

“NO AID TO RELIGION?”

Charitable Choice and the First Amendment

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As government struggles to solve a confounding array of poverty-related social problems—deficient education, un- and underemployment, substance abuse, broken families, substandard housing, violent crime, inadequate health care, crumbling urban infrastructures—it

has turned increasingly to the private sector, including a wide range of faith-based agencies. As described in Stephen Monsma’s *When Sacred and Secular Mix*, public funding for non-profit organizations with a religious affiliation is surprisingly high. Of the faith-based child service agencies Monsma surveyed, 63 percent reported that more than 20 percent of their budget came from public funds.

Government’s unusual openness to cooperation with the private religious sector arises in part from public disenchantment with its programs, but also from an increasingly widespread view that the nation’s acute social problems have moral and spiritual roots. Acknowledging that social problems arise both from unjust socioeconomic structures and from misguided personal choices, scholars, journalists, politicians, and community activists are calling attention to the vital and unique role that religious institutions play in social restoration.

Though analysis of the outcomes of faith-based social services is as yet incomplete, the available evidence suggests that some of those services may be more effective and cost-efficient than similar secular and government programs. One oft-cited example is Teen Challenge, the world’s largest residential drug rehabilitation program, with a reported rehabilitation rate of over 70 percent—a vastly higher success rate than most



other programs, at a substantially lower cost. Multiple studies identify religion as a key variable in escaping the inner city, recovering from alcohol and drug addiction, keeping marriages together, and staying out of prison.

The New Cooperation and the Courts

Despite this potential, public-private cooperative efforts involving religious agencies have been constrained by the current climate of First Amendment interpretation. The ruling interpretive principle on public funding of religious non-profits—following the metaphor of the wall of separation between church and state, as set forth in *Everson v. Board of Education* (1947)—is “no aid to religion.” While most court cases have involved funding for religious elementary and secondary schools, clear implications have been drawn for other types of “pervasively sectarian” organizations. A religiously affiliated institution may receive public funds—but only if it is not too religious.

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Application of the no-aid policy by the courts, however, has been confusing. The Supreme Court has provided no single, decisive definition of “pervasively sectarian” to determine which institutions qualify for public funding, and judicial tests have been applied inconsistently. Rulings attempting to separate the sacred and secular aspects of religiously based programs often appear arbitrary from a faith perspective, and at worst border on impermissible entanglement. As a result of this legal confusion, some agencies receiving public funds pray openly with their clients, while other agencies have been banned even from displaying religious symbols. Faith-based child welfare agencies have greater freedom in incorporating religious components than religious schools working with the same population. Only a few publicly funded religious agencies have been challenged in the courts, but such leniency may not continue. While the no-aid principle holds official sway, faith-based agencies must live with the tension that what the government gives with one hand, it can take away (with legal

damages to boot) with the other. The lack of legal recourse leaves agencies vulnerable to pressures from public officials and community leaders to secularize their programs.

The Supreme Court’s restrictive rulings on aid to religious agencies stand in tension with the government’s movement toward greater reliance on private sector social initiatives. If the no-aid principle were applied consistently against all religiously affiliated agencies now receiving public funding, government administration of social services would face significant setbacks. This ambiguous state of affairs for public-private cooperation has created a climate of mistrust and misunderstanding, in which faith-based agencies are reluctant to expose themselves to risk of lawsuits, civic authorities are confused about what is permissible, and multiple pressures push religious organizations into hiding or compromising their identity, while at the same time, many public officials and legislators are willing to look the other way when faith-based social service agencies include substantial religious programming.

Fortunately, an alternative principle of First Amendment interpretation, which Monsma identifies as the “equal treatment” strain, has recently been emerging in the Supreme Court. This line of reasoning—as in *Widmar v. Vincent* (1981) and *Rosenberger v. Rector* (1995)—holds that public access to facilities or benefits cannot exclude religious groups. Although the principle has not yet been applied to funding for social service agencies, it could be a precedent for defending cooperation between government and faith-based agencies where the offer of funding is available to any qualifying agency.

