VIII

Charitable Choice: The Law As It Is and May Be

Marc D. Stern

The impression is abroad that when the law is clear, government agencies comply. Conversely, it is popularly assumed that if government agencies routinely engage in a practice touching on constitutional concerns, the practice must be constitutional. Neither proposition is true. A third, related, commonly held misconception is equally untrue. After 50 years of constitutional litigation over the Establishment Clause, one might be excused for thinking that the meaning of the clause was settled. However, the boundaries of what is and is not permissible are not at all well marked. Part of the debate over charitable choice stems from the Supreme Court's own re-examination of its traditional interpretation of the Clause as a ban on aid to religious institutions, no matter what competing secular institutions are funded. Three, perhaps four, current free standing Justices would jettison that no-aid rule in favor of a rule of equal treatment of religious and secular institutions.

The debate over charitable choice–the idea that government should subsidize sectarian agencies to provide social services even if the services are profoundly sectarian is a classic instance of these three interrelated axioms.[1] Some constitutional rules are clear, but ignored by government agencies. Some scenarios lie in between existing decisions. Other times government gives no thought to the Constitution, but does what seems popular, politically desirable, or expedient. The unexamined practice is then bootstrapped into an argument in favor of constitutionality.

The legislation most commonly referred to as charitable choice is a portion of the 1996 welfare reform law, more properly known as the *Temporary Assistance to Needy Families Act* (TANF). That provision applies only to certain programs, notably welfare to work programs funded under TANF. (More recently, charitable choice provisions were included in the *Children's Health Act*[2]; the *Community Renewal Tax Relief Act of 2000* [3] and the *Community Services*

1 The phrase "non-sectarian" is sometimes used to describe any pan-Protestant activity, so long as there is no preference for any particular Protestant denomination. More broadly, it means a practice acceptable to all (or most) Christians, or even most in the Judeo-Christian tradition. None of these meanings is the equivalent of secular for constitutional purposes.

2 P.L.106 - 310, § 1955, 114 Stat. 1212. Unlike TANF, this section requires notice to participants about alternative providers.

3 P.L. 106 - 554.

Block Grants of 1998.[4] As will be noted, President Clinton issued a statement when signing the *Children's Health Act* indicating a narrower compass for charitable choice than intended by its congressional sponsors, particularly Senator Ashcroft.

The term charitable choice reflects the view that beneficiaries should have a choice whether to utilize government funded social services programs at secular or religious providers. (The name is something of a misnomer since the legislation in fact does not guarantee any such right.) These provisions authorize states to provide services authorized by the statute through private contractors. The legislation goes on to say that the state may contract directly with private providers or may issue vouchers to participants, enabling them to secure approved services. So far vouchers appear not to have been a major part of charitable choice programs. Absent a voucher program, participants will have only such choices as the government makes available.

Charitable choice provisions go on to provide that religious organizations can participate in both voucher and direct grant programs on the same terms as other organizations, provided the assistance is consistent with the Establishment Clause. The Act does not explicitly prohibit *more* favorable treatment of religious institutions. In particular, religious organizations can retain their organizational form without government interference. This provision was designed to forestall the need for houses of worship to set up separate, nominally secular, corporations as a prerequisite to receiving government grants.

Religious contractors are protected from being required to remove religious symbols from their premises. Moreover, religious organizations can receive aid and retain their exemption from the anti-religious discrimination provision of the employment discrimination laws.[5] This provision generated the most significant political opposition to charitable choice, and remains particularly controversial with civil rights groups who object to any weakening of the anti-discrimination principle. TANF also provides for limits on federal audits of religious organizations that establish segregated accounts for federal funds. Organizations may not use federal funds to support "sectarian worship, instruction, or proselytization."

The Act confers limited rights on beneficiaries. No one may be forced to attend a religious program to which they object. If a recipient objects to participation in a religious program, she must be offered an alternative program, equally accessible and of the same value, within a reasonable time. Nothing in TANF requires that beneficiaries be notified of this right, although some of

4 42 U.S.C. § 9920.

5 The lower courts have divided on whether employers taking governmental funds can invoke a provision of the anti-employment discrimination laws permitting religious organizations to engage in religious discrimination. There is also some question whether a recipient of tax funds may constitutionally discriminate in employment. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (White, J., dissenting).

the later charitable choice programs do require such notice. No participant may be denied admission to a federally funded program on the basis of his or her religion or religious belief, nor may a participant be coerced to "actively participate" in a religious practice. The Act does not explain whether mandatory but passive attendance at a religious service is considered "active participation in a religious practice."

As noted, similar provisions are now incorporated in the Children's Health Act of 2000[6], Community Renewal Tax Relief Act, and the Community Services Block Grant Program.[7] In addition, several federal programs for the homeless specifically allow for participation by religious organizations, although these do not spell out any special rights or limitations. It can be expected that more efforts to broaden charitable choice will be forthcoming in the 107th Congress, probably seeking to apply it to all federal programs. Several states, notably Indiana, Florida and Wisconsin, have passed general charitable choice laws.

Charitable choice is complicated by the fact that the universe of religious social services providers is so large, diverse and diffuse, that the term covers a wide range of religious providers. Various Federations of Jewish Philanthropies are religiously affiliated (though in the case of Jews it is always difficult to tell whether one speaks of a religious or ethnic group). Services provided by Jewish Federations are generally secular, frustratingly so for some Jews. Catholic Charities is largely the same (although this varies from diocese to diocese), with the exception of matters touching on abortion and contraception. Yet identical government funded programs run by institutions affiliated with other faiths (or even Judaism or Catholicism, but under different institutional auspices) will be laden with sectarian perspectives. The differences on the ground have profound legal implications, but the entire range of providers fit comfortably under the rubric "religious (sectarian) social services".

Likewise, religious commitments can range from a passive, non-coercive, religious symbol on a wall to mandatory attendance at a sermon prior to a government funded meal. (Imagine having to listen to a sermon on an empty stomach!) In still other cases, the religious component is a requirement to accept religious propositions as a prerequisite for admission (*e.g.*, an openness to accepting Jesus as a condition for entry into a drug rehabilitation program)[8]. In some programs, these religious references will be incidental. In others, they will be pervasive. Any of these factors might or might not make a program "religious" for constitutional purposes, but they are too often indiscriminately lumped together when discussing "charitable choice."

