria used to measure such "inhibition."

If these evolving principles are applied to Charitable Choice, certain conclusions and concerns follow. Foremost, the government may finance those aspects of social service programs that are secular in content (e.g., food, office supplies, secular educational materials), but it may NOT directly pay for goods or services with religious content.[11] Thus, the provisions of existing and proposed law that prohibit government monies from being used for "sectarian worship, instruction, or proselytization"[12] are required by the Constitution, but do not go far enough. Government money may not be used to pay directly for any materials, any counseling, or any other services that incorporate concepts of divine, ultimate, or superhuman authority; the teachings of Alcoholics Anonymous, for example, which encourage participants to surrender their lives to divine custodianship, are not properly made the object of direct government support.[13]

The distinction between secular goods and services, for which government may pay, and goods or services with religious content, for which government may not pay, bears acutely on the design of Charitable Choice programs. In light of the Supreme Court's repudiation of the concept that some organizations are so "perva-

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[7] Id. at 826-829. Chief Justice Rehnquist joined in this opinion, suggesting that he no longer takes the view, adopted in his opinion for the Court in Bowen v. Kendrick, that the Establishment Clause requires a categorical prohibition on government assistance to "pervasively sectarian" organizations. For my own view of the anti-Catholic bias associated with the origins of the concept of "pervasively sectarian" organizations, see Ira C. Lupu, The Increasingly Anachronistic Case Against School Vouchers, 13 Notre Dame J. of Law, Ethics, & Public Policy 375, 385-88 (1999).

[8] The Supreme Court has long adhered to this proposition. See, e.g., Hunt v. NcNair, 413 U.S. 734, 743 (1973) (government may not fund "specifically religious activit[ies] in an otherwise substantially secular setting."); accord, Tilton v. Richardson, 403 U.S. 672 (1971).

[9] Agostini, 521 U.S. at 222-223.

[10] Id. at 234. See also Mitchell, 530 U.S. at 844-45 (O'Connor, J., joined by Breyer, J., concurring).

[11] This testimony does not address the device of government vouchers, made available to service beneficiaries and redeemable by faith-based providers. Such a device, which involves the intervening private choice of beneficiaries in the selection of faith-based providers, appears to stand on safer constitutional ground than direct grants to, or contracts with, religious organizations, in which government officials themselves select religious providers. Even such voucher programs, however, must be designed to facilitate the purchase of social services with secular value. The validity of such voucher programs may well turn on the overall neutrality between faith-based and secular providers in the mix of those eligible to receive and redeem vouchers in any particular jurisdiction.

[12] 42 U.S.C. at sec. 604a(j). See also H.R. 7, sec. 201(i) ("No funds provided through a grant or contract to a religious organization to provide assistance under any program described [herein] shall be expended for sectarian worship, instruction, or proselytization.")

[13] For a recent and illustrative example of a court limiting government support for Alcoholics Anonymous, see DeStefano v. Emergency Housing Group, Inc., 247 F.3d 397 (2nd Cir. 2001). See also Warner v. Orange County Dept. of Probation, 115 F.3d 1068 (2d Cir. 1997), reaff'd after remand, 173 F.3d 120 (2nd Cir), cert. denied, 528 U.S. 1003 (1999) (county may not condition probation on participation in Alcoholics Anonymous, because of AA's religious content).

sively sectarian" that they may never be the recipients of government assistance, contracts and programs should be designed to permit faith- based organizations, and those who monitor or audit them on behalf of the government, to separate expenditures into categories of those eligible for government support and those ineligible.

Goods and materials are obviously easier to monitor and label in these ways than are services, especially counseling services. Goods may be readily inspected for religious content without any governmental intrusion into private religious practices. The content of counseling services, by contrast, will be determined in part by individualized interactions between counselors and beneficiaries.[14] Moreover, some kinds of counseling more readily invites religious influence than others—for example, counseling those who have problems with substance abuse seems more likely to involve matters of the spirit than does job training. If there lurks a danger of "excessive entanglement" between government and faith-based organizations in Charitable Choice programs, the monitoring of counseling services is the flash point for that danger. Perhaps the best solution to this problem is a combination of clear guidelines to faith-based organizations regarding the required secularity of the content of their government-financed services, and a requirement that all organizations certify that such services have been rendered in compliance with such requirements.[15]

In any event, such separation, monitoring and auditing of federally funded activities are essential to the constitutionality of particular grants, contracts, and practices.[16] If faith-based organizations are unwilling to tolerate such segregation and monitoring of their expenditures, they should not participate in government-financed programs. The auditing process should examine each program, not each faith-based provider viewed as a whole. Some programs operated by faith-based organizations may be so entirely infused with religiosity in their philosophy and methods of service that segregation of secular and religious expenditures will be impossible, at least with respect to counseling services. Teen Challenge, for example, is a well- publicized substance abuse program that has been described in precisely this way.[17] If government auditors are unable or unwilling to examine expenditures for religious content, government should not enter into these arrangements.

One additional concern arising under the Establishment Clause is that charitable choice programs may be thought to "endorse" religious belief in violation of the Constitution, in a way analogous to government support of sectarian religious symbols in public places.[18] I do not give such objections much credence. First, unlike government support of religious holidays or symbols, each instance of which can be identified and analyzed, Charitable Choice programs involve religion-neutral umbrellas under which many private programs are sponsored. Second, that the religious speech of religious organizations must be private—and privately financed—under-

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[14] In her crucial concurring opinion in Mitchell v. Helms, Justice O'Connor suggested a distinction between goods and services in her willingness to uphold the provision of educational materials to sectarian schools, while adhering to her ruling in Grand Rapids v. Ball, 473 U.S. 373 (1985), that government-financed salary supplements paid to teachers in such schools to teach secular subjects in after-school programs were unconstitutional. One might fairly presume, Justice O'Connor suggested, that such teachers would continue to advance the school's religious mission in the after school program. 530 U.S. at 857-860.

[15] The facts of Mitchell v. Helms revealed that Louisiana had required all nonpublic schools to certify that the materials and equipment provided by the state would be used only for "secular, neutral, and nonideological purposes," as required by federal law, and Justice O'Connor's concurring opinion approved of this device to avoid excessive entanglements and help insure compliance with constitutional limits. 530 U.S. at 861-64.

[16] There is a difference of constitutional stature between requirements of segregation of accounts—those reflecting only secular expenditures which government may lawfully make—and requirements of allocation of expenditures between the religious and the secular. The latter would permit government to pay for one half of the overall expense for a clergy member's salary if one-half of the clergy member's work were secular. This sort of allocation is constitutionally insufficient, because such a scenario would not permit the confident assertion that government had not directly financed religious activity and because monitoring the allocation would invite impermissible government scrutiny of the work of the clergy. By contrast, account segregation only requires the government to look at the expenditures in the exclusively secular category to which government funds had been devoted. Indeed, H.R. 7 endeavors to respond precisely to these concerns by requiring segregation of government funds into a separate account or accounts, and providing that "[o]nly the government funds shall be subject to audit by the government." H.R. 7, Title II, sec. 201(h)(2).

[17] See Charles Glenn, The Ambiguous Embrace: Government and Faith-Based Schools and Social Agencies (Princeton 2000), at 62-73; see also Charitable Choice Dance Begins, Christianity Today, April 2, 2001 (describing conflict among Teen Challenge leaders over whether to accept government funds, which in turn would force a secularization of their program).

[18] Justice O'Connor suggested this analogy in her opinion for the Court in Agostini v. Felton, 521 U.S. 203, 235 (1997).

mines the argument that it may be attributed to the government for Establishment Clause purposes.[19] If constitutional limitations concerning beneficiaries' rights and providers' duties are followed, beneficiaries and others should be able to discern that the government message in a charitable choice program is that secular gains will follow from the pursuit of work, abstention from drugs, etc., and that any religious message is separable, private, and attributable to the religious entity alone.[20]

IV. PREVENTING SECTARIAN DISCRIMINATION AGAINST PROVIDERS.

An issue that has been given insufficient attention in the Charitable Choice debate thus far arises from the danger that government contract officers will invidiously discriminate against certain religious denominations in the making of awards. It is easy to see how faiths that are widely adhered to and/or well-respected in a particular state or local community might have advantages in the competition for federal social service funds; inversely, faiths that are less widely followed in the U.S., either because they depart from our predominant Judeo-Christian tradition, or for some other reason become the target of bias or suspicion, may labor under comparable disadvantages.[21] Even if those authorized to enter into contracts on behalf of the government do not share any such bias, bureaucratic caution and fear of public criticism may lead such officers in the same direction. This sort of sectarian discrimination, whether overt or covert, is presumptively unconstitutional.[22]

Although nothing in any existing or proposed legislation authorizes such discrimination, there are not adequate safeguards against it. One such safeguard would involve tightening up the awards criteria utilized by contracting agencies.[23] More precise criteria would facilitate the monitoring of contracting agencies and would likely improve their accountability to norms of nondiscrimination. This is a constitutional strategy widely used in the realm of freedom of speech and assembly,[24] and would be salutary in this context as well.[25] Congress should consider requiring all agencies, state or federal, which enter contracts with or make grants to faith-based orga-

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[19] See Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (private religious speech in a public, state-owned forum cannot be attributed to the state).

[20] Whatever force arguments based on government endorsement of religious speech may have in the setting of voucher programs to support private education, in which the mix of participating schools may be highly tilted toward the religious variety or towards a particular faith, see Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000), both federal and statewide social service programs ordinarily include a wide variety of options, secular and otherwise, and overall government neutrality between religion and secularity is therefore much easier to identify and defend.

[21] Some religious leaders have already expressed fears that Charitable Choice programs will lead to government financing of religious movements of which such leaders in some fashion disapprove. See Leslie Lenkowsky, Funding the Faithful, Why Bush is Right, Commentary, Vol. 111, No. 6 (June 2001) 19, 20. A survey done for the Pew Forum on Religion and Public Life reported recently that "Most Americans would not extend [the right to participate in government-financed social services] to . . . Muslim Americans, Buddhist Americans, Nation of Islam and the Church of Scientology. Many also have reservations about [including] the Church of Jesus Christ of Latter-Day Saints . . ." See Faith-Funding Backed, But Church-State Doubts Abound, wysiwyg://12/http://pewforum.org/events/0410/report/execsum.php3.

[22] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Larson v. Valente, 456 U.S. 228 (1982). Related questions would arise if contracting officers systematically favored secular providers over religious providers, or systematically preferred the faith-based over the secular.

[23] The criteria currently employed by government grantors and contracting agencies do not always inspire confidence in this regard. See, e.g., Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, Center for Substance Abuse Prevention, Guidance for Applicants No. SP–01–006, Minority HIV Prevention Initiatives (Issued March 2001), at 9: "Funding Criteria Decisions to fund a grant are based on: 1. The strengths and weaknesses of the application as determined by the Peer Review Committee 2. Concurrence of the CSAP National Advisory Council 3. Availability of funds 4. Overall program balance in terms of geography and race/ethnicity of target populations."

[24] See, e.g., Lakewood v. Plain dealer Publishing Co., 486 U.S. 750 (1988) (invalidating a city ordinance requiring a permit from the city's mayor in order to place newsracks on public property, because the permit scheme impermissibly conferred unbridled discretion on the mayor); Hague v. CIO, 307 U.S. 496 (1939) (holding unconstitutional a scheme requiring a permit for assemblies in the streets and parks, because the standards for permits did not adequately curb abuses of discretion); Saia v. New York, 334 U.S. 558 (1948) (invalidating ordinance requiring permit to use a sound truck because of inadequacy of standards to confine impermissible uses of discretion.).

[25] See Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 698–99 (1970) (Harlan, J., concurring) (remarking on the value of property tax exemptions for broad classes of property owners, including religious organizations, as a useful device for checking abuse of discretion by taxing officers, and suggesting that discretionary subsidies to religious organizations might invite such abuse).

nizations, to specify award criteria in ways that are sufficiently precise and transparent to permit evaluation of the religious evenhandedness with which they are employed.

V. HIRING DISCRIMINATION BY FAITH-BASED PROVIDERS.

Whether religious organizations may retain, in their government-funded programs, their statutory exemption from the federal ban on religious discrimination in employment is a hotly disputed matter. The issue raises concerns of freedom of association and workforce composition for such organizations, on the one hand, and government guarantees of equality of employment opportunity for those who might be hired to perform government-funded social services, on the other. Although current law leaves this precise question open, I believe that, with respect to employees compensated with funds originating from the federal government, Congress may either preserve the exemption to cover such employees or refuse to preserve it; that is, the decision about the scope of the exemption within Charitable Choice programs is a matter of policy, not a matter upon which the Constitution dictates a result one way or the other.[26] I also believe that Congress should carefully gather information about the costs and benefits of these policy options before committing in full to either.

For most employers in the U.S., Title VII of the 1964 Civil Rights Act forbids discrimination based on religion.[27] For those organizations whose purposes and activities are primarily religious, however, the same statute provides an exemption "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [organization] of its activities."[28] Current Charitable Choice proposals preserve this exemption from the prohibition on religious discrimination in hiring to the federally funded activities of religious organizations.[29]

At first glance, the extension of the co-religionist exemption to government funded positions seems troubling indeed. Religious discrimination ordinarily runs counter to well- settled norms of equal employment opportunity in America. In most circumstances, such discrimination is unfair, invidious, and inefficient in its exclusion of highly qualified individuals from employment. When the employment is for activity designed to aid our neediest or most troubled citizens, exclusion of capable workers on religious grounds may undercut national purposes in delivering the best social services. Moreover, co-religionists within a faith-based organization may be more tempted than others to inject religious content into government-funded programs. Government itself may not discriminate based on religion in hiring for government positions, [30] and the question arises whether government may authorize the use of tax dollars to do what government itself may not.

For a variety of reasons, however, extension of the co-religionist exemption to federally funded activities carried out in religious organizations does not offend the Constitution. First, discretionary action taken by private parties with the use of government funds ordinarily does not constitute "state action" subject to the Constitution.[31] The decision by a religious organization to limit hiring to co-religionists is

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[26] An extremely thorough analysis of this question can be found in Memorandum for William P. Marshall, Deputy Counsel to the President, from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, Re: Application of the Coreligionists Exemption in Title VII of the Civil Right Act of 1964, 42 U.S.C. sec. 2000e-1, to Religious Organizations That Would Directly Receive Substance Abuse and Mental Health Services Administration Funds Pursuant to Section 704 of H.R. 4923, the "Community Renewal and New Markets Act of 2000" (copy on file with the author of this testimony).

[27] Title VII, Civil Rights Act of 1964, sec. 703(a), 42 U.S.C. sec. 2000e-2(a).