The section of the 1996 welfare reform law known as Charitable Choice paves the way for this cooperation by prohibiting government from discriminating against nonprofit applicants for certain types of social service funding (whether by grant, contract, or voucher) on the basis of their religious nature. Charitable Choice also shields faith-based agencies receiving federal funding from governmental pressures to alter their religious character—among other things, assuring their freedom to hire staff who share their religious perspective. Charitable Choice prohibits religious nonprofits from using government funds for “inherently religious” activities—defined as “sectarian worship, instruction, or proselytization”—but allows them to raise money from nongovernment sources to cover the costs of any such activities they choose to integrate into their program. Clearly, Charitable Choice departs from the dominant “pervasively sectarian” standard for determining eligibility for government funding, which has restricted the funding of thoroughly religious organizations. It

makes religiosity irrelevant to the selection of agencies for public-private cooperative ventures and emphasizes instead the public goods to be achieved by cooperation. At the same time, Charitable Choice protects clients' First Amendment rights by ensuring that services are not conditional on religious preference, that client participation in religious activities is voluntary, and that an alternative nonreligious service provider is available.

The First Amendment and the Case for Charitable Choice
Does Charitable Choice violate the First Amendment's non-establishment and free exercise clauses?

We think not. As long as participants in faith-based programs freely choose those programs over a "secular" provider and may opt out of particular religious activities within the program, no one is coerced to participate in religious activity, and freedom of religion is preserved. As long as government is equally open to funding programs rooted in any religious perspective—whether Islam, Christianity, philosophic naturalism, or no explicit faith perspective—government is not establishing or providing preferential benefits to any specific religion or to religion in general. As long as religious institutions maintain autonomy over such crucial areas as program content and staffing, the integrity of their separate identity is maintained. As long as government funds are exclusively designated for activities that are not inherently religious, no taxpayer need fear that taxes are paying for religious activity. While Charitable Choice may increase interactions between government and religious institutions, these interactions do not in themselves violate religious liberty. Charitable Choice is designed precisely to discourage such interactions from leading to impermissible entanglement or establishment of religion.

Not only does Charitable Choice not violate proper church-state relations, it strengthens First Amendment protections. In the current context of extensive government funding for a wide array of social services, limiting government funds to allegedly "secular" programs actually offers preferential treatment to one specific religious worldview.

In setting forth this argument, we distinguish four types of social service providers. First are *secular providers* who make no explicit reference to God or any ultimate values. People of faith may work in such an agency—say, a job training program that teaches job skills and work habits—but staff use only cur-

rent techniques from the social and medical sciences without reference to religious faith. Expressing explicit faith commitments of any sort is considered inappropriate.

Second are *religiously affiliated providers* (of any religion) who incorporate little inherently religious programming and rely primarily on the same medical and social science methods as a secular agency. Such a program may be provided by a faith community and a staff with strong theological reasons for their involvement, and religious symbols and a chaplain may be present. A religiously affiliated job training program might be housed in a church, and clients might be informed about the church's religious programs and about the availability of a chaplain's services. But the content of the training curriculum would be very similar to that of a secular program.