Houses of worship (*e.g.* churches, synagogues, mosques and temples) are

6 P.L. 106-310 (2000).

7 42 U.S.C. § 9920, adopted in 1998.

8 *Cf. Wazeerud-Din v. Good Will Home Industries*, 325 N.J. App. 3, 737 A.2d 683 (1999). The program at issue in that case was not government-funded.

what lawyers call pervasively sectarian organizations, that is, institutions whose every activity is permeated with religious practice. Under current law, they are presumably ineligible for government aid because religion permeates every aspect of their activity. Nevertheless, it is a matter of common knowledge—and in this case, it is even true—that houses of worship run fully secular social service programs at government expense (feeding programs for the homeless or GED preparation programs are common examples). These programs are as secular as government run programs, and have not been challenged as unconstitutional. The rule against aiding pervasively sectarian agencies is sometimes observed by requiring pervasively sectarian institutions to create separate secular corporations, a requirement charitable choice legislation would dispense with. Sometimes, it is simply ignored.

Religious institutions operate social service programs for a variety of motives, but often only because they are concerned with the public weal. Churches also provide social services because they are genuinely committed to helping serve the less fortunate as a matter of religious duty. This subjective religious intent is irrelevant to the constitutionality of government aid directed at such programs. But what of the house of worship that conceives of social services as a means of religious outreach, to save souls, i.e., the Chabad Movement or the Salvation Army? An answer to that question requires a look at history.

History of Religious Involvement

American religious institutions have a long history of social involvement. For Protestant churches, the development was natural, given Protestant hegemony over early American life, coupled with a theological view of man that insisted that social problems were a direct result of human depravity for which only religion could provide a cure. On this thesis, attacking distortions of the marketplace, empowering labor unions or imposing minimum wage laws would not cure social ills. Only religion could aid the poor by saving them from sin. Churches could, with some financial assistance, also serve the poor more cheaply than government by harnessing eager volunteers and utilizing existing church facilities. Then, as now, this was a powerful argument.

In the case of Jewish Federations and Catholic Charities, the creation of social welfare institutions dates to eras of large-scale immigration of fellow believers, who for a variety of reasons needed help in adjusting to their new American homes. In the 19th century, "public" government welfare programs were either non-existent or themselves so Protestant in character as to be unwelcoming and unacceptable to Catholics and Jews.

History of the Legal Dispute

As a practical matter, charitable choice came to the notice of the law in the mid-to-late 19th century. Disputes over the constitutional propriety of charitable choice occurred against the backdrop of the bitter battle over aid to Catholic parochial schools, a battle which paralleled, even preceded, the battle

over sectarian social services. The *contretemps* over aid to social welfare institutions appears not to have been as bitter as that over parochial schools. Perhaps this was because both Catholics and Protestants operated social welfare institutions eligible for government (state) funding, while only Catholics had significant numbers of parochial schools. Social welfare services are also less obviously ideologically driven than the education of the young. Protestants sought to block aid to parochial schools, urging that it was un-American to finance anything but public (i.e., Protestant) schools. To buttress that argument, they invoked substantial but not incontrovertible evidence that the Founders intended to prohibit government financing of religious education and instruction. Protestants were especially fearful of funding schools subject to the control of a Catholic Church, which was in the 19th century theologically opposed to the separation of church and state.[9] For their part, Catholics complained about the unfairness of being taxed to support public schools which were only thinly disguised Protestant schools, and then having to pay Catholic schools tuition to provide their children an acceptable education. They claimed to seek only an equal share of school funds, not the creation of a theocracy.

In the wake of the dispute over aid to parochial schools, many states adopted constitutional provisions against expending funds on any institution under control of a religious organization. (These are sometimes known as Blaine Amendments.) Some of these provisions were narrowly confined to education; others were broader, and prohibited all forms of aid to sectarian institutions.

In New York, Jews supported the Protestants on the parochial school aid question, and Catholics on the social welfare question. Apparently, Jews held the swing votes at the 1894 Constitutional Convention, because both propositions were written into law. New York strictly prohibits aid to parochial schools, but explicitly permits aid to sectarian social service providers. These provisions remain in effect.

State courts in the late 19th and early 20th centuries divided over the constitutionality[10] under state constitutions of funding social services through private sectarian providers. *Bennett v. City of La Grange*[11] invalidated a contract with the Salvation Army requiring the Army to "handle charitable cases" for a fixed monthly fee. The Georgia Supreme Court, without discussing the question of whether there was any religious content to, or discrimination in, the operation of the program, invalidated the contract:

> [W]hen the City of La Grange made the contract with the Salvation Army, by which the latter, a sectarian institution, assumed the care of the poor of that city, although at actual cost, this was

9 M. Stern, School Vouchers, "The Church-State Debate That Really Isn't," 31 *Connecticut Law Review* 977 (1999).

10 The Federal Constitution's Establishment Clause did not apply to the states until World War II. Because the role of the federal government in social services was relatively small until the New Deal, the issue of charitable choice did not often arise under the Federal Constitution.

11 153 Ga. 428, 112 S.E. 482 (1922).

> giving a great advantage and the most substantial aid to the Salvation Army in the prosecution of its benevolent and religious purposes. The giving of loaves and fishes is a powerful instrumentality in the successful prosecution of the work of a sectarian institution.[12]

The Nevada Supreme Court earlier reached a similar result in *State ex rel Nevada Orphan Asylum v. Hallock*,[13] invalidating *per diem* payments to a Catholic orphanage.[14] Illinois at first followed *Hallock* in *Cook County v. Chicago Industrial School for Girls*,[15] and did not allow subsidies to a sectarian child care institution. It later reversed ground, *Dunn v. Chicago Industrial School for Girls*,[16] holding that *per diem* payments to the same school for delinquent Catholic girls were constitutional, where the fees were less than the actual cost of providing care. In both schools, Catholic religious instruction was offered, and the instruction was under the management of members of the Catholic clergy. Admission was always limited to Catholics.