[28] Title VII of the Civil Rights Act of 1964, sec. 702(a), 42 U.S.C. sec. 2000e-1(a) (1994). The original statute enacted in 1964, limited the exemption to employees involved in carrying out "religious activities" of such organizations; the 1972 amendments to Title VII deleted the word "religious" as a modifier of activities in the exemption, so as to extend the exemption to employees engaged in any of their employers' activities. For discussion of the reasons for this extension, see Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335–36 (1987).

[29] None of these enactments or proposals would relieve religious organizations of other anti-discrimination norms, such as those which forbid discrimination based on race. See, e.g. H.R. 7, sec. 201(c)(3).

[30] Such discrimination would violate the First Amendment's Religion Clauses, the Fifth Amendment's Due Process Clause, and the prohibition on Religious Tests for public office in Article VI.

[31] See Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (private school receiving over 90% of its funding from the state is not a state actor when it fires a teacher because of her speech activities); Blum v. Yaretsky, 457 U.S. 991 (1982) (private nursing home is not a state actor when

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not attributable to the government, even if government funds are paying the employees' salaries, unless the government requires the discrimination. Because the co-religionist exemption permits, but does not require private discrimination, the government cannot be held constitutionally responsible for it.

There are two possible exceptions to this principle suggested by current law. First, government may not subsidize private discrimination if the subsidy will tend to undercut some constitutional duty of the state.[32] Second, if the state delegates exclusive functions of sovereignty to private parties, constitutional requirements (including those of nondiscrimination in employment) will attach to the delegation.[33] Neither of these exceptions, however, fits the question of extending the co-religionist hiring exemption to federally funded social services. Discrimination in favor of co-religionists by some faith-based organizations does not undercut any state responsibility to ensure that it refrain from religious discrimination itself; rather, the exemption preserves the state's neutrality toward a particular private choice. And the provision of social services for the poor is far from an exclusive function of sovereignty; religious organizations have been instrumental in such activity for so long that one is tempted to say that support for social services involves the state in "religious action," rather than involving religious organizations in "state action."[34]

Second, there are affirmative reasons, rooted in freedom of religious association and national employment policy, to preserve the co-religionist exemption in government-financed programs. The existing co-religionist exemption in Title VII rests in part upon a judgment that religious organizations should be free to pursue religious cohesion and common values among their employees, whether or not such employees have religious duties.[35] Of course, pursuant to Establishment Clause principles discussed above, employees are forbidden from engaging in explicitly religious activity on their government-financed time. Nevertheless, religious organizations may be religiously motivated in choosing to provide social services, whether or not the services themselves are intrinsically religious. Accordingly, the sense of community and religious spirit on which success of the group's efforts depend may be hampered by a requirement that members of all faiths be considered in hiring. To the extent this occurs, the overarching policy concern for the best possible provision of social services by religious organizations may be undermined.

Moreover, the employees working for religious organizations pursuant to government contracts may also be performing other duties that are privately financed. In such circumstances, elimination of the co-religionist exemption for government-funded jobs would force religious organizations to split employment opportunities between co-religionists in the privately financed positions and non-co-religionists in the government-financed jobs (with whatever inefficiencies such job-splitting entailed), or to hire non-co-religionists to do jobs formerly reserved for co- religionists. To the extent the co-religionist exemption is a means for harnessing the energy of faith in community service rather than merely a way to reserve employment for "members of the club," the creation of disincentives to hire co-religionists may undermine the private as well as the publicly supported activities of faith-based groups.[36]

Despite these considerations supporting the constitutionality of preserving the co-religionist exemption to government-financed employment positions, Congress may

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it decides to transfer patients supported by Medicaid, a government-financed program, from one level of care to another).

[32] See Norwood v. Harrison, 413 U.S. 455 (1973) (state which has engaged in de jure racial segregation in public schools may not lend textbooks to private segregated schools).

[33] See Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

[34] For a description of the role of religious organizations in the provision of such services in early America, see Marvin Olasky, The Tragedy of American Compassion (Regnery 1992), at 6–23.

[35] See Amos, 483 U.S. at 340-46 (Brennan, J., concurring).

[36] Extension of the coreligionist exemption to government financed employment within religious organizations may also be defended as an equalizer, putting such organizations on the same footing as ideological organizations which can favor their own sympathizers whether or not the employment positions are government-financed. The ACLU or the Sierra Club may limit hiring for all positions to those who share their beliefs, and the co-religionist exemption permits religious organizations to do likewise. To be sure, this argument is imperfect to the extent that religious affiliation is a matter of identity or narrow theological creed rather than general religious sentiment; the coreligionist exemption permits exclusion by religious organizations of those who share all of their social values, and their enthusiasm for such values, but who do not share their particular method of worship. Nevertheless, religious organizations are uniquely situated in connection with the question of religious discrimination in employment, and this uniqueness provides a constitutionally sufficient reason to treat them differently from secular organizations for these purposes.

of course choose not to so preserve it.[37] Whether or not the exemption is required by the Free Exercise Clause of the Constitution with respect to privately supported positions within religious organizations,[38] Congress has the authority to impose full and complete nondiscrimination requirements with respect to government financed employment positions. Because religious organizations may forego such funding, or accept it and continue to hire only co-religionists for their privately financed positions, the free exercise rights of such organizations would not be unconstitutionally compromised by the failure to extend the co-religionist exemption to government financed employment. Conditioning government funds on full nondiscrimination in employment with those funds would obviously serve legitimate national interests in equal employment opportunity, and therefore would fall within the legislative prerogative.

Accordingly, Congress may constitutionally choose between 1) preserving the coreligionist exemption from nondiscrimination requirements within the federally financed activities of religious organizations, because the exemption may enhance these organizations' religious freedom, organizational efficiency, and service delivery; or 2) refusing to preserve the exemption in such programs, because it undercuts equality of employment opportunity and may actually lead to hiring those not best able to deliver social services to their intended beneficiaries. This choice is one for Congress to make, and is not dictated by the requirements of the Constitution. Instead, the choice should be controlled by a careful, empirical assessment of the relative costs and benefits of the various policy options. Because such an assessment has not, to my knowledge, yet been undertaken, I urge caution in the legislative approach to this delicate question.

VI. FACIAL VALIDITY VERSUS VALIDITY AS APPLIED.

The Supreme Court in *Bowen v. Kendrick*, 487 U.S. 589 (1988), emphasized the distinction between the facial validity of a government program which authorizes direct transfers of material assistance to religious organizations, among others, and the validity of particular grants made or contracts entered under such a program. The kinds of safeguards, alluded to above, which Congress has enacted in earlier Charitable Choice legislation will go a long way toward ensuring that any subsequent legislation will also survive attacks on its facial validity. Thus, provisions requiring 1) the inclusion of secular as well as religious providers, 2) respect for religious freedom of beneficiaries and providers, 3) prohibitions on religious content in goods and services for which funds directly transferred from government are spent, and 4) nondiscrimination in the distribution of funds will go a long way toward ensuring that the overall scheme will survive constitutional challenge.[39]

The Congress should be mindful, however, that much of what will go on in the contracting process, and even more of what will transpire in the actual delivery of these services, will be difficult to monitor and is unlikely to find its way into the courts.[40] Beneficiaries may consent to unconstitutional practices, or may feel too dependent upon providers to complain even if they do not consent. Accordingly, any such legislation should provide for mechanisms of constitutional accountability, pursuant to which beneficiaries, providers, agencies of state and local government, civil liberties groups and others can be assured that constitutional concerns are being re-

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[37] In at least one case of federal grants for which faith-based organizations are explicitly eligible, Congress has indeed chosen not to so preserve the exemption. With respect to "formula grants" made to the states by the Substance Abuse and Mental Health Services Administration of the Department of Health and Human Services, religious discrimination is completely prohibited. 42 U.S.C. sec. 300x–57(a)(2) (1994).

[38] With respect to clergy positions, the courts have held that exemption from all nondiscrimination law is constitutionally required. See, e.g., Rayburn v. General Conference of Seventh Day Adventists, 772 F.2d 1164 (4th Cir. 1985), cert. denied, 478 U.S. 1020 (1986).

[39] By contrast, self-serving declarations like those in H.R. 7 concerning whether receipt of government funds constitutes aid to the receiving organization (as contrasted with its beneficiaries), see sec. 201(c)(2), or whether receipt of such funds constitutes government endorsement of religious belief, id. at sec. 201(c)(3), add nothing to the facial validity of congressional enactments. The questions addressed by such provisions must be independently asked and answered by the courts in appropriate circumstances.

[40] There have been lawsuits arising over the application of Charitable Choice programs within particular religious providers. See Funding of Faith Works Challenged, Milwaukee Journal Sentinel, Oct. 13, 2000 (describing lawsuit against Wisconsin for aiding the religious activities of Faith Works, an addiction recovery program); 'Charitable Choice' Gets Challenge; Suit targets state spending on church-based social work, Dallas Morning News, July 25, 2000, p. 23A (describing suit against Texas officials for supporting religious activities in the Jobs Partnership of Washington County, Texas.) Such suits do not necessarily signify that courts generally can police these matters effectively, nor do such suits, if successful, necessarily mean that violations of the Constitution within such programs are widespread.

spectfully observed.[41] Such concerns should be rigorously enforced by government officers to whom beneficiaries and providers alike should have easy access. Moreover, the auditing practices used, auditing results obtained, and performance evaluations conducted by or for government agencies should be widely and readily accessible.

Mr. CHABOT. I want to compliment all the witnesses for staying within the time constraints very well. Sometimes it doesn't go all that well, and all the witnesses were very, very good in that respect.

Professor Lupu, I would like to begin with you if I could, maybe let you expand a little bit on whether or not we should trust faith-based organizations essentially to follow the law. Haven't arguments that Members of faith-based organizations simply cannot be trusted to follow the guidelines preventing the use of government funds for proselytizing activities been decisively rejected by the Supreme Court? Doesn't both plurality opinion and the opinion of Justice O'Connor, which was joined by Justice Breyer in the *Mitchell vs. Helms* case, stand for the proposition that Members of religious organizations should be presumed to act in good faith? Which is I think what you basically indicated, the law was heading in that direction.

Mr. LUPU. Mr. Chairman, I believe you have stated accurately what those opinions reflect, that there will be a presumption that Members of religious organizations will act in good faith.

But if I may elaborate on this question just a bit, I think in a great many circumstances, Members of faith-based organizations, they are not lawyers, they don't have constitutional lawyers on their staffs, and they are really not sure exactly what those requirements are. And the law on this subject has been in sufficient flux that it seems to me very important that in any legislation of this sort and in whatever contracts they may enter into with State and local government, that they be given very clear guidance on what those limitations are. I think clear guidance on what the limits are is very important in having this sort of scheme run in the way that is consistent with the Constitution.

Mr. CHABOT. Thank you very much, Professor Lupu. I appreciate it.

Professor Esbeck, if I could ask you to expound again on something that Professor Lupu brought up. Would you discuss what the monitoring procedures that would be put in place under the proposed charitable choice programs would be to ensure that the religious organizations that would receive public funding do comply with those procedures and how we would be protected to make sure

[41] State and local contracting agencies in particular need concrete guidance concerning relevant constitutional limitations. The current Charitable Choice contract in the State of Texas, for example, purports to limit the religiosity of the efforts of faith-based organizations performed under contract with the state by providing that "The purpose of this contract is the provision of social services; no state expenditures have as their objective the funding of sectarian worship, instruction, or proselytization." Texas Department of Human Services, Contract for Local Innovation Projects, Section II.F. (copy on file with the author of this testimony). This provision, which focuses on state purposes rather than provider behavior, seems wholly inadequate as a mechanism for communicating to providers that their state-financed efforts—means as well as ends—must be entirely secular in content. I do not attribute this choice of language in the Texas contract to any sort of constitutional bad faith; rather, it seems to me to reflect a lack of awareness or a deep uncertainty on the part of state officers of precisely what the Constitution requires of them in these circumstances.

that we don't have organizations going off in directions which aren't appropriate?

Mr. ESBECK. Sure, I would be happy to. Of course, the legislation, like all legislation, just begins to sketch the outlines of what sort of monitoring and enforcement there would be for any funding program. We start with the proposition that faith-based organizations are to be treated like other grantees. And so in that regard, of course, they can be audited, and those audits would be announced or unannounced. For very large grantees, the Office of Management and Budget requires that they secure a certified public accountant, and the CPA comes in and does a thorough-going audit according to OMB guidelines. And that is each year, and then that audit, along with any variances that are detected and a plan to correct those problems, is filed with the government, the grantors, so that they can see what kind of job that faith-based organization is doing.

In addition, of course, there is some self-enforcement, if you will, because the beneficiaries themselves, the object of the social service, is given a private right of action, and they have rights under the statute. And if they feel that their rights are being violated, they are being discriminated against or something is occurring in the delivery of services that is contrary to their rights, they then can notify the faith-based organization of the problem, as well as the government grantor, and bring a private cause of action if it comes to that. Hopefully, it would be resolved informally.

Then the Department of Justice, going beyond H.R. 7, suggests two additional rules of prudence, and those are set out in our written statement at the bottom of page 5 in a footnote where we block out a suggested amendment. And there are two additional things there, and there are also mentioned, I should say, at the end of my statement footnotes 70 and 71. One is that there be, just for faith-based organizations, an annual requirement of a self-audit of the critical provision. I say "critical" for church-State separation reasons, because that is where there is a requirement that there be separation of sectarian activities from the government-funded program; and also that they self-audit themselves to make sure that any beneficiaries who are participating in sectarian activities are doing so of their own volition. And then in addition, there is this separate certificate of compliance.

We wanted to impress upon these faith-based organizations that they have special responsibilities to comply with this separation and the voluntariness requirements, so that they would separately sign off on those, and then there is an enforcement mechanism behind that certification.

Mr. CHABOT. Thank you very much, Professor. The bells that we just heard indicate that there is a vote on the floor. So rather than going into an additional 5 minutes at this time, we will go over and vote and then come right back and continue with the witnesses, the questions to the witnesses. So at this time we are in recess for probably 10 minutes. Thank you.

[Recess.]

Mr. CHABOT. The Committee will come to order. If the witnesses could take their seats again, we will get on with our questions. Before we get to the next questioner, I just wanted to recognize that

we are aware there are a number of faith-based organizations, Salvation Army and others, some homeless shelter folks. And we want to thank you for your work and also we appreciate you being here today to observe firsthand Congress as it deals with this very important issue and one of the President's highest priorities. So we welcome you here today, and we are happy that you were able to come to Washington to see us acting on this issue.