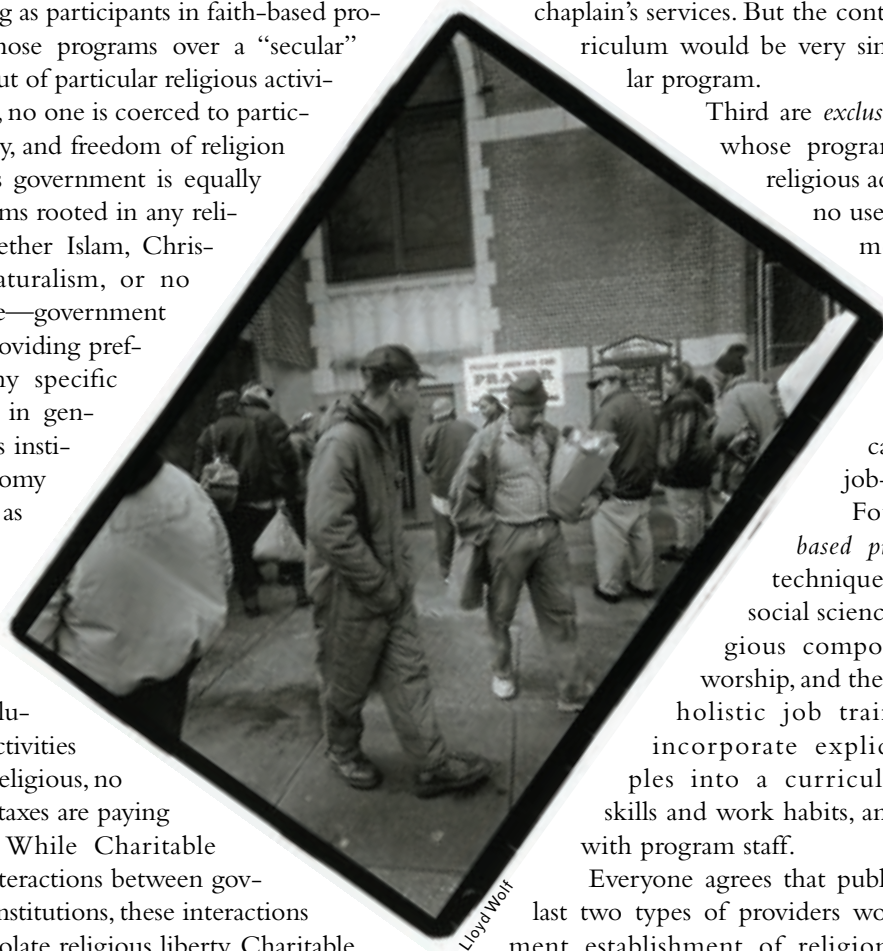
Third are *exclusively faith-based providers* whose programs rely on inherently religious activities, making little or no use of techniques from the medical and social sciences. An example would be a prayer support group and Bible study or seminar that teaches biblical principles of work for job-seekers.

Fourth are *holistic faith-based providers* who combine techniques from the medical and social sciences with inherently religious components such as prayer, worship, and the study of sacred texts. A holistic job training program might incorporate explicitly biblical principles into a curriculum that teaches job skills and work habits, and invite clients to pray with program staff.

Everyone agrees that public funding of only the last two types of providers would constitute government establishment of religion. But if government (because of the "no aid to religion" principle) funds only secular programs, is this a properly neutral policy?

Not really, for two reasons. First, given the widespread public funding for private social services, if government funds only secular programs, it puts all faith-based programs at a disadvantage. Government would tax everyone—both religious and secular—and then fund only allegedly secular programs. Government-run or government-funded programs would be competing in the same fields with faith-based programs lacking access to such support.

Second, secular programs are not religiously neutral. Implicitly, purely "secular" programs convey the message that nonreligious technical knowledge and skills are sufficient to address social problems such as low job skills and single par-



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enthood. Implicitly, they teach the irrelevance of a spiritual dimension to human life. Although secular programs may not explicitly uphold the tenets of philosophical naturalism and the belief that nothing exists except the natural order, *implicitly* they support such a worldview. Rather than being religiously neutral, “secular” programs implicitly convey a set of naturalistic beliefs about the nature of persons and ultimate reality that serve the same function as religion. Vast public funding of only secular programs means massive government bias in favor of one particular quasi-religious perspective—namely, philosophical naturalism.