Other courts have expanded on the *Dunn* court's argument that there is no constitutional violation where the state pays less than the full cost of social services it would otherwise be obligated to provide. *Community Council v. Jordan*[17] and *Schade v. Allegheny County Institution*,[18] are leading modern expressions of this theory.

In *Community Council v. Jordan*, *supra*, a local government contracted with the Salvation Army to provide emergency relief services on nights and weekends. The contract called for the government to reimburse the Salvation Army for 40 percent of its expenditures for such services. The services were provided at a Salvation Army center, which had religious symbols displayed on the walls. Chapel services took place at the welfare center, but participation was voluntary, and conferred no substantial advantage on applicants.

The Arizona Supreme Court first rejected a strict no-aid theory–that is, the view that government may never subsidize a religious organization, and the argument that the ability to provide social services was a sufficiently important benefit to religion as to be constitutionally proscribed. Instead, the court held

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12 The Georgia Attorney General later opined that a government contract with the YMCA for the provision of recreational services was "probably" unconstitutional, *Ga. O.A.G.* 69-136 (1969) (unofficial). More recently, the Attorney General prohibited giving grants to church-run after school programs. *Ga. O.A.G.* 00-5.

13 16 Nev. 373 (1882).

14 The orphan asylum in question was operated by an order of Catholic nuns, but accepted orphans of all creeds. Only Catholic prayers were recited publicly. Protestant children were excused from oral recitation of these prayers, although they were required to kneel during these devotions. The court invalidated $75.00 a year child payments to the home as being in violation of a constitutional provision barring the use of public funds for sectarian purposes.

15 125 Ill. 540, 18 N.E. 183 (1888).

16 380 Ill. 613, 117 N.E. 735 (1917).

17 102 Ariz. 448, 432 P.2d 460 (1967).

18 386 Pa. 507, 126 A.2d 911 (1958).

that so long as the state paid less than the actual cost of services it was in any event obligated to provide, there was no impermissible aid to religion. It observed, however, that costs included only actual welfare expenditures (*i.e*, for food, clothing or shelter). Payment for labor would constitute unconstitutional aid to the institution. That distinction is surely not obvious.

While *Community Council v. Jordan* could be confined to those cases in which religious institutions merely serve as conduits for government funds to purchase secular services, the same cannot be said of *Schade v. Allegheny County Institution*, *supra*. There, the Pennsylvania Supreme Court upheld an agreement under which a county paid for the court-ordered placements of juveniles in sectarian homes:

> The cost of the maintenance of neglected children either by the State or the County is neither a charity nor a benevolence, but a governmental duty.... A considerable part of this money is recouped...from the parents of these minor wards. The balance of the funds so expended are, in legal effect, payments to the child—not the institution—supporting and maintaining him or her.... The Constitution does not prohibit the State or any of its agencies from doing business with denominational or sectarian institutions, nor from paying just debts to them when incurred at its direction or with its approval.[19]

This argument is sometimes known as the "child-benefit" theory.[20] It posits that aid does not benefit institutions, but children, and hence does not come within the constitutional proscriptions on aiding religion.

Finally, the Oklahoma Supreme Court in *Murrow Indian Orphans Home v. Childers*,[21] made an additional argument in support of payments to sectarian child care institutions:

> It is not the exposure to religious influence that is to be avoided: it is the adoption of sectarian principles or the monetary support of one or several or all sects that the State must not do. Could these officials refuse to pay claims incurred by the keeping of needy children in private homes under contract where the State deliberately adopted the policy of placing children in homes observing the same religious principles as were practiced by the families from which the children came? We think not.

Whose Rights Need to be Protected?

Modern Americans conceive of church state disputes as about the power of citizens to resist being taxed to pay for sectarian institutions, or the right of sectarian providers to equal treatment with their secular competitors. More

19 386 Pa. at 512, 126 A.2d at 914.

20 See *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968).

21 171 P.2d 600, 602 (Okla. 1946). The orphanage there was operated by Baptists. Children were encouraged, but not required, to participate in church services of their choice.

rarely, Establishment Clause cases present problems of religious coercion, such as mandatory attendance at church as a condition of probation or attendance at a religiously based anti-alcoholism program following a DWI conviction.

However, in the case of homes away from home such as orphanages, mental hospitals, or old age homes, there is the perspective of service recipients to consider as well. Where a government funded program is provided on an out patient basis, recipients can receive necessary religious services elsewhere and at private expense. A participant in a welfare to work program will not be denied the ability to practice her faith, attend services of his choosing or seek spiritual counseling if the Constitution required government funded transition to work programs to be secular.

But what of the child for whom an orphanage provides a substitute for the family? If government funding carries with it an obligation to be devoid of religious instruction, indoctrination or proselytizing, then the state is not being neutral about religious choices. If the state insists on permitting the child to be raised in the faith of his or her parents,[22] it is subsidizing religious instruction, generally something the Constitution forbids, and forcing religion on the child. If it attempts to provide a minimum of religious instruction, but maintains a secular pattern of life in the home, it is again dictating how religious a child's life will be.

Early Federal Constitutional Law

In 1899, *Bradfield v. Roberts*, a rare 19th century Federal Establishment Clause challenge to a government contract with a sectarian service provider, reached the United States Supreme Court. The District of Columbia had contracted with the Sisters of Charity to provide health care for the indigent at a hospital run by the order. The evidence showed that all were admitted to the hospital regardless of faith. There were no differences in care between this hospital and other public hospitals. The hospital board of directors was dominated by Catholics.[23]

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22 These questions arose in a case challenging New York City's child care programs, which functioned largely on a denominational basis, except that these there were not many quality Protestant programs. The result was Protestant children, who at the time of the suit were mostly black, received inferior public care. For the decision, which approved a settlement imposing substantial limits on the religious life of children in care in Catholic and Jewish institutions, see *Wilder v. Sugarman*, 965 F.2d 1196 (2d Cir. 1992).

Even the assumption that the child is to be raised in the faith of the parents interferes with the perfect liberty of the child and for that matter, the parents. Just because a child is born a Catholic does not mean the parents would have given it an orthodox Catholic upbringing, or taught it to comply with the teachings of the church on all points. For the state to insist that a child have no faith until it is an adult, is likewise to depart from neutrality on religious questions. To insist that a Catholic institution raise Catholic children as religion free is to deny the freedom of the institution, an issue which today arises in connection with contraception services in Catholic homes. (The problem is sometimes elided by having someone else provide these services to those in Catholic child care facilities.)