And at this time I will recognize the gentleman from New York, the Ranking Member, Mr. Nadler, for 5 minutes to ask questions.

Mr. NADLER. Thank you, Mr. Chairman.

First question for Professor Laycock. I was intrigued with your three principles, because with one possible exception I think they are the current law without—and certainly probably constitutionally mandated, some of them—without charitable choice.

Nondiscrimination versus religious organizations I would think on an equal protection basis, if nothing else—I mean, I assume that is the current law, and if it isn't we should fix it. And we don't need charitable choice for that.

I assume that the Fifth Avenue Baptist Church Free Lunch Program, Inc. can compete on an equal basis with the Fifth Avenue Block Association Free Lunch, Inc. for Federal funding. Is that not the case, and that it would be illegal for government to discriminate vis-a-vis one or the other because one is affiliated with a religious group?

Mr. LAYCOCK. I think it should be unconstitutional for government to discriminate in that way. We don't have a case that says so. I don't think the bureaucrats have the slightest idea that they are under that restriction. This would make it a lot more visible.

Mr. NADLER. I don't think anybody will—okay, but we don't need charitable choice for that. A simple—okay, let's go further.

Deregulation of religious providers need not secularize itself. Again, the church doesn't have to secularize itself; it is simply that the provision of the social service must be done in a secular manner. Is that not the old law?

Mr. LAYCOCK. I am not sure where the requirements in the old law come from, but it certainly seems to be the conventional wisdom that the separately—that there needs to be a separately created organization to take the money, and that that organization needs to be secularized.

You know, I think the people who say don't offer all this money to religious organizations, you will bribe them into secularizing themselves, are describing the status quo. They are describing the conditions that the executive currently puts on these grants when they go to religiously affiliated organizations.

Mr. NADLER. And do you oppose that condition for the provision of the service?

Mr. LAYCOCK. I think if we had a court that cared about free exercise, that would be an unconstitutional condition. The government should not say to religious organizations, if you get rid of enough of that religious stuff we will give you some money.

Mr. NADLER. Well, not get rid of that religious stuff we will give you some money, but don't put the religious stuff in the provision of the federally funded service; isn't that the key distinction?

Mr. LAYCOCK. I think that is a distinction without a difference.

Mr. NADLER. Let me ask you this then, Professor, because I think here we are coming to the nub of it. Certainly we know that a church may discriminate on the—may say we don't hire women rabbis, we don't hire women priests, cantors, whatever. No one quarrels with that. I have assumed that the law has always been that if you are running a hot lunch—I will keep using this example because it is easy, if you are running a hot lunch program, you can't discriminate on the basis of anything, sex, religion, whatever, and who ladles out the soup or who gets the soup. That is the current law. Do you think that should change?

Mr. LAYCOCK. I think if you are running a hot lunch program, and it is a religious organization running the hot lunch program——.

Mr. NADLER. With its own money. But I am talking about with government money.

Mr. LAYCOCK. With government money, I think plenty of people disagree with that. The Title 7 exemption doesn't care whether you have government money or not. There is at least one district court case in Mississippi that says if it is funded with government money, it must be a secular position. There are other cases that go the other way.

Mr. NADLER. That is not clear in current law.

Mr. LAYCOCK. Pardon?

Mr. NADLER. With government money. Whether you can discriminate in who ladles out the soup hired with government money is unclear under current law?

Mr. LAYCOCK. I think it is clear enough under the statute, but there is at least one case that says you lose the exemption, which is why I think people are pushing this language.

Mr. NADLER. Let me ask the following because I think this goes to the nub of it. Somebody's running a church or church-affiliated 501(c)(3); either way, is running a drug detoxification program. The drug detoxification says in effect, stop using drugs because it is good for your health, and anyway it is illegal. Nobody has a problem with that. The drug detoxification program says stop—and pay for it with Federal money; otherwise it is not an issue, obviously. Paid for with Federal money, the drug detoxification program says to the addicts, stop using drugs because Jesus wants you to stop using drugs. Is that constitutional? Should it be permissible with Federal money?

Mr. LAYCOCK. It is not constitutional for the government to pay for that. I think it is constitutional for the government to pay for the secular portion of the services that that group is delivering and for them to also offer that same message, religious message, in addition to the secular treatment to those same people.

Mr. NADLER. But if the religious message is the cure—in other words, as I understand part of the reasoning or the alleged rationale for faith-based social services, aside from the discrimination question, it is for many people a religious motivation is more effective, allegedly, and probably true in many cases; a religious motivation is more effective in getting somebody off drugs or not to be a recidivist and going to prison or whatever. So if it is intimately bound up, stop using drugs because Jesus wants you to, stop steal-

ing everybody's cars because Jesus wants you to, can the government pay for that—in effect pay for that message?

Mr. LAYCOCK. I don't think government can pay for that message, but neither should government require that that message be delivered by some other organization in some other place on some other day. To get the grant or the contract, the organization has to offer some secular treatment that the government can pay for——.

Mr. CHABOT. The gentleman from New York is recognized for an additional minute.

Mr. LAYCOCK. But if it does that, then it should also be able to say Jesus will help you achieve those goals.

Mr. NADLER. Let me ask Rabbi Saperstein to comment on the same question.

Mr. SAPERSTEIN. It would seem, for example, in your drug rehabilitation program that from—if I understand Professor Laycock—you can have a program in which the people running it said, "We have a 2-hour program here, and there are two parts to it. The first hour we have drug counselors, paid for by government money, and we don't put religious content; and the second hour we are doing it, but we regard this program as a whole. This won't work for you unless you go to both parts. We can't make you do it, but we are telling you, you are not going to have a success without both." The notion that these people aren't, in some way, being coerced to participate in it and that these are really functionally very different things that are constituted and administered, troubles me.

Mr. NADLER. Do you think that is okay constitutionally?

Mr. SAPERSTEIN. No, I don't.

Mr. NADLER. Is it permitted under current law? Would it be permitted under charitable choice?

Mr. SAPERSTEIN. It is not permitted under current law as I believe current law is generally understood. I agree with Professor Laycock's depiction on that. I do not believe that that would be constitutional if government money goes to that. The Court has always said, because of the fungibility argument in pervasively sectarian institutions, where religion is subsumed in all of this, that in essence you are paying for the entire thing.

Mr. CHABOT. The gentleman is recognized for an additional minute.

Mr. NADLER. Thank you. I have one more question for you. At a recent hearing, the executive director of Teen Challenge stated that some participants become, quote, completed Jews, unquote, after completing their substance abuse program. The President has cited this program as a model program. How do you reconcile a program whose cure is a religious one, with a right under the statute not to be proselytized to participate in the program, leaving aside the offensive term, offensive to Jews, "completed Jew," implying that an adherence to the Jewish religion is not somehow complete.

Shouldn't parents be concerned that if their kids are in trouble and vulnerable, that government will fund someone to use that vulnerability to induce them to abandon perhaps their parents' faith?

Mr. SAPERSTEIN. That is, of course, the human dilemma of all of this. The people often being subject to this kind of social coercion that is going on there and the pressure to participate are exactly

the people who are most vulnerable, at a time of their lives they need the greatest help and are most subject to influence here. It is why some of these programs work, but it is why the government then is complicit in the religious activity that is going on. And the notion you would correct that by having audits done by the very institution that is perpetrating the problem—that is a bit bewildering to me.

Mr. CHABOT. The gentleman's time has expired. The gentleman from Tennessee, Mr. Jenkins, is recognized for 5 minutes.

Mr. JENKINS. Thank you, Mr. Chairman. And I apologize to the Committee and to the witnesses for being late. I had another what I consider to be very important meeting. So I would like to just use my time if I could to catch up here, and go from my left to right and just ask what the witnesses, what their testimony was very briefly with respect to the constitutionality of Federal funds being used by faith-based organizations under the concept that has been advanced here. Professor Lupu, what was your——.

Mr. LUPU. Well, the point I emphasized in my testimony and I will repeat, and it is related to the question that was just asked, has to do with what the government may pay for, what it may not pay for. I believe the government may aid faith-based organizations in delivery of secular social services, but the government may not pay for goods or services with religious content. And goods are the much easier case than services to segregate and to monitor.

Habitat for Humanity, to use an example that the President used in his speech the other day, they are religiously motivated but they acquire land and they help people build housing. So if the government helps pay for land or nails or lumber, then I think there is not a great problem in the government supporting that sort of program.

When Teen Challenge, for a different sort of example, uses salvation as a method for helping people end substance abuse, I think there is a severe constitutional problem in aiding that sort of service.

Mr. SAPERSTEIN. My position, Mr. Jenkins, is that the Supreme Court has never upheld direct funding of pervasively sectarian institutions except in the most limited kinds of circumstances. And it has always distinguished it where it has upheld aid, from direct cash support for pervasively sectarian institutions. Its major concern is they are so bound together, that the religion is so infused into the life of these entities, that support for one part of it is government support for religion that is prohibited by the Constitution. And asking for a level playing field, treating religion just like everyone else, in the long run, is going to be harmful for religion, jeopardizing all the special protections and exemptions that we have.

Mr. JENKINS. Have there been cases since 1996 when the Welfare Reform Act was passed and some Federal moneys have been used?

Mr. SAPERSTEIN. Yes. There are a number of cases coming up through the courts. In Texas we had a case where Federal money was used to buy Bibles as part of the program. That is now being contested. My appeal at the end of my testimony was we have the laws on the books for the last 5 years; let's stop, don't go any further, let's look at those, see how they really work in real life. Let's

really learn from them and let's see what really happened to the beneficiaries, let's see how religion did get woven into it. Let's assess whether it is doable and how to work it before we go on.

Mr. JENKINS. Thank you sir. Professor Laycock.

Mr. LAYCOCK. Well, I emphasize that charitable choice in principle protects the religious liberty of both the providers and the beneficiaries. It guarantees no discrimination on the basis of religion. It deregulates the religious providers and it protects the beneficiaries by saying they can go somewhere else or they can refuse to participate.

I agree with Mr. Nadler that we were down to the nub of it when he was questioning me. Is it—do we better protect religious liberty by saying here are billions of dollars in government money; to be eligible for it you have to promise you will not add the religious component of your message, you will not say that God can help you get off drugs, or here's money to suppress your religious message? Or is it better for both the providers and the beneficiaries to say we will give you money for the secular part of your program whether you add that religious message or not. We will not put religious conditions on the money to the provider and we will protect the beneficiary by really making available an alternate provider. You have got to really do that or this program is a fraud.

But without that, Mr. Nadler's solution is both the provider and the beneficiary are deprived of that religious alternative.

The beneficiary didn't get a choice between a religious and a secular provider and the provider has to supress any religious message that it might want to supplement the program with. And we use tons of government money to bribe people into these programs in which the religious alternative disappears and only the secular alternative is available.

Mr. CHABOT. The gentleman is recognized for an additional minute to let Mr. Esbeck address the questions.

Mr. ESBECK. Mr. Jenkins, if I could refer you to page 5 of my testimony, there is agreement here that government money cannot be diverted to sectarian activity, or religious indoctrination as the Court calls it. So what we have tried to do at the Department of Justice was to recommend a refinement so that—and of course the struggle is how do you prevent that from happening in a program where sectarian activity may be going on by a faith based organization but they are also delivering social services.

And so the language that we recommend here, which is set out at the bottom of page 5 in this footnote, the first sentence of course says, the constitutional rule, that no government funds can be used for sectarian activity and it says proselytizing, which is the example being here used, is an example obviously of sectarian activity. But then the next sentence tries to give guidance, obviously broad guidance because it is a statute, it is not regulations, it is not sort of detailed implementation, nuts and bolts kind of things, but it says that if the religious organization offers such activity, referring back to sectarian activity, then it says that it shall be voluntary for the individuals receiving the services and offered separate from the program funded under this subpart.

So what it sets up is this: You have got a government funded program where there is no sectarian activity going on. That is what

separation means. But the overall organization may be quite religious, but they are able to follow the rules so that the government funds just come into this program where no sectarian activities go on. If there are sectarian activities, it is outside of the government funded program. That is the beginning, at least, of what begins to approach some bright lines so that people know what they can do and what they cannot do.

Mr. CHABOT. The gentleman's time has expired. The gentleman from Virginia, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT. Thank you. I would like to follow up on that idea because it seems under present law that as long as you are not, Mr. Esbeck, as long as you are not actually paying for the specific proselytization that is going on it can be part and parcel of the drug rehabilitation program.

My question is during the federally paid for drug counseling program, if somebody signs up for drug counseling services, are you saying that they can fully participate in that program without any proselytization, worship or religious instruction?

Mr. ESBECK. Your characterization of the present law I am not sure if under——.

Mr. SCOTT. Under present charitable choice law you can convert the drug counseling program into a worship service.

Mr. ESBECK. That is not—I am sorry.

Mr. SCOTT. So long as you are not paying for the assistant minister who is leading the group in prayer and worship.

Mr. ESBECK. That is not our current understanding.

Mr. SCOTT. Can you under present charitable choice law or under the amendment in a drug counseling program, proselytize, worship——.

Mr. ESBECK. Or do bible teaching, no.

Mr. SCOTT [continuing]. During the program?

Mr. ESBECK. Not during the government funded program.

Mr. SCOTT. Okay. Then what is the necessity of the separate but equal program; if there is no worship going on during the program, why do you need an alternative program?

Mr. ESBECK. What this permits, and I think I alluded to this in my opening remarks, in the past if the organization was so-called pervasively sectarian, then it was simply assumed that if money came in, it would be diverted to sectarian activity. It was a rule that they couldn't even apply.

Mr. SCOTT. Let me get it clear. You can participate in the drug counseling program and not be subjected to sectarian worship?

Mr. ESBECK. Are you talking about the prior situation or the current?

Mr. SCOTT. Under the current charitable choice law can you or can you not be subjected, voluntarily, to sectarian worship during the program?

Mr. ESBECK. Within the government funded program you should not be subjected to worship.

Mr. SCOTT. And if there is a 2-hour block of time during which the government funded drug counseling program is going on, there shall be no sectarian worship or proselytization or advancement of religion during that 2-hour period; is that what you are saying?

Mr. ESBECK. During the government funded program there should not be worship or sectarian activity or proselytizing. I am not sure about this 2-hour period that you are referring to.

Mr. SCOTT. The drug counseling program, if the drug counselor says we are going to have a session from 6 to 8 on Tuesday night, from 6 to 8 you are saying there should be no sectarian worship, no proselytization, no attempt to convert or anything else during that period of time?

Mr. ESBECK. During the government funded program there should be no sectarian activity. I think the problem that we are having in communication is how are you defining the government funded program.