Religiously affiliated agencies (type two), which have received large amounts of funding in spite of the “no aid to religion” principle, pose another problem. These agencies often claim a clear religious identity—in the agency’s history or name, in the religious identity and motivations of sponsors and some staff, in the provision of a chaplain, or in visible religious symbols. By choice or in response to external pressures, however, little in their program content and methods distinguishes many of these agencies from their fully secular counterparts. Prayer, spiritual counseling, Bible studies, and invitations to join a faith community are not featured; in fact, most such agencies would consider inherently religious activities inappropriate to social service programs.

Millions of public dollars have gone to support the social service programs of religiously affiliated agencies. There are three possible ways to understand this apparent potential conflict with the “no aid to religion” principle. Perhaps these agencies are finally only nominally religious, and in fact are essentially secular institutions, in which case their religious sponsors should be raising questions. Or perhaps they are more pervasively religious than they have appeared to government funders, in which case the government should have withheld funding.

The third explanation may be that these agencies are operating with a specific, widely accepted worldview that holds that people may need God for their spiritual well-being, but that their social problems can be addressed exclusively through medical and social science methods. Spiritual nurture, in this worldview, is important in its place, but has no direct bearing on achieving public goods like drug rehabilitation or overcoming welfare dependency. Such a worldview acknowledges the spiritual dimension of persons and the existence of a transcendent realm outside of nature. But it also teaches (whether explicitly or implicitly) a particular understanding of God and persons, by addressing people’s social needs independently of their spiritual nature. By allowing aid to flow only to the religiously affiliated agencies holding this understanding, government in effect has given preferential treatment to a particular religious worldview.

Holistic faith-based agencies (type four), on the other hand, operate on the belief that no area of a person’s life—whether psychological, physical, social, or economic—can be adequately considered in isolation from the spiritual. Agencies operating out of this worldview consider the explicitly spiritual components of their programs—used in conjunction

with conventional, secular social service methods—as fundamental to their ability to achieve the secular social goals desired by government. Government has in the past considered such agencies ineligible for public funding, though they may provide the same services as their religiously affiliated counterparts.

Some claim that allowing public funds to be channeled through a holistic religious program would threaten the First Amendment, while funding religiously affiliated agencies does not. But the pervasively sectarian standard has also constituted a genuine, though more subtle, establishment of religion, because it supports one type of religious worldview while penalizing holistic beliefs. It should not be the place of government to judge between religious worldviews—but this is what the no-aid principle has required the courts to do. Selective religious perspectives on the administration of social services are deemed permissible for government to aid. Those who believe that explicitly religious content does not play a central role in addressing social problems are free to act on this belief with government support; those who believe that spiritual nurture is an integral aspect of social transformation are not.

The alternative is to pursue a policy that discriminates neither against nor in favor of any religious perspective. Charitable Choice enables the government to offer equal access to benefits to any faith-based nonprofit, as long as the money is not used for inherently religious activities and the agency provides the social benefits desired by government. Charitable Choice does not ask courts to decide which agencies are too religious. It clearly indicates the types of “inherently religious” activities that are off-limits for government funding. The government must continue to make choices about which faith-based agencies will receive funds, but eligibility for funding is to be based on an agency’s ability to provide specific public goods, rather than on its religious character. Charitable Choice moves the focus of church-state interactions away from the religious beliefs and practices of social service agencies, and onto the common goals of helping the poor and strengthening the fabric of public life.

A Model for Change

Our treasured heritage of religious freedom demands caution as we contemplate new forms of church-state cooperation—but caution does not preclude change, if the benefits promise to outweigh the dangers. Indeed, change is required if the pervasively sectarian standard is actually biased in favor of some religious perspectives and against others.

For church and state to cooperate successfully, both must remain true to their roles and mission. Religious organizations must refrain from accepting public funds if that means compromising their beliefs and undermining their effectiveness and integrity. Fortunately, Charitable Choice allows faith-based agencies to maintain their religious identity, while expanding the possibilities for constructive cooperation between church and state in addressing the nation’s most serious social problems. ■