23 Abortion had not yet surfaced as an issue that divides Catholic and public hospitals. Catholic hospitals, bound by Ethical Directives for Catholic Health Care, will not perform abortions or sterilizations, and in some cases have religiously based differences in regard to end of life

Taxpayers sued under the Establishment Clause, challenging the funding of this religious hospital. The Supreme Court thought the claim not serious. Its decision is correctly understood to stand for the proposition that the bare fact that the government contracts with a sectarian affiliated provider is not a violation of the federal Establishment Clause.[24]

The Supreme Court has recently reiterated this holding.[25] Federal government practice has long assimilated it. The use of religiously affiliated providers is so routine (even more so with regard to foreign aid than domestic services)[26] as to excite almost no comment. Indeed, so well settled is the practice that it seems almost churlish to suggest that the contrary position is not without merit.

As the Georgia Supreme Court noted in *City of La Grange*, sectarian social services serve a variety of purposes for the sponsoring institution beyond fulfilling a religious obligation to assist those in need. Social services provide an opportunity to contact potential converts in a context that will favorably dispose them to the faith. Providing social services casts religion in a favorable light, and demonstrates the sort of practical faith that is so appealing to Americans. In the case of newer or unpopular faiths, government funded social services can be a public relations boon.

The provision of social services under the aegis of the faith also allows it to care for its existing members in a non-threatening atmosphere, keeping them loyal, and sparing believers from exposure to the secular world or competing faiths, exposure which can undermine religious loyalties.

Nevertheless, it is true that *Bradfield v. Roberts* and the disarray in the state courts indicates that, unlike the consensus against tax support to teach or otherwise further religion, in the school context, no such consensus existed with regard to secular social services. Although the next half-century (up until the end of World War II) saw almost no federal litigation on the subject, it is the case that at least sectarian affiliated social services continued to receive government funds.

The Early Modern Establishment Clause Case

The Supreme Court returned to the question of the propriety of spending tax funds on religion in *Everson v. Board of Education*,[27] a case challenging the provision of bussing to parochial school students. The Court upheld that on the theory that the aid benefited students, not schools. In *Everson*, the Court

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care. It still is likely not to be unconstitutional to fund sectarian hospitals, but the recent emergence of a gap between Catholic and non-religious hospitals does point out the danger of blindly citing precedents, especially older ones.

24 A few states (*i.e.*, Idaho) have reached a contrary result under state constitutional provisions.

25 *Bowen v. Kendrick*, 487 U.S. 589 (1988).

26 See *Lamont v. Woods*, 948 F.2d 825 (2nd Cir. 1991) (holding unconstitutional practice of permitting aid to foreign religious seminaries). Compare, Senator Jesse Helms' recent proposal to extend charitable choice to foreign aid.

27 330 U.S. 1(1947). The quote is found at pp. 16-17 of the opinion.

set forth a strict rule against financial subsidies to religious institutions. It was so understood by the dissenters, who argued that the majority had not gone far enough in enforcing its own rule.

However, a close reading of the crucial part of Justice Black's opinion discloses a latent ambiguity:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion over another. *Neither can force nor influence a person to go to or to remain away from church against his will* or force him to profess belief or disbelief in any religion. *No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance*. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." (Emphasis added; citations omitted.)

Did Justice Black mean to say that a refusal to fund a sectarian provider was required by the Constitution or that such exclusions were impermissible as a penalty for religious belief? The italicized language probably was intended to say only that a person could not be excluded from a government program because he adhered to a specific faith, not that the Establishment Clause required funding of religious activity on an equal basis with secular competitors. The language will, however, bear the latter meaning as well. In recent years, advocates of increased funding of religious activities of various sorts have invoked the sentence to support their arguments that it is unconstitutional to refuse to fund sectarian agencies, merely because they are religious. (This is not merely an argument that government *may* fund religious social services; it is an argument that it *must* do so.) That argument is not what Justice Black had in mind, but it is arguably what he wrote.

Church-state disputes in the courts were largely about aid to parochial schools from the end of World War II until the mid-1980s. The issue of aid to religious social service providers surfaced briefly in the debate over the 1964 Civil Rights Act. One of the most potent provisions of the Act was Title VI,[28] which banned racial discrimination by recipients of government aid. As originally drafted, the provision applied to religious as well as racial discrimination. The United States Catholic Conference, then struggling to obtain aid for

28 42 U.S.C. § 2000d, *et seq.*

parochial schools, objected that the inclusion of religion in Title VI would make that aid impossible. Parochial schools then regularly engaged in religious discrimination in admissions. A general ban on religious discrimination by recipients of government funding would have forced parochial schools to choose between their religious mission and federal funding.

Jewish defense groups such as the American Jewish Congress and the Anti-Defamation League insisted on the inclusion of religion in the statute. In the end, the Catholic Church prevailed, as much because Congress was content to leave the issue of the conditions under which government could fund sectarian institutions with all its constitutional overtones to the courts, as it was an explicit agreement with the Church that racial and religious discrimination ought not be equated.[29]

Title VI has nevertheless not been irrelevant to the provision of sectarian social services, even though few religious providers engage in racial discrimination for religious reasons (*cf.*, Bob Jones University). However, Title VI has been construed to bar not only intentional racial discrimination (*i.e.*, no blacks allowed, no interracial dating), but also prohibit neutral practices that have an adverse disparate impact on racial minorities, such as moving a hospital to (white) suburbia from (minority) central city. Since racial minorities are not equally distributed across the religious spectrum, a decision to limit admissions to faith-run nursing homes to members of a particular faith, permissible by virtue of the absence of religion from Title VI, for example, might have an adverse impact on minorities.

Over the years, but particularly during the Carter Administration, various agencies charged with enforcing Title VI filed complaints challenging the use of sectarian names which were thought to discourage minority applicants (*e.g.*, Jewish Home for the Aged) or even to kosher diets, on the ground that these are unfair to racial minorities living in the home. All of these claims were eventually dropped, although they were, on the law, not frivolous.