Mr. SCOTT. 6 to 8. Because your testimony talks

about—and this is what is difficult in getting a straight answer—your testimony talks about people not being—beneficiary's right to avoid any unwarranted or unwanted sectarian practices. Suppose they want to be prayed over and worshipped with during the program.

Mr. ESBECK. If someone who qualifies as a beneficiary under the program wants to partake in sectarian activity, they need to go outside that government funded program and they can voluntarily participate in that.

Mr. SCOTT. Okay. So let's get this straight: The beneficiary can receive—cannot receive unwanted sectarian worship nor wanted sectarian worship?

Mr. ESBECK. Inside the government funded program.

Mr. SCOTT. Inside the government program.

Mr. ESBECK. That is right.

Mr. SCOTT. If there is no religion going on, and let me tell you that is 180 degrees contrary to what everybody else has been saying about this program, because if that is your position you have no reason for an alternative program, a separate but equal program down the street, and you have to excuse—there is no reason to be discriminating based on religion and employment if it is a totally secular program, no sectarian worship going on. Why do you need to discriminate in that kind of activity anymore than any other small organization needs to discriminate?

The fact of the matter is that everybody assumes that this avoid unwanted sectarian practices means that you can get wanted sectarian practices, you can convert it into a worship service. If I am wrong and you are right, then we don't have a problem. Because you don't need to discriminate and you don't need to proselytize during the program and therefore you don't need charitable choice.

Mr. CHABOT. The gentleman's time has expired but the witness has time to answer the question.

Mr. ESBECK. I don't know if there was a question there, but there were declaratory——.

Mr. SCOTT. The question——.

Mr. ESBECK [continuing]. Remarks. I would like to say that the Department of Justice doesn't agree with the characterization of what everyone is saying about this program is different than what we have said in our oral remarks here and in our written testimony.

Mr. SCOTT. Let me say that the chief sponsor in the Senate said in a forum when you are talking about drug rehabilitation religion is a methodology, that that is what you are paying for, the religious conversion. If it is your position that during the 2-hour period of the drug counseling program there should be no worship, no sectarian proselytization, then it begs the question what is charitable choice all about if it is not funding the religion? Why do you need charitable choice?

Mr. CHABOT. That is the Senate. We don't care what they say anyway. The gentleman from——.

Mr. NADLER. A month ago you did.

Mr. CHABOT. Not anymore. The gentleman from—you want to answer?

Mr. ESBECK. There was finally a question in that. And if once the government funded drug rehabilitation program is over, or if there is a break, as one of the hypotheticals I pointed out as an illustration in my written testimony, they then, for those who voluntarily want to, they can outside of that program take place or take part in sectarian activity if they want to.

Mr. SCOTT. Mr. Chairman, how is that different than present law, the law without charitable choice?

Mr. ESBECK. Because under present law as Professor Laycock said, the requirement that these groups not be pervasively religious or pervasively sectarian in fact has driven them into being largely secular throughout. What charitable choice does is it shifts the focus. No longer is it what—who are you but the question is what can you do. So you can remain pervasively sectarian but then have a separate government funded program where you follow the rules.

Mr. CHABOT. The gentleman's time has expired. The gentleman from Indiana, Mr. Hostettler, is recognized for 5 minutes.

Mr. HOSTETTLER. Thank you, Mr. Chairman. I appreciate the panelists, witnesses giving us the Court's interpretation of the Constitution with regard to this very important issue. I would, however, note that I would agree with Thomas Jefferson in a letter that he wrote to Charles Hammond, a friend, on August 18th, 1821, we are want to quote Jefferson often in this discussion on the separation of church and state, and this is what he said to Mr. Hammond in another letter: "it has long, however, been my opinion and I have never shrunk from its expression that the germ of dissolution of our Federal Government is in the constitution of the Federal judiciary, working like gravity by night and by day, gaining a little today and a little tomorrow and advancing its noiseless step like a thief over the field of jurisdiction until all shall be usurped."

And I think that is the discussion we are having today is that we are not really talking about the law as established in the Constitution or in article 1, section 7, direction on how to actually create law, which doesn't mention anything about the United States Supreme Court. But there was a Supreme Court justice that issued—that published his commentaries in 1833 about this very important issue, the first amendment. And I hope that today we don't confuse what the current Court and recent Court has said about the first amendment and the actual amendment to the Constitution itself.

Joseph Story said this, talking about—and first the prohibition of any establishment of religion and the freedom of religious opinion and worship, he said this, "The promulgation of the great doctrines of religion, the being and attributes and province of one Almighty God, the responsibility to him for all our actions founded upon moral freedom and accountability, the future state of rewards and punishments, the cultivation of all the personal, social and benevolent virtues, these can never be a matter of indifference in any well ordered community, never a matter of indifference," or neutrality, if we wanted to use a different word today. "It is indeed difficult to conceive how any civilized society can well exist without them. This is a point wholly distinct from that of the right of private judgment in matters of religion and the freedom of public worship according to the dictates of one's own conscience."

So the idea of what the first amendment actually said and means is in Story's opinion wholly distinct from the right of private judgment in matters of religion and the freedom of public worship. He went on to say, "Probably at the time of the adoption of the Constitution and of the amendment to it"—meaning the first amendment now under consideration—"the general if not the universal sentiment in America was that Christianity ought to receive encouragement from the States so far as it is not incompatible once again with the private rights of conscience and the freedom of religious worship."

He went on to say that the real object of the amendment was, in Story's words, "not to countenance much less to advance Mohammedism or Judaism or infidelity by prostrating Christianity but to exclude all rivalry among Christian sects and to prevent a national ecclesiastical establishment which would give to an hierarchy the exclusive patronage of the national government."

Now, in some of the testimony that I received and that I have perused today, we don't even put quotation marks around the idea of separation of church and state. We just assume it as being the truth as if it was found somewhere in the Constitution. So we in fact by not inferring the colloquial nature of that phrase, we actually in the words of the Judiciary Committee in 1853 and 1854 said, "Had the people during the revolution had a suspicion of any attempt to war against Christianity, that revolution would have been strangled in its cradle."

So in my opinion that is basically what the Judiciary Committee 150 years ago was talking about and it is what we are talking about really here today. The Judiciary Committee said in that report, "What is an establishment of religion? It must have a creed defining what a man must believe, it must have rights and ordinances which believers must observe, it must have ministers of defined qualifications to teach the doctrines and administer the rights, it must have tests for the submission and penalties for the nonconformist." There never was an established religion without these.

The Senate Judiciary Committee said this about the establishment of religion. "What is meant by the clause the establishment of religion? It referred without doubt to that establishment which existed in the mother country which was an endowment and the public expense in exclusion of or in preference to any other by giv-

ing to its Members exclusive political rights and by compelling the attendance of those who rejected its communion upon its worship or religious observances."

I don't think what we are talking about here today is exclusivity on a national basis, universal exclusivity on a national basis, in that we are allowing what I understand is virtually every organization that considers itself a faith based organization to take part, whether or not they believe in the doctrines of the religion that was so pointed out in Story's commentary.

So—and I would just like to ask the witnesses' opinion of a potential act that may be introduced, hypothetically speaking of course. Say, for example, an act regulating the grants of land for the Society of United Brethren for Propagating the Gospel, let's say, Among the Heathen. If that statute, for example, said that the said surveyor general required to be caused several tracts of land for the Society of, say, United Brethren for Propagating the Gospel Among the Heathen, would you consider that to be unconstitutional?

Mr. LAYCOCK. That is a real statute. Congress really did it. It was unconstitutional. I must say I support this program but not because the establishment clause is a noncompetition covenant among Christians. And with all respect, relying on Justice Story discredits this enterprise.

Mr. HOSTETTLER. James Madison didn't believe so. That is why he appointed him.

Someone said something about predating—it was actually signed into law by George Washington, June 1, 1796. And that was after, actually, the first amendment.

Mr. CHABOT. The gentleman is recognized for an additional minute to allow——.

Mr. LUPU. At the time that statute was drafted I guess it was commonplace in this culture to consider the Members of native American tribes——.

Mr. HOSTETTLER. That was not my question. My question was is it constitutional.

Mr. LUPU. It is not. It was not and even if it was then it surely would not be so considered today and it should not.

Mr. SAPERSTEIN. In terms of your comment about President Madison, I would hate to hold Presidents responsible for the decisions made by justices to the Supreme Court that they appoint more generally.

I am concerned about the very rivalry that you talked about. I think opening a door to have all religious groups in America competing for government funds exacerbates, and does not ameliorate, that rivalry.

Mr. HOSTETTLER. Mr. Esbeck, do you have any? I am just curious. Because this is the Constitution Subcommitteee and we are very concerned about constitutionality as opposed to anything else, and that is what I was speaking of, according to the first amendment, and what was thought of by, for example, the President of the Continental Congress that passed the——.

Mr. ESBECK. Our enterprise here is to try and apply the establishment cause as interpreted by the United States Supreme Court. They have the power of judicial review, *Marbury v. Madison*. Ev-

erybody here on both sides or three or four sides of the issue is trying their best to apply the Court's law in *Mitchell v. Helms*, *Agostini v. Felton*, *Bowen v. Kendrick*, et cetera.

Mr. CHABOT. The gentleman's time has expired. The gentleman from Massachusetts, Mr. Frank, is recognized.

Mr. FRANK. It had not occurred to me that I guess the Northwest Ordinance might in fact be a precedent for this. I haven't had a chance to look through it. I haven't come across any reference to heathens but perhaps it is in here in a footnote, and I will look further.

I appreciate Professor Laycock making clear what is and isn't involved here and I think that was very helpful. Also to Professor Lupu, I appreciate your making it explicit that not everything has to be constitutionalized, that the Constitution is a broad framework and that we have policy choices.

A few years ago there was a great deal of unhappiness because some public housing authorities employed the Nation of Islam to provide security in the public housing programs. I notice Federal housing wasn't one of the specific areas covered in this bill, crime control. Now, my impression is that the Nation of Islam, judging purely by results, did a very good job of enforcing order in the public housing projects, probably on an unarmed basis. For a variety of reasons they did a very good job. Yet there was a great deal of outcry, including the people who are now sponsors of the charitable choice provision, objecting to that. Under the charitable choice provision would not the Nation of Islam have every right to in fact reapply if there were programs for—we have one in fact, the Public Housing Drug Elimination Program. The President said he wanted to get rid of it, but Secretary Martinez said it is ineligible activity through other funding. Would charitable choice not empower the Nation of Islam to go in there and say, well, look, judge me purely on the results, I will hire who I want to hire and I will use my approach, Professor Lupu?

Mr. LUPU. Absolutely they would have the right to apply. It is an organization that purports to deliver certain social service, whether it is drug rehabilitation or whatever it is. They can say, here we are, here are our merits.

Mr. SAPERSTEIN. If one of the postions was that they would only hire African Americans and not whites, would that raise a problem under this?

Mr. FRANK. Under the bill if it is religiously—I gather that is probably their theology. In fact we did have the Nation of Islam doing that a few years ago, I think it was in Baltimore, some other places. It caused some unhappiness. Professor Laycock, what is your view of this?

Mr. LAYCOCK. They are clearly entitled to participate and they can't be barred because people dislike their religion. If they have racial qualifications in hiring that is not exempt under any language in this bill. They can't discriminate on the basis of race. And the *Bob Jones* case says preventing racial discrimination does serve——.

Mr. FRANK. Even if it is religiously—so if the Nation of Islam announced that it was going to hire white people, then they would be—because—without affirmative action we can see that. I think

that is an honest answer. I think it is one of the problems. I do think there are some inconsistencies with people who were against it before.

But now the other issue I have, Professor Laycock, you said, I thought very honestly, that without the right to participate in a purely secular program for the beneficiaries this would be a fraud. And I suggested the phrase before that we are talking not about separate but equal, but secular but equal. The problem is, and this is a very important problem I think for the people who want charitable choice, I have other problems with it, but taking what you say, those of us who understand how we fund social service programs, the notion that would you have a completely parallel set of programs out there everywhere and, again, you have said and you have been honest about this, can't be 20 miles away if the other one is within your neighborhood. You have got to be able to get there. The inefficiency is enormous. Plus you have this problem: We have funding cycles. So we fund a program. And 3 months after the funding cycle has ended, six people say I don't like this program, I don't want to become a completed Jew. I am very happy incomplete. And we got to give them a separate program. Where does it come from? Do we have a reserve pool to fund new things?

I understand what you say, taking it on that term, I think the notion that you can create nationwide—and it really is like separate but equal but in this case secular but equal will be inherently unequal, that there is simply no practical way to have in place a complete alternative set of programs that meet the condition that you say is necessary for this not to be fraudulent.

Mr. LAYCOCK. If you read my written testimony, you will see I said yes, this is where the real issue is. How do we make this happen? This is a religious liberty bill, it is not a funding bill. The higher the levels of funding the better this will work. If funding continues to shrink, this thing will not work at all.

Mr. FRANK. Mr. Esbeck, speaking for the Bush administration, we have just heard now from one of the articulate defenders of this program that the higher the funding levels for various social services the better off we will be. The phrase "fat chance" comes to mind as I look at the President's budget. I am wondering would you agree that there are financial issues involved in funding—well, let me—first of all, would you agree with Professor Laycock that the existence of a substantively equal set of programs for people to participate in is essential to the fair workings of this program?

Mr. ESBECK. Well, there is one possibility and that is that rather than have two programs in the same geographic area, the government when they get a religious objector to receiving services from a faith based organization, let's say it is a drug rehabilitation service, if they have one objector, they could simply employ a clinical psychologist to deliver the services to that one particular individual. You don't——.

Mr. FRANK. Home schooling.

Mr. ESBECK [continuing]. Have entirely separate or parallel programs.

Mr. FRANK. What if there were 7 or maybe there was 11. Maybe there is just more than just one. Let me ask you, if you agreed with Professor Laycock's I thought quite honest and valid argument that

if you do not have—even taking this program on its own terms, if you are going to allow sectarian content in part of the government funded program, interrelated with it although not specifically funded by it, do you agree that for this to be fair you have to have a completely secular alternative roughly equal in convenience and efficacy available for people who object? Do you agree with that principle?

Mr. CHABOT. The gentleman's time has expired, but the gentleman is granted an additional minute to have the question answered and use it as he sees fit.

Mr. ESBECK. I am told that throughout this country there are secular alternatives——.

Mr. FRANK. I asked if you agree with the principle. Do you agree with what Professor Laycock said that it needs to be that for that to be fair?

Mr. ESBECK. I think in my earlier answer I suggested to you one alternative as opposed to have the——.