The Parochial School Aid Cases Cast a Shadow

The current debate over the legality of charitable choice, and the crazy quilt pattern of administrative practice with regard to the funding of sectarian providers, can only be understood against the background of the aid to parochial school aid cases decided between 1968 and 1982. Those cases assume a popular conception of the Catholic parochial schools as institutions which were pervasively sectarian.[30] That is, the Court approached these cases as if religion permeated every aspect of the school's educational program. It did not, as it might

29 Some individual programs such as Head Start contain their own anti-discrimination provisions and some of these ban religious discrimination against participants. Whether these civil rights provisions are enforced against religious provider is an interesting question.

30 The pervasively sectarian model still holds true for most Orthodox Jewish day schools. It is also true for the Christian schools operated by evangelical churches of various denominations. Parochial school aid law, however, has historically been driven by the model of the Catholic school.

have, conceive of the parochial school as composed of distinct secular and sectarian components. Such an approach would have allowed the state to fund the secular portions of the school's program, but not its sectarian ones. The upshot of the Court's conception of the schools as pervaded with religious content was that any aid to the school necessarily subsidized religious instruction.

In 1965, Congress enacted the *Elementary and Secondary Assistance Act*, providing general federal aid to education. That measure required some aid to flow to parochial school students, but not their schools (the child-benefit theory). Three years later, the Supreme Court three years later upheld the loan of secular textbooks approved for use in the public schools to parochial school students.[31] The Court's opinion had two prongs: first, the aid went to students (the "child benefit theory") and not the schools, a transparent fiction since the schools chose the books, stored them, were responsible for their safe keeping and could not function without them. The other rationale was more substantial. The Court reasoned that since the texts had to be suitable for use in the secular public schools, there was no likelihood that they would be used in sectarian instruction. The state could thus be reasonably certain that it was not funding religious instruction.

Although *Allen* departed from the strict no-aid rule of *Everson*, the hope entertained by some that the Court would permit more direct and substantial aid to religious schools quickly faded. In *Lemon v. Kurtzman*,[32] the Court considered Pennsylvania and Rhode Island statutes authorizing the state to pay a portion of the salary of secular teachers in parochial schools. That decision set forth a three part test for evaluating the constitutionality of governmental acts under the Establishment Clause. The test, known as the *Lemon* test, requires that to be constitutional a practice must have: (1) a secular purpose; (2) a primary effect that is secular; and (3) not duly entangle government with religion.

The *Lemon* Court reasoned that the Constitution required that a state be *certain* that its funds were used only for secular instruction, and not religious instruction. Since the schools were pervasively sectarian, that is religious instruction permeated all aspects of the schools' activities, paying the salaries of secular teachers meant paying for sectarian instruction. The only way to avoid an improper subsidy would be intrusive state monitoring of everything happening in the schools.

Over the next few years, the Court threw out a variety of state efforts to help parochial schools. Those decisions proceeded on the same assumptions as did *Lemon*: that the Establishment Clause barred government subsidies for institutions engaged in religious instruction, indoctrination and worship; that in pervasively sectarian institutions it was not possible to separate the secular and the religious; and, the government could not rely on presumptions or good

31 *Bd. of Education v. Allen*, 392 U.S. 236 (1968).

32 403 U.S. 21 (1971).

faith in assuring compliance with the Establishment Clause.

It was never entirely clear whether pervasive sectarianism was alone enough to invalidate government aid. *Bradfield v. Roberts* suggested that it was not (although perhaps a hospital is not a pervasively sectarian institution)[33] and that parochial schools are somehow different. But the Court once suggested (in 1971) that where a pervasively sectarian institution was asked by government to perform a secular task at government expense, the aid had the effect of aiding religion. In a case discussing the constitutionality of aid to sectarian affiliated colleges, the Court remarked:

> Aid may normally be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that substantial portions of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.[34]

The case law made clear that parochial schools are pervasively sectarian. Presumably, houses of worship are as well. Nevertheless, churches all through the 1970s and '80s continued to get government money to run lunch programs and the like. Still, some government agencies refused to allow funds to flow directly to churches on the ground that they were pervasively sectarian and were thus debarred from aid under the parochial school aid cases. While the practice of the federal government was far from uniform, some agencies insisted that the churches set up independent corporations to receive funds, a requirement that still exists in some government regulations.

Thus, HUD regulations for the youth building program allows funds for construction of facilities to go to religious organizations only if the facility will be leased to a wholly secular organization, and if the property will not be reconveyed to the religious organization for the life of the property. However, the same regulations allow operating funds to go to pervasively sectarian organizations if they provide assurances that they will provide no religious instruction or worship or exert no other religious influences. They must also promise not to engage in religious discrimination in admission or hiring.[35]

On the other hand, HHS simply provides that churches may be assigned AmeriCorps participants, without special limitations on the activities they engage in.[36] It is hard to see rhyme or reason to the differences, except perhaps that they were written by different administrations, acting each time in

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33 Justice Brennan in his concurring opinion in the Bible reading case, *School District of Abington Twshp. v. Schempp*, 374 U.S. 203, 246 (1963), read *Bradfield* to hold that a religiously affiliated hospital was not pervasively sectarian.

34 *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

35 24 C.F.R. 585.150 and *id.* at 406.The problem of discrimination in employment and admissions is addressed directly below. See also, 24 C.F.R. 570.200 (similar restrictions on Community Development Block Grant).

36 45 C.F.R. 2510.20.

response to the latest Supreme Court pronouncements.

From time to time, one runs across a news story in which government officials tell recipients of government funding that they must take down a religious symbol, or that they may not have a prayer before a government funded lunch program, or the like. Sometimes the decisions stick, sometimes they are rolled back in a storm of angry publicity. Sometimes religious institutions comply, sometimes they refuse additional federal funding. Most of the time, no one seems to pay much attention, so the rules say one thing and the recipients do something else again. Presumably, regulations banning or limiting aid to sectarian providers will be targeted for elimination by the Bush Administration.

The Court Begins to Change Course

More recently, a group of Justices have pushed the Court to adopt a different vision of the Establishment Clause. This movement, which is not complete, and has not succeeded yet in overturning past law, begins with a very different understanding of the Establishment Clause. This alternative interprets the Clause as an equal protection clause for religion. That is, the Clause prohibits government from favoring religion, but also does not forbid the government from funding sectarian endeavors on an equal basis with non-sectarian ones. Stronger versions of the equality argument prohibit the government from excluding religious providers from programs for which they would be eligible if they were secular.

To an uncertain extent, these Justices have coupled this equality based approach with an emphasis on the fact that private citizens, not government officials, decide which institutions receive government funds, thus minimizing the possibility of governmental favoritism toward, or hostility to, faith. Obviously, charitable choice will fair far better under this vision of the Establishment Clause than it would under the vision enunciated in *Everson*.

Several cases illustrate this movement. The first is *Mueller v. Allen*,[37] a case upholding a Minnesota tax deduction for parents who incur expenses in furthering the education of their children. Most of the benefit of this deduction flowed to parents of parochial school students. However, certain expenses which were, or could in theory be, incurred by public school parents were also deductible. One earlier decision (*PEARL v. Nyquist*)[38] had invalidated a tax credit substantially identical to the Minnesota deduction.

The Court found the deduction constitutional, first because the deduction was not limited to expenses incurred in obtaining a religious education. It was broadly available for educational expenses, an important indication, the Court said, that the program had a primary secular effect. Second, the Court pointed out that the benefit to religion came not as a result of a governmental decision to aid parochial schools, but the private decision of parents as to which

37 413 U.S. 388 (1983).

38 413 U.S. 621 (1973).

school their children would attend. The private choice of parents was a "circuit breaker" between church and state and hence obviated Establishment Clause concerns.

A year later, the Court decided *Witters v. Washington*,[39] in which the state assisted the visually handicapped to obtain vocational training. Witters asked that he be permitted to use the funds at a religious seminary to train for ordination. The state refused, saying that to grant the aid would be to establish religion. A unanimous United States Supreme Court disagreed. The Court held that the program was not a sophisticated scheme for channeling money to seminaries, and the funding was sufficiently like a paycheck to be constitutionally tolerable. However, separate opinions for a majority of the Court said it was sufficient that Witters had a range of religious and secular vocational choices, and that the final choice of where the aid would be spent was his, not the state's.

In *Rosenberger v. Rector*,[40] the Court decided that a state university could allow student activity funds to pay the costs of printing a student religious magazine, as they paid for printing secular student magazines. Most of the opinion is devoted to freedom of speech. However, the Court also passed on the claim that a university subsidy would establish religion.

> The Court held it would not, pointing out that it was not dealing with an ordinary tax but a student fee. It also pointed to the wide range of magazines the university was funding and the fact that the university had not on its own decided to fund a religious magazine, but would be responding to student requests. Somewhat incongruously, the Court added: It is…true that if the State pays a church's bills it is subsidizing it, and we must guard against this abuse. That is not a danger here, based on the considerations we have advanced and for the additional reason that the student publication is not a religious institution, at least in the usual sense of that term as used in our case law….

In addition to these decisions, several parochial school aid cases have been decided since *Mueller*. The cases are most notable for relaxing the Court's skepticism about the ability of pervasively sectarian institutions to use even secular aid for secular purposes.[41] In addition to overturning several of the farthest reaches of the Court's earlier aid to parochial school cases, these decisions emphasize the importance of the fact that the aid to parochial schools was equal to the aid given public schools, and that, because the programs in question were apportioned on a per capita basis, the aid flowed to the religious schools as a result of the private choice of parents. However, the Court also

39 474 U.S. 481 (1986).

40 515 U.S. 819 (1999).

41 *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills*, 509 U.S. 1 (1993).

indicated that it was relevant that the contested aid (i.e., remedial instruction by public employees, or a sign language interpreter) was intrinsically secular.

The transition between the older no-aid conception of the Constitution and the new equal treatment-range of choice-private choice model has not come easily, nor is it complete. The Supreme Court's latest school aid decision neatly illustrates the divide on the Court. *Mitchell v. Helms* [42] was a challenge to a federal program that gave per capita grants to students, whether attending parochial or public schools, for secular equipment such as computers and library books. The government was obligated to insure that the materials were used only for secular purposes. Prior decisions would have permitted the library book loans, but not the computers. A majority of the Court permitted both forms of aid. There was no majority for any single rationale.

Four Justices,[43] in an opinion by Justice Thomas, would have substituted the private choice-equal treatment rationale across the board. They would have dispensed entirely with the "pervasively sectarian" rubric, a category Justice Thomas deemed demeaning and attributable to 19th century anti-Catholic bigotry. The opinion is not clear as to whether it made a difference that the aid was in the form of secular computers and library books or whether direct cash grants would also have been permissible. Justice Thomas did allow that where the element of private choice was missing—that is, if the government decided which institutions would receive aid—the Establishment Clause might be violated because of the possibility that government would engage in favoritism in selecting beneficiaries. That caveat seems to undermine that much of charitable choice not dependent on vouchers.

Three Justices [44] dissented and would have banned the contested aid. The deciding votes were those of Justices O'Connor and Justice Breyer. While they agreed that the earlier decisions should be overruled insofar as they banned the aid in question, they announced their disagreement with the standard announced by the plurality opinion of Justice Thomas. Justice O'Connor wrote:

> Thus, I agree with Justice Souter's conclusion that our "most recent use of 'neutrality' to refer to generality or evenhandedness of distribution…is relevant in judging whether a benefit scheme so characterized should be seen as aiding a sectarian school's religious mission, but this neutrality is not alone sufficient to qualify the aid as constitutional."…I also disagree with the plurality's conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause.…Although "[o]ur cases have permitted some government funding of secular functions performed by sectarian organizations," our decisions "provide no

42 120 S.Ct. 2530 (2000).

43 Chief Justice Rehnquist; Justices Scalia, Kennedy and Thomas.

44 Justices Souter, Stevens and Ginsburg. The opinion was written by Justice Souter.

> precedent for the use of public funds to finance religious activities." (Citations omitted.)