Mr. FRANK. But the question is do you think we need it. You are going beyond that. Do you agree with Professor Laycock's characterization that for this program to be fair and justifiable there needs to be a substantively equal secular alternative set of programs? Do you agree with that principle?

Mr. ESBECK. I think in my earlier answer I was showing you an example where that was not necessary. So I guess the answer is no.

Mr. FRANK. You don't agree with Professor Laycock. Thank you. I know you don't agree with him on the funding, so you guys can work it out later.

Mr. CHABOT. The gentleman's time has expired. The gentleman from North Carolina, Mr. Watt, is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. And let me start by thanking the Chairman. Intentionally or unintentionally, you have accomplished something that is very, very important here in this hearing, I think, which is to get us beyond a rhetorical level down to a practical level. On the rhetorical level, those who often express concerns about what we are doing here often get characterized as nonreligious or whatever, all kinds of different things. But down at the practical level, I think if we could get some meeting of the minds, I think there would be a great deal of common ground and I think these witnesses have identified a number of those areas of common ground.

Unfortunately, we are not always hearing the same thing from the people who are talking about this program. Mr. Esbeck is here. I read the beginning of his statement. He says this is the official department's response; that is, the Justice Department's response, to the Committee's letter. Mr. Dilulio I don't know if he is in the Justice Department or he is in the executive branch or White House, I mean you obviously may not be speaking for him, Mr. Esbeck, because one of the problems that we have had is getting him to answer some of these practical, nonrhetorical questions about how this thing gets implemented. I am looking at a press report here that says last month Mr. Dilulio argued that programs in which the religious and secular elements cannot be separated should only be eligible for vouchers. That got Dilulio in trouble

with conservatives who argued that some of the most effective programs use religion as an integral part of their curriculum and should not be excluded, which I take to be inconsistent with what Mr. Esbeck said. If it is not, he is even more explicit about it because yesterday he said, or some time last week he said more appropriate for these kinds of religious programs to be funded with vouchers, quote, but if they want to apply for direct grants, quote, fine. So, if the heart of the program that they are moving forward on is prayer and religious curriculum, I think Mr. Dilulio has said that is fine. Mr. Esbeck has said the Justice Department is not going to allow that, as I heard his testimony this morning.

Now, that brings me to a real concern about these, and this has nothing to do with the first amendment of the Constitution. I think Professor Lupu and Professor Saperstein both agree that that is not constitutional. This is policy. What happens when a faith-based recipient of government funds doesn't comply with the government guidelines about proselytizing. Is, quote-unquote, good faith enough? Will there be unannounced audits of not only the books, the financial records, but of the content of these programs to determine whether they are proselytizing or not? And how will they be carried out and what implications will that have for the Federal Government injecting itself into the religious activities of these organizations?

I am just raising some questions here. Maybe they won't get a chance to answer them.

Mr. CHABOT. The gentleman's time has expired, but the witnesses are given sufficient time——.

Mr. WATT. I am not through with the questions yet. I am just on a roll here, so let me finish the questions.

Mr. CHABOT. That is debatable. The gentleman is recognized for such additional time as he might consume to ask his questions as long as it is reasonable.

Mr. WATT. Thank you. I appreciate it. Does the government have discretion in what and how to audit? Could these audits be tainted with political or partisan considerations? What is the enforcement mechanism that you referred to in the footnote on page 5, Mr. Esbeck? Is there going to be a right of private action as opposed to a government right to come in and police this and what implication does that have for the independence of government and religion?

These are some of the practical questions that we get down to. I think that unfortunately you all will give us very nice, tidy answers to because you understand the law and because you are honest brokers here. I mean, I haven't heard anything today that I thought was just absolute dishonesty, and that is unusual in hearings. But I am telling you that the people at the rhetorical level, at the political level are not talking about this in the case that Mr. Esbeck has wrapped his arms around it from a legal perspective.

So I put those things out there, not because I am unreligious. I want you to know I was born in a house where the front yard adjoined the church yard. I couldn't have been anything other than a Presbyterian. I couldn't get out of my house without going across the lot. So I have been in church for a long, long time. But I also have tremendous respect for keeping the government out of reli-

gious activities and not putting religious organizations in precarious positions where 5 years down the road some preacher because he didn't vote for somebody is going to get prosecuted or have his program terminated. And you can't determine whether he complied with the law or didn't comply with the law without making an assessment of the religious activities that he either did or did not engage in.

Mr. CHABOT. The gentleman's time has expired. But the witnesses can address the questions put to the panel by the Member.

Mr. LUPU. If I may have one word on it, Mr. Watt did not use the word entanglement or excessive entanglement in his questions but he certainly might well have. That is what he was asking about. I do think that there are issues of monitoring and auditing that are very serious, that are very delicate, that are very complicated. Many of them will be quite subvisibility to people like you. They will happen in local communities, they will happen when States administer their contracts. And if I were in your position in trying to design legislation of this character, I would be very mindful of the tension between enforcing the limits of the establishment clause and the problems of monitoring and intrusion that those limits might create. I think those issues are quite serious.

Mr. LAYCOCK. I agree those are the right questions to ask. I would suggest you might not have the right witnesses to answer them. The four of us are experts in constitutional law, first amendment law, the law on religion. You need to get some people who are experienced and experts in the nuts and bolts of actually administering these programs and delivering these services to answer questions about how it actually works on the ground.

Mr. WATT. Mr. Esbeck, I think he is experienced in this area.

Mr. ESBECK. Professor Laycock has it right. We in fact are people who would look at the Constitution on statutory issues, and the implementation or what Mr. Nadler called the sort of nuts and bolts is not what we were of course asked to testify to here and prepare to.

I would just say that of course the government has a vast amount of experience in the regulatory oversight of Federal programs and issuance of grants. And from what little I have been able to learn about that is when a statute is passed, of course there is quite a lot of consideration given to the very next layer, which is the regulatory layer, and then underneath that is policy explanations.

And also I am told that when a new program begins or when an old program is reauthorized, always with some changes, there are a number of workshops that are held which are free, workshops for those who are considering applying for grants as to the dos and don'ts, what they can do, what the rules are, and then even after grants are approved and an organization is a new grantee or an old grant is renewed, again there are workshops. And there is something called a project officer over every grant and he or she is sort of the person assigned to be a point of contact to answer questions, and so on. So it is not like these organizations are just cast out there on their own without some sort of guidance or ability.

Mr. SCOTT. But if they are given one set of instructions from the White House and another set of instructions from the Justice De-

partment, whose instructions are they giving? I guess that is the political question on this side. But a more practical question, you are absolutely right that the government has much experience with the administration of grants. I am not sure that you are so right that they have experience in the administration of grants where the recipient on the other side has the kind of political and moral and religious authority that some of these religious organizations tend to have.

Now, that creates this disparity. One group gets away with proselytizing and never gets looked at, audited, certainly not prosecuted because it just can't be done politically. And then the little guy down at the end of the line, where there is no political price, typically in my community, is the guy that gets indicted because instead of using the money, all the money to do drug rehabilitation, he went out and bought two or three Bibles.

Mr. SAPERSTEIN. Because there is, under H.R. 7, the right of action here and, depending on how the law is read, (perhaps you are right) if the government did not fund a church because of its perception of the mix of religion with the program, or a right of the church to sue the government, here and the right (outside this) bill for taxpayers to contest violations of church and state. You are also—this is—and because Professor Lupu so rightly said, this is a confused area of law. There really is no great certainty about it. This is clearly begging for a spew of lawsuits that are going to really burden the individual church here. We are putting them in a Catch-22 situation where they are going to get sued: dammed if they do, dammed if they don't. That is just not wise public policy.

Mr. WATT. Thank you, Mr. Chairman, for your indulgence.

Mr. CHABOT. We thank the gentleman. I think you made some very good points. I want to thank the witnesses for their testimony here this morning. I think it was very helpful in Congress' attempt to deal with this very important issue. I think you shed a lot of light.

Mr. ESBECK. Do I have just 15 seconds to make one point?

Mr. CHABOT. Yes.

Mr. ESBECK. The comment was made that the White House sort of obliquely and Mr. John Dilulio, or Dr. Dilulio is saying different things. I would just point out that Dr. Dilulio has testified in a House Committee and that testimony is available. And that was a Committee chaired by the Honorable Mark Souder. And I know that the White House Office of Faith-based and Community Initiatives has made a number of information papers available and I am in communication with them from time to time, and it is my understanding that the position of the Department of Justice today in our written testimony is consistent with the White House Office of Faith-based Initiatives.

Mr. CHABOT. Thank you. We appreciate the panel's testimony. I want to thank the Members for being here. Mr. Nadler.

Mr. NADLER. I now ask unanimous consent that all Members shall be permitted to revise and extend their remarks and submit any additional material for the records.

Mr. CHABOT. Without objection. And I also want to thank you very much. I also want to thank the folks who came here from the

faith-based community and thank you for your work with the American people. And with that, we are adjourned.

[Whereupon, at 12:08 p.m., the Subcommitteee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

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The Institute for Public Affairs is the non-partisan public policy research and advocacy center of the Union of Orthodox Jewish Congregations of America, the nation's largest Orthodox Jewish umbrella organization founded in 1898.

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June 4, 2001

Hon. Steve Chabot
Chairman
House Judiciary Subcommittee
On the Constitution
362 Ford House Office Bldg.
Washington, DC 20515

Dear Chairman Chabot,

I write to you in advance of your hearing scheduled for Thursday, June 7, 2001 which will address the constitutional and legal issues associated with the expansion of charitable choice and the President's faith-based initiative.

This public policy issue is of great interest to the Union of Orthodox Jewish Congregations of America, and I submit the enclosed testimony to you on my organization's behalf.

In brief, we believe that if it is carefully structured and implemented, the faith-based initiative in general, and the expansion of charitable choice in particular, are critical components of an effort to address America's social welfare challenges.

As elaborated herein, we believe the Establishment Clause does not stand in the way of this initiative, and that the Free Exercise Clause demands that the religious liberty interests of beneficiaries and providers be carefully protected.

I hope this submission is helpful to the deliberations of the Subcommittee on this issue.

Sincerely,

Nathan J. Diament

cc: Paul Taylor

WRITTEN TESTIMONY
of
NATHAN J. DIAMENT, Esq.
Director of Public Policy –
Union of Orthodox Jewish Congregations of America

June 7, 2001
United States House of Representatives
Committee on the Judiciary –
Subcommittee on the Constitution

With regard to

The Constitutional Role of Faith-Based Organizations
in Competitions for Federal Social Service Funds

UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA
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Introduction

Thank you, Chairman Chabot, for the opportunity to address this Committee today. My name is Nathan Diament and I am privileged to serve as the director of public policy for the Union of Orthodox Jewish Congregations of America. The UOJCA is a non-partisan organization in its second century of serving the traditional Jewish community, and is the largest Orthodox Jewish umbrella organization in the United States representing nearly 1,000 synagogues and their many members
nationwide.

On behalf of the UOJCA, I come before you today to address two legal issues that are relevant to the effort to expand the already existing partnership between government and faith-based social service providers: the first issue is the Constitutional issue raised by the First Amendment's religion clauses, the second issue relates to religious liberty protections contained in our nation's civil rights statutes.

But before addressing the legal issues, I would like to suggest that we step back for a moment and appreciate the broader context of our conversation today. Since this nation's founding, evaluating the role of religion in our society's public life has been part of our national conversation. But in recent months, this issue has been re-engaged with new vigor and prominence. Last year's nomination of an Orthodox Jew to a national ticket put the discussion back on the front page. This year's creation of the White House Office of Faith-Based & Community Initiatives has served as a catalyst for continuing this

national discussion. The fact that we are having this discussion is in itself a wonderful thing for our democratic society.

Just as important is the fact that we are having a national discussion about finding new ways to address our social welfare challenges, particularly those confronting lower income populations. To have President Johnson's declaration of a war on poverty cited once again in public addresses appreciatively, rather than derisively is a welcome development.[1]

One more word of introduction, I believe is critical. It is the case that the Bush Administration's focus on faith-based initiatives has given this policy issue a new degree of attention. But I respectfully remind you that this is not a new initiative. It received bipartisan support in the congress and was signed into law by President Clinton on four occasions since 1996.[2] Moreover, it was one of the few public policy initiatives that enjoyed support during the last presidential campaign from both parties' presidential candidates.

In a major address to the Salvation Army, it was candidate Al Gore who stated: "The men and women who work in faith...based organizations are driven by their spiritual commitment...they have sustained the drug addicted, the mentally ill, the homeless; they

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1 Remarks by President Bush at University of Notre Dame Commencement Exercises, May 21, 2001. Attached as Appendix 1.

2 Personal Responsibility & Work Opportunity Reconciliation Act (Pub. Law 104-193); Community Services Block Grant (Pub. Law 105-285); Children's Health Act (Pub. Law 106-310); and Community Renewal Tax Relief Act (Pub. Law 106-554).

have trained them, educated them, cared for them...most of all they have done what government can never do...they have loved them." Mr. Gore went on to propose what he called a "New Partnership" under which the "charitable choice" concept would be expanded. He stated: "As long as there is always a secular alternative for anyone who wants one, and as long as no one is required to participate in religious observances as a condition for receiving services, faith-based organizations can provide jobs and job training, counseling and mentoring, food and basic medical care. They can do so with public funds – and without having to alter the religious character that is so often the key to their effectiveness."[3]

I raise this today not to minimize in the least the commitment of President Bush and his Administration to this effort which is well known, but to remind you that, to date, "charitable choice" initiatives have been bipartisan initiatives. The speeches delivered by Mr. Bush and Mr. Gore that I have appended to my testimony clearly reflect their common commitment to this cause.

The fact that this initiative is now receiving greater attention should not be the cause for baser partisanship. The faith-based initiative does seem to have become a political Rorschach test, with some interest groups projecting their worst fears upon it.[4] But the fact that this initiative raises complex and critical questions should give rise to careful

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[3] Remarks by Vice President Al Gore on the Role of Faith-Based Organizations, delivered May 24, 1999. Attached as Appendix 2.

[4] *See*, Diament, *A Faith-Based Rorschach Test*, The Washington Post, March 20, 2001.

and reasoned discussion – as we have engaged in today – rather than overheated fear-mongering.

Social Service Grants and the Establishment Clause

America's synagogues, churches and other faith-based charities already play an important role in addressing many social challenges – through soup kitchens and literacy programs, clothing drives and job skills training, our faith communities remain the "little platoons" of our civilized society. My organization believes that these institutions can play an even larger and more beneficial role if they are supported in that effort.