One obvious difference between Justice Thomas and O'Connor is that school vouchers are plainly constitutional for Justice Thomas, but not at all so for Justice O'Connor. Charitable choice programs are equally in the gap between the two, at least charitable choice programs that award money on a per capita basis and not flat sums to religious institutions.

Chastity and Charitable Choice

The relationship between these two lines of cases are at the heart of the debate over charitable choice. There is, however, one relatively recent Supreme Court case which more directly touches on that issue–*Bowen v. Kendrick*.[45] At issue there was the constitutionality of the *Adolescent Family Life Act* (irreverently known as the "Chastity Act"). Enacted during the administration of President Reagan, the Act provided grants to a wide variety of private groups, specifically including religious ones, to teach sexual abstinence. On behalf of itself, the American Jewish Congress,[46] and several taxpayers, the ACLU challenged this statute and its administration. Plaintiffs contending that funding religious institutions in an area as laden with religious values as sex was inevitably (in legal terms, "on its face") unconstitutional, and that as administered ("as applied") the Chastity Act had the effect of advancing religion because actual religious instruction was taking place at government expense.

Citing *Bradfield v. Roberts*, *supra*, the Court (by a 5 to 4 vote) rejected the facial claim. It reasoned that there might be some religious affiliated institutions which would offer secular courses advocating chastity.[47] That possibility was sufficient to defeat the claim that in every instance the Act was unconstitutional.

Although the Court conjured up some formal defects in the fact finding by the District Court, it agreed that if the government were funding abstinence courses which had religious content, or pervasively sectarian institutions, those grants would be unconstitutional:

> In particular, it will be open to appellees on remand to show that AFLA aid is flowing to grantees that can be considered "pervasively sectarian religious institutions, such as we have held parochial schools to be…. As our previous discussion has indicated,…it is not enough to show that the recipient of a challenged grant is affiliated with a religious institution or that it is "religiously inspired."
>
> The District Court should also consider on remand whether in particular cases AFLA aid has been used to fund "specifically religious activit[ies] in an otherwise substantially secular setting."…Here it would be relevant to determine, for example, whether the Secretary

45 487 U.S. 589 (1988).

46 The writer participated in the litigation of the case on behalf of plaintiffs.

47 The Court assumed that abstinence was not a uniquely religious doctrine.

> has permitted AFLA grantees to use materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith. (Citations omitted.)

Four dissenters thought the Act unconstitutional as written (on its face).

If *Bowen* is still good law, it is hard to see how much of charitable choice will survive constitutional attack. *Bowen* has not been overruled, nor does any subsequent opinion directly question it. However, the Court has placed greater reliance on the equal treatment rationale in the years since *Bowen*. As noted in *Mitchell*, Justice Thomas did question the continued viability of the restriction on aid to pervasively sectarian agencies, calling it a hangover of 19th century anti-Catholicism. A majority of Justices pointedly did not go along.

The United States Department of Justice subsequent to *Mitchell* took the position that aid to pervasively sectarian institutions was banned by the Constitution. In signing the charitable choice provision of the Children's Health Act of 2000, President Clinton accepted that position and ordered the Act be so administered. (California, too, limits charitable choice to non-pervasively sectarian institutions.) One imagines that the Bush Administration will have a substantially different view.

Challenges to charitable choice are pending already,[48] and more are sure to come. The pending lawsuits challenge a variety of aspects of charitable choice, although none has yet progressed to the point of a district court ruling, let alone a ruling of the courts of appeal. These challenge most aspects of charitable choice, except for the voucher provisions. However, it may be that the constitutionality of charitable choice, at least in broad strokes, will be decided not in one of these cases, but by a pending challenge to the Cleveland voucher case.[49] The legal issues are similar: does the fact that aid is broadly available and distributed by private choice make it constitutional, even if a lion's share of the funding goes to pervasively sectarian institutions?

The Autonomy of Religious Institutions

The President's Executive Orders on faith-based initiatives call for eliminating "unnecessary legislative, regulatory and other bureaucratic barriers that impede effective faith-based and other community efforts to solve social problems." Existing charitable choice law similarly provides that private faith-based groups receiving government contracts "shall retain their independence from [government], including such organization's control over the definition, development, practice and expression of its religious beliefs." The scope of these provisions is uncertain. Do they mean only that the government may not insist

48 The four pending lawsuits are ably described in an article in the *National Law Journal* of January 9, 2001. The present writer is counsel in two of these suits in which the American Jewish Congress is plaintiff.

49 A panel of the Sixth Circuit Court of Appeals invalidated Cleveland's voucher program in December, 2000. In March, after the entire circuit court declined to reconsider the case, the state of Ohio appealed the decision to the U.S. Supreme Court. In July, the Bush administration asked the Court to take up the case and uphold the program.

that the church offering an AIDS program cannot be forced to change its theological position on extramarital or same gender sex, or do these provisions grant religious and community providers a trump card against complying with otherwise applicable regulations which are theologically or philosophically distasteful?

Consider a child care provider who believes as a matter of biblical interpretation that sparing the rod spoils the child, and uses corporal punishment in violation of state regulations for child care providers.[50] Or, what if religious-based providers of AIDS services refuse on religious grounds to provide instruction about condom use? What about a church group that refuses to screen participants for immigration status? What about a day-care program which requires schools to encourage self-confidence, but the faith-based provider believes that self-confidence instilled in a child is sinful? What of requirements that counselors in drug programs be professionally certified or use specified psychological techniques anathema to a faith based provider?

These and other conflicts between facially neutral program requirements and the religious beliefs of providers are likely to be recurring features of charitable choice programs. The statutory language quoted above does not resolve any of these disputes cleanly. The problem is made more complex because a different section of the Executive Order requires government to assure that faith-based services are high quality, a command that will often be at war with the preservation of the autonomy of providers.

The constitutional concerns which arise from this are twofold: One, whether the Free Exercise Clause of the Constitution imposes some limit on the ability of government to regulate religiously motivated conduct without some special showing of need: and two, even if it does, whether those constraints apply when the government is purchasing services. To use one of the examples cited above, does the Free Exercise Clause impose a limit on the government's ability to dictate the curriculum of a preschool program; even if the government may not forbid unfunded preschools to teach to a different set of values than the government's, may it insist on paying only for services consistent with its view of what is desirable?

Until 1990, the Free Exercise Clause was interpreted to require a twofold inquiry when a government regulation substantially burdened a religious practice: did the regulation further a compelling interest (an interest of the highest order) and was it the least burdensome method of advancing that interest?[51] If this were still the law, religious institutions in theory would have a legal basis for challenging regulations which interfered with their implementation of G-

50 See *State v. Corpus Christi People's Baptist Church*, 683 SW2d 692(1984); *Roloff Evangelistic Enterprises v State*, 556 S.W.2d 856(Tex Civ. App. Austin 1978); *State v. Heart Ministries* ,227 Kan. 244, 607 P.2d 1052 (1980) (corporal punishment). The Kansas Court approved a no corporal punishment policy, but allowed parents to consent to moderate corporal punishment.

51 See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

d's word. How often they would prevail is a different question, since courts tended to defer to state claims of need. The availability of legal recourse nevertheless gave religious institutions a fulcrum with which to negotiate mutually acceptable resolutions.

In 1990, the Supreme Court changed the rule. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court dispensed with any requirement for special justification of governmental burdens on religious practice. So long as a regulation was neutral and generally applicable, it was valid no matter what burden it imposed on religious practice.[52] A subsequent Supreme Court decision makes it clear that a statute can be targeted at a religious practice even if it does not mention religion, if surrounding circumstance's make it clear that the only target of the legislation is religious practice.

Congress passed legislation designed to fill the gap left by the Court, the *Religious Freedom Restoration Act*,[53] but the Supreme Court subsequently held that the Act was beyond Congress' power to enact, at least as applied to states. Some states have passed their own religious freedom acts. These are largely untested. Both federal and state regulations often have their own religious exemptions built in, and these are not directly affected by the *Smith* decision.

Even assuming some level of constitutional or statutory protection for religious liberty, it does not follow that the government cannot insist on whatever program conditions it deems appropriate when it purchases or subsidizes services. Here, one plunges into one of the murkier areas of constitutional law. On the one hand, the Court has insisted that the government cannot attach unconstitutional conditions (i.e., no grants to people who have criticized the government) to privileges it extends to citizens, including the privilege of contracting with the government. On the other hand, the Court has given the government wide latitude to impose conditions on contracts and grants it could not impose in a regulatory capacity. The government need not fund abortion or abortion counseling, but it may not ban abortions or abortion counseling. (These same principles were in conflict in the controversy over funding of the National Endowment for the Arts).

These legal uncertainties have led to several reports of faith-based groups reluctant to accept government funds for fear that the receipt of such funds will compromise their independence, if not immediately, then later. It may also generate pressure for laws granting greater autonomy to religious institutions, laws that will engender opposition from competing secular organizations and from groups worried that broad exemptions from regulatory requirements will

52 The *Smith* Court 'retained' an exception for hybrid rights, where a claim for religious liberty is combined with another constitutional claim, such as the right of parents to direct the upbringing of their children. The lower courts are badly divided on whether the Court was really serious about this category, and if so, how strong the other claim must be to create a hybrid claim. Presumably, it need not be strong enough to prevail in its own right, or otherwise the Free Exercise Clause claim is superfluous.

53 42 U.S.C. 20000bb, *et seq.*

endanger the welfare of program beneficiaries. Some exemptions may even be challenged as unconstitutional favoritism toward religion. Particularly likely to be challenged on that ground are provisions of the law which allow faith-based providers to both accept government funds and discriminate on the basis of religion in hiring. It is difficult to predict the funds for fear that the receipt of such funds will compromise their independence, if not immediately, then later. It may also generate pressure for laws granting greater autonomy to likelihood success of such challenges.

Issues to Keep An Eye on

Several years ago, the Congress enacted a bill to fund child care. That act provides that direct aid may not go to schools teaching religion. However, it also authorizes the use of vouchers to purchase child care, even at sectarian institutions. The Act has never been challenged, nor to the best of my knowledge has anyone studied the administration of the Act. An investigation of this program would be illuminating.

If it is true that religious charities do a better job because of their spiritual component, would it not follow that states should encourage a wide range of religious choices so all citizens could benefit from them? My impression is that this is not happening. Is this because of decisions by public officials to favor dominant faiths, because smaller faiths cannot afford to set up social programs, or yet something else?

Is there any evidence for the repeated claim that sectarian providers do a better job than secular ones? (Query: Would, or should, this make a legal difference?)

Are churches unwilling despite the charitable choice law and the protections to their autonomy to rely on government money because they fear regulation? There is anecdotal evidence to support this thesis.

Are recipients of charitable choice funds actually engaging in religious discrimination in hiring as the Act permits? Again, some anecdotal evidence suggests that some recipients of government funds are reluctant to do so; others plainly are not. What is happening on the ground?

Will the new Office for Faith Based Affairs attempt to undo all regulation inconsistent with charitable choice thinking, or will it await congressional action? Will it insist on affirmative action for faith groups to make up for years of discrimination? (California has done just that. The American Jewish Congress is challenging that aspect of California's plan.)

What are the states doing about the "pervasively sectarian" problem?

Contacts

Supporters

Professor Carl Esbeck
Christian Legal Society
4208 Evergreen Lane
Anandale, Virginia 22003-3264
(713) 642-1073, ext. 3500

Stanley Carlson Thies
Office of Faith-Based
and Community Initiatives
White House
Washington, DC 20036

Critics

Marc D. Stern
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 360-1545

Steve Green
Americans United for Separation
of Church and State
1816 Jefferson Place, NW
Washington, DC 20036
(202) 466-3243 ext 210

J. Brent Walker
Baptist Joint Committee
200 Maryland Avenue, NE
Washington, DC 20002
(202) 544-4226

Professor Marcie Hamilton
Cardozo Law School
55 West 5th Avenue
New York, New York
(212) 790-0215

Neutrals

Professor Douglas Laycock
School of Law
University of Texas at Austin
727 East Dean Keeton Street
Austin, Texas 78705-3299
(512) 232-1341

Professor Burt Neuborne
School of Law
New York University
New York, New York
(212) 998-6172