We at the UOJCA do not suggest, as some might, that every faith-based social service provider will do a better job than a secular or government agency. Each of these agencies are programmed and staffed by real people – some will do better than others. We do not assert that every person in need will best be served by a faith-based provider – some will, some won't; we've long ago realized that "one-size-fits-all" approaches do not work in most contexts – we need H.U.D. and Habitat for Humanity, H.H.S. and the Hebrew Home for the Aged. Moreover, we do not believe that including faith-based providers in the partnerships that government forms should be an excuse for letting the government shirk its commitment to devote an appropriate level of financial and human resources directly to addressing social needs.[5] But we do believe that if the government decides not to go it alone, but to invite partners from the private and public interest sectors in tackling

[5] For this reason, the UOJCA welcomed President Bush's recently announced plans to increase federal funding allocations for housing rehabilitation and drug treatment program grants. Notre Dame Commencement Address, Appendix 1.

social welfare challenges, then the government ought not say to one class of agencies – "you may not be our partner because you are religious."[6]

We submit that the Constitution's Establishment Clause stands for a simple proposition: that the government may not favor one religion over others, or religion over non-religion. But it does not stand for the proposition that government must favor the secular over the sacred. The Establishment Clause, as the Supreme Court has said, demands neutrality toward religion, not hostility.[7]

Neutrality, I submit to you, means that in a grant program, government must be "faith-blind," if you will. Government ought to establish grant criteria that have nothing to do with whether prospective grantees are religious or secular, but simply whether they have the capacity to perform the service and obtain the results the government seeks to achieve through the grant. That is the essence of what the Establishment Clause demands in this context.

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[6] This is exactly what the four existing charitable choice laws do; they do not provide for the indiscriminate funneling of government funds to churches and synagogues, they do provide that government grant makers cannot red-line such programs out of the funding pool on the sole basis of their religious character. Moreover, while charitable choice provisions permit participation by faith-based organizations, such participation is not mandated in any way.

[7] "'It has never been thought either possible or desirable to enforce a regime of total separation'...nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

The Court will speak again to the Establishment Clause and the neutrality principle before the end of this month when it rules in the pending case of *Good News Club v. Milford Central School District.* This case challenges the policy of a New York school district that allows its public school facilities to be used for meetings by a wide range of civic and youth groups after school hours, but refused to allow a Christian youth group to use facilities for its meetings due to their religious content.

Support for this neutrality-centered view can be found in many Supreme Court precedents the most recent of which is *Mitchell v. Helms*, decided just one year ago.[8] In *Helms*, six of the nine justices came down squarely on the side of the neutrality view of the Establishment Clause.[9] The issue before the Court was the constitutionality of a federal grant program which allows local education agencies to use federal funds for the purchase of supplementary educational materials, including textbooks and computers, for schools within their jurisdiction.[10] Because the aid was also made available to parochial schools within the jurisdiction, it was challenged as a violation of the Establishment Clause.[11] The Court rejected this challenge.

Justices Thomas, Rhenquist, Kennedy and Scalia rejected the challenge on the basis of a neutrality-centered understanding of the Establishment Clause without any qualifications. For these justices, so long as secular government aid is provided to religious institutions on the basis of religion-neutral criteria it does not violate the Establishment Clause, and the constitutionality of currently enacted and pending charitable choice laws is unquestionable.

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8 530 U.S. 793, 120 S.Ct. 2530 (2000).

9 This position is clearly enunciated by the plurality opinion of Justices Thomas, Rhenquist, Scalia and Kennedy and is at the core of the concurrence by Justices O'Connor and Breyer.

10 Chapter 2 of the Education Consolidation and Improvement Act of 1981, Pub. L. 97—35, 95 Stat. 469, as amended, 20 U.S.C.§ 7301—7373.

11 Many public interest organizations, including the UOJCA, filed friend of the court briefs in the *Helms* case. Not surprisingly, those who question the neutrality principle today in the context of charitable choice also questioned it there. It is worth noting that the Solicitor General, on behalf of Secretary of Education Richard Riley, argued in support of the program's constitutionality. *See*, http://supreme.lp.findlaw.com/supreme_court/docket/decdocket.html#98-1648.

Justice O'Connor, joined by Justice Breyer, also invoked the principle of neutrality, but with qualifications.[12] Inasmuch as this concurrence was essential to the Court's holding, it can be said that it is the O'Connor opinion which is controlling. Working with the framework she developed previously in *Agostini v. Felton*,[13] Justice O'Connor determined that the program at issue did not violate the Establishment Clause because it furthered a secular purpose, did not have the primary effect of advancing religion,[14] and did not raise the likelihood that an "objective observer"[15] would believe the program was a governmental endorsement of a particular religion. It is important to note that, as part of this analysis, Justice O'Connor, like the *Helms* plurality, explicitly rejected the precedents of *Meek v. Pittinger* [16] and *Wolman v. Walter*,[17] which had held even the capability for (as opposed to the actual) diversion of government aid to religious purposes to be sufficient grounds to render an otherwise neutral aid program an Establishment Clause violation.[18] Finally, Justice O'Connor stressed that the aid provided under the

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[12] Justice O'Connor was not prepared to accept what she viewed as the plurality's "treatment of neutrality [as a] factor of singular importance" above other factors developed in the *Agostini* case. 120 S. Ct. at 2556.

[13] 521 U.S. 203 (1997), upholding a government funded program for secular special education teachers to teach in parochial schools. Writing for the Court's majority in *Agostini*, Justice O'Connor revised the much-maligned three prong test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[14] For Justice O'Connor, the question of whether an aid program has the primary effect of advancing religion is determined by whether: a. the aid is actually diverted for religious indoctrination; b. the eligibility for program participation is made with regard to religion; and c. the program creates excessive administrative entanglement.

[15] Justice O'Connor's "objective observer" is not the typical person on the street, but a person "acquainted with the text, legislative history, and implementation of the statute." *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985).

[16] 421 U.S. 349 (1975).

[17] 433 U.S. 229 (1977).

[18] 120 S. Ct. at 2558. Justice O'Connor notes that the plurality bases its reasoning for this point on the Court's precedents that have allowed government aid to be utilized to access religious instruction, specifically *Witters v. Washington*, 474 U.S. 481 (1983), and *Zobrest v. Catalina Foothills Sch. Dist.*, 509

education grant program was "secular, neutral and non-ideological," supplemented funds from private sources, and was expressly prohibited from being used for religious instruction purposes.[19]

Taking all of these considerations together, it is possible to construct a regime under which faith-based organizations may receive government social service grants in a manner consistent with the latest interpretation of the Establishment Clause.[20] This regime is evidenced in the previously enacted charitable choice laws and in the pending Community Solutions Act, H.R.7. The eligibility criteria for receiving a grant are religion neutral. The grant program serves the secular purpose of providing social welfare services to needy individuals. The grant funds are expressly prohibited from being "expended for sectarian worship, instruction or proselytization." And Justice O'Connor's sophisticated "objective observer" would not believe that government support for the faith-based provider under this legislation constituted the endorsement of the particular religion.[21] Moreover, the bill's accounting and auditing requirements are a safeguard against the diversion of funds for religious purposes, as well as an appropriate

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U.S. 1 (1993). O'Connor correctly notes that those cases relied heavily on the "understanding that the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use," 120 S. Ct. at 2558, as opposed to a per-capita, direct aid program at issue in *Helms*. With regard to this issue in this context of direct aid to faith-based social service agencies, *see below* at note 22.

[19] 120 S. Ct. at 2569.

[20] Of course, *Mitchell v. Helms* and the long line of school/religion cases that came before it pose Establishment Clause questions squarely in the area of K-12 education, where the Court has been most sensitive to Establishment Clause concerns. It is quite plausible that an assessment of the constitutionality of charitable choice programs would employ more relaxed criteria than those discussed in the *Helms* opinion.

[21] H.R.7, §201(c)(3).states that the receipt of funds by a religious organization "is not and should not be perceived as an endorsement by the government of religion."

means of ensuring that public funds are expended for their specifically intended programmatic purposes.[22]

Free Exercise of Religion Considerations; For Program Beneficiaries

There are other safeguards in charitable choice laws that are not necessitated by the Establishment Clause, but by the Constitution's Free Exercise Clause – a feature of the First Amendment that ought to carry equal weight to the Establishment Clause but, for a variety of reasons, often seems forgotten – even by the Supreme Court.[23]

As members of a minority religion in this country, we in the Orthodox Jewish community are terribly sensitive to the issue of religious coercion in general, and certainly in situations where government support, albeit indirect, is involved. We believe government should bolster the "first freedom" of religious liberty at every opportunity. Thus, we would insist that there be adequate safeguards to prevent any eligible beneficiary from being religiously coerced by a government-supported service provider. We believe that a requirement that each beneficiary be entitled to a readily accessible alternative service program and that each beneficiary be put on specific notice that they

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[22] These last two provisions lessen the need for the aid to flow on the basis of private and independent choices discussed above, note 18. At the same time, it is certainly the case that any "voucherized" mechanisms, as opposed to direct grants, for charitable choice will satisfy the conditions set out by Justice O'Connor in this regard. From a policy standpoint, however, a voucher-based approach has two principle shortcomings; it reinforces the non-neutral treatment of religious entities and it biases against newer participants and programs who cannot overcome start-up costs while waiting for vouchers to be presented by beneficiaries.

[23] Members of this Committee are well aware of the Court's recent apathy toward the Free Exercise Clause beginning with *Employment Division v. Smith*, 474 U.S. 872 (1990), resulting in the passage of the Religious Freedom Restoration Act, 42 U.S.C. §2000bb. "RFRA" was struck down by the Court in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997) to which congress, led by members of this Committee, responded last year with the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc.

are entitled to such an alternative is the proper method for dealing with this issue. Moreover, as a condition for receiving federal assistance, faith providers must agree not to refuse to serve an eligible beneficiary on the basis of their religion or their refusal to hold a particular religious belief. These safeguards are contained in H.R.7.[24]

Free Exercise of Religion Considerations; For Faith-Based Providers

There are also critical religious liberty considerations with regard to the protections afforded to religious organizations by the Constitution and federal civil rights laws. As you are already aware, the one that has received considerable attention from critics of the faith-based initiative is the thirty-seven year old federal law[25] permitting religious organizations to hire employees on the basis of religion.[26] A few basic points must be made with regard to this argument which, I believe, will set the record straight and refute the accusation that suggests that all American houses of worship are, in fact, houses of bigotry.

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[24] Some have suggested that allowing a beneficiary to opt out of the faith-related portions of the faith-based agency's program while being entitled to partake of the secular portions of the program is an appropriate safeguard. We believe this is insufficient. It would force beneficiaries to constantly assert their objection in contexts where that might be difficult, if not awkward. The best safeguard, in the view of the UOJCA, for the religious "objector" is to facilitate his or her participation in an acceptable alternative program.

[25] A recent survey conducted by the Pew Forum on Religion and Public Life noted broad support for the faith-based initiative overall, but concerns over permitting religious social service providers to receive government funds while continuing to possess the right to hire on the basis of religion. At no point, however, was any information offered to the respondents apprising them of the limited nature of the exemption, *see below*, or its creation as part of the Civil Rights Act of 1964. *See*, http://pewforum.org/events/0410/report/topline.php3.

[26] Section 702 of the Civil Rights Act of 1964, as amended 42 U.S.C. §2000e-1, provides in relevant part: "This subchapter 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."

As the members of this Committee are well aware, the Civil Rights Act of 1964 is the great bulwark against objectionable acts of discrimination and Title VII of that Act bans discrimination in employment on the basis of race, ethnicity, gender, religion and national origin. It was the very same architects of modern civil rights law who created a narrow exemption in the 1964 Act permitting churches, synagogues and all other religious organizations to make hiring decisions on the basis of religion.[27]

It would be absurd, to say the least, to suggest that a Catholic parish could be subjected to a federal lawsuit if it refused to hire a Jew for its pulpit. In 1972, still the heyday of civil rights reforms, Congress expanded the statutory exemption to apply to virtually all employees of religious institutions, whether they serve in clergy positions or not. The Free Exercise Clause demands this broad protection, and in 1987, the Supreme Court unanimously upheld the Title VII exemption as constitutional.[28]

This well-established law has now become a central feature of the opposition to charitable choice; so much so that the interest groups who have joined together to fight charitable choice over the last few years have called themselves the "Coalition Against

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[27] Religious institutions remain bound by prohibitions against employment discrimination on the basis of race, ethnicity and the like.

[28] *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987). The majority opinion assumed only "for the sake of argument" that the §702 exemption as enacted in 1964, prior to its 1972 expansion by congress, was sufficient to meet the requirements of the Free Exercise Clause, 483 U.S. at 336, while Justice Brennan, joined by Justice Marshall, suggested that the broader exemption was also supported by Free Exercise requirements; he noted that "'[r]eligion included important communal events for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise][C]lause.'" 483 U.S. at 341, quoting Laycock, *Towards a General Theory of the Religion Clauses*, 81 Colum.L. Rev. 1373, 1389 (1981).

Religious Discrimination" and decry the fact that this initiative will "turn back the clock on civil rights."

In fact, what is happening here is savvy political gamesmanship, not substantive argument. These very same opponents have lost their argument for the strictest view of church-state separation in the courts and in Congress. After all, the charitable choice laws that I described earlier received bipartisan support in the face of their protestations. Thus, they have cast about for a more potent political argument, and have found it in invoking the evils of discrimination – something all Americans rightly oppose.

But the assumption underlying the opponents' assertion 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.

In fact, in the incredibly diverse and fluid society that is America 2001, religious groups are increasingly open and reflective of that diversity. There are now black Jews, Asian Evangelicals and white Muslims and these trends will only increase. This is because, at their core, religious groups are supposed to care not about where you come from or what you look like, only what you believe.[29] Religious institutions are thus compelled to ignore a person's heredity and champion his or her more transcendent characteristics.[30]

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[29] Secular groups that are ideologically driven – from liberal to conservative – function in a similar manner and enjoy an analogous constitutional protection for their hiring practices under the freedom of expressive association, also recognized under the First Amendment. Thus, even though Planned Parenthood may receive government grants, it cannot be compelled to hire pro-lifers.

[30] Of course, one cannot overlook the fringe groups such as the Church of the Creator and Aryan Church that propound a "theology" of racial and ethnic hatred and hold themselves out as "religions."

Those who appreciate the role of religious institutions in America should resist the easy equation the opponents assert, for its implications are dangerous indeed. After all, a defining element of the civil rights era was a commitment to root out invidious forms of discrimination not only in public institutions, but in the private sector – at lunch counters, in motel rooms and on bus lines. If faith institutions' hiring practices are so terribly wrong, are we not obligated to oppose them however we can irrespective of whether they receive federal funds? If, as the critics suggest, your church and my synagogue are such bigoted institutions, why do we offer them the benefit of tax-exempt status? Why do we afford their supporters tax deductions for their contributions? Why do we hallow their role in society as we do?

There are other arguments to be made against the faith-based initiative over which we may reasonably differ. Some people may hold fast to a vision of stricter separation of church and state -- even in the face of Supreme Court decisions to the contrary, while others may believe that the best way to serve Americans in need is solely through government agencies. We ought to vigorously debate these points as we have at this hearing. But slandering our sacred institutions with the charge of bigotry is unacceptable and must be ruled out of bounds.

They are despicable and give mainstream religions a bad name. But we don't generally make our public policy decisions on the basis of the radical extremist; we afford everyone the freedom of speech even though it will benefit the neo-Nazi or the flag-burner. This approach should not be abandoned here.

A second rejoinder, with regard to the specific goals of this policy initiative, is important as well. If the goal of charitable choice is to leverage the unique capacities of faith-based providers with government grants, to force them to dilute their religious character is the same as saying you don't believe in the whole enterprise.[31] The critics, obviously do not, but we believe that, carefully considered and properly structured, expanding the partnership between government and faith-based social service agencies is a critical component of a strategy to bring new solutions to America's social welfare challenges.

Conclusion

At the end of the day, the debates surrounding the faith-based initiative come down to questions of cynicism versus hope. The cynics see a slippery slope down every path; some see deeply religious people as untrustworthy – incapable of following regulations and perpetually plotting to proselytize their neighbor, while others see every civil servant as a regulator lacking restraint just waiting to emasculate America's religious institutions.

But if we set our minds -- and our hearts -- to it, we can find a way to be more hopeful. After all, what this is really about is bringing some new hope and some real help to people in need through a new avenue.

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[31] Again in Vice President Gore's words, "the religious character [of these organizations] that is so often the key to their effectiveness." Appendix 2. *See also*, Jeffrey Rosen, *Religious Rights*, The New Republic, February 26, 2001.

APPENDIX 1

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release May 21, 2001

REMARKS BY THE PRESIDENT
IN COMMENCEMENT ADDRESS
University of Notre Dame
Notre Dame, Indiana

2:48 P.M. EST

THE PRESIDENT: Thank you, Father Malloy. Thank you all for that warm welcome. Chairman McCartan, Father Scully, Dr. Hatch, Notre Dame trustees, members of the class of 2001. (Applause.) It is a high privilege to receive this degree. I'm particularly pleased that it bears the great name of Notre Dame. My brother, Jeb, may be the Catholic in the family -- (laughter) -- but between us, I'm the only Domer. (Laughter and applause.)

I have spoken on this campus once before. It was in 1980, the year my Dad ran for Vice President with Ronald Reagan. I think I really won over the crowd that day. (Laughter.) In fact, I'm sure of it, because all six of them walked me to my car. (Laughter.)

That was back when Father Hesburgh was president of this university, during a tenure that in many ways defined the reputation and values of Notre Dame. It's a real honor to be with Father Hesburgh, and with Father Joyce. Between them, these two good priests have given nearly a century of service to Notre Dame. I'm told that Father Hesburgh now holds 146 honorary degrees. (Applause.) That's pretty darn impressive, Father, but I'm gaining on you. (Laughter.) As of today, I'm only 140 behind. (Laughter.)

Let me congratulate all the members of the class of 2001. (Applause.) You made it, and we're all proud of you on this big day. I also congratulate the parents, who, after these years, are happy, proud -- and broke. (Laughter and applause.)

I commend this fine faculty, for the years of work and instruction that produced this outstanding class.

And I'm pleased to join my fellow honorees, as well. I'm in incredibly distinguished company with authors, executives, educators, church officials and an eminent scientist. We're sharing a memorable day and a great honor, and I congratulate you all. (Applause.)

Notre Dame, as a Catholic university, carries forward a great tradition of social teaching. It calls on all of us, Catholic and non-Catholic, to honor family, to protect life in all its stages, to serve and uplift the poor. This university is more than a community of scholars, it is a community of conscience -- and an ideal place to report on our nation's commitment to the poor, and how we're keeping it.

In 1964, the year I started college, another President from Texas delivered a commencement address talking about this national commitment. In that speech, President Lyndon Johnson issued a challenge. He said, "This is the time for decision. You are the generation which must decide. Will you decide to leave the future a society where a man is condemned to hopelessness because he was born poor? Or will you join to wipe out poverty in this land?"

In that speech, 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. Yet, there were also some consequences that no one wanted or intended. The welfare entitlement became an enemy of personal effort and responsibility, turning many recipients into dependents. The War on Poverty also turned too many citizens into bystanders, convinced that compassion had become the work of government alone.

In 1996, welfare reform confronted the first of these problems, with a five-year time limit on benefits, and a work requirement to receive them. Instead of a way of life, welfare became an offer of temporary help -- not an entitlement, but a transition. Thanks in large part to this change, welfare rolls have been cut in half. Work and self-respect have been returned to many lives. That is a tribute to the Republicans and democrats who agreed on reform, and to the President who signed it: President Bill Clinton. (Applause.)

Our nation has confronted welfare dependency. 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. This is a challenge to my administration, and to each one of you. We must meet that challenge -- because it is right, and because it is urgent.

Welfare as we knew it has ended, but poverty has not. When over 12 million children live below the poverty line, we are not a post-poverty America. Most states are seeing the first wave of welfare recipients who have reached the law's five-year time limit. The easy cases have already left the welfare rolls. The hardest problems remain -- people with far fewer skills and greater barriers to work. People with complex human

problems, like illiteracy and addiction, abuse and mental illness. We do not yet know what will happen to these men and women, or to their children. But we cannot sit and watch, leaving them to their own struggles and their own fate.

There is a great deal at stake. In our attitudes and actions, we are determining the character of our country. When poverty is considered hopeless, America is condemned to permanent social division, becoming a nation of caste and class, divided by fences and gates and guards.

Our task is clear, and it's difficult: we must build our country's unity by extending our country's blessings. We make that commitment because we are Americans. Aspiration is the essence of our country. We believe in social mobility, not social Darwinism. We are the country of the second chance, where failure is never final. And that dream has sometimes been deferred. It must never be abandoned.

We are committed to compassion for practical reasons. When men and women are lost to themselves, they are also lost to our nation. When millions are hopeless, all of us are diminished by the loss of their gifts.

And we're committed to compassion for moral reasons. Jewish prophets and Catholic teaching both speak of God's special concern for the poor. This is perhaps the most radical teaching of faith -- that the value of life is not contingent on wealth or strength or skill. That value is a reflection of God's image.

Much of today's poverty has more to do with troubled lives than a troubled economy. And often when a life is broken, it can only be restored by another caring, concerned human being. The answer for an abandoned child is not a job requirement -- it is the loving presence of a mentor. The answer to addiction is not a demand for self-sufficiency -- it is personal support on the hard road to recovery.

The hope we seek is found in safe havens for battered women and children, in homeless shelters, in crisis pregnancy centers, in programs that tutor and conduct job training and help young people when they happen to be on parole. All these efforts provide not just a benefit, but attention and kindness, a touch of courtesy, a dose of grace.

Mother Teresa said that what the poor often need, even more than shelter and food -- though these are desperately needed, as well -- is to be wanted. And that sense of belonging is within the power of each of us to provide. Many in this community have shown what compassion can accomplish.

Notre Dame's own Lou Nanni is the former director of South Bend's Center for the Homeless -- an institution founded by two Notre Dame professors. It provides guests with everything from drug treatment to mental health service, to classes in the Great Books, to preschool for young children. Discipline is tough. Faith is encouraged, not required.

Student volunteers are committed and consistent and central to its mission. Lou Nanni describes this mission as "repairing the fabric" of society by letting people see the inherent "worth and dignity and God-given potential" of every human being.

Compassion often works best on a small and human scale. it is generally better when a call for help is local, not long distance. Here at this university, you've heard that call and responded. It is part of what makes Notre Dame a great university.

This is my message today: there is no great society which is not a caring society. And any effective war on poverty must deploy what Dorothy Day called "the weapons of spirit."

There is only one problem with groups like South Bend's Center for the Homeless -- there are not enough of them. It's not sufficient to praise charities and community groups, we must support them. And this is both a public obligation and a personal responsibility.

The War on Poverty established a federal commitment to the poor. The welfare reform legislation of 1996 made that commitment more effective. For the task ahead, we must move to the third stage of combatting poverty in America. Our society must enlist, equip and empower idealistic Americans in the works of compassion that only they can provide.

Government has an important role. It will never be replaced by charities. My administration increases funding for major social welfare and poverty programs by 8 percent. Yet, government must also do more to take the side of charities and community healers, and support their work. We've had enough of the stale debate between big government and indifferent government. Government must be active enough to fund services for the poor -- and humble enough to let good people in local communities provide those services.

So I have created a White House Office of Faith-based and Community Initiatives. (Applause.) Through that office we are working to ensure that local community helpers and healers receive more federal dollars, greater private support and face fewer bureaucratic barriers. We have proposed a "compassion capital fund," that will match private giving with federal dollars. (Applause.)

We have proposed allowing all taxpayers to deduct their charitable contributions -- including non-itemizers. (Applause.) This could encourage almost $15 billion a year in new charitable giving. My attitude is, everyone in America -- whether they are well-off or not -- should have the same incentive and reward for giving.

And we're in the process of implementing and expanding "charitable choice" -- the principle, already established in federal law, that faith-based organizations should not suffer discrimination when they compete for

contracts to provide social services. (Applause.) Government should never fund the teaching of faith, but it should support the good works of the faithful. (Applause.)

Some critics of this approach object to the idea of government funding going to any group motivated by faith. But they should take a look around them. Public money already goes to groups like the Center for the Homeless and, on a larger scale, to Catholic Charities. Do the critics really want to cut them off? Medicaid and Medicare money currently goes to religious hospitals. Should this practice be ended? Child care vouchers for low income families are redeemed every day at houses of worship across America. Should this be prevented? Government loans send countless students to religious colleges. Should that be banned? Of course not. (Applause.)

America has a long tradition of accommodating and encouraging religious institutions when they pursue public goals. My administration did not create that tradition -- but we will expand it to confront some urgent problems.

Today, I am adding two initiatives to our agenda, in the areas of housing and drug treatment. Owning a home is a source of dignity for families and stability for communities -- and organizations like Habitat for Humanity make that dream possible for many low income Americans. Groups of this type currently receive some funding from the Department of Housing and Urban Development. The budget I submit to Congress next year will propose a three-fold increase in this funding -- which will expand homeownership, and the hope and pride that come with it. (Applause.)

And nothing is more likely to perpetuate poverty than a life enslaved to drugs. So we've proposed $1.6 billion in new funds to close what I call the treatment gap -- the gap between 5 million Americans who need drug treatment, and the 2 million who currently receive it. We will also propose that all these funds -- all of them -- be opened to equal competition from faith-based and community groups.

The federal government should do all these things; but others have responsibilities, as well -- including corporate America.

Many corporations in America do good work, in good causes. But if we hope to substantially reduce poverty and suffering in our country, corporate America needs to give more -- and to give better. (Applause.) Faith-based organizations receive only a tiny percentage of overall corporate giving. Currently, six of the 10 largest corporate givers in America explicitly rule out or restrict donations to faith-based groups, regardless of their effectiveness. The federal government will not discriminate against faith-based organizations, and neither should corporate America. (Applause.)

In the same spirit, I hope America's foundations consider ways they

may devote more of their money to our nation's neighborhood and their helpers and their healers. I will convene a summit this fall, asking corporate and philanthropic leaders throughout America to join me at the White House to discuss ways they can provide more support to community organizations -- both secular and religious.

Ultimately, your country is counting on each of you. Knute Rockne once said, "I have found that prayers work best when you have big players." (Laughter and applause.) We can pray for the justice of our country, but you're the big players we need to achieve it. Government can promote compassion, corporations and foundations can fund it, but the citizens -- it's the citizens who provide it. A determined assault on poverty will require both an active government, and active citizens.

There is more to citizenship than voting -- though I urge you to do it. (Laughter.) There is more to citizenship than paying your taxes -- though I'd strongly advise you to pay them. (Laughter.) Citizenship is empty without concern for our fellow citizens, without the ties that bind us to one another and build a common good.

If you already realize this and you're acting on it, I thank you. If you haven't thought about it, I leave you with this challenge: serve a neighbor in need. Because a life of service is a life of significance. Because materialism, ultimately, is boring, and consumerism can build a prison of wants. Because a person who is not responsible for others is a person who is truly alone. Because there are few better ways to express our love for America than to care for other Americans. And because the same God who endows us with individual rights also calls us to social obligations.

So let me return to Lyndon Johnson's charge. You're the generation that must decide. Will you ratify poverty and division with your apathy -- or will you build a common good with your idealism? Will you be the spectator in the renewal of your country -- or a citizen?

The methods of the past may have been flawed, but the idealism of the past was not an illusion. Your calling is not easy, because you must do the acting and the caring. But there is fulfillment in that sacrifice, which creates hope for the rest of us. Every life you help proves that every life might be helped. The actual proves the possible. And hope is always the beginning of change.

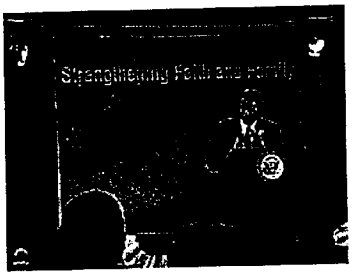
Thank you for having me, and God bless. (Applause.)

END
3:10 P.M. EST

APPENDIX 2

REMARKS AS PREPARED FOR DELIVERY BY VICE PRESIDENT AL GORE ON THE ROLE OF FAITH-BASED ORGANIZATIONS

Monday, May 24, 1999



I want to talk today about a dramatic transformation in America. It's one that you and your families are already a part of.

This transformation is a quiet one -- and a good one. It is a movement that is entirely about solutions. And it is sweeping from home to home and neighbor to neighbor, right now in America.

In spite of the cultural soul sickness we've confronted recently, there is a goodness in Americans that, when mobilized, is more than a match for it. Americans are still the most decent people on earth -- and are actually growing in service and in selflessness. America has the highest level of religious belief and observance of any advanced nation. Americans' volunteer work has doubled in twenty years, even as more women -- the traditional mainstay of volunteer groups -- have moved into the workplace. Both adults and teenagers are just as likely to go to church or synagogue today as their counterparts were twenty years ago. And in many ways, our public policies have shown the face of that strong and growing commitment to decency: ever-fewer Americans tolerate bigotry and discrimination, and our journey as a society reflects that.

This hunger for goodness manifests itself in a newly vigorous grassroots movement tied to non-profit institutions, many of them faith-based and values-based organizations. A church's soup kitchen. A synagogue's program to help battered women. A mosque's after-school computer center that keeps

teenagers away from gangs and drugs.

It's commonplace to say that people are turned off to politics. This transformation shows that in fact people are not turned off to politics - to organized community action; rather, they are turned off to too many of the ways they have seen Washington work.

What many people are struggling to find is the soul of politics, to use Jim Wallis' words. They are living their politics, by deciding to solve the problems they see, and by going out into the streets of their communities and serving those left out and left behind. People are engaged in the deeply American act of not waiting for government to deal with the problems on their own doorsteps. Instead, they are casting a vote for their own wise hearts and strong hands to take care of their own.

I came here today to say this: the moment has come for Washington to catch up to the rest of America. The moment has come to use the people's government to better help them help their neighbors.

Ordinary Americans have decided to confront the fact that our severest challenges are not just material, but spiritual. Americans know that the fundamental change we need will require not only new policies, but more importantly a change of both our hearts and our minds. If children are not taught right from wrong, they behave chaotically; if individuals don't do what's right by their kids, no new government programs will stanch that decay. Whether they are religious or not, most Americans are hungry for a deeper connection between politics and moral values; many would say "spiritual values." Without values of conscience, our political life degenerates. And Americans profoundly -- rightly -- believe that politics and morality are deeply interrelated. They want to reconnect the American spirit to the body politic.

For too long, national leaders have been trapped in a dead end debate. Some on the right have said for too long that a specific set of religious values should be imposed, threatening the founders' precious separation of church and state. In contrast, some on the left have said for too long that religious values should play no role in addressing public needs. These are false choices: hollow secularism or right-wing religion. Both positions are rigid; they are not where the new solutions lie. I believe strongly in the separation of church and state. But freedom of religion need not mean freedom from religion. There is a better way.

My wife Tipper practices her faith and sees its power through her work with homeless people who come to Christ House, in Washington, D.C. Many at Christ House are struggling with substance abuse and mental health issues -- but they often suffer from a feeling of spiritual emptiness as well. So Christ House does more than provide shelter and medical care. It creates a loving, trusting atmosphere that helps address the issues that led to homelessness in the first place. Its founder tells the story of a reporter who spent a week there, interviewing the patients. At the end of her time, she said: "What amazed me is that for all of the medical treatment, I didn't hear anyone talking about putting on bandages, or taking medication." Instead, the reporter said, they talk of "a much deeper type of healing."

I have seen the transformative power of faith-based approaches through the national coalition I have led to help people move from welfare to work - the Coalition to Sustain Success.

In San Antonio I met a woman named Herlinda. She had given up on finding work, and had gone on welfare. She had so many challenges to face. English was her second language. She didn't think she had the skills to hold a job. And she had begun to conclude that maybe she didn't deserve one. Then she signed up for job training at the Christian Women's Job Corps, which is part of our Coalition.

There, she met a woman who mentored her through prayer and Bible study, and she soon began to regain her self-confidence. Faith gave her a new feeling of self-worth, of purpose – something no other program, no matter how technically sophisticated, could give her. When I met her, she told me that for the first time in years, she had applied for a position at Wal-Mart. Then she looked me in the eye, and said with pride, "I know I'll get the job."

And she did. In fact, Herlinda was recently honored as employee of the month in her workplace. In San Francisco, I met a woman named Vicki. Because of a drug addiction, she had lost custody of her two children, lost her job, and gone on welfare. She had tried without success to beat her addiction. Then she joined a faith and values-based program that was part of our Coalition, and finally gained the inner strength to become clean. She regained custody of her children. And she has kept a full-time job. When I asked what she could do for others in the same bind, she said, "unfortunately, nothing -- unless they want to change first." For Vicki, it was faith that finally enabled her to pry open the vise grip of drug addiction.

This better way is working spectacularly. From San Antonio to San Francisco, from Goodwill in Orlando to the Boys and Girls Club in Des Moines – I have seen the difference faith-based organizations make.

Tipper and I also began to learn about this better way at our annual "Family Reunion" policy conferences, where we saw how the power of love can reconnect fathers with children they had abandoned, and how that surrendering commitment to the father-child bond has a transforming impact on men more powerful than any program ever tried. I've also seen this approach used to clean up the environment by many local congregations working in their own communities, and working on national and global issues under the umbrella of the Religious Partnership for the Environment.

Leaders of the new movement of faith-based organizations call it "the politics of community." In this new politics, citizens take local action, based on their churches, synagogues, and mosques, but reaching out to all -- to do what all great religions tell good people do: visit the prisoners, help the orphans, feed and clothe the poor. The men and women who work in faith- and values-based organizations are driven by their spiritual commitment; to serve their God, they have sustained the drug-addicted, the mentally ill, the homeless; they have trained them, educated them, cared for them, healed them. Most of all, they have done what government can never do; what it takes God's help, sometimes, for all of us to manage; they have loved them -- loved their neighbors, no matter how beaten down, how hopeless, how despairing. And good programs and practices seem to follow, borne out of that compassionate care.

Here in Atlanta at the Salvation Army's Adult Rehabilitation Center, I see in you the powerful role of faith in nurturing a change of consciousness. All of the men here who are recovering from substance abuse start the day with a morning devotion period. Many of them work right here during the day refinishing and reupholstering furniture, doing the work of the Salvation Army. Captain Guy Nickum, who runs the Center, says: "Our belief in God is

in all of the steps of recovery." That belief is giving new hope to many of the recovering people who are with us today.

That is why this transformation is different in many ways from what has come before. Some past national political leaders have asked us to rely on a fragile patchwork of well-intentioned volunteerism to feed the hungry and house the homeless. That approach, optimistic though it was, was not adequate for the problems too many Americans face. It left too many American children behind to suffer. If all the private foundations in America gave away all their endowments, it would cover about one year of our current national commitment to meeting social challenges. In contrast, faith- and values-based organizations show a strength that goes beyond "volunteerism." These groups nationwide have shown a muscular commitment to facing down poverty, drug addiction, domestic violence and homelessness. And when they have worked out a partnership with government, they have created programs and organizations that have woven a resilient web of life support under the most helpless among us.

Reverend Eugene Rivers, as I read recently in an article, has been widely celebrated for helping to take back the worst neighborhoods of Boston through faith. He remembers a hardened gangster telling him: "I'm there when Johnny goes out for a loaf of bread. I'm there, you're not. I win, you lose. It's all about being there." But Reverend Rivers resolved that he would be there, too. He was, and he faced down the gangs.

A second difference is that they give another kind of help than the help given in government programs, no matter how dedicated the employees. To the workers in these organizations, that client is not a number, but a child of God. Those on the front lines of our most intractable battles are surprised to discover how concrete a difference that makes. "You couldn't function effectively without ministers in Boston," says William J. Bratton, who was the city's police commissioner, talking to a reporter about the clergy who saved inner-city kids from gangs.

Partly because of Reverend Rivers and his fellow faith leaders, Boston went 18 months without losing a single child to gun violence.

These workers are motivated more by service than institutional allegiance, so they try to get every penny to go to alleviating suffering rather than upholding a program for the sake of professional credentialism. Unlike bureaucracies, which can sometimes be self-perpetuating, the churches want their helping programs to work so well that they become obsolete. Traditional "helping" often gives material aid to the poor or hungry -- and that's all. FBO outreach gives food, shelter -- but also the one-to-one caring, respect and commitment that save lives even more effectively than just a nourishing meal or a new suit of clothes.

A third difference is that this kind of activism changes the volunteer as much as the one being helped. This work, then, feeds physical hunger in the needy even as it feeds a spiritual hunger in those ordinary Americans who are showing their dedication to a better world in this way.

A fourth, most important difference is that the solutions and programs are more likely to work because they are crafted by people actually living in the neighborhood they are serving, or by people who came from that world.

Those in the movement of FBO's, as they have put it themselves, are "waging peace." They took responsibility to change themselves and their own homes

before asking government or groups they disagreed with to change. And all the great religions teach that responsibility begins at home -- with oneself. These little acts of kindness so many Americans are building into their daily or weekly lives are not trivial; they add up to sweeping social change.

As Mother Teresa put it, "Plant the act, reap the habits. Plant the habits, reap the virtue. Plant the virtue, reap the character. Plant the character, reap the destiny."

I am here today because I believe government should play a greater role in sustaining this quiet transformation – not by dictating solutions from above, but by supporting the effective new policies that are rising up from below.

And I believe the lesson for our nation is clear: in those specific instances where this approach can help us meet crushing social challenges that are otherwise impossible to meet – such as drug addiction and gang violence – we should explore carefully-tailored partnerships with our faith community, so we can use the approaches that are working best.

Today, I would like to propose concrete actions to clear bureaucratic hurdles out of the way of these good men and women who are helping to solve our problems. In place of these hurdles, I propose a New Partnership.

The 1996 welfare reform law contained a little-known provision called Charitable Choice. It says, simply, that states can enlist faith-based organizations to provide basic welfare services, and help move people from welfare to work.

As long as there is always a secular alternative for anyone who wants one, and as long as no one is required to participate in religious observances as a condition for receiving services, faith-based organizations can provide jobs and job training, counseling and mentoring, food and basic medical care. They can do so with public funds – and without having to alter the religious character that is so often the key to their effectiveness.

I believe we should extend this carefully tailored approach to other vital services where faith-based organizations can play a role – such as drug treatment, homelessness, and youth violence prevention.

Of course, any extension must be accompanied by clear and strict safeguards: government must never promote a particular religious view, or try to force anyone to receive faith. We must ensure that there is always a high-quality secular choice available. We must continue to prohibit direct proselytizing as part of any publicly-funded efforts. And we must establish the same clear accountability for results we would expect of anyone who does the public's business. But we must dare to embrace faith-based approaches that advance our shared goals as Americans.

There is a reason faith-based approaches have shown special promise with challenges such as drug addiction, youth violence, and homelessness. Overcoming these problems takes something more than money or assistance – it requires an inner discipline and courage, deep within the individual. I believe that faith in itself is sometimes essential to spark a personal transformation – and to keep that person from falling back into addiction, delinquency, or dependency.

Let us put the solutions that faith-based organizations are pioneering at the very heart of our national strategy for building a better, more just nation.

Many people in the faith-based organizations want their role to be not exemplary, but strategic; not to be merely a shining anecdote in a pretty story told by a politician, but to have a seat at the national table when decisions get made. Today I give you this pledge: if you elect me President, the voices of faith-based organizations will be integral to the policies set forth in my administration.

This focus on a New Partnership, which emerges from the voices of the leaders of the faith-based organizations, will invigorate civil society; it will empower faith-based and secular non-profits alike. Best of all, it will bring a whole new leadership into the political process: that of the community. We're not just talking about new mini-programs here, but about new strategies based on the grassroots efforts which are already working, with both government and business willing to offer substantial support.

This "politics of community" will be neither government doing everything, nor the churches and charities picking up the slack when government scales back. Rather, it will mean a new era of civil society collaboration. A politics of community can be strengthened when we are not afraid to make connections between spirituality and politics.

I believe we should also encourage more private support for faith-based organizations. Right now, it is common for employees to have their charitable contributions matched by their company, up to an annual limit. Rarely are faith-based programs approved for such matches, perhaps because we are just starting to realize the role they play. Or maybe it is the allergy to faith that is such a curious factor in much of modern society. Whatever the cause of their past reluctance, I call on the corporations of America to encourage and match contributions to faith- and values-based organizations.

For too long, faith-based organizations have wrought miracles on a shoestring. With the steps I'm proposing today, they will no longer need to depend on faith alone.

America's national identity is not shaped solely by our diverse faith traditions. But we are a people who believe that these traditions contribute to the formation of values with which we agree to live out our common lives together.

Our founders believed deeply in faith. They created the Bill of Rights in large measure to protect its free expression. One reason America is the most religious country on earth is precisely because of the church-state divide: people who are free to worship as they wish worship more freely.

Our founders also knew history. They could look back on centuries of religious war in Europe that tore nations apart. They resolved that religious war should never tear this nation apart – and the only way to do that was to allow religious freedom.

The history of the United States has proven our founders' wisdom. They believed – and I believe – that we can protect against the establishment of religion without infringing in any way on its free exercise. That belief is at the very heart of our Constitution. And we must keep on working to make it a reality in our public life.

Let me be clear: I believe very strongly in the separation of church and state – and the careful balance that has served us well since our founding. From the beginning of our history, refugees from religious persecution have come

here for safety. My mother's family, generations ago, were Huguenots, driven from their homeland because they were Protestants in a Catholic country. Others came here because they were Catholics in a Protestant country. Still others came with completely different faith traditions. All found a new home here in America.

The separation of church and state has been good for all concerned – good for religion, good for democracy, good for those who choose not to worship at all. It is our freedom from persecution, our absolute and unassailable choice of whether to and how to worship, that keeps religion strong.

In our founders' day, the greatest need was to protect believers of one faith from religious coercion by others. Today, we also need to ensure that believers of all faiths are free to engage in national dialogue and community action -- without feeling that they must hide their religious beliefs.

Grassroots change is now driving the best changes in our shrinking world. The Berlin wall fell, South Africa began its healing, Northern Ireland is laying down its arms. These great changes did not come about primarily because of governments or individual world leaders; but because of lasting change in heart after heart of ordinary people willing to take the leap of faith of seeing the enemy as neighbor, as family.

Ordinary Americans involved with faith-based organizations have all done something just as extraordinary: they each decided that one person can make a difference. The Jewish tradition says, if you save one life, it is as if you have saved a whole world.

Jesus said that the Kingdom of God is within us. I believe that means in part that in our hearts, we already know the way it is supposed to be; we already know what's right. The way it is supposed to be, we already know, has not even one child crying from hunger. Not one old person left uncared-for. We know the way it is supposed to be -- and those at the forefront of the faith- and values-based organizations movement have decided to be true day after day to the way it is supposed to be.

For, after all, what are peace and prosperity really for? Prosperity is a blessing, and we are grateful for it. But there is a hunger that goes even deeper than the hunger for material security. Prosperity can build a million bigger garages; but it can also create institutions in which the human spirit can flourish.

Americans are creating those now in their own communities. Through their efforts we are becoming an America which is not just better off but better -- where we are serving as I believe God meant us to -- as a light to this ever-shrinking world.